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COURT OF APPEALS

STATE OF NEW YORK

PEOPLE,

Appellant,

-against-

No. 65

JONAI WASHINGTON,

Respondent.

20 Eagle Street
Albany, New York 12207
March 26, 2014

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:

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Penina Wolicki
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: Number 65, People v.
2 Washington.

3 Counselor?

4 MS. LEVY: Good afternoon, Your Honors.
5 Yael Levy of the Nassau County District Attorney's
6 Office on behalf of the People of the State of New
7 York.

8 CHIEF JUDGE LIPPMAN: Do you want any
9 rebuttal time, counsel?

10 MS. LEVY: I'd like two minutes for
11 rebuttal, Your Honor.

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

14 MS. LEVY: Your Honors, by operating a
15 motor vehicle, Jonai Washington was deemed to consent
16 to a chemical test of her breath. She has - - -

17 CHIEF JUDGE LIPPMAN: Counsel, but let's -
18 - - let's get to the root of this.

19 MS. LEVY: Um-hum.

20 CHIEF JUDGE LIPPMAN: You had a - - - a
21 call in that there was an attorney - - -

22 MS. LEVY: Yes.

23 CHIEF JUDGE LIPPMAN: - - - representing
24 the defendant. Don't question him, don't give the
25 test. Was there, in this case, an interference with

1 that attorney-client relationship, which had formed
2 by that point; or you had been on notice about?

3 MS. LEVY: The attorney-client relationship
4 didn't form, because it was inapplicable, because the
5 refusal option never kicked in, in this case.

6 CHIEF JUDGE LIPPMAN: But you were - - -
7 you were told there is such a relationship, right?

8 MS. LEVY: You're saying the police were
9 told?

10 CHIEF JUDGE LIPPMAN: The - - - the
11 sergeant was told, right?

12 MS. LEVY: The sergeant was told after Ms.
13 Washington has already given consent to the chemical
14 - - -

15 CHIEF JUDGE LIPPMAN: Why wasn't the
16 sergeant - - -

17 MS. LEVY: - - - test.

18 CHIEF JUDGE LIPPMAN: - - - produced to - -
19 - to say what happened and the timing and - - - and
20 was it a leap for the trial court to find that, you
21 know, that maybe - - - maybe you didn't act the way
22 you should; that maybe you didn't inform the - - -
23 the client of the representation?

24 MS. LEVY: The assistant, at the time of
25 the hearing, explained to the trial court - - - to

1 the hearing court, that the sergeant had no
2 recollection of this event.

3 CHIEF JUDGE LIPPMAN: Yeah, but - - - but
4 doesn't that say something in and of itself?

5 MS. LEVY: Yes - - -

6 CHIEF JUDGE LIPPMAN: When the sergeant is
7 not produced? That might - - -

8 MS. LEVY: But it - - -

9 CHIEF JUDGE LIPPMAN: - - - warrant the
10 conclusion on a factual basis of what happened?

11 MS. LEVY: Well, we - - -

12 CHIEF JUDGE LIPPMAN: An adverse conclusion
13 as to what you would want them to find?

14 MS. LEVY: It's speculative to conclude
15 that it says - - - that it says something adverse to
16 the People. It could just as well say something
17 adverse to the defense.

18 JUDGE SMITH: Yeah, but - - -

19 MS. LEVY: That's po - - -

20 JUDGE SMITH: - - - but you're the
21 appellant. I mean, the - - - aren't you bound by the
22 - - - I mean, you can read the record several ways.
23 But we have to read it the defendant's way. The - -
24 - we have a - - - you have affirmed findings of fact
25 against you.

1 MS. LEVY: We have an affirmed finding of
2 fact as to the failure to - - - or as to the decision
3 not to call the sergeant. But that decision is not
4 fatal or should not be fatal to our case, because in
5 this case, the - - -

6 CHIEF JUDGE LIPPMAN: But isn't the
7 sergeant the one with the knowledge?

8 MS. LEVY: The sergeant can only talk about
9 whether he had the ability to put the attorney in
10 touch with Ms. Washington before the test was
11 administered. But that is not - - -

12 JUDGE SMITH: So - - -

13 MS. LEVY: - - - relevant - - -

14 JUDGE SMITH: - - - so we have to assume
15 that the did have that ability - - - that the lawyer
16 could have been connected before the test was
17 administered?

18 MS. LEVY: And even if you have to make
19 that assumption, I'm saying that that is not - - -

20 CHIEF JUDGE LIPPMAN: Why is it not - - -

21 MS. LEVY: - - - fatal to my - - -

22 CHIEF JUDGE LIPPMAN: - - - fatal to you?

23 MS. LEVY: It's not fatal, because Ms.
24 Washington had already given express, unhesitating
25 consent - - -

1 withdrawn her consent to the test.

2 JUDGE SMITH: Then why - - -

3 MS. LEVY: And - - -

4 JUDGE SMITH: - - - well, then why does it
5 matter that she had given the consent?

6 MS. LEVY: Because what matters about that,
7 what's significant about that - - - and I hope that
8 Your Honors received the Ward case that I sent under
9 separate cover, which was decided one year after the
10 chemical testing statute went into effect. That case
11 says that the refusal provision itself has absolutely
12 no applicability when the motorist gives an express
13 and uncompelled consent to take the breath test.

14 CHIEF JUDGE LIPPMAN: You had no obligation
15 to inform the defendant in this case that - - - that
16 there was representation?

17 MS. LEVY: If - - - that's absolutely
18 correct.

19 CHIEF JUDGE LIPPMAN: No - - - no
20 obligation, even - - - even if you knew it, and
21 assume that you knew it, and she hadn't had the test
22 yet. No obligation?

23 MS. LEVY: No legal obligation. The police
24 had no legal obligation to do so, because - - -

25 JUDGE SMITH: But suppose - - - suppose she

1 - - - suppose she had signed the consent, and she
2 said, you know what, come to think of it, before I
3 take the test, I'd like to call my lawyer. You have
4 to let her make the call, don't you?

5 MS. LEVY: Absolutely. That's Gursesey.

6 JUDGE SMITH: And why - - - so doesn't - -
7 - your whole argument turns, it seems to me, on the
8 fact that there's a difference between her trying to
9 call the lawyer and the lawyer trying to call her.

10 MS. LEVY: There's a big difference.

11 JUDGE SMITH: Do you agree that that's what
12 the case turns on?

13 MS. LEVY: Yes. Absolutely. You
14 understand my argument.

15 JUDGE SMITH: Okay. But in the - - - in
16 the lineup situation, we've held - - - and also in
17 the self incrimination situation - - - we've held it
18 doesn't make a difference - - -

19 MS. LEVY: Because - - -

20 JUDGE SMITH: - - - that the lawyer - - -
21 the lawyer calling in is the same as the client
22 trying to call out.

23 MS. LEVY: That's when you're talking about
24 the lawyer's right to be present for the lineup.
25 It's completely different - - - you've never held

1 that a lawyer can enter a case and then be put in
2 touch with the client so that the client can make a
3 decision as to whether to participate in the lineup.

4 And you have to compare apples to apples
5 here. Here, just like there's a - - -

6 JUDGE GRAFFEO: But why - - - why shouldn't
7 we extend the rule? What's the - - - what's the
8 danger or the harm of extending the rule?

9 MS. LEVY: It would completely thwart the
10 legislature's intent in enacting the provisions at
11 issue here: the deemed consent provision and the
12 refusal provision of the - - -

13 JUDGE PIGOTT: How would it thwart it?

14 MS. LEVY: - - - chemical testing sta - - -
15 I'm sorry?

16 JUDGE PIGOTT: How would it thwart it?

17 MS. LEVY: It would thwart the intent,
18 because the purpose of this statute was to increase
19 reliable chemical testing. And - - -

20 CHIEF JUDGE LIPPMAN: You think this is
21 going to happen a lot, this particular situation - -
22 -

23 MS. LEVY: I'm not - - -

24 CHIEF JUDGE LIPPMAN: - - - where the - - -
25 where the lawyer calls immediately at the same time

1 that you want to give this test? That's something
2 that's going to - - - that's going to have a negative
3 effect in terms of these kinds of cases?

4 MS. LEVY: My argument isn't that - - -

5 CHIEF JUDGE LIPPMAN: Is - - - wouldn't
6 this be a rare situation?

7 MS. LEVY: It may. But it would still
8 thwart the intent. It would complete - - -

9 CHIEF JUDGE LIPPMAN: Yeah, but doesn't
10 that - - -

11 JUDGE PIGOTT: But - - -

12 CHIEF JUDGE LIPPMAN: - - - matter, that
13 it's a rare situation?

14 JUDGE PIGOTT: If that's true, then why - -
15 - why wouldn't we also hold that if she tries to call
16 her lawyer, we're not going to let the call go
17 through?

18 MS. LEVY: Because that's different.
19 Because there, that's completely consistent with the
20 - - -

21 JUDGE PIGOTT: But if - - -

22 MS. LEVY: - - - intent of the - - -

23 JUDGE PIGOTT: - - - we do that, if we
24 allow her to call her lawyer, we're thwarting the
25 purpose of the statute.

1 MS. LEVY: I disagree with you.

2 JUDGE PIGOTT: Because I guarantee you, the
3 lawyer's going to say don't take the test.

4 MS. LEVY: No, because in enacting the
5 refusal provision of the chemical testing statute,
6 the legislature was cognizant of the possibility that
7 a motorist might initiate refusal and might hesitate
8 or have some concern about submitting to the breath
9 test, even though there's no right to refuse the
10 breath test.

11 CHIEF JUDGE LIPPMAN: So that addresses
12 this situation where the attorney calls, the test
13 hasn't been given yet, and - - - and on the basis of
14 that statute, the client - - - the defendant doesn't
15 have any idea that she's being represented?

16 MS. LEVY: The client didn't know - - -

17 CHIEF JUDGE LIPPMAN: But - - - is that - -
18 - that's a yes, the statute, you know, obviates this
19 whole line where when an attorney calls and says I
20 represent, don't give her the test - - - nothing?
21 The statute controls?

22 MS. LEVY: My argument is that the statute
23 controls. The legislature has made very clear here
24 that - - -

25 JUDGE PIGOTT: The sanction - - - the

1 sanction's spelled out too. You don't take the test,
2 you lose your license. That's - - - that's that
3 statute. That's all. Now, you've got a homicide and
4 you've got a lawyer who wants to talk to this person
5 who may soon be indicted for - - - for manslaughter.
6 Shouldn't you let him in?

7 MS. LEVY: I'm - - - I'm not - - - the law
8 does not require it. And I think that if you were to
9 extend it to so - - -

10 JUDGE SMITH: Well, the law - - - the law -
11 - - the Gurse right, isn't in the statute either?

12 MS. LEVY: Understood. But the Gurse
13 right furthers the intent of the refusal provision of
14 the statute, because the refusal provision is there
15 to accommodate the police in the event that a
16 recalcitrant motorist expresses hesitation or concern
17 and asks to speak to a lawyer before taking the test.
18 And there shouldn't be any compulsion in chemical
19 testing.

20 So the - - - giving the opportunity to
21 consult with a lawyer when - - -

22 JUDGE SMITH: Well, isn't it - - - well,
23 isn't it - - - if that's the intent of the statute,
24 wouldn't it further the intent for a lawyer to be
25 able to talk to her and say you - - - you should

1 understand, you don't have to take the test. You've
2 got a choice to make. You can - - - you can get your
3 license suspended, but you're not - - - but if you go
4 to jail for manslaughter, you won't be driving much
5 anyway, and you're better off not taking the test.

6 MS. LEVY: Only if there's an indication of
7 compulsion in the record. But there is no such
8 indication.

9 CHIEF JUDGE LIPPMAN: But the statute gives
10 you the wherewithal to interfere with the attorney-
11 client relationship? Isn't that what you're doing
12 here?

13 MS. LEVY: There was - - -

14 CHIEF JUDGE LIPPMAN: By failing to tell
15 the client?

16 MS. LEVY: There's no attorney-client
17 relationship that has kicked in at this point.
18 There's no refusal option, because she expressly - -
19 -

20 JUDGE PIGOTT: Well, it hasn't kicked in
21 because you wouldn't let it.

22 MS. LEVY: Your Honor, it hasn't kicked in,
23 because she expressly and unhesitatingly consented to
24 take the test. And because she did that - - -

25 JUDGE PIGOTT: So - - - so if - - -

1 MS. LEVY: - - - as - - -

2 JUDGE PIGOTT: - - - if we were in the
3 situation where the lawyer's screaming and knocking
4 on the door and saying let me talk to my client, and
5 said, you know what, we understand what you're
6 saying. We've got a thing over here where she signed
7 this, and we're not letting you in; why don't you go
8 home and get some sleep, because we'll - - - you
9 know, we'll let you in nine o'clock tomorrow morning;
10 is that okay?

11 MS. LEVY: Under the law, if the client has
12 not asked - - -

13 JUDGE PIGOTT: This is going to be a yes?

14 MS. LEVY: - - - it's okay. It is okay.
15 I'm not saying that it would be okay in the context
16 of statements. I'm saying that with regard only to
17 chemical testing, where there is no hint of
18 compulsion, where there has been no request initiated
19 - - -

20 CHIEF JUDGE LIPPMAN: Okay counsel.

21 MS. LEVY: - - - by the client - - -

22 THE COURT: We understand your point.
23 Let's hear from your adversary; and you'll have your
24 rebuttal time. Thank you.

25 MR. BREWINGTON: May it please the court,

1 my name is Frederick K. Brewington. I am the
2 attorney for Ms. Washington.

3 CHIEF JUDGE LIPPMAN: Counsel, your
4 adversary says in answer to Judge Pigott's question,
5 that if the counsel is banging on the door and saying
6 he wants to talk to the client, the statute
7 essentially gives the police the right to say, go
8 home, take a nap, and we'll give another test.

9 MR. BREWINGTON: I do not agree with that,
10 Your Honor.

11 THE COURT: Why - - - why - - - what's
12 wrong with that? And how does that situation compare
13 with the situation at hand?

14 MR. BREWINGTON: Well, first of all, the
15 right to counsel is a very personal right. And it's
16 one to be protected. I believe that this court has
17 said in both People v. Settles and People v. Lopez,
18 how important this right is and how it is to be
19 guarded and protected.

20 JUDGE ABDUS-SALAAM: Does it apply in this
21 context? Isn't the right more limited in a DWI
22 context, leaving aside the manslaughter. This is
23 just currently - - -

24 MR. BREWINGTON: Well - - -

25 JUDGE ABDUS-SALAAM: - - - about the

1 chemical breath testing. So is the right as broad as
2 in Settles?

3 MR. BREWINGTON: Judge Abdus-Salaam, it - -
4 - it is not as - - - the breadth is not as extended.
5 But here, the exceptions that we look at in that
6 situation is whether or not it's going to create any
7 - - - some concern, whether or not there are exigent
8 circumstances, or whether or not it's going to thwart
9 the process that they're about to engage in, for
10 instance, running headlong into the two-hour rule.

11 JUDGE GRAFFEO: Even - - - even though it's
12 deemed nontestimonial, and we're not dealing with a
13 Fifth Amendment rights of self incrimination, you
14 still think the same rules should apply to the test
15 refusal?

16 MR. BREWINGTON: Absolutely. Because the
17 issue here is not the refusal whether or not it's an
18 option or a right, but whether or not the right to
19 counsel, in this situation, is one that should be
20 protected.

21 JUDGE ABDUS-SALAAM: Well, your adversary
22 points out that the agreement or the consent to take
23 the breath test had already occurred before counsel
24 even made the call - - -

25 MR. BREWINGTON: Well - - -

1 JUDGE ABDUS-SALAAM: - - - so how is that -
2 - -

3 MR. BREWINGTON: - - - Judge, I believe
4 that - - -

5 JUDGE ABDUS-SALAAM: - - - different?

6 MR. BREWINGTON: - - - and going back to
7 one of your colleague's points just earlier, if
8 indeed that consent had been signed at any time, and
9 Ms. Washington had said herself, I would like to
10 speak to an attorney, and I withdraw my consent, it
11 is not irrevocable. It is revocable. And the
12 absence of having - - - or the - - - or - - -

13 JUDGE ABDUS-SALAAM: But she - - - but she
14 - - - in this case, she never asked to speak to
15 counsel. Counsel tried to come in on behalf of - - -
16 on her behalf, because a family member called.
17 Right?

18 MR. BREWINGTON: And counsel made his
19 appearance known. And as this court has ruled on
20 many occasions, that the - - - the police may not set
21 up mechanical barriers to the access to and right to
22 counsel. And that's what happened here.

23 If indeed - - - and by the way, one of the
24 flaws in this record, it's clear that the People did
25 not put on Sergeant Gabrielle, who was a person that

1 allegedly would have had knowledge. They basically,
2 said according to ADA Bushwack in this record, that
3 he had nothing to offer the court.

4 JUDGE PIGOTT: The defense could have
5 called him, right?

6 MR. BREWINGTON: Judge - - - we could have,
7 but it was not our obligation to. That is correct,
8 Your Honor.

9 JUDGE ABDUS-SALAAM: What - - - what would
10 the sergeant have - - - I mean, if the consent had
11 already been given, and the call apparently occurred
12 after she consented, how does that - - - she didn't
13 ask for a lawyer. We can only - - - we can only get
14 to where you want to be if we say that the right to a
15 lawyer comes from the lawyer asking to speak to a
16 client, not the client speaking to a lawyer, to get
17 advice.

18 MR. BREWINGTON: Well - - -

19 JUDGE ABDUS-SALAAM: She had already
20 decided to consent.

21 MR. BREWINGTON: Your Honor, I don't think
22 it's - - - you even need to go that far, Your Honor.
23 I think that once - - - once a lawyer enters the
24 picture and notifies the police, whether or not it's
25 a switchboard operator, as occurred - - -

1 JUDGE ABDUS-SALAAM: Do we have any cases
2 in this context where the request comes from the
3 lawyer rather than from the - - - the person who's
4 about to give the test?

5 MR. BREWINGTON: Yes, Judge. In - - - in
6 this court's case of Pinzon, P-I-N-Z-O-N, the court
7 did make a determination that even a call to the
8 switchboard operator notifying that there was a
9 attorney in the picture and that the attorney was
10 speaking on behalf of his client, that that satisfied
11 the requirement of putting the police on notice.

12 JUDGE PIGOTT: This is where the Appellate
13 - - -

14 JUDGE GRAFFEO: On notice of what?

15 MR. BREWINGTON: I'm sorry?

16 CHIEF JUDGE LIPPMAN: Go ahead, Judge
17 Pigott.

18 MR. BREWINGTON: Yes, yes and no.

19 CHIEF JUDGE LIPPMAN: Judge Pigott.

20 JUDGE PIGOTT: This is where the Appellate
21 Division split, right? Is it a right to counsel or
22 is it a DWI refusal, or consent?

23 MR. BREWINGTON: Well, Judge, I think that,
24 you know, the question that you ask, actually is one
25 that actually becomes almost irrelevant. Because if

1 we're looking at this as a violation of right to
2 counsel, whether or not it's a refusal or not, the
3 question of her having the access to her counsel to
4 help make that important decision that would impact
5 her life in a very serious way - - -

6 JUDGE SMITH: Why - - -

7 JUDGE GRAFFEO: Why - - -

8 JUDGE SMITH: Go ahead.

9 MR. BREWINGTON: - - - very serious way is
10 important.

11 I'm sorry, Your Honor.

12 CHIEF JUDGE LIPPMAN: Judge Graffeo.

13 JUDGE GRAFFEO: Counsel, if the police have
14 already started to administer the breathalyzer - - -
15 because you know, sometimes they have you blow more
16 than once - - - and then - - - and the call comes in
17 from an attorney in the process of when they're
18 administering the test, what happens then, under your
19 analysis?

20 MR. BREWINGTON: Your Honor, with that
21 hypothetical, it becomes even more critical for this
22 court to evaluate it. But I - - - I have to relate
23 to that question by saying that is not the case that
24 we have before us. What we have before us is that at
25 a - - -

1 JUDGE GRAFFEO: I understand I'm posing a
2 hypothetical. I'm just trying to determine between
3 these two, apparently, like, competing lines of
4 analysis here in the Appellate Division, what ha - -
5 - what would you think happens in that situation,
6 once they've started to administer the test?

7 I presume you'd like to say the right to
8 counsel is superior.

9 MR. BREWINGTON: Your Honor, I would say
10 the right to counsel is not only superior, it's
11 paramount. And that in that situation, if counsel
12 comes in and they're in the middle of administering
13 the test, and they are aware that counsel is in the
14 picture, all testing should stop.

15 JUDGE READ: So consent is - - - her
16 consent was just irrelevant from your point of view?

17 MR. BREWINGTON: Her consent when a - - -
18 when counsel comes into the picture and seeks the
19 opportunity to have access to his or her client,
20 absolutely, Your Honor.

21 JUDGE SMITH: Why - - - why is that so - -
22 - as a policy matter, why is it that we - - - we - -
23 - the right to counsel may be important, but we don't
24 protect it so much that we'll get her a lawyer if she
25 doesn't ask for one. It's not a - - - if she never

1 asks for one and nobody shows up, she can take the
2 test.

3 Why does it make a difference there's
4 somebody who's calling on the phone and can't get
5 through? Why is - - - why does that elevate the
6 right to counsel?

7 MR. BREWINGTON: It elevates the right to
8 counsel for two reasons, Your Honor. First of all,
9 from a factual standpoint, we know that counsel is in
10 the picture. It's not as though there's not been a
11 request.

12 But second of all, in this situation, the
13 police are not the gatekeepers as to whether or not a
14 client in custody has a right to speak to counsel.

15 CHIEF JUDGE LIPPMAN: Your view is that the
16 attorney has gotten through?

17 MR. BREWINGTON: That is correct. And - -
18 -

19 CHIEF JUDGE LIPPMAN: Gotten - - - gotten
20 through and - - - and at that point, your adversary
21 says, but - - - but the relationship hadn't joined.
22 Your view is that - - - I think what Judge Pigott
23 said, your view is hadn't joined because they hadn't
24 let it join.

25 MR. BREWINGTON: Absolutely.

1 CHIEF JUDGE LIPPMAN: Is that - - -

2 MR. BREWINGTON: Not only - - -

3 CHIEF JUDGE LIPPMAN: - - - is that the way
4 you - - -

5 MR. BREWINGTON: - - - not only did they
6 not let it join, but one of the things that is clear
7 - - - and that's why there's a great flaw in this
8 record, but not offering Sergeant Gabrielle and
9 placing him on the stand, subjecting him to cross-
10 examination, which I would have gladly taken, as
11 cross-examination.

12 In this situation, Your Honor, what they
13 did was they served to prevent access between Ms.
14 Washington and the attorney that was on the other end
15 of the phone.

16 JUDGE SMITH: What - - - what should we
17 infer - - - I mean, what do you think the lower
18 courts inferred that Sergeant Gabrielle would have
19 testified to? They've only drawn - - - they drew an
20 inference against the People for failure to call him.
21 What specifically did they infer?

22 MR. BREWINGTON: Well, actually, Judge, I
23 think that there were two inferences. The first
24 dealt with what Ms. Washington had a right to, or
25 what would be - - - what her position would have been

1 had she had the opportunity to speak to counsel.

2 But I think the court below also would have
3 inferred, very clearly, that in this situation, had
4 he been called and subjected to cross-examination, as
5 he should have been, that he would have had to admit,
6 if he could remember, that indeed, the telephone call
7 came in and he had yet administered the - - - the
8 testing.

9 JUDGE PIGOTT: Well, it's been clear that
10 we don't - - - you know, as Judge Smith mentioned,
11 you don't have a right to a lawyer when - - - when
12 you get stopped and you're pulled over, and they ask
13 you to take a breath test. So she was asked that.
14 She consented. And is there any doubt that this
15 whole dispute that we're in now is the fact that if
16 you - - - if you came in, you were going to say don't
17 take the test, and they already had a consent to take
18 the test? So - - -

19 MR. BREWINGTON: Judge - - -

20 JUDGE PIGOTT: - - - we're down to minutes
21 and seconds over whether or not she should take the
22 test. Right?

23 MR. BREWINGTON: Well, in this situation,
24 first of all, I was not the attorney that made that
25 call.

1 JUDGE PIGOTT: I know that.

2 MR. BREWINGTON: My instructions probably
3 would have been a little bit more vehement on the
4 telephone.

5 JUDGE PIGOTT: You would have been - - -

6 MR. BREWINGTON: Yeah, I would have kicked
7 the door in, yes. But in this situation, very
8 clearly, Your Honor, what we have for purposes of
9 your question is that Ms. Washington was denied the
10 opportunity. And that's what we're talking about
11 with the right to counsel. So she can make informed
12 decisions, and that with counsel thinking clearly,
13 under whatever compulsion she may have been at that
14 particular time, particularly having just seen a - -
15 - a person that ran into her car, on the ground, that
16 in those situations, having counsel available to us
17 is something that we have hold - - - held sacred in
18 this State and should continue to do so.

19 CHIEF JUDGE LIPPMAN: Okay, counsel.
20 Thanks counsel.

21 MR. BREWINGTON: Thank you very much.

22 CHIEF JUDGE LIPPMAN: All right. Rebuttal?

23 MS. LEVY: Yes, Your Honor. With the
24 court's permission, I'd like to just read a sentence
25 from the Ward decision.

1 CHIEF JUDGE LIPPMAN: You have our
2 permission.

3 MS. LEVY: Thank you.

4 THE COURT: Go ahead.

5 MS. LEVY: This pertains to the court's
6 understanding of the refusal provision, one year
7 after it was enacted. And this court said, "This new
8 section was directed at the problem of compelling
9 submission to the test. It was concerned not with
10 those who consented to take the test, but with those
11 who were required to submit."

12 And it also said earlier in the decision
13 that the provision "has no application where, as
14 here, the defendant voluntarily submitted to the test
15 and there is no claim or hint of coercion."

16 That's our case. That's this case.

17 JUDGE SMITH: But - - - but we held that -
18 - - that no matter how voluntary it is, they - - -
19 they have a right to consult with counsel before they
20 make the decision.

21 MS. LEVY: If they request it. But where
22 there is no - - -

23 CHIEF JUDGE LIPPMAN: But they can revoke -
24 - - but she can revoke her permission, right?

25 MS. LEVY: She can, of her own initiative.

1 But that doesn't mean that if she never initiates a
2 request, and an attorney of his own initiative,
3 enters the case, that she then has the right to
4 consult.

5 The limited - - -

6 JUDGE SMITH: Is there any - - - is there
7 any context - - - I mean, I see - - - I have some
8 sympathy with your point, but is there any context in
9 which any court, actually, has made the distinction
10 that you're making between the lawyer trying to
11 contact the client and the client trying to contact
12 the lawyer?

13 MS. LEVY: I haven't seen a case like that.
14 However, I would suggest that if this were a lineup
15 scenario, and a lawyer entered the case and said I
16 want to talk to the client about whether she should
17 stand in the lineup, the same rule should exist,
18 because there's no more right to refuse to stand in a
19 lineup, as this court has held, than there is to
20 refuse a breath test.

21 JUDGE SMITH: Well, why - - -

22 MS. LEVY: This isn't a right that's being
23 protected.

24 JUDGE SMITH: - - - there is a right to
25 refuse a breath test. It's just - - - if you're

1 willing to suffer suspension of your license.

2 MS. LEVY: If - - - my argument is that a
3 motorist has the ability to refuse - - -

4 CHIEF JUDGE LIPPMAN: Your argument is - -
5 -

6 MS. LEVY: - - - but not the right to
7 refuse.

8 CHIEF JUDGE LIPPMAN: Your argument is from
9 a policy perspective, putting aside everything else,
10 that this makes sense, this is a fair - - - you have
11 a lawyer who's calling and says I represent the
12 client, and that this from a - - - from a policy
13 perspective makes sense to you? From a - - - from
14 the ends of what we're supposed to be doing is all
15 about, of - - - of justice, you think this is fair?

16 MS. LEVY: It's fair because she's - - -

17 CHIEF JUDGE LIPPMAN: Policy?

18 MS. LEVY: Policy. Understood. Policy.

19 CHIEF JUDGE LIPPMAN: Go ahead. Why is it
20 fair?

21 MS. LEVY: It's fair because it was
22 completely voluntary. There was no hint of
23 compulsion. There was no hint of coercion. And
24 because there's no right to refuse. If you rule - -
25 -

1 JUDGE SMITH: But if there's no right, what
2 - - - what is Gurseley protecting the right to be
3 advised about?

4 MS. LEVY: Gurseley is protecting the right
5 to be ad - - - Gurseley is protecting a client's free
6 decision. Because a client does have the ability to
7 opt not to take the test. I'm not saying that a
8 client has to submit to the chemical test. But the
9 reason that the legislature enacted the refusal
10 provision in conjunction with the deemed consent
11 provision, was just to accommodate the police, not to
12 encourage refusal, not to give more opportunities for
13 individuals to refuse.

14 CHIEF JUDGE LIPPMAN: But there are
15 consequences to not taking the test, right?

16 MS. LEVY: There are also consequences to
17 not standing in a lineup. A photo ID can be admitted
18 then. You forfeit the right to rely on the rules of
19 evidence that prevent - - - that prevent the
20 admissibility of a photographic ID. But that doesn't
21 mean that a client has the right to consult with an
22 attorney about whether - - -

23 CHIEF JUDGE LIPPMAN: Okay.

24 MS. LEVY: - - - to stand in a lineup.

25 CHIEF JUDGE LIPPMAN: Okay, counsel. Thank

1 you both.

2 MS. LEVY: Thank you.

3 CHIEF JUDGE LIPPMAN: Appreciate it.

4 (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. Jonai Washington, No. 65 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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