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COURT OF APPEALS

STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

No. 104

SIXTUS UDEKE,

Appellant.

20 Eagle Street
Albany, New York
November 20, 2019

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE PAUL FEINMAN

Appearances:

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1 CHIEF JUDGE DIFIORE: The next appeal on this
2 afternoon's calendar is appeal number 104, the People of
3 the State of New York v. Si - - - Six - - - Sixtus Udeke.

4 I couldn't get it out.

5 Good afternoon, counsel.

6 MR. WIENER: Good afternoon, and may it please
7 the court. I'm Benjamin Wiener, from the Center for
8 Appellate Litigation, on behalf of Mr. Udeke.

9 I'd like to please reserve two minutes of my time
10 for rebuttal.

11 CHIEF JUDGE DIFIORE: Two minutes, yes, sir.

12 Isn't this case very different than Suazo,
13 procedurally? Suazo was charged with the B misdemeanor.
14 Defendant here is charged in a Count A misdemeanor.

15 MR. WIENER: I'm not sure why that's a relevant
16 distinction here, Your Honor. The bottom line here is that
17 the court effectively told Mr. Udeke that he would have no
18 right to a jury trial on - - -

19 JUDGE RIVERA: But okay, but - - -

20 JUDGE FEINMAN: Did she actually say that, or did
21 she say it depends on how the prosecution chooses to
22 proceed, which seems to me an entirely accurate statement.
23 You know, are they going to continue to try to join these
24 all together? Are they actually going to reduce? I mean,
25 I don't even see what the error is in what she said.



1 MR. WIENER: Well, Your Honor, they're talking
2 about the contempt charge here. That's the charge that Mr.
3 Udeke is pleading guilty to, and defense counsel - - - this
4 is after Mr. Udeke asked about the right to a jury trial,
5 specifically defense counsel says it was represented to him
6 that this would be reduced to a B misdemeanor.

7 JUDGE STEIN: But getting back to the Chief
8 Judge's question, that had to do with a plea, okay. This
9 case has to do with a plea and whether the - - - whether
10 that plea was willing and voluntary because of what the
11 court said. At the time that the court was giving
12 instructions or giving - - - having a colloquy, the charge
13 was a Class A misdemeanor. Mr. Udeke was entitled to a
14 jury whether he was subject to deportation or not subject
15 to deportation. So I - - - I don't - - - I see this as a
16 very different context than what Suazo was.

17 MR. WIENER: But the constitution requires that
18 Mr. Udeke understand the rights he's waiving by pleading
19 guilty to the charge that - - -

20 JUDGE STEIN: But how could he not?

21 MR. WIENER: - - - he's pleading guilty to.

22 JUDGE STEIN: How could he now when the court
23 said it depends on what the prosecution does. Isn't that
24 an accurate statement - - - statement? If the prosecution
25 decided, okay, you don't want to plead to this then we're



1 going to go ahead and we're going to proceed with a trial
2 in the Class A because now you're arguing you're entitled
3 to a jury in the Class B. Okay? Or it could have done
4 something different, but - - - and that's - - - that's
5 exactly what the court said.

6 MR. WIENER: It was not an accurate statement,
7 Your Honor. What - - -

8 JUDGE GARCIA: But what if it was just a Class B
9 misdemeanor now and he was subject to deportation, and the
10 court, when they're allocuting, says you have the right to
11 a jury, you're waiving that right, we go through the whole
12 thing, and now you come here and you say he didn't have a
13 right to a jury. How is it a knowing waiver?

14 MR. WIENER: Well, that's a very different
15 scenario - - -

16 JUDGE GARCIA: Why?

17 MR. WIENER: - - - Your Honor, because in that
18 scenario the defendant is waiving more than he actually
19 had.

20 JUDGE GARCIA: Here he knew that he was, in some
21 context, waiving the right to a jury, right?

22 MR. WIENER: But he was led to believe by the
23 court that he would have no right to a jury trial on the B
24 misdemeanor to which he pleaded guilty. That's exactly
25 what the court is saying when it says it depends on how the



1 prosecution proceeds. It's saying if the prosecution does
2 just what counsel has said they are saying they will do,
3 you will have no right to a jury trial. And that wasn't
4 true, in light of Suazo, because Mr. Udeke - - -

5 JUDGE GARCIA: Did the trial court know that at
6 the time?

7 MR. WIENER: Well, this plea was taken before
8 Suazo was decided, but respondent doesn't contest that - -
9 -

10 JUDGE GARCIA: No, but did they know that he had
11 - - - was subject to deportation? I mean, I thought in the
12 forms that were filled out at the time of the plea that's
13 unidentified, for probably good reason, but does the court
14 then have - - - because they're in a kind of strange area
15 here, so does the court have an obligation, at this point,
16 where nobody's raised that? So depending on what you do,
17 do you have a right to a jury or not, so isn't it kind of
18 accurate, you know, maybe - - -

19 MR. WIENER: Well, I'd make two points, Your
20 Honor. First of all, the rap sheet says that Mr. Udeke is
21 a Nigerian citizen. That's - - -

22 JUDGE GARCIA: But it doesn't say he's not a U.S.
23 citizen. You can have dual citizenship.

24 MR. WIENER: It doesn't say he's a United States
25 citizen.



1 JUDGE GARCIA: Right.

2 MR. WIENER: And there's nothing in the record to
3 indicate that he's a dual citizen. It - - - the record
4 pretty firmly establishes that he's a Nigerian citizen, and
5 respondent conceded that before the appellate term based on
6 cal - - -

7 JUDGE RIVERA: But there would be no reason to
8 hide one's U.S. citizenship.

9 MR. WIENER: No, Your Honor.

10 JUDGE RIVERA: Is that correct?

11 MR. WIENER: No, there wouldn't.

12 JUDGE STEIN: But didn't we say in Suazo that the
13 defendant really had a burden of showing not only
14 citizenship but the effect of - - - you know, the
15 immigration consequences of that conviction.

16 MR. WIENER: If the defendant is actually going
17 to trial, he has that burden. But this court has always
18 been clear that it is fundamentally the court's
19 responsibility to tell the defendant which rights he's
20 waiving by pleading guilty but not the other way around.

21 JUDGE GARCIA: The Court doesn't know at that
22 point. I mean, the point of Suazo was you have to tell us
23 because it depends on your status.

24 MR. WIENER: In - - -

25 JUDGE GARCIA: So if you're going to not make an



1 issue of the status, and again, I can understand why, then
2 how is the court supposed to do - - - know what your status
3 is? And at that point they didn't.

4 MR. WIENER: All the court needs to do is not get
5 it wrong in the way that it was wrong here. The court can
6 say if you can establish before trial that you are an
7 immigrant who will be subject to deportation, then you will
8 entitled to a jury trial. That's a - - -

9 JUDGE RIVERA: Well, doesn't the court, only a
10 few questions after this particular part of the colloquy,
11 go on to inform this defendant that there may very well be
12 deportation or other adverse immigration consequences
13 flowing from this particular plea?

14 MR. WIENER: Sure, but what the court never tells
15 Mr. Udeke is that those consequences would entitle him to a
16 jury trial.

17 JUDGE RIVERA: Well, my point of that is the
18 court obviously is alert to this issue with the defendant;
19 otherwise there would be no point to that - - -

20 MR. WIENER: Oh, yes.

21 JUDGE RIVERA: - - - particular reference.

22 MR. WIENER: Yes, by all means, Your Honor. And -
23 - -

24 JUDGE FEINMAN: Because they told them they have
25 to do that in Peque (ph.) and others.



1 JUDGE GARCIA: Yeah, that - - -

2 JUDGE STEIN: It seems to me that what you're
3 arguing is that the court has to think about every
4 possibility here that could take place, whether the People
5 were going to just go to - - - go ahead if - - - if he
6 demanded a trial on the Class A misdemeanor, on the B
7 misdemeanor that they offered, that might or might not have
8 deportation consequences, or maybe on a completely
9 different B misdemeanor, or I don't know what other
10 possibilities there are. But have we ever said that the
11 court has to do that in a plea colloquy?

12 MR. WIENER: That's not what we're asking the
13 court to do here, Your Honor.

14 JUDGE STEIN: But that's essentially, it seems to
15 me, because what - - - what the record shows the court said
16 is it depends on how the People choose to proceed.

17 MR. WIENER: And it did not depend on how the
18 People chose to proceed.

19 JUDGE STEIN: Well, it did - - -

20 MR. WIENER: He had - - -

21 JUDGE STEIN: - - - because it depended on what -
22 - - how - - - whether they were going to reduce it to a B
23 misdemeanor that did or didn't have immigration
24 consequences, right?

25 MR. WIENER: What defense counsel has just said



1 is either you're going to - - - there's the A misdemeanor,
2 unquestionably, he has the right to a jury trial with
3 respect to that charge. The reduced attempted contempt
4 charge, he also had a right to a jury trial under Suazo.
5 And so in no way did it depend on whether the prosecution
6 reduced the charge here.

7 JUDGE STEIN: But the People never said they were
8 going to go ahead to a trial on that reduced B charge.
9 They offered the reduced B charge only if he was going to
10 plead to it.

11 MR. WIENER: And he had a right to a jury trial
12 either way, no matter how the prosecution chose to proceed.
13 It didn't depend on whether they reduced the charge or not
14 or what they actually would have done, and that was the
15 mistake that the court made here.

16 JUDGE FEINMAN: Well, let me ask you this,
17 because the court had a whole other accusatory instrument
18 in front of it. What if they decide, you know what, the
19 person who was the protected person in the order is not
20 going to come in, so we're not actually going to proceed
21 with that accusatory instrument at all, we're going to
22 proceed on this - - - you know, the one that had to do with
23 the entry into the subway.

24 MR. WIENER: Your Honor, the - - -

25 JUDGE FEINMAN: Why is the court's statement



1 incorrect? I mean, I'm still struggling with that.

2 MR. WIENER: Well, the charge at issue here, the
3 charge that they're discussing is the contempt charge.
4 It's the charge that Mr. Udeke is pleading guilty to. The
5 context makes that entirely clear, and what the court is
6 effectively saying to Mr. Udeke is that if you proceed on
7 this B misdemeanor attempted contempt charge, you will have
8 no right to a jury trial. And that was not correct under
9 Suazo.

10 JUDGE FEINMAN: So I see that your red light's
11 on. Let's say we reject your premise that the court
12 affirmatively misadvised the defendant. Then what? Can
13 you still prevail?

14 MR. WIENER: Well, Your Honor, I think the court
15 can look at this charge and say it didn't adequately convey
16 to Mr. Udeke that he had the right to a jury trial and that
17 he was waiving that right. I think that is exactly what
18 happened here. That's exactly what the court said is you
19 will not necessarily have the right to a jury trial when
20 Mr. Udeke did necessarily have the right to a jury trial
21 here. And therefore he cannot possibly have made a valid
22 waiver of that right, and absent such a waiver, the plea
23 was not valid. Thank you, Your Honors.

24 CHIEF JUDGE DIFIORE: Thank you, counsel.

25 Counsel?



1 MR. KROIS: Good afternoon, Your Honors. John
2 Krois for respondent, the People.

3 What the court said was entirely correct for a
4 number of reasons but I think, first and foremost, my - - -
5 my colleague here is overstating, I think, what this court
6 said in Suazo. Suazo did not establish a completely
7 inalienable right for any class of individuals to a jury
8 trial.

9 What Suazo said was defendant has a burden.
10 There's a presumption, of course, that a B misdemeanor is a
11 petty offense, that it doesn't require a jury trial. Now,
12 if a defendant who is both a noncitizen and who is facing a
13 charge that they believe is deportable, shows affirmatively
14 to the trial court both of those things, then they can
15 overcome that presumption. But this is not a - - - a
16 blanket thing.

17 JUDGE RIVERA: Well, that can be established by
18 the record, right? So if the record in front of you is
19 that the person is a noncitizen or there's nothing to
20 suggest they are a U.S. citizen and the nature of the crime
21 is one that, under the federal definition, is of course the
22 kind - - - the type of offense that makes it possible that
23 they're subject to deportation - - - well, let's get to the
24 colloquy, shall we, please?

25 MR. KROIS: Absolutely.



1 JUDGE RIVERA: - - - because that's where there's
2 been a lot of question. I'm - - - I'm having difficulty
3 with - - - with what I understood was the argument in your
4 brief, given the colloquy in context. The judge's first
5 line of question is regarding the right to a jury trial.
6 That's the first Boykin right he starts - - - excuse me,
7 the judge starts out with and - - - and says emphatically,
8 at least twice, you have a right to - - - to a jury.

9 MR. KROIS: That's right.

10 JUDGE RIVERA: And only changes course after
11 defense counsel says, well, it was represented to him that
12 this would be reduced to a B misdemeanor. And it's at that
13 point that the court retreats from its emphatic statement
14 about having a right to a jury trial.

15 So how is counsel incorrect with - - - with
16 respect to his argument that the colloquy shows that - - -
17 that the defendant has been, at a minimum, misinformed
18 about whether or not he's got a right to a jury trial,
19 given - - - given the ruling in Suazo?

20 MR. KROIS: Well, first of all, you're right,
21 Your Honor, that this could be shown by defendant from the
22 record. But it wasn't shown by defendant from the record.

23 JUDGE RIVERA: All right. Well, I'm on the
24 colloquy now, so let's talk about that.

25 MR. KROIS: But Your Honor, with respect, I think



1 it informs the colloquy because a showing under Suazo that
2 established that right might very well change the colloquy.
3 No showing, however, the statement by the court was correct
4 on those terms. But Your Honor, it was also correct on
5 general terms.

6 I read this colloquy as Judge Peterson attempting
7 to capture every possible situation that defendant could be
8 faced with. And the literal words once - - - once alerted
9 to the - - - the small amount of confusion that appeared to
10 be going on there, the literal final words on the matter
11 were: it could be a judge trial, it could be a jury trial,
12 depending on how the People chose to proceed.

13 JUDGE RIVERA: But isn't the judge responding to
14 the only thing that's presented in that moment, reduction -
15 - -

16 MR. KROIS: The judge - - -

17 JUDGE RIVERA: - - - to the B misdemeanor; isn't
18 that what the judge is responding to, not something else?

19 MR. KROIS: Well, yes, but I think this - - -
20 this broad statement is the response to that. It is the
21 attempt to clarify for the defendant that, had this gone to
22 trial, there were a couple of different ways that this
23 could have gone.

24 JUDGE RIVERA: Okay. What would that have been?

25 MR. KROIS: Well, Your Honor, we could have - - -



1 as I think was brought up, we could have dropped the - - -
2 the contempt charge, we could have gone forward on
3 something like theft of services. We could have pulled the
4 complaint, and we could have issued a superseding
5 information charging a nondeportable defense. There were
6 certainly ways that we could have gone forward here that
7 would not have implicated deportability at all, which goes
8 back to the fact that the statement, read literally, is
9 literally true and can't be a misstatement. It's - - -

10 JUDGE WILSON: The upshot of that argument, I
11 think, is that then, in your ordinary case where a felony
12 is charged, a proper statement by the court would be you
13 might or might not have a right to a jury trial, depending
14 on how the prosecutor intends to proceed. And that would
15 be sufficient to apprise defendants of their jury trial
16 right.

17 MR. KROIS: Yes, Your Honor.

18 JUDGE WILSON: And that - - - that would be
19 perfectly acceptable?

20 MR. KROIS: I believe so, Your Honor.

21 JUDGE WILSON: Okay.

22 MR. KROIS: Yes. I think, certainly under
23 circumstances that are similar to this one, I mean,
24 obviously a Boykin - - -

25 JUDGE WILSON: Well, I wasn't asking about that;



1 I was asking about circumstances that are dissimilar from
2 this one.

3 MR. KROIS: Dissimilar in which way; I'm sorry,
4 Your Honor.

5 JUDGE WILSON: That there's no deportation
6 consequence, no B misdemeanor issue; it's just I'm charged
7 with murder and I'm thinking of pleading to something in a
8 lesser form of homicide. And the court says I want you to
9 understand you might or might not have a jury trial right,
10 depending on how the prosecution decides to proceed,
11 because they might charge you with trespass instead of
12 homicide.

13 MR. KROIS: Under that circumstance, that's
14 absolutely true, Your Honor. I - - - I don't - - - I don't
15 suspect that a court would have gotten to that point - - -

16 JUDGE RIVERA: So in other words - - -

17 MR. KROIS: - - - unless this issues was - - -
18 sorry, Your Honor.

19 JUDGE RIVERA: So in other words, what the court
20 is doing there is saying I have no idea if you have this
21 right. I have no idea.

22 MR. KROIS: I don't think so, Your Honor, because
23 I believe in a situation like that, where that arose, would
24 be in response to this kind of question. That seems
25 unlikely to be something that a court would, sua sponte,



1 say. But when you're dealing with a situation - - -
2 setting deportability aside, a situation where somebody is
3 asking a one-step-further-into-it question about what could
4 have happened, that statement would be true, and it would
5 be germane and responsive to what the defendant was
6 concerned about.

7 So Your Honors, both because he didn't make his
8 Suazo showing to establish - - - to overcome the
9 presumption, and because the statement was literally true,
10 we are in a Boykin case. And without an affirmative
11 misstatement, without any sort of lack - - - I mean, there
12 were all three Boykin rights. There were more than that on
13 the record. With everything else on the record,
14 holistically, this is - - - this is certainly a voluntary
15 plea.

16 JUDGE STEIN: Along those lines, can I just ask
17 you about your position on preservation?

18 MR. KROIS: Yes, Your Honor.

19 JUDGE STEIN: Here we have the plea and the
20 sentencing in the same proceeding, and if this is really
21 about the plea and the Boykin rights and not about Suazo,
22 isn't it all on the face of the record? And therefore, why
23 would this not be an exception to the preservation
24 requirement?

25 MR. KROIS: Well, it would be all on the record



1 if Your Honors adopt our position that this was a
2 completely - - -

3 JUDGE STEIN: Well, that was my - - -

4 MR. KROIS: - - - true statement.

5 JUDGE STEIN: That was my hypothetical.

6 MR. KROIS: In that situation, I suppose
7 preservation wouldn't necessarily be an issue, but what we
8 have here is defendant is asserting something is very
9 specifically wrong with this colloquy - - - colloquy,
10 sorry. And then they paused the colloquy to address,
11 essentially, what defendant was concerned about. And then
12 they present defendant with another - - - another
13 opportunity later on to speak on whatever subject he wants,
14 as defense counsel had the same opportunity. They choose
15 to address different legal matters.

16 JUDGE RIVERA: Where - - -

17 MR. KROIS: I think, Your Honor - - -

18 JUDGE RIVERA: Where does the record establish
19 all these pauses and breaks?

20 MR. KROIS: The record establishes - - - well,
21 the first - - - the first pause and break is during the
22 Boykin colloquy itself where the court said that he had a
23 right to a trial by jury. Defendant pipes up and says, "By
24 jury?" Then they pretty much pinpoint and discuss this - -
25 - this question, and then at the end, before sentence is



1 imposed, because that's the crucial part, defendant is
2 given the opportunity to speak, he does indeed speak. He
3 speaks about the underlying order of protection. Defense
4 counsel also speaks. Now, Your Honors, that is the
5 opportunity - - -

6 JUDGE RIVERA: But this record looks like those -
7 - - all those records where it's basically a joint plea and
8 sentencing proceeding. You're moving directly from one to
9 the other at the conclusion of the plea.

10 MR. KROIS: It is - - -

11 JUDGE RIVERA: Where is the opportunity?

12 MR. KROIS: I think the opportunity here is
13 unique because of the fact that this issue was flagged
14 specifically. I think that that really does change the
15 tenor of the situation. They are talking about jury trial
16 versus judge trial right. This was an - - - this was a
17 perfect opportunity for defendant to, at a minimum, ask for
18 clarification. And he didn't do that.

19 JUDGE RIVERA: He did. He said: "By jury?", and
20 the court says: "A jury trial, that's correct."

21 MR. KROIS: Sorry, Your Honor. A clarification
22 on the argument the defendant is now raising, the Suazo - -
23 - the Suazo - - - I'm not sure of the right adjective, but
24 the Suazo-esque argument that defendant is now raising. It
25 was an opportunity to make that claim. And he didn't make



1 that claim. For that reason, I'd say it's unpreserved.

2 Your Honors, if there are no further questions,
3 thank you very much.

4 CHIEF JUDGE DIFIORE: Thank you.

5 Mr. Wiener?

6 MR. WIENER: Your Honors, Boykin imposed a duty
7 on the court to ensure that the defendant makes a knowing
8 waiver of his right to a jury trial specifically when he's
9 pleading guilty. This record here just establishes that
10 the court didn't do that. It said that the right depended
11 on how the prosecution proceeded when it didn't. No matter
12 how the prosecution proceeded, Mr. Udeke had the right to a
13 jury trial. So straightforwardly here, he could not
14 possibly have understood that from this colloquy.

15 JUDGE RIVERA: What about the examples he gave
16 before, because I asked him the same thing, and he said,
17 well, these are all the ways that there would not have been
18 the availability of a jury trial. Or did I misunderstand
19 him?

20 MR. WIENER: Well, Your Honor, you have to look
21 at this in context. They're talking about the contempt
22 charge here. That's the charge that Mr. Udeke is pleading
23 guilty to. That's the charge, on page 16 of the colloquy,
24 just immediately before this, they say your understanding
25 that you're pleading guilty to B misdemeanor attempted



1 contempt. That's what they're talking about here. The
2 Court isn't just saying as a general matter. The Court is
3 saying if the prosecution does what counsel has just
4 represented that they're going to do, you will not be
5 entitled to a jury trial. And that was not correct. I
6 think with respect to this I - - -

7 JUDGE RIVERA: I think the argument is if you're
8 not going to take this plea there are many options that the
9 People have. I think that's the argument, so why is he
10 wrong about that?

11 MR. WIENER: But that's not what the court said,
12 right? What defense counsel says is, it's represented to
13 him that this would be reduced to a B misdemeanor.
14 Immediately after that, the court says a trial by a judge
15 or a jury, depending on how the People proceed. The Court
16 isn't just saying how the People proceed in general; the
17 court's saying, if they reduce the charge, or if they
18 don't, two potentially different things might happen.

19 JUDGE RIVERA: Well, and the reality is, I guess,
20 as I - - - as I'm listening to your argument, I think
21 you're also suggesting that if - - - if counsel had not
22 made this statement about the reduction, certainly the
23 judge would have been working on the same premise that of
24 course if you're not going to take this plea the prosecutor
25 may have many options available.



1 MR. WIENER: Sure, I think that that's - - -

2 JUDGE RIVERA: You didn't need the prosecutor to
3 make this statement, I think, to address his - - - the
4 defense counsel - - - excuse me, to make this statement
5 because if the argument from the People is: if you don't
6 plead then the People have lots of options available, and
7 some don't include the right to a jury, that that was true
8 before defense counsel made this statement. And yet the
9 court emphatically said you have a right to a jury trial at
10 that point.

11 MR. WIENER: Yes, that's right, Your Honor.
12 That's - - - that's exactly right.

13 JUDGE RIVERA: So all I'm saying is that the
14 court appears to be reacting only to what defense counsel
15 has said - - -

16 MR. WIENER: Yes, that - - -

17 JUDGE RIVERA: - - - this general idea that the
18 People can choose to, perhaps, have other paths that
19 they're going to follow.

20 MR. WIENER: That's precisely correct, Your
21 Honor.

22 JUDGE STEIN: But can you reasonably read this
23 record to - - - to assume that the People were going to
24 reduce this charge, whether he was going to plead to it or
25 not?



1 MR. WIENER: Yes, that's what defense counsel
2 says. It was represented to him that this would be reduced
3 to a B misdemeanor. The prosecutor doesn't stand up at
4 that point and say, no, no, no, we're not going to do that.

5 JUDGE STEIN: So you don't read that as meaning
6 for him to be able to plead to the B misdemeanor?

7 MR. WIENER: No, because - - -

8 JUDGE STEIN: Okay. That's - - -

9 MR. WIENER: - - - it's in the context - - -

10 JUDGE FEINMAN: Wait a minute.

11 MR. WIENER: - - - of him asking about this jury
12 trial.

13 JUDGE FEINMAN: They have a motion to consolidate
14 that's pending in front of the court, how - - - how can you
15 say that that's a reasonable reading of this record when
16 not only are they ready to - - - they answer ready for
17 trial, but they're seeking to add more charges to - - - to
18 go - - - you know, or basically put forward three A
19 misdemeanors. Was it three or two? I don't remember.

20 And as I think somebody pointed out earlier, you
21 don't actually - - - I mean, from the time you walk out of
22 the AP part over to the jury trial part and finally get a
23 judge assigned, and people, right before you start, are
24 going to substitute a prosecutor's information. You're not
25 going to go forward on these instruments.



1 MR. WIENER: So I think, anecdotally, Your Honor,
2 this was a fairly common practice in New York County and
3 the Bronx, at least at the time, was to reduce A
4 misdemeanor contempt charges to B misdemeanor charges
5 precisely to avoid a jury trial. That's why Suazo happened
6 in the first place.

7 JUDGE FEINMAN: I think it was more common in the
8 Bronx. I don't know about Manhattan.

9 JUDGE GARCIA: But counsel, going back just for a
10 minute, if I might, Chief Judge, to Judge Wilson's
11 potential, you know, kind of colloquy. Why isn't this
12 accurate then because, depending on how they proceeded,
13 maybe they would have filed a violation or something. So
14 why isn't it accurate, depending on how the People proceed,
15 you might not get a jury. I mean, like, with a murder
16 trial, they might file a violation. Here they might file a
17 violation.

18 MR. WIENER: Well, I just disagree with
19 respondent that in a murder trial, where the defendant is
20 pleading guilty to murder, and the court says - - -

21 JUDGE GARCIA: Well, I think that was Judge
22 Wilson, in fairness, not your - - -

23 MR. WIENER: Well, I think what respondent was
24 saying was, in that case, all that the court needs to say
25 is you may or may not have a right to a jury trial - - -



1 JUDGE GARCIA: But isn't that what they said
2 here?

3 MR. WIENER: - - - depending on how the
4 prosecution proceeds.

5 JUDGE GARCIA: I mean, they could file a
6 violation here, and then you wouldn't have a right to a
7 jury trial.

8 MR. WIENER: But - - -

9 JUDGE GARCIA: That's how they proceed.

10 MR. WIENER: But Boykin requires more than that.
11 It requires a knowing waiver of the right to a jury trial,
12 a right that Mr. Udeke unquestionably had and which the
13 court implied he did not necessarily have.

14 JUDGE WILSON: Does it matter that Suazo was
15 decided three years after all of this?

16 MR. WIENER: No, it doesn't, Your Honor.

17 JUDGE WILSON: Why not?

18 MR. WIENER: Because respondent doesn't even
19 contest that Suazo is retroactive. It's based on a federal
20 right.

21 JUDGE FEINMAN: I just want to follow up on
22 something you just said. So in the course of doing a
23 Boykin allocution, the judge said you're waiving your right
24 to a trial, your right to, say, have the People prove your
25 guilt beyond a reasonable doubt, your right to compel



1 witnesses, and you know, it goes, in, like, one sentence it
2 lists a whole bunch of rights. If they don't say the word
3 "jury trial" - - -

4 MR. WIENER: No, Your Honor.

5 JUDGE FEINMAN: - - - I understand - - -

6 MR. WIENER: That's not our position. I think -
7 - -

8 JUDGE FEINMAN: Okay.

9 MR. WIENER: - - - Conceicao - - -

10 JUDGE FEINMAN: I just wanted to make sure
11 because I thought you just said that.

12 MR. WIENER: Conceicao controls that. You get to
13 look to the totality of the circumstances to decide
14 whether, when there's an omission like that, it's
15 sufficient to undermine the court's confidence that a
16 knowing waiver of the rights was made. But here, again,
17 this colloquy shows that Mr. Udeke affirmatively was not
18 making a knowing waiver of his jury trial right. This
19 isn't like an omission.

20 Thank you, Your Honors.

21 CHIEF JUDGE DIFIORE: Thank you.

22 (Court is adjourned)

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

I, Sharona Shapiro, certify that the foregoing transcript of proceedings in the Court of Appeals of The People of the State of New York v. Sixtus Udeke, No. 104, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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