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COURT OF APPEALS

STATE OF NEW YORK

MATTER OF PEREZ,

Respondent,

-against-

No. 26

RHEA,

Appellant.

20 Eagle Street
Albany, New York 12207
January 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.

Appearances:

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Karen Schiffmiller
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: 26, Matter of Perez.
2 Counsel, would you like any rebuttal time?

3 MR. KRAMER: Your Honor, three minutes,
4 please.

5 CHIEF JUDGE LIPPMAN: Sure. Go ahead,
6 counsel.

7 MR. KRAMER: May it please the court, my
8 name is Seth Kramer for the Housing Authority. In
9 vacating the Housing Authority's determination, the
10 Appellate Division mischaracterized the offense, and
11 disregarded a lot of the court's discussion in the
12 Pell case.

13 CHIEF JUDGE LIPPMAN: Let me ask you
14 something, counsel. Why didn't you wait for the
15 criminal proceeding before you made a deal with the
16 tenant?

17 MR. KRAMER: Before the administrative
18 proceeding took place, you mean?

19 CHIEF JUDGE LIPPMAN: Yeah, why - - - you
20 made a deal, right?

21 MR. KRAMER: The Housing Authority didn't
22 make a deal.

23 CHIEF JUDGE LIPPMAN: No, who made a deal?

24 MR. KRAMER: The District Attorney's Office
25 in the context of the criminal prosecution - - -

1 JUDGE PIGOTT: Were you there?

2 MR. KRAMER: I'm sorry?

3 JUDGE PIGOTT: Were you there? Not you,
4 personally, but was the Housing Authority present at
5 the time that the plea bargain was worked out?

6 MR. KRAMER: I'm not sure whether the
7 Housing Authority was present. Normally the
8 Inspector General's Office handles the referral for
9 the prosecution. According - - - I don't believe the
10 Housing Authority's mentioned in the transcript for
11 the - - -

12 JUDGE SMITH: But the Housing - - - I
13 assume the Housing Authority would have signed off on
14 the amount of restitution before the People agreed to
15 it?

16 MR. KRAMER: Not necessarily, Your Honor.
17 And even if they - - -

18 CHIEF JUDGE LIPPMAN: So, they acted and
19 then you proceeded? That's the - - -

20 MR. KRAMER: Yeah, the District Attorney's
21 Office actually - - -

22 CHIEF JUDGE LIPPMAN: You had nothing to do
23 with that, as far as you know?

24 MR. KRAMER: As far as I know, in the
25 ongoing proceeding - - - criminal proceeding, the

1 Housing Authority is not involved, and as - - -

2 JUDGE SMITH: Isn't it unusual for a
3 prosecutor to agree on an amount of restitution less
4 than the full amount, without even talking to the
5 victim?

6 MR. KRAMER: What I've seen in other cases
7 - - - and it's possible the Housing Authority did
8 authorize it, like you said, it's not on the record
9 and I wasn't there at the time - - - but I have seen
10 in some other cases is the District Attorney's
11 Office, you know, there's different standards for
12 criminal law and also statute of limitation issues; I
13 have seen in other cases where the District
14 Attorney's Office believes that certain periods of
15 time in which there was a concealment of income can't
16 be prosecuted, like I said, possibly for statute of
17 limitation purposes. So they will agree to a lesser
18 amount in the plea agreement.

19 But while the plea agreement is conclusive
20 facts of the tenant's misconduct, it doesn't preclude
21 the Housing Authority from showing evidence outside
22 of the criminal prosecution of the plea agreement to
23 demonstrate additional concealment of income.

24 CHIEF JUDGE LIPPMAN: But if you were - - -
25 let's say, you were satisfied, why are you not

1 satisfied now with that arrangement?

2 MR. KRAMER: With the - - - satisfied with
3 the plea agreement?

4 CHIEF JUDGE LIPPMAN: What the - - - the -
5 - - the - - - what she's paying to - - -

6 MR. KRAMER: So taking - - -

7 CHIEF JUDGE LIPPMAN: - - - the back rent,
8 or whatever it is.

9 MR. KRAMER: Taking aside the amount of
10 money, the criminal agreement was agreed to by the
11 petitioner for purposes of avoiding imprisonment, for
12 purposes of reducing the charges. She was initially
13 charged with grand larceny - - - and by the way,
14 initially charged with 27,000 dollars, if you'd look
15 at the arrest report.

16 JUDGE PIGOTT: But that raises - - - I
17 apologize for interrupting. But the complainant here
18 is the Housing Authority, right? I mean, I agree - -
19 -

20 MR. KRAMER: Well, it's an Article 78 case.

21 JUDGE PIGOTT: No, no, no - - -

22 MR. KRAMER: Oh - - -

23 JUDGE PIGOTT: - - - what I mean is the
24 criminal case. It's People - - -

25 MR. KRAMER: - - - the criminal case.

1 JUDGE PIGOTT: - - - People versus, but it
2 was - - - I mean, you're the one that had to go the
3 police and - - -

4 MR. KRAMER: Correct.

5 JUDGE PIGOTT: - - - say this lady stole
6 our money.

7 MR. KRAMER: Correct.

8 JUDGE PIGOTT: So why can't we conclude, as
9 a result of that, that you were satisfied with the
10 plea?

11 MR. KRAMER: It's possible - - - it's
12 possible you can, but again, I don't think what - - -
13 that the Housing Authority was satisfied with the
14 purposes of the criminal agreement.

15 JUDGE SMITH: It was not a term of the plea
16 agreement that she gets to stay in the apartment?

17 MR. KRAMER: No, certainly not.

18 JUDGE READ: But let me ask - - -

19 MR. KRAMER: And the affidavits of income
20 were explicit that the Housing Authority warned her
21 on these affidavits of income that if she conceals
22 her income, remedies including criminal prosecution
23 as well as repayment of rent - - -

24 JUDGE PIGOTT: But you could have said, you
25 know - - -

1 MR. KRAMER: - - - as well as - - -

2 JUDGE PIGOTT: - - - to the DA, yeah, the
3 plea's fine, just as long as she's out by the first
4 of next month.

5 MR. KRAMER: I'm not sure that the
6 administrator - - - I believe under termination
7 procedures for the Housing Authority that would have
8 been - - - had to be required through the termination
9 proceeding. I'm not sure that through the criminal
10 proceeding - - -

11 JUDGE PIGOTT: You don't think she would
12 have complained if she was getting the - - - whatever
13 plea bargain she wanted. Of course, she could have
14 said, no, I'm not agreeing to that.

15 MR. KRAMER: To agree to leave by a
16 specific date?

17 JUDGE PIGOTT: Yeah, yeah.

18 MR. KRAMER: It's possible she would have
19 agreed to it. It's possible she wouldn't have. You
20 know, I'm not going to - - - I don't know whether she
21 would have accepted and then - - -

22 JUDGE PIGOTT: And then the problem, it
23 seems to me, is she walks out of criminal court
24 thinking, oh, this is behind me. You know, I've got
25 a big nut to pay, but at least I'm in my apartment,

1 only to be greeted with a petition to remove her, you
2 know, shortly thereafter.

3 MR. KRAMER: As I was saying, in the
4 affidavits of income, though, the Housing Authority
5 does explicitly warn the tenants that if they conceal
6 income - - -

7 JUDGE PIGOTT: Oh, well, she pled guilty.
8 There's no question about it.

9 MR. KRAMER: No, no - - -

10 JUDGE PIGOTT: I get that. No, I get that.

11 MR. KRAMER: - - - but that other remedies
12 can occur.

13 JUDGE PIGOTT: But there's a lot of cases
14 where there's a criminal aspect and a civil aspect,
15 and usually when you plead to the criminal aspect,
16 you - - - there's restitution, you know. And so you
17 know that if you comply with the plea, restitution's
18 made, and the person's not going to sue you civilly,
19 because you've made the restitution.

20 MR. KRAMER: When this was - - -

21 JUDGE PIGOTT: In this case, there's that
22 extra step saying, well, fine, thank you for the
23 money, but you're out.

24 MR. KRAMER: Well, and this isn't a true
25 civil proceeding where you're suing for damages, this

1 was an administrative proceeding covering the issue
2 of whether she's entitled to remain in the apartment,
3 and she was warned on the affidavits of income - - -

4 JUDGE PIGOTT: Your petition said that the
5 - - - that "her continued occupancy constitutes a
6 danger to the health and safety of your neighbors, is
7 conduct of a sex or morals offense, is a source of
8 danger or a cause of damage to employees, premises or
9 property of the Authority, is a source of danger to
10 the peaceful occupation of other tenants, or is a
11 common-law nuisance." Which one of those does this
12 fit under?

13 MR. KRAMER: I'm not sure any of those are
14 required. She was charged with misrepresentation.
15 But it was - - -

16 JUDGE PIGOTT: No, that's what - - - that's
17 what - - -

18 MR. KRAMER: But I think it does - - -

19 JUDGE PIGOTT: Excuse me, excuse me.
20 That's what you said: "her continued occupancy
21 constitutes" one of those.

22 MR. KRAMER: I believe it would constitute
23 a morals offense, as this court held in Pell and the
24 Best v. - - - specifically with regard to the Best v.
25 Ronan case --

1 JUDGE PIGOTT: "A conduct of a sex or
2 morals offense"?

3 MR. KRAMER: I believe this counts - - -
4 constitutes moral turpitude, so I think it would fall
5 within that category. And - - -

6 JUDGE READ: Let me ask you this. It's a
7 little bit, maybe, off the point, but is there a
8 waiting list for this housing, for this kind of
9 housing?

10 MR. KRAMER: Yes, there is a lengthy
11 waiting list, and I think that goes into part of this
12 decision, that even, you know, with all - - - the
13 Appellate Division had relied on the threat of
14 homelessness to petitioner, and the fact that public
15 housing constitutes housing of last resort, and that
16 doesn't account for people on the waiting list.

17 And there's a question of we're a scarce
18 resource; how is this scarce resource going to be
19 allocated? And should it be allocated to someone who
20 lies to the Housing Authority to conceal income, and
21 steals from the Housing Authority who's giving them
22 subsidies, or should it go to these other families
23 who are equally in need of housing, and - - -

24 JUDGE PIGOTT: Had she disclosed this,
25 would that have rendered her ineligible for the

1 apartment that she was in? In other words, if six
2 years before, when she said I've got this job, it's
3 paying me 34,000 dollars, would she then have been
4 evicted because she was over the guidelines?

5 MR. KRAMER: No, Your Honor. The - - -
6 while that's an eligibility criteria for an initial
7 application, once they're in the apartment, there's a
8 maximum rent that tenants can be charged for income.

9 JUDGE SMITH: So, even if you're in public
10 house - - - if you're in Section 8 housing, and you
11 become a multi-millionaire, you don't have to move
12 out. You just pay the maximum?

13 MR. KRAMER: Section 8's different, but for
14 public housing purposes - - - because Section 8 deals
15 with subsidies for the private landlords - - - but
16 for public housing purposes, the tenants are not
17 evicted for being over-income. Once they're in the
18 apartment, then they're charged the maximum rent. At
19 least, that's the policy as of now.

20 JUDGE SMITH: So, even if - - - even if,
21 say, through a tort case or some other reason the
22 person becomes wealthy, he can still stay.

23 MR. KRAMER: At least as of now, or at
24 least as of the time of the termination.

25 CHIEF JUDGE LIPPMAN: Okay, counsel, thank

1 you.

2 MR. KRAMER: Thank you, Your Honor.

3 CHIEF JUDGE LIPPMAN: You'll get a
4 rebuttal.

5 MR. SACKIN: Good afternoon, Your Honors.
6 Marc Sackin, at - - - pro bono attorney for
7 respondent Jacqueline Perez.

8 CHIEF JUDGE LIPPMAN: Counsel, wasn't this
9 a situation, really, of her own making? You know,
10 that the intentional misrepresentation - - - she
11 really - - - the agreement that she gets into is to
12 avoid prosecution. She didn't say anything earlier
13 about the kid's supposed disabilities. Why - - - why
14 - - - why is this - - - why shouldn't she be removed
15 under our - - - the standards of the Housing
16 Authority and our case law? What's different about
17 this case?

18 MR. SACKIN: Well, Your Honor, Ms. Perez
19 does blatantly admit - - - and admitted, once
20 confronted, right away - - - that she did make the
21 mistake. She did not report her income.

22 CHIEF JUDGE LIPPMAN: But she knows that
23 the consequence of that may be removal from the
24 housing, even though it's a harsh result and it's
25 difficult, and Judge Read just mentioned or asked a

1 question about the people waiting in line for public
2 housing. What's wrong with terminating this?

3 MR. SACKIN: Well, Your Honor, in this
4 court, in Pell v. Board of Education, said that the
5 courts are authorized to set aside administrative
6 decisions like this, when - - -

7 CHIEF JUDGE LIPPMAN: Yeah, but they - - -
8 but they talked about the type of offenses that are
9 of an exception to that, right, in Pell?

10 MR. SACKIN: Well, they said - - - they
11 discussed - - - yes - - -

12 CHIEF JUDGE LIPPMAN: Except morally grave
13 kind of, you know, like larceny and he or she - - -

14 MR. SACKIN: Right. Yeah, and - - -

15 CHIEF JUDGE LIPPMAN: - - - petty larceny.
16 I mean, why - - -

17 MR. SACKIN: Right.

18 CHIEF JUDGE LIPPMAN: Again, why - - -
19 what's - - - what - - - why shouldn't she be
20 terminated from this housing?

21 MR. SACKIN: Well, many of the appellate
22 courts interpreting Pell have looked into mitigating
23 circumstances in cases very, very, very similar to
24 this, Your Honor.

25 JUDGE READ: I guess the question is should

1 Honor, is - - - and, frankly, the deterrent is
2 exactly what happened to Ms. Perez. She was
3 prosecuted criminally for a felony - - -

4 JUDGE SMITH: And did no time, had to pay
5 restitution of less than she took without interest
6 over years. I mean, if I - - - you know, I don't
7 want to be harsh on her, because she's obviously got
8 a tough life, but objectively, it sounds like she got
9 a fabulous deal.

10 MR. SACKIN: Well, respectively, first,
11 it's not conceded that she is paying her restitution
12 less than what she ever - - -

13 JUDGE SMITH: Well, then she - - - well,
14 she - - - the proof said she got 27,000 in benefit,
15 and she's only paying back 20.

16 MR. SACKIN: Well, the Chief Investigator
17 France, during the administrative proceeding here,
18 stated that she's making a full restitution in the
19 amount of the 20,000 dollars, and the Confession of
20 Judgment does say the 20,000 dollars as well.

21 But back to your initial point of what's
22 the incentive, Your Honor, this now - - - this
23 misdemeanor is on her record. She's been trying to
24 apply for other jobs to earn in a higher income to
25 afford other housing. She's been denied, in large

1 part we believe, because of her criminal record.

2 She's been actually zealously attempting to
3 find public - - - private housing because of this
4 case and because, frankly, she needs more space for
5 her three children, two of whom have disabilities,
6 one of whom is only ten years old now, and - - -

7 CHIEF JUDGE LIPPMAN: But that hasn't been
8 on the record the whole time, right, that disability
9 thing? That just came up later - - -

10 MR. SACKIN: It came up during the - - -

11 CHIEF JUDGE LIPPMAN: - - - the kids'
12 disability?

13 MR. SACKIN: It came up during the
14 administrative proceeding, Your Honor, so it is in
15 the record.

16 JUDGE SMITH: She did say - - - on the
17 form, say, does anyone have a disability, and she
18 checked "no". Is it your position that she was
19 really - - - that that was really directed at - - -
20 does she have a disability, who needs - - - you need
21 like a ramp in the apartment or something?

22 MR. SACKIN: Yes, Your Honor, exactly,
23 exactly. She believed that that meant more like
24 wheelchairs, things that the Housing Authority needs
25 to provide for her. She didn't want to try to take

1 advantage of the Housing Authority, so she said no.

2 JUDGE SMITH: She - - - she got no - - -
3 there's no obvious benefit that she got from denying
4 the disability.

5 MR. SACKIN: No, absolutely not, absolutely
6 not, absolutely not.

7 JUDGE GRAFFEO: I understand you're trying
8 to make an equity argument, but under the
9 administrative law principles, isn't the Appellate
10 Division supposed to just look at whether it shocks
11 the conscience - - - consciousness, which they found
12 here, but does it really raise to that level, to
13 expect that someone who has not revealed the income
14 that they were receiving is going to be evicted from
15 public housing?

16 MR. SACKIN: Yes, I believe, it does shock
17 the conscience. Not only is she - - -

18 JUDGE GRAFFEO: That's going to be true in
19 all the cases, because - - -

20 MR. SACKIN: Well, I - - -

21 JUDGE GRAFFEO: - - - we do see these cases
22 periodically. She's not the only person that
23 attempted to fail to disclose income.

24 MR. SACKIN: Right. I would not say in all
25 cases. I'd - - - I believe CPLR 7803, as well as

1 Pell, left it an open - - - a broad test
2 intentionally, so the courts can - - -

3 JUDGE SMITH: So, in all cases where she -
4 - - where the tenant has children with special needs
5 who are going to be harmed by the eviction. That's
6 going to be a lot of cases.

7 MR. SACKIN: No, Your Honor. Not with all
8 cases, and there's no bright-line test.

9 JUDGE SMITH: The - - - the family - - -
10 the children are always the innocent victims in these
11 situations. I mean, that doesn't make this unique.

12 MR. SACKIN: No, it does not make it
13 unique, but that's definitely a significant,
14 mitigating circumstance. Also a mitigating
15 circumstance here is that she has been in full
16 compliance with the restitution agreement which she
17 agreed upon with the DA.

18 CHIEF JUDGE LIPPMAN: What's the - - -

19 MR. SACKIN: And I may add - - -

20 CHIEF JUDGE LIPPMAN: What's the deterrent
21 to other people if, basically, they make an agreement
22 and she pays back what she misrepresented? How is
23 that a deterrent? You know, what do you do in these
24 cases, if in every case you can misrepresent, and
25 then you pay it back later. What's the penalty?

1 MR. SACKIN: Well, the deterrent, Your
2 Honor, is the same deterrent that I would face and
3 that the members of the court would face, is that
4 you'd face the penalty of criminal prosecution. And
5 that's exactly what happened to Ms. Perez here. And
6 unfortunately, as I say - - -

7 JUDGE GRAFFEO: I guess what I'm asking is
8 why shouldn't that result in the eviction? Because,
9 on the other hand, you've got families in homeless
10 shelters with children waiting for the public
11 housing. So where's the deterrent to keep the system
12 honest - - -

13 MR. SACKIN: Well, I think the - - -

14 JUDGE GRAFFEO: - - - if we - - - if the
15 Appellate Division - - - excuse me - - - is able to
16 substitute its judgment all the time?

17 MR. SACKIN: Well, I think the Appellate
18 Courts have kind of given some guidance as to what
19 criteria it should look at. The children is one of
20 them. Also, a very, very important criteria is
21 whether they have a prior criminal record, and
22 whether they have been a model tenant. In this case
23 - - -

24 JUDGE SMITH: Yeah, but doesn't this come
25 down to, if you have - - - if you have children, and

1 can tell a sympathetic story, you're allowed to do
2 this once, and - - - as long as you pay most of the
3 money back over time?

4 MR. SACKIN: No, no. This is - - - each
5 case is specific on its own, Your Honor. And here, I
6 mean, it is a unique situation, where not only does
7 she have children. Two of her children - - - one of
8 whom is ten - - - has significant disabilities, that
9 being diagnosed with ADHD, as well as severe
10 emotional problems.

11 JUDGE PIGOTT: But the experts - - - the
12 experts in this field are the Housing Authority
13 themselves. They have this elaborate process of
14 reviewing these cases, and then there was the
15 hearing, and a determination made. Why should five
16 judges in the Appellate Division, or seven judges in
17 Albany, override what they do?

18 MR. SACKIN: Because the reason 7803 and
19 Article 78 was put in place was to put checks on the
20 Housing Authority so they're not over - - - they do
21 not overstep their bounds, and that they don't just
22 follow a strict formula, but they consider the full
23 story, the full scope of what's happening to find a
24 fair result.

25 JUDGE SMITH: They said they did. I mean,

1 the hearing examiner said he'd looked at the
2 mitigation and it wasn't enough. Why is that
3 outrageous for him to say that?

4 MR. SACKIN: Because, frankly, as the
5 Appellate Court held, they did look at the mitigating
6 circumstances, and the Appellate Court held that the
7 - - - that individual was incorrect.

8 JUDGE SMITH: Well, they - - - they - - -
9 well, I mean, the Appellate Court thought it was
10 enough and the administrator doesn't. Whose job is
11 it to make that decision?

12 MR. SACKIN: Well, the Article 78 clearly
13 states that the courts have discretion to overrule
14 the determinations of the administrative agencies.
15 So, while examining the record, they have the
16 authority to disagree and over - - - and vacate that
17 determination.

18 JUDGE SMITH: It's not just be - - - not
19 just because they disagree, surely.

20 MR. SACKIN: Well, after a review of the
21 record, if they think that the determination was
22 arbitrary and capricious, and they - - - and shocks
23 the sense of fairness, which they did, and which I
24 frankly feel as well, then they do have that
25 discretion.

1 And if I may just discuss one thing - - -
2 one question brought to Mr. Kramer over here. The
3 court asked whether the Housing Authority was part of
4 the confession of judgment. The verified petition
5 does have that - - - we did state that a Ms. Dillard
6 (ph.) of the Housing Authority was very involved in
7 the agreement to the confession of judgment.

8 So it's our position that the Housing
9 Authority was - - - did sign off on it, and did agree
10 that she would be released from, not just all
11 criminal liability, but all civil liability upon her
12 full restitution.

13 JUDGE SMITH: But - - -

14 JUDGE GRAFFEO: Let me ask you a policy
15 question, if I could?

16 MR. SACKIN: Yes.

17 JUDGE GRAFFEO: Do you really want - - -
18 sorry, I'm losing my voice here - - - do you really
19 want the Housing Authority to ask the prosecutors to
20 make eviction one of the conditions of a criminal
21 plea? I wouldn't think from a policy standpoint,
22 that you want that - - -

23 MR. SACKIN: No - - -

24 JUDGE GRAFFEO: - - - that outcome of this
25 type of case.

1 MR. SACKIN: No, but I - - -

2 JUDGE GRAFFEO: Aren't you better off with
3 the Housing Authority reviewing these cases and
4 deciding if they want to do an eviction?

5 MR. SACKIN: Yes, but I don't believe the
6 Housing Authority should have unlimited statute of
7 limitations also to make such a determination. This
8 - - - this confession of judgment was entered into
9 more than two years - - -

10 JUDGE SMITH: Yeah, but she only benefits
11 from the delay. I mean, she - - - it's been how long
12 now, since she stopped - - - it's about fourteen
13 years since - - - since she concealed her income and
14 about eight since they discovered it, and she's still
15 in there?

16 MR. SACKIN: She's still - - - yeah, she's
17 still in there, but I mean, during those two years,
18 or even before this - - - before the confession of
19 judgment was entered into, before this was her - - -
20 she had a black mark on her criminal record. If they
21 had disclosed to her immediately that, listen, you
22 may be evicted, and that when there's a confession of
23 judgment, we're going to seek her eviction, she could
24 have immediately taken action, tried to get new
25 housing. Now, it's virtually - - - it's very

1 difficult for her.

2 CHIEF JUDGE LIPPMAN: Are you saying
3 basically that they agreed to leave her in the
4 apartment?

5 MR. SACKIN: After the confession of
6 judgment was signed, which released her from civil
7 liability, I would argue that, yes, they did agree to
8 leave her in the apartment.

9 JUDGE SMITH: She was - - - I assume she
10 had a lawyer at the time of her plea.

11 MR. SACKIN: Yes, Your Honor.

12 JUDGE SMITH: And the lawyer - - - and she
13 could have said to the lawyer, do I get to stay in
14 the apartment? Or the lawyer could have said to the
15 prosecutor, I'm not going to plead unless I get a
16 deal that she stays in the apartment. That didn't
17 happen.

18 MR. SACKIN: Well, based on looking at the
19 transcripts, the lawyer was - - - that particular
20 lawyer was very, very busy. There are numerous
21 adjournments because he had other things going on.
22 To the extent that lawyer did not provide the best
23 counsel possible, I would suggest that that should
24 not be held against Ms. Perez.

25 CHIEF JUDGE LIPPMAN: Okay, thanks,

1 counsel.

2 Counsel, did you, in effect, agree to leave
3 her in the apartment or did the - - - was the whole
4 arrangement in reality that she stays in the
5 apartment?

6 MR. KRAMER: No, Your Honor. First,
7 they're referring to the - - -

8 CHIEF JUDGE LIPPMAN: Was that the usual
9 arrangement? Do those things - - -

10 MR. KRAMER: No, Your Honor. And I can
11 refer this court to the Appellate Division decision
12 in Bland. This - - - not in the language of the
13 decision itself, but in the amicus brief, they attach
14 the underlying papers.

15 And the Bland case, it's almost these exact
16 same facts. It's a seven-year period of concealment
17 of income; 30,000 dollars of underpayment of rent,
18 and there was a similar criminal prosecution, guilty
19 plea, restitution agreement. In that case, however,
20 the Appellate Division upheld the administrative
21 determination.

22 CHIEF JUDGE LIPPMAN: Would it - - -
23 couldn't you have given like a - - - let her stay and
24 have given her just a penalty, rather than just
25 paying the amount, like paying more than she had

1 would have - - - that would have made ineligible for
2 the housing.

3 MR. KRAMER: Right, I mean, I think - - -
4 I'm not sure of the policy reasons. I presume they
5 don't want to deter people from trying to earn more
6 income - - -

7 JUDGE PIGOTT: Yeah.

8 MR. KRAMER: - - - to do it that way.

9 JUDGE PIGOTT: But the Appellate Division
10 has a line that says, "where the petitioner, a model
11 tenant, has faithfully abided by an agreement with
12 the Housing Authority to make full restitution of her
13 rent," and they went on from there. Was there an
14 agreement between the New York City Housing Authority
15 and her for this restitution?

16 MR. KRAMER: No, there wasn't. And they
17 continually refer to the confession of judgment. It
18 wasn't introduced at the hearing. There was also - -
19 - you know, you could look at her testimony; it's
20 pages 158 through 161 of the record - - - she never
21 alleges that there was any type of agreement with the
22 Housing Authority.

23 She had an attorney at the hearing also,
24 and she waived that. She waived the right to
25 introduce this - - - the confession of judgment is

1 unsigned. The Housing Authority isn't a party to the
2 confession of judgment, anyway.

3 JUDGE SMITH: Well, what - - -

4 JUDGE GRAFFEO: Is there any obligation
5 that the Housing Authority has to - - - before the
6 termination or criminal proceeding, to alert or warn
7 the subject that they may be facing eviction?

8 MR. KRAMER: Not - - - not for the criminal
9 proceeding, but prior to the termination proceeding,
10 yes. There's a management interview process.
11 There's a call and a letter that gets mailed that's
12 in the record. And the Housing Authority did - - -
13 management did interview petitioner. Counsel was
14 stating that she was - - - there was a length of time
15 that's suggested she would remain in the apartment.
16 That's not so.

17 In July 2008 was the - - - where she pled
18 guilty. And just a few months later after that is
19 when the Housing Authority mailed her a notice of the
20 termination charges.

21 JUDGE GRAFFEO: No, I'm asking before she
22 - - - before the person pleads guilty, are they
23 issued some kind of a notice that regardless of what
24 happens in the criminal proceeding, they may still be
25 subject to being - - - to being removed from the

1 premises?

2 MR. KRAMER: Other than the affidavits of
3 income and the lease provisions says various poss - -
4 - things can occur, there's nothing other than those.
5 But again, that affidavits of income do say criminal
6 prosecution, repayment, and termination of tenancy
7 are all possible results.

8 CHIEF JUDGE LIPPMAN: No, but, you know, I
9 think the thing is it's sort of a common sense view
10 of what happened. It's almost like, you know, you
11 encouraged this understanding as to what she paid
12 back, and without really - - - and I think this is
13 what Judge Graffeo is saying - - - without really
14 letting her know that if she's - - - if she accepts
15 this, it still - - - you may well be evicted from the
16 - - - when you don't say that, I mean, isn't there
17 almost some kind of estoppel that then to come back
18 later and say, you know - - - encourage this
19 agreement, and then come back and say, well, okay,
20 now you have to leave.

21 I mean, don't you have an obligation to say
22 something to her before they enter into this kind of
23 a plea?

24 MR. KRAMER: I mean, I don't think - - - I
25 don't think there's a - - -

1 CHIEF JUDGE LIPPMAN: All I'm saying, that
2 wouldn't she maybe get the impression, particularly
3 when she's removed from all criminal and civil
4 penalties, she's going to be able to stay in this
5 housing?

6 MR. KRAMER: Again, I think she was warned
7 at various times that both - - - all these remedies
8 are possible. I think there's - - -

9 JUDGE SMITH: Did she ever say in the
10 record that she thought she had a deal to stay?

11 MR. KRAMER: In the record? I don't
12 believe that is in the record. Again, those four
13 pages of the transcript are where she testified. She
14 had an attorney at the hearing.

15 JUDGE SMITH: And it made - - - no one ever
16 asked her if her understanding of the deal was that
17 she would not be evicted?

18 MR. KRAMER: That's correct, Your Honor.
19 And again, there were termination notices - - - there
20 were various notices sent to her before the criminal
21 prosecution advising her that she could have - - -
22 she could be terminated. Based on these prior
23 notices and in addition to the affidavits of income,
24 the termination notices that were sent, she should
25 have - - - if she had that misunderstanding, she

1 should have affirmatively tried to resolve that
2 confusion beforehand. And she may have accepted the
3 plea anyway. She avoided imprisonment; she - - -

4 CHIEF JUDGE LIPPMAN: I guess what I'm
5 saying is - - -

6 MR. KRAMER: - - - had a reduction in
7 charges - - -

8 CHIEF JUDGE LIPPMAN: - - - maybe you had
9 an affirmative responsibility, too.

10 MR. KRAMER: At the - - - in the addition
11 to the prior notices sent at the time of the criminal
12 prosecution?

13 CHIEF JUDGE LIPPMAN: Yeah, you could say,
14 hey, you maybe making an arrangement here and we may
15 be saying it's okay, but don't think that means
16 you're necessarily staying in the apartment.

17 MR. KRAMER: I don't think there's - - -
18 especially since the Housing Authority isn't
19 technically a party to that criminal proceeding - - -

20 JUDGE PIGOTT: You took the money.

21 MR. KRAMER: Well, I think the Housing
22 Authority was entitled to the restitution payments,
23 and - - -

24 CHIEF JUDGE LIPPMAN: Okay.

25 MR. KRAMER: Thank you, Your Honor.

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CHIEF JUDGE LIPPMAN: Thank you both.

(Court is adjourned)

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

I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of MATTER OF PEREZ v. RHEA, No. 26 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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