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COURT OF APPEALS

STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

No. 193

HOWARD GRUBSTEIN,

Appellant.

20 Eagle Street
Albany, New York 12207
October 16, 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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Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: 193, People v.
2 Grubstein.

3 MR. HERZFELD: Good afternoon, Your Honors.
4 Richard Herzfeld for appellant, Howard Grubstein.
5 Two minutes rebuttal, if I may.

6 CHIEF JUDGE LIPPMAN: Yeah, sure. Go
7 ahead.

8 MR. HERZFELD: Thank you. What this appeal
9 really comes down to is what the justified or
10 unjustified failure to appeal is. This court dealt
11 with it in Syville, where it found that an attorney
12 who's instructed by his client to file a notice of
13 appeal - - -

14 CHIEF JUDGE LIPPMAN: Yeah, but here
15 there's no attorney, right?

16 MR. HERZFELD: Exactly. He has no one to
17 advise - - -

18 CHIEF JUDGE LIPPMAN: So how does that - -
19 - how does that effect compare to Syville?

20 MR. HERZFELD: I think it's exactly the - -
21 - it's different facts, but it's the exact same
22 result. You have a dif - - - actually, it's even
23 worse than Syville, because here - - - in Syville, at
24 least the attorney or the defendant knew of his right
25 to appeal, so maybe he should have followed up, maybe

1 he should have done something to find out where it
2 was going. Maybe there was something incumbent of
3 the defendant to do to see that nothing actually
4 happened. Yet in Syville, the court concluded that
5 this was a justified failure to appeal.

6 Here, you have a defendant who doesn't - -
7 - is deprived of his right of attorney. I don't
8 think there's any question that the colloquy leading
9 up to the pro se representation was grossly
10 inadequate - - -

11 JUDGE SMITH: Well, well, wait a minute. I
12 mean, it would have been grossly inadequate at a
13 trial. Is - - - is the standard the same at a plea?

14 MR. HERZFELD: Absolutely, absolutely.

15 JUDGE SMITH: What - - - what says that?

16 MR. HERZFELD: I'm sorry?

17 JUDGE SMITH: What says that - - -

18 MR. HERZFELD: I don't have any auth - - -

19 JUDGE SMITH: - - - that it's the same at a
20 plea. I thought it depended on the nature of the
21 proceeding. I mean, I agree with you that if - - -
22 if a defendant had gone to trial pro se on this
23 colloquy, it would be bad, but I'm not sure about a
24 plea.

25 MR. HERZFELD: Well, I - - - I don't have

1 any authority to cite to you, but, Judge, the right
2 to counsel is the right to counsel. It's not the
3 right to counsel if it's a lower court proceeding, or
4 - - -

5 JUDGE SMITH: There's a case called - - -
6 are you familiar with a case called Iowa v. Tovar?

7 MR. HERZFELD: I - - - I can't say I am,
8 Judge.

9 JUDGE SMITH: Okay. Then I won't - - -
10 then I won't ask you about it.

11 MR. HERZFELD: Okay. Sorry. But our
12 position is that even if you have a lesser - - -
13 lesser standard - - - I mean, in this case, the
14 defendant just kept questioning what it meant to have
15 counsel, and nobody would explain it to him. Even -
16 - - even the district attorney said, judge, let's put
17 this over; let him get an attorney. And - - - and
18 they didn't.

19 JUDGE SMITH: Couldn't - - -

20 JUDGE PIGOTT: So - - -

21 JUDGE SMITH: - - - couldn't - - - couldn't
22 - - - isn't it reasonable to read this record as a
23 guy who was really just didn't want a - - - he says
24 I'm guilty; what do I need a lawyer for? I mean,
25 yeah, I - - - it's a - - - yeah, it's kind of

1 appealing as - - - he's a little more straightforward
2 than some - - - than some of these defendants who
3 come into these courts looking for angles. He says I
4 did it. I'll pay my fine; what am I supposed to do?

5 MR. HERZFELD: What - - -

6 JUDGE SMITH: What's wrong with that? What
7 do you have to be bound by?

8 MR. HERZFELD: I - - - I don't see that,
9 Judge, though. What - - - what I see is a defendant
10 who says, gee, I can have an attorney, well, what
11 does that mean? Will he come to represent me? Will
12 he talk to me? What - - - what is he going to do for
13 me? And the judge says, well, that's between you and
14 your attorney.

15 Not, it's important to have an attorney
16 because all of these defenses that the defendant said
17 he was unaware of in his affidavit will be explained
18 to you. Or it's someone to advocate on your behalf.
19 Or - - - or maybe you're not guilty. Maybe there's
20 something out there that you don't know about,
21 because you're pro se, and - - -

22 JUDGE SMITH: I - - - I basically
23 interrupted you. You were going to say that - - -
24 say, yeah, since we all know he was deprived of his
25 right to counsel, therefore. Go ahead. Pick up

1 where you left off.

2 MR. HERZFELD: Okay, basically, this is the
3 same or worse than Syville, because you've got no one
4 there to explain to him his right to appeal. There's
5 nothing on the record in accordance with - - -

6 CHIEF JUDGE LIPPMAN: Regardless - - -
7 regardless of whether he actually would have appealed
8 or not?

9 MR. HERZFELD: Well, yes, Judge, because
10 the - - - the whole point here is that he's being
11 deprived, potentially or actually, under the
12 Appellate Term decision, of his right to avail
13 himself of Article 440, because he didn't appeal.

14 JUDGE PIGOTT: Well, normally, you just
15 advise people that they have a right to an attorney.
16 If they can't afford one, one will be appointed for
17 you. Are you saying that's insufficient?

18 MR. HERZFELD: It's - - - to - - - to waive
19 it? That's absolutely insufficient, Judge.

20 JUDGE PIGOTT: So - - - so all the time
21 that the courts have been doing that, they've been -
22 - - they've been insufficient because they got to say
23 something more?

24 MR. HERZFELD: Well, no, they don't have to
25 say anything more, but when the defendant says, okay,

1 I don't want an attorney, then the case law is quite
2 clear that there has to be a knowing waiver. You
3 have to explain - - - you have to insure that the
4 defendant is - - - is capable of representing
5 himself, and you have to insure that the defendant
6 under - - -

7 JUDGE PIGOTT: Well, he says, will my
8 attorney automatically be here? And the court said,
9 that's up to you. And he says, I have to hire an
10 attorney? And he says, you do; if you can't afford
11 one, we'll give you one. He says, no, I'll just
12 plead guilty.

13 And he - - - and then the - - - the DA
14 says, I would ask that - - - that you not accept his
15 plea. And the court says I'm going to decline the
16 plea. The reason - - - a very serious charge. He's
17 - - - one mistake, and I'm crucified like this? He
18 says, it's a serious charge; I think you should speak
19 to a lawyer to figure out what your options are. I
20 don't want to. I just want to plead guilty, and I
21 will accept the punishment.

22 Now, was - - - where is the error in the
23 court there?

24 MR. HERZFELD: The error, Judge, is - - -
25 is that there was - - - he - - - none of his

1 questions were answered. What the judge said is, you
2 got to figure out with your attorney; not if you get
3 an attorney, he's going to appear. He has to appear
4 on - - - on your behalf. If you have an attorney,
5 he's going to consult with you. He's going to
6 explain to you what defenses you might have. All - -
7 -

8 JUDGE PIGOTT: You're saying that's what a
9 court's got to do. It - - -

10 MR. HERZFELD: The risks of proceeding pro
11 se. That's - - - that's exactly what the cases
12 provide for.

13 JUDGE PIGOTT: No, he said, get a lawyer.
14 He didn't say proceed pro se.

15 MR. HERZFELD: But that's ultimately what
16 happened. And if he's go - - - going to proceed pro
17 se - - - I mean, if - - - if you don't use the word -
18 - - pro se is not a magic word. If the defendant
19 opts to proceed without counsel, then the case law is
20 clear that the judge has to make sure it's - - - it's
21 a knowing and voluntary waiver.

22 JUDGE ABDUS-SALAAM: And your position is
23 that it should be similar to when someone is - - - is
24 saying I want to go - - - I want to represent myself
25 at trial? That that litany should - - -

1 MR. HERZFELD: Yes, Judge.

2 JUDGE ABDUS-SALAAM: - - - cure that.

3 MR. HERZFELD: Because you're - - - you're
4 waiving the same - - - you're - - - you're availing
5 of the same rights. You're waiving the same rights.
6 You want to make sure that it's a knowing and
7 voluntary waiver.

8 And - - - and that determination can't be
9 made on a record where the judge says to the
10 defendant, that's between you and your attorney. It
11 should be explained that yes, if you get an attorney,
12 whether you hire one, or whether you're appointed one
13 because you can't afford one, he's going to explain -
14 - - he's going to tell you if there are defenses.
15 He's going to advocate on - - - on your behalf.

16 You should be really careful doing this,
17 because there may be defenses.

18 JUDGE PIGOTT: We're not going to - - -
19 you're not going to ask every court in the state of
20 New York to say everything that you're now saying
21 every time somebody comes in with a speeding ticket.

22 MR. HERZFELD: If the - - - certainly if
23 the defendant raises a question. I mean, I'm not
24 saying yes or no to whether as part of the overall
25 colloquy, and perhaps there should be, but certainly

1 where the defendant says, what happens if I get an
2 attorney? What does that mean? What are - - - what
3 are my - - -

4 JUDGE PIGOTT: Why? I - - - I'm mystified.
5 I - - - in other words, the defendant - - - you have
6 to - - - what happens if I get an attorney?

7 MR. HERZFELD: He has a right to an - - -

8 JUDGE PIGOTT: He's going to bill you. And
9 - - - and you're going to pay him money, and he's
10 going to come in here and represent you.

11 MR. HERZFELD: Unless, as it turns out, he
12 can't afford it, which is why - - -

13 JUDGE PIGOTT: Then one will be assigned
14 for you.

15 MR. HERZFELD: That - - -

16 JUDGE PIGOTT: And that's - - - that was
17 covered. I - - - I - - - I'm - - - I just don't know
18 how much farther - - - I mean, they - - - they
19 wouldn't take his plea. I mean, I - - - I'm trying
20 to figure out what the - - - what - - - what was the
21 judge left to do here, do you say?

22 MR. HERZFELD: What the judge was left to
23 do if he was going to take his plea, is explain to
24 him what an attorney would do for him, so he could -
25 - -

1 CHIEF JUDGE LIPPMAN: So he doesn't
2 understand. It can't be knowing and intelligent,
3 because he doesn't understand the risk of self-
4 representation?

5 MR. HERZFELD: Exactly, Judge.

6 JUDGE ABDUS-SALAAM: And the other prong of
7 that is, once he took the plea, then the judge is
8 supposed to tell him you have a right to appeal?

9 MR. HERZFELD: And - - - and that's - - -

10 JUDGE ABDUS-SALAAM: Go through the litany
11 with that?

12 MR. HERZFELD: I'm sorry?

13 JUDGE ABDUS-SALAAM: And - - - and go
14 through that litany as well?

15 MR. HERZFELD: Absolutely. I - - - I think
16 that's part and parcel of - - - of the court
17 regulations that they're required to - - - to give a
18 defendant notice of his right to appeal. With - - -
19 with any plea, on the record; I cite the regulation
20 in my brief. It's obligatory. And that's - - - I
21 mean, that's just really icing on the cake. The
22 important part is that he didn't have counsel - - -

23 CHIEF JUDGE LIPPMAN: Okay.

24 MR. HERZFELD: Thank you.

25 CHIEF JUDGE LIPPMAN: Thanks, counsel.

1 Counselor.?

2 MS. SCHULZ: Good afternoon. Elizabeth
3 Schulz for the respondent. Essentially the defendant
4 claims on appeal that the mandatory procedural bar
5 outlined in CPL 440.10(2)(c) doesn't apply to him,
6 because he was unrepresented and the trial court
7 failed to inform him of his right to file a direct
8 appeal.

9 In the first place, the defendant never
10 actually raised these arguments in his original 440.
11 He only argued the fact that he was pro se, and that
12 - - -

13 JUDGE SMITH: Am I right in understanding
14 that you're really only making the procedural
15 argument? You're not questioning the - - - the merit
16 of his right to counsel or the underlying argument
17 that the guy was giving him a hard time about?

18 MS. SCHULZ: I - - - frankly, I agree with
19 you. I think that his - - - his waiver of counsel
20 was valid. And I don't think that the inquiry had to
21 be as extensive as in, let's say - - -

22 JUDGE SMITH: You don't really argue that
23 in your brief, do you?

24 MS. SCHULZ: Well, I'm just saying that I
25 think that his remedy here was to file a coram nobis.

1 What he's really saying is he - - - the court - - -
2 the trial court didn't tell him about his right to
3 appeal. And as this court has said in Syville and
4 more recently in People v. Perales~~oralis~~ (ph.), he
5 can still petition the intermediate appellate court
6 and seek review that way.

7 I just don't see how based on these facts
8 there's any point in conflating the distinction
9 between a collateral motion in a 440 and a direct
10 appeal.

11 JUDGE SMITH: But here - - - here he was -
12 - - he was unrepresented before the trial court. And
13 your typical coram nobis before the Appellate
14 Division, he was fine before the trial court. He got
15 - - - he had a problem before the Appellate Division.
16 Why - - - why isn't - - - why isn't a problem be - -
17 - that occurred before the trial court one
18 appropriately raised in a 440?

19 MS. SCHULZ: Do you mean because of the
20 fact that the errors usually occur after the fact of
21 the conviction or - - -

22 JUDGE SMITH: No, I mean, I'm - - - I'm - -
23 -

24 MS. SCHULZ: I'm not - - -

25 JUDGE SMITH: - - - I'm saying he's saying

1 that his conviction was tainted by the fact that he
2 was deprived of his right to counsel.

3 MS. SCHULZ: Well, I don't - - -

4 JUDGE SMITH: Well, why isn't that an error
5 that can be raised in a 440?

6 MS. SCHULZ: As long as it's based on
7 matters outside of the record, he can raise it in a
8 440. I just don't think that this - - -

9 JUDGE SMITH: Well, then, but what if it's
10 - - - but if it's on the record and he unjustifiably
11 failed to appeal, then he can't. But why isn't it
12 justifiable not to appeal, if the whole problem is
13 you didn't have a lawyer to tell you to appeal?

14 MS. SCHULZ: Well, frankly, I don't want
15 the Town of Tuxedo justice court deciding my appeals.
16 I think if you - - - if you look at the record - - -

17 JUDGE PIGOTT: Is that really the problem?
18 I think Judge Smith said, you're really arguing
19 procedure, and that's what you're saying. You don't
20 want town judges doing things like this.

21 MS. SCHULZ: Exactly. I want to preserve
22 the - - -

23 JUDGE PIGOTT: Now, let me ask you a
24 question about that, because I don't think this is
25 infrequent. And - - - and if you - - - if you read

1 the record - - -

2 MS. SCHULZ: Yes.

3 JUDGE PIGOTT: - - - and there are things,
4 it would seem to me, that the judge knew that do not
5 appear in the cold print. I mean, his conduct, his
6 demeanor, what may or may not have been going on,
7 that - - - that doesn't find its way onto the record.

8 And what's wrong with allowing a judge, if
9 he sees this and said, you know, this - - - I don't
10 want to pick on this particular individual, but he
11 has a person in front of him who he thinks just isn't
12 getting it. And finally, out of frustration, he
13 says, all right, you want to plead guilty, plead
14 guilty.

15 And that - - - and knowing that at some
16 point it's going to dawn on him that he didn't do the
17 right thing, and he'll be back and then he'll vacate,
18 or maybe he won't, but he'll - - - but if he comes
19 back, he'll take a look at it. Is that wrong?

20 MS. SCHULZ: But the defendant still has to
21 plead facts sufficient to support granting his
22 motion, and he didn't do that here. And the trial
23 court's decision didn't reflect any facts. In fact,
24 it - - - it didn't reflect anything.

25 In my opinion, I think he just felt bad for

1 the guy. And there - - - there's nothing wrong with
2 that, but when you're talking about defendants who -
3 - - I think this case is dangerous if this court
4 takes a big interpretation of 440.10(2)(c) and starts
5 finding that for any number of reasons, defendants
6 can file 440 motions based on facts that appear on
7 the record, where they should probably be fil - - -

8 JUDGE SMITH: Well, not - - - not really
9 for any number of reasons - - - for one.

10 MS. SCHULZ: Right.

11 JUDGE SMITH: Not having a lawyer. Why
12 isn't that a pretty good reason? I mean, yeah. Why
13 isn't - - - why shouldn't a failure to appeal be
14 considered justifiable when the guy didn't have a
15 lawyer? When the very problem is that the guy had no
16 lawyer to tell him to appeal or to point out the
17 error to him, which might get it reversed?

18 MS. SCHULZ: But he never argued that in
19 the 440 court. He only argued the fact that he was
20 pro se, and the court didn't advise him that the DWI
21 could serve as a predicate.

22 JUDGE PIGOTT: Right, when you - - - but
23 you get into - - -

24 MS. SCHULZ: But the court never had a duty
25 to advise him of that.

1 JUDGE PIGOTT: There are so many of those
2 permutations. If - - - if he - - - you know, he
3 takes the plea, figuring I'm now going to - - - I'm -
4 - - I've learned my lesson; I'm never going to drink
5 again.

6 MS. SCHULZ: Exactly.

7 JUDGE PIGOTT: And then something happens,
8 and you re - - - now realizes he's going to lose his
9 commercial driver's license, and therefore his job,
10 and therefore, a lot of other things. What's wrong
11 with him going back to the - - - the original judge
12 and saying, didn't have a lawyer, didn't realize the
13 ramifications, and I want to reopen this?

14 MS. SCHULZ: I still think that even - - -
15 he should still have to plead facts that would
16 warrant vacatur under 440. And here he didn't. He
17 complained about effects that were basically
18 collateral to his conviction. The trial court didn't
19 have a duty to notify him that - - -

20 JUDGE RIVERA: But he - - -

21 CHIEF JUDGE LIPPMAN: But what about basic
22 - - -

23 JUDGE RIVERA: Well, he did - - -

24 CHIEF JUDGE LIPPMAN: What about basic
25 fairness? Why isn't the - - - the scenario that

1 Judge Pigott just laid out, why isn't that just fair?
2 That he should have this opportunity? He didn't - -
3 -

4 MS. SCHULZ: Interest of justice
5 jurisdiction is reserved for the intermediate
6 appellate courts. So because his claim is based on
7 the record, he can go to the 4 - - - to the Appellate
8 Term and plead those facts.

9 But there's no - - - no comparable - - - or
10 comparable statute in the - - - in the 440 statute
11 that would give him the same sort of relief. It has
12 to be the type of claim that could be raised in a 440
13 motion at which he can grant relief.

14 CHIEF JUDGE LIPPMAN: Yeah, yeah, but I'm -
15 - - I'm ask - - -

16 MS. SCHULZ: And not just - - -

17 CHIEF JUDGE LIPPMAN: - - - I'm asking you
18 a different question. I'm saying that - - - that
19 take a look at the situation here. This guy comes
20 in. He doesn't know what the hell is going on. He
21 just wants to take a plea. He doesn't - - - doesn't
22 really understand what the ramifications will be, and
23 what they become later.

24 And - - - and then he wants to go back and
25 say, oh, now, I get it; this is terrible. In the

1 most visceral fairness level, why - - - why isn't
2 that something that we wouldn't want to find a way to
3 let him do?

4 MS. SCHULZ: For two reasons. First of all
5 - - -

6 CHIEF JUDGE LIPPMAN: Go ahead.

7 MS. SCHULZ: - - - he has a remedy. He can
8 file a coram nobis and seek review of his claims that
9 way. So he has - - - he has an out. And second of
10 all, in my opinion, the real reason that he filed
11 this motion has - - - has nothing to do with the
12 issues that you raise. It's because he - - - he
13 figured out that his - - - his misdemeanor conviction
14 could serve as a predicate for a DWI. But nobody had
15 a duty to inform him of that anyway. So - - -

16 JUDGE PIGOTT: But isn't that his point?
17 That if - - - if had a lawyer, he would have known
18 that?

19 MS. SCHULZ: I don't - - - that's not my
20 understanding of the law. I don't necessarilly agree
21 that - - -

22 JUDGE PIGOTT: Not the law, I'm just saying
23 that's what he's saying. He's saying if I had - - -
24 you know, if I had somebody standing there, they
25 probably would have said don't take a plea; you can

1 probably get it down to an impaired; don't be stupid.
2 And you - - - you protect yourself.

3 MS. SCHULZ: Well, it - - - I don't think
4 that he would have based on these facts, because of
5 his high BAC, at least that's our DWI policy, so I'm
6 not certain if I would agree that he could get a
7 better plea with a lawyer. I - - - I thought - - -

8 JUDGE PIGOTT: Well, you're just saying
9 there's - - - there's a lot of defenses to DWI, isn't
10 there? And the fact that you got a BAC of whatever
11 it is - - -

12 MS. SCHULZ: Right.

13 JUDGE PIGOTT: - - - doesn't always get
14 into evidence.

15 MS. SCHULZ: Well, I think that he - - -
16 from my review of the case, he didn't have any
17 defenses. Like, this was a pretty straightforward
18 DWI.

19 JUDGE SMITH: Yeah, but you could
20 understand why he would want someone other than the
21 prosecutor to review the case for that purpose.

22 MS. SCHULZ: Right, but he - - - it goes to
23 the fact that his - - - the real error that he's
24 complaining of is that he wasn't notified of his
25 right to an appeal. And Syville is clear that his

1 remedy is to file a coram nobis. And in my opinion -
2 - -

3 JUDGE SMITH: Well, what - - - what - - - I
4 mean, what - - - can you just address what the word
5 "unjustifiable" means in 440.10(2)(c). They - - -
6 they didn't say the justice - - - the defendant's
7 failure to take or perfect an appeal. They said the
8 defendant's unjustifiable failure to take or perfect
9 an appeal. What were they thinking when they wrote
10 that word "unjustifiable" in there?

11 MS. SCHULZ: I'm not entirely sure, but I
12 don't think it's this case, especially because even
13 at the time that he - - - he learned maybe that there
14 was an issue with his prior conviction, he never even
15 tried to file an appeal. He - - - he went and filed
16 a - - -

17 JUDGE SMITH: Yeah, about - - - before - -
18 -

19 MS. SCHULZ: - - - 440 immediately.

20 JUDGE SMITH: Before 440 was enacted,
21 everything was called cor - - - the equivalent then
22 was called coram nobis. And under those cases,
23 before 440, it was perfectly clear that if you were
24 deprived of your right to counsel before the trial
25 court, you could file - - - you could bring coram

1 nobis. Why doesn't - - - why doesn't 440 tend as the
2 successor to that old form of coram nobis?

3 MS. SCHULZ: Well, I don't agree that he
4 was deprived of his right to counsel. And I think
5 that based on the record - - -

6 JUDGE SMITH: Okay, but isn't that what the
7 case turns on, really?

8 MS. SCHULZ: I don't think so, because - -
9 - because there's no merit to his underlying claim,
10 and because the issue that he's really saying is that
11 he was deprived of his right to appeal, his remedy is
12 to file a coram nobis.

13 JUDGE PIGOTT: But if it's - - - if - - -
14 if his remedy is granted, you get a - - - you're back
15 to arraignment, right?

16 MS. SCHULZ: If he goes - - -

17 JUDGE PIGOTT: I mean, we're not dismissing
18 - - - no one's dismissing the case. You're just
19 saying you're back in front of the Town of Tuxedo
20 justice court and now you're going to enter a not
21 guilty if you want.

22 MS. SCHULZ: If his remedy is - - - if he
23 files a coram nobis?

24 JUDGE PIGOTT: No, if what happens here is
25 granted, right?

1 MS. SCHULZ: Correct. I believe that - - -

2 JUDGE PIGOTT: So you can take your BAC,
3 convict him, and be happy that he spent a lot of
4 money on a lawyer he didn't need.

5 MS. SCHULZ: I'm worried about
6 prospectively what's going to happen, how this case
7 is going to be interpreted. I just - - - what scares
8 me is that I don't think that trial courts, and in
9 particular, local justice courts, are equipped to
10 decide the nuances of appellate law and appellate
11 procedure.

12 JUDGE PIGOTT: Well, there - - - your - - -
13 your assessment of this, I think, is that this is
14 curbstome equity going on here. The judge, you know,
15 saw a case that he saw ought to get corrected and one
16 fashion or another, appreciated the fact that he's
17 now facing a felony, that when if he had listened to
18 the judge in the first place, he may not have been,
19 and decided to give him a second chance. And you
20 think that's wrong?

21 MS. SCHULZ: Yes, to the extent that it
22 goes against - - -

23 JUDGE PIGOTT: Procedurally.

24 MS. SCHULZ: - - - procedure.

25 CHIEF JUDGE LIPPMAN: Yeah, procedurally,

1 but - - - but what about fairness?

2 MS. SCHULZ: He can have - - -

3 JUDGE PIGOTT: Isn't that - - - isn't
4 curbstone justice, as Judge Pigott just mentioned,
5 isn't - - - isn't that what we're supposed to be
6 doing, justice?

7 MS. SCHULZ: If - - - he can have all the
8 justice he wants in the Appellate Term. If his error
9 is based - - -

10 CHIEF JUDGE LIPPMAN: Okay.

11 MS. SCHULZ: - - - on matters of record - -
12 -

13 CHIEF JUDGE LIPPMAN: Okay, counsel.
14 Thanks.

15 MS. SCHULZ: Thank you.

16 CHIEF JUDGE LIPPMAN: Counsel, what does
17 unjustified mean?

18 MR. HERZFELD: Unjustified, I - - - I think
19 the courts have dealt with it to some extent, where
20 you ask your appellate - - - your attorney to file a
21 notice of appeal and he doesn't. That is an unjust -
22 - - well, it's a justified failure to take the
23 appeal, not an unjustified failure. Where you're
24 wrongfully deprived of an attorney at the trial
25 level, and you don't know necessarily that you have a

1 right to appeal. I think that's a justified failure
2 to - - -

3 JUDGE ABDUS-SALAAM: Are you saying he was
4 wrongfully deprived of an attorney here? He declined
5 to get one or to even say that he needed one.

6 MR. HERZFELD: I'm sorry?

7 JUDGE ABDUS-SALAAM: Are you saying he - -
8 - are you saying that your client was wrongfully
9 deprived of an attorney here?

10 MR. HERZFELD: Well, no, that - - - that
11 his waiver was - - - was - - - I'm sorry; I - - - I
12 probably misspoke. Where - - -

13 JUDGE ABDUS-SALAAM: I thought you were
14 talking about another case - - -

15 MR. HERZFELD: No, no, no.

16 JUDGE ABDUS-SALAAM: - - - not this one.

17 MR. HERZFELD: Where the - - - the waiver -
18 - - the allocution is not adequate to support the
19 waiver of a right to attorney. You proceed pro se
20 and there's no one there to advise you of your right
21 to appeal. The regulation is not enforced, so that
22 there's nothing on the record advising you of your
23 right to appeal, so there's nothing to show that you
24 know you have a right to appeal. That - - - that's a
25 justified failure to take an appeal. Okay. Thank

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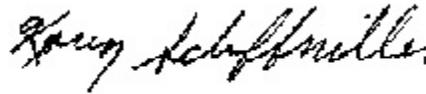
CHIEF JUDGE LIPPMAN: Thanks - - - thank
you both. Appreciate it.

(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 People v. Howard Grubstein, No. 193 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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Date: October 24, 2014