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COURT OF APPEALS  
STATE OF NEW YORK

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PEOPLE,

Respondent,

-against-

No. 78

RASAUN SANDERS,

Appellant.

-----

Judicial Institute  
84 North Broadway  
White Plains, New York 10603  
April 29, 2015

Before:

CHIEF JUDGE JONATHAN LIPPMAN  
ASSOCIATE JUDGE SUSAN PHILLIPS READ  
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM  
ASSOCIATE JUDGE LESLIE E. STEIN  
ASSOCIATE JUDGE EUGENE M. FAHEY

Appearances:

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Karen Schiffmiller  
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: So let's start with  
2 number 78, People v. Sanders. Counsel?

3 MR. DIAMOND: Good morn - - - good  
4 afternoon, Your Honors. I'm Mark Diamond and I  
5 represent Mr. Sanders.

6 CHIEF JUDGE LIPPMAN: Counselor, do you  
7 want any rebuttal time?

8 MR. DIAMOND: Five minutes, please.

9 CHIEF JUDGE LIPPMAN: Five minutes? You  
10 have it. Go ahead.

11 MR. DIAMOND: Thank you, Your Honors.

12 So the question is, do you draw the line  
13 when a death threat is made against a suspect to get  
14 him to confess?

15 JUDGE READ: Was it a death threat?

16 MR. DIAMOND: Absolutely.

17 JUDGE READ: Well, wasn't a statement of  
18 fact? Wouldn't he have been eligible for the death  
19 penalty - - -

20 MR. DIAMOND: No.

21 JUDGE READ: - - - if the federal  
22 government had decided to prosecute him? No?

23 MR. DIAMOND: Absolutely not. And that - -  
24 - let me refer you to statutes specifically on that.  
25 It would 18-3592. This situation - - -

1 CHIEF JUDGE LIPPMAN: Counsel, so - - - so  
2 what did - - - did happen here? What - - - what are  
3 you - - - what is the - - - the problem?

4 MR. DIAMOND: Okay.

5 CHIEF JUDGE LIPPMAN: There was a waiver,  
6 though, you're - - - you're arguing that the waiver  
7 was not valid.

8 MR. DIAMOND: Correct, for five reasons.

9 CHIEF JUDGE LIPPMAN: And - - - and you're  
10 arguing that the - - - the death threat was - - - was  
11 a death threat that - - -

12 MR. DIAMOND: Yes.

13 CHIEF JUDGE LIPPMAN: - - - in some way  
14 intimidated the defendant?

15 MR. DIAMOND: That's the case, Your Honor.

16 CHIEF JUDGE LIPPMAN: Okay, now tell - - -  
17 talk about the waiver first. Let's hear what - - -  
18 what the problem is with the waiver. As I understand  
19 it, he did away - - - why - - - why isn't everything  
20 included in that waiver?

21 MR. DIAMOND: Okay, for five reasons.

22 CHIEF JUDGE LIPPMAN: Five reasons.

23 MR. DIAMOND: Right.

24 CHIEF JUDGE LIPPMAN: Let's start. Go  
25 ahead.

1 MR. DIAMOND: So the waiver, you're  
2 familiar with; there was five sentences to the  
3 waiver.

4 CHIEF JUDGE LIPPMAN: Yes.

5 MR. DIAMOND: That was it.

6 CHIEF JUDGE LIPPMAN: We're all familiar  
7 with it.

8 MR. DIAMOND: The first reason is that the  
9 waiver was specifically limited to appeal - - -  
10 waiver of appeal to the Appellate Division, Second  
11 Department.

12 JUDGE STEIN: Is that - - -

13 CHIEF JUDGE LIPPMAN: What is - - - what's  
14 - - - what's the problem with that?

15 MR. DIAMOND: So - - - no meeting of the  
16 minds, Judge. He could reasonably have thought - - -  
17 you can't say beyond reasonable doubt that he didn't  
18 think he could appeal it to the Court of Appeals.

19 CHIEF JUDGE LIPPMAN: You think they have  
20 to say "higher court", not - - - not the Appellate  
21 Division? It's a ter - - -

22 MR. DIAMOND: That's correct, Judge. Or  
23 all courts.

24 CHIEF JUDGE LIPPMAN: You're arguing it's a  
25 term of art?

1 MR. DIAMOND: It's a - - - more than a term  
2 of art.

3 CHIEF JUDGE LIPPMAN: Within our world,  
4 yeah?

5 MR. DIAMOND: It's a term of art that would  
6 lead him to believe that he was limited - - - that  
7 his waiver of appeal was limited only to appeal to  
8 the Second Department. He was not told - - - and by  
9 the way, this - - -

10 JUDGE RIVERA: But would he even know what  
11 the Second Department is? Does that even sound like  
12 it's a court if you don't know?

13 MR. DIAMOND: It doesn't matter. He was -  
14 - - he was told you - - - this is one court that  
15 you're limited to appeal. He could have reasonably  
16 thought he could appeal it to a million other courts.  
17 And there are other courts. He can bring a federal  
18 habeas action. There's a lot of things that he can  
19 do.

20 So - - - and I want to point out that it  
21 was the District Attorney who allocuted - - -

22 JUDGE ABDUS-SALAAM: Well, is the federal  
23 court a higher court than the state court - - -

24 MR. DIAMOND: Oh, absolutely.

25 JUDGE ABDUS-SALAAM: - - - state appellate

1 court?

2 MR. DIAMOND: And we all know that.

3 JUDGE ABDUS-SALAAM: Really?

4 MR. DIAMOND: Let's say, it's a different  
5 court.

6 JUDGE ABDUS-SALAAM: Only in your minds,  
7 not ours.

8 JUDGE READ: Yeah, I - - - I think you  
9 better watch where you're going on that one.

10 MR. DIAMOND: Yeah, I know. I apologize.  
11 I take that back.

12 JUDGE RIVERA: What is that? The supremacy  
13 of federal law, is that what you're trying to  
14 suggest?

15 MR. DIAMOND: So - - -

16 JUDGE READ: And we're the students.

17 MR. DIAMOND: - - - the - - - so it was the  
18 District Attorney who allocuted. He - - - the  
19 District Attorney specifically limited - - -

20 JUDGE STEIN: Does - - - does it - - - are  
21 we allowed to consider what his background and  
22 experience in the criminal justice system was?

23 MR. DIAMOND: If the record is clear as to  
24 what it is, but there is no record here, Judge.

25 JUDGE STEIN: Well - - -

1 MR. DIAMOND: That would be pure surmise on  
2 our parts to - - -

3 JUDGE STEIN: And is it relevant that he in  
4 fact ultimately filed a pro se notice of appeal?

5 MR. DIAMOND: No.

6 JUDGE STEIN: Well, doesn't that indicate  
7 that he knew what - - - what to do?

8 MR. DIAMOND: He knew enough to file a  
9 notice of appeal, but it does - - - what - - - how  
10 does that - - - that doesn't really affect his know -  
11 - - that doesn't apply that he knows - - -

12 JUDGE RIVERA: Well, when - - - when did he  
13 file that notice of appeal?

14 MR. DIAMOND: When did he file?

15 JUDGE RIVERA: That pro se notice of  
16 appeal?

17 MR. DIAMOND: When did he file the notice  
18 of appeal? I can't remember.

19 JUDGE RIVERA: He didn't file it the same  
20 day, did he?

21 MR. DIAMOND: I don't remember, Judge.

22 JUDGE RIVERA: So - - - well, that doesn't  
23 mean he knew - - -

24 MR. DIAMOND: So in other words, some - - -

25 JUDGE RIVERA: We don't know what he knew

1 at the moment.

2 MR. DIAMOND: He could have learned - - -  
3 yeah, he could have learned in prison that he needs  
4 to file a pro se notice of appeal as - - - it would  
5 be pure surmise to assume that he knows what waiver  
6 of appeal means, that it means appeal - - - waiver of  
7 appeal to every court for every circumstance.

8 CHIEF JUDGE LIPPMAN: So, counsel, what  
9 else is wrong with the waiver?

10 MR. DIAMOND: Number two.

11 CHIEF JUDGE LIPPMAN: You said there five  
12 things wrong. Go ahead.

13 MR. DIAMOND: Number two, so the court  
14 didn't distinguish between appeal by waiver of appeal  
15 and forfeiture of rights by merely pleading guilty.  
16 Not the strongest argument, but it's a factor that  
17 you can consider. So in other words, the court  
18 didn't distinguish - - - and there's case law - - -  
19 the court did not distinguish between when you - - -  
20 when you plead guilty, you're forfeiting certain  
21 rights.

22 JUDGE STEIN: Well - - - well, the  
23 allocution as to that or - - - was totally separate  
24 from the other rights, which I think we have said is  
25 - - - is okay. I don't - - - you're not required to

1 say - - -

2 MR. DIAMOND: No.

3 JUDGE STEIN: - - - and by the way, this is  
4 a separate and distinct right.

5 MR. DIAMOND: No, but it helps. It distin  
6 - - -

7 JUDGE STEIN: Okay, but - - - but that - -  
8 - but the separation was done here. How is that  
9 different from other cases where we've held it's - -  
10 - it's sufficient?

11 MR. DIAMOND: Well, the separation between  
12 the plea and between the waiver of appeal was  
13 separate. But the court did not distinguish - - -  
14 did not - - - did not say that when you plead guilty,  
15 you're forfeiting certain rights, and then say, by  
16 the way, also, when you waive appeal, there are other  
17 rights that you are waiving.

18 JUDGE STEIN: But - - - but - - -

19 MR. DIAMOND: The court did not make that  
20 distinction.

21 JUDGE STEIN: - - - but we - - - we haven't  
22 said that - - -

23 MR. DIAMOND: No.

24 JUDGE STEIN: - - - that exact language is  
25 necessary - - -

1 MR. DIAMOND: Absol - - -

2 JUDGE STEIN: - - - as long as it is - - -  
3 is apparent from the face of the record that they  
4 weren't lumped together, and - - - and as I read it,  
5 I don't see them being lumped here.

6 MR. DIAMOND: I agree, and I'm not - - -  
7 it's - - - by itself, it's certainly not  
8 determinative, but it's a factor.

9 CHIEF JUDGE LIPPMAN: Okay, counsel - - -  
10 counselor, give us - - - give us three, four, five,  
11 please, here - - -

12 MR. DIAMOND: Three, four and five quickly.  
13 The court told him that he had to waive his right of  
14 appeal; it didn't ask him. Number four, it did not  
15 tell him that he was waiving his right of appeal,  
16 denial of the suppression motions. In other words,  
17 prosecutor's - - -

18 CHIEF JUDGE LIPPMAN: Okay, we understand.  
19 Go ahead.

20 MR. DIAMOND: And number five, it was  
21 involuntary, unknowing and unintelligent, because the  
22 allocution under Bradshaw and a number of other cases  
23 is just not sufficient.

24 CHIEF JUDGE LIPPMAN: All right. Let - - -  
25 let me just ask you one question on - - - on - - - on

1 the other items that you mentioned. Why do you have  
2 to say separately about the suppression? Where - - -  
3 what's the authority that you're relying on that that  
4 has to be said separately?

5 MR. DIAMOND: You don't have to, but in  
6 Bradshaw, you said that that's an element - - -  
7 that's the factor that the court could consider in  
8 determining whether the waiver of appeal was knowing,  
9 voluntary and intelligent.

10 CHIEF JUDGE LIPPMAN: I see. So you - - -  
11 though - - - so you're saying that - - - that based  
12 on all of those things, not - - - and for two  
13 seconds, because your light is on - - - tell us about  
14 - - - again, about the other issue, that you think  
15 that that - - - what was it that - - - that he took  
16 it as fact that he was facing the death penalty? Is  
17 that the essence of what you're saying?

18 MR. DIAMOND: Right. So what happened was  
19 - - - very quickly - - - he was - - - they started  
20 questioning him at 2 o'clock. At 5 - - - and he kept  
21 denying, denying, denying; I didn't do anything, I  
22 wasn't involved. 5:30, the Yonkers - - - the Mt.  
23 Vernon Police Department got upset. They brought in  
24 an FBI agent. The FBI agent comes in and says, I'm  
25 FBI Agent McDonald, and I want you to know that you



1           been, but that's not in the record. And if you look  
2           at the NYSIS, there's an indication that he may have  
3           been in federal parole - - -

4                         JUDGE READ: Yeah.

5                         MR. DIAMOND: - - - at one point, but  
6           that's not in the rec - - - that wasn't at the  
7           suppression hearing. It's not - - -

8                         JUDGE FAHEY: I thought that it was a gang  
9           assault.

10                        JUDGE READ: Yeah.

11                        JUDGE FAHEY: I thought it was a gang  
12           assault charge - - -

13                        MR. DIAMOND: In this particular case.

14                        JUDGE FAHEY: - - - that - - - was the  
15           basis.

16                        MR. DIAMOND: Yes, yes, it was.

17                        JUDGE FAHEY: Yeah, yes, that was the basis  
18           of him bringing him in. It seems though that here,  
19           the lynchpin in this case is the waiver of appeal,  
20           and - - - and really it's - - - we have to look at  
21           the Nicholson case, which seems to set the floor for  
22           the appeals, and then whether or not the colloquy in  
23           this case misses it, and it really turns on those two  
24           phrases that you identified.

25                        And I'm not sure if I agree with you, but I

1 think you've correctly narrowed it down, and then if  
2 - - - if the waiver of appeal wasn't valid, then - -  
3 - then you have a stronger argument on the merits.

4 MR. DIAMOND: That - - - that - - - that  
5 really is it in a nutshell. And I would just ask you  
6 in the two seconds that I have remaining - - -

7 CHIEF JUDGE LIPPMAN: Go - - - counselor,  
8 go - - - go ahead. Let me just see if the judges - -  
9 -

10 JUDGE RIVERA: I did have one question.

11 MR. DIAMOND: I'm sorry. I beg your  
12 pardon. I'm sorry.

13 CHIEF JUDGE LIPPMAN: - - - Judge Rivera.  
14 And - - - and then we'll have your adversary.

15 JUDGE RIVERA: Yes, I just wanted you to -  
16 - - to address the question of the attorney's  
17 withdrawal of the motions.

18 MR. DIAMOND: Attorney's withdrawal of  
19 which motion?

20 JUDGE RIVERA: Well, I believe he was asked  
21 if he was withdrawing all the motions, and he said  
22 yes. Did I miss something here?

23 MR. DIAMOND: During the allocution, you're  
24 talking about?

25 JUDGE RIVERA: Correct.

1 MR. DIAMOND: "Do you understand that a  
2 condition of this plea, you are waiving the right to  
3 appeal your conviction and sentence to the Appellate  
4 Division Second Department?

5 "A. Yes.

6 "Q. Have you discussed this waiver of the right of appeal  
7 with your attorney?

8 "A. Yes.

9 "Q. In consideration of this negotiated plea, do you now  
10 voluntarily waive your right of appeal to conviction and  
11 sentence under this indictment?

12 "A. Yes."

13 MR. DIAMOND: That was it.

14 JUDGE RIVERA: Wait, wait. I thought the  
15 defense counselor agreed to withdraw all motions that  
16 are pending or decided.

17 MR. DIAMOND: Not that I saw - - -

18 JUDGE PIGOTT: Well, the next - - - the  
19 next - - -

20 MR. DIAMOND: - - - but if I'm wrong, I  
21 apologize.

22 JUDGE PIGOTT: The next line, Mr. Diamond.  
23 It says "In further - - - in further consideration of  
24 this negotiated plea, Mr. Scholar, do you withdraw  
25 all motions made by you, whether pending or

1 undecided?" and he said "Yes, withdrawn."

2 MR. DIAMOND: The attorney said that, but  
3 not - - -

4 JUDGE RIVERA: Correct.

5 MR. DIAMOND: - - - the defendant, and  
6 nobody addressed the defendant to ask him whether he  
7 wanted to withdraw.

8 JUDGE RIVERA: Are - - - are you saying  
9 that - - - that the judge must - - - when the defense  
10 counsel is standing next to the - - -

11 MR. DIAMOND: It would have been better.

12 JUDGE RIVERA: - - - defendant says yes?

13 MR. DIAMOND: No, I'm not saying - - -

14 CHIEF JUDGE LIPPMAN: Yeah, but counsel,  
15 that defies all that - - - that we do in criminal  
16 courtrooms, that you ask the attorney; you don't ask  
17 the defendant.

18 MR. DIAMOND: I - - - again, I'll refer - -  
19 -

20 JUDGE RIVERA: The defendant is - - -

21 MR. DIAMOND: - - - to the Bradshaw case.  
22 The Bradshaw case is - - -

23 CHIEF JUDGE LIPPMAN: In this case - - -

24 MR. DIAMOND: All right.

25 CHIEF JUDGE LIPPMAN: - - - this is in the

1 normal course.

2 MR. DIAMOND: Okay.

3 CHIEF JUDGE LIPPMAN: I think that's a  
4 tough row to hoe.

5 MR. DIAMOND: My point is this: if this  
6 was a - - - if he was sentenced to a year, or five,  
7 ten years in jail for jaywalking or what - - - he was  
8 threatened with death.

9 CHIEF JUDGE LIPPMAN: Okay.

10 MR. DIAMOND: That's - - - that's what  
11 elevates this case.

12 CHIEF JUDGE LIPPMAN: We get your point.

13 MR. DIAMOND: Thank you very much.

14 CHIEF JUDGE LIPPMAN: Let's hear from your  
15 adversary. You'll have your rebuttal time.

16 MR. DIAMOND: Thank you very much, Your  
17 Honors.

18 CHIEF JUDGE LIPPMAN: Counselor, go ahead.

19 MS. SPENCER: Good afternoon, Your Honors,  
20 Jennifer Spencer, with the Office of the Westchester  
21 District Attorney, representing the People.

22 CHIEF JUDGE LIPPMAN: Was - - - was there  
23 anything wrong in this case in terms of the waiver  
24 that was obtained?

25 MS. SPENCER: Absolutely not. This ri - -

1 - this waiver - - -

2 CHIEF JUDGE LIPPMAN: Could the judge have  
3 done a better job or - - -

4 MR. DIAMOND: The question is not whether  
5 there could have been a better job, but whether this  
6 was sufficient.

7 CHIEF JUDGE LIPPMAN: But - - - but I'm  
8 asking, was everything handled best practices?

9 MS. SPENCER: Yes, what happened here - - -

10 CHIEF JUDGE LIPPMAN: Okay. Tell us why.

11 MS. SPENCER: - - - is first of all, I'd  
12 like to address the issue of the defendant's age and  
13 background and experience. It's not speculation. It  
14 is a matter of record. The Sandoval hearing was held  
15 on the very morning of which defendant ultimately  
16 pled guilty - - -

17 JUDGE PIGOTT: Could you tell me why, then,  
18 the judge doesn't take the plea? It - - - it just -  
19 - - it's remarkable to me, if I'm - - - if I'm the  
20 lawyer for the defendant, and I - - - and you're the  
21 People, and we're negotiating and trying to get stuff  
22 done, and finally a plea comes in. The - - - the  
23 judge takes the bench, says, go ahead; take the plea.

24 And you, the person he despises the most,  
25 who's going to put him in jail, make him walk through

1 these things, when it's the judge who's supposed to  
2 make sure that each one of these rights are known and  
3 waived, and not the District Attorney.

4 And I understand that in CPL 2015, it says  
5 that the plea - - - or excuse me - - - at the  
6 arraignment, the judge or - - - you know, shall read  
7 the charges or have them read, which I take it to  
8 mean a clerk of the court or something like that. It  
9 turns out a lot of DAs do that too.

10 But I don't understand why your adversary  
11 sticks it down your throat and then says, and you  
12 realize you're doing this, and you realize you're  
13 waiving that, when it's the court that's supposed to  
14 find out and make - - - and make the determination  
15 that all of this is fair and on the up-and-up, and  
16 the co - - - and the defendant knows his - - - knows  
17 his rights.

18 MS. SPENCER: The court oversees the  
19 process, Your Honor. In - - - in our practice - - -

20 JUDGE PIGOTT: Well, let's assume - - -  
21 let's assume that I'm him, and I'm lazy, and I - - -  
22 and I don't want to do it, and I - - - here, I got to  
23 go do - - - I got to take three pleas this morning.  
24 And I don't want to, because the Bills lost last  
25 Sunday, and I'm not in a good mood. So I go - - -

1 CHIEF JUDGE LIPPMAN: Which is very often  
2 for the judge.

3 JUDGE PIGOTT: That's right.

4 CHIEF JUDGE LIPPMAN: But go ahead.

5 JUDGE FAHEY: It's been a tough season.

6 CHIEF JUDGE LIPPMAN: Yeah.

7 JUDGE PIGOTT: So, so I say, okay, Ms.  
8 Spencer, would you - - - would you allocate - - - and  
9 I don't care. I - - - I'm not paying any attention.  
10 I'm just getting through it. And you - - - you're  
11 more than happy to do that, because it's get the  
12 judge out of the way, and you take the plea. Isn't  
13 there something fundamentally wrong with that?

14 MS. SPENCER: I - - - I don't agree, Your  
15 Honor. I - - - I would presume that judges are  
16 fulfilling their role to oversee the process.

17 JUDGE PIGOTT: Well, why don't they do it?  
18 Tell me why they don't do it?

19 MS. SPENCER: Judge Pigott, I - - - I  
20 believe in our office, we prefer to insure the  
21 validity of the plea and waiver - - -

22 CHIEF JUDGE LIPPMAN: Yeah, but what's the  
23 judge supposed to be doing during all this?

24 MS. SPENCER: He's overseeing the process.  
25 He's - - -

1 JUDGE READ: So it's customary in  
2 Westchester County.

3 MS. SPENCER: It's a customary practice.  
4 It has been for - - - for as long as I'm aware,  
5 that's our practice. And in this case - - -

6 JUDGE RIVERA: So that your concern is that  
7 the judge might miss something and creates - - -

8 MS. SPENCER: I would assume - - - I mean I  
9 - - -

10 JUDGE RIVERA: - - - an appeal?

11 MS. SPENCER: That makes - - -

12 JUDGE RIVERA: A basis for an appeal, so  
13 this is why you do it.

14 JUDGE FAHEY: I have to say that's - - -  
15 that's not the practice in - - - in Erie County.

16 MS. SPENCER: Okay, well, it's the practice  
17 in Westchester and it has been.

18 CHIEF JUDGE LIPPMAN: Well, let me - - -  
19 let me ask you a question. Is it the practice in  
20 Westchester County for FBI agents to come in and - -  
21 - and - - - and threaten some defendant or the - - -  
22 what's going to be the defendant with - - - with - -  
23 - with a facing the death penalty? Doesn't that seem  
24 weird? What went on here? Why - - - why was that  
25 FBI agent there?

1 MS. SPENCER: It appears the FBI agent - -  
2 - it's on the record - - - that he's there to  
3 investigate gang violence in Mt. Vernon.

4 CHIEF JUDGE LIPPMAN: So why is he going in  
5 and - - - and telling the guy he's facing the death  
6 penalty? What legitimate - - - what I'm asking you  
7 is, isn't that an unusual thing, and what legitimate  
8 purpose could it have?

9 MS. SPENCER: Your Honor, the FBI agent - -  
10 - well, first of all, there was - - - there were  
11 federal agents involved because of - - -

12 CHIEF JUDGE LIPPMAN: Isn't it an - - - is  
13 it an unusual thing?

14 MS. SPENCER: I would imagine, but I cannot  
15 answer that with - - - with spe - - -

16 CHIEF JUDGE LIPPMAN: Is it - - - does it  
17 make any sense for him to come in and say what - - -  
18 what - - - that you may be facing the death penalty?

19 MS. SPENCER: Let's look at what - - -

20 CHIEF JUDGE LIPPMAN: I'm not saying it's  
21 dispositive. I'm asking you, isn't that really  
22 unusual and strange?

23 MS. SPENCER: I would imagine it is, but as  
24 I said - - -

25 JUDGE RIVERA: The incredible amount of

1 coordination between the state and feds sounds  
2 unusual to me.

3 MS. SPENCER: It - - - it was about  
4 investigations of gang violence. The defendant is -  
5 - -

6 JUDGE STEIN: Is - - -

7 MS. SPENCER: - - - an admitted member of  
8 the Crips who was on federal parole for numerous gun  
9 possession charges.

10 JUDGE STEIN: But does this - - -

11 JUDGE RIVERA: He just thought he'd go in  
12 and chat?

13 MS. SPENCER: Excuse me?

14 JUDGE RIVERA: The FBI agent is going in  
15 and chatting? What - - - what - - -

16 MS. SPENCER: The FBI agent went in and in  
17 - - - it not - - - what he said, if you read the  
18 language of what he said, there's quite a few might  
19 be, could be, possibly sometime in the future. The -  
20 - -

21 JUDGE RIVERA: Did he have to re-Mirandize  
22 him to do that?

23 MS. SPENCER: No.

24 JUDGE RIVERA: Why not? Why not?

25 MS. SPENCER: The defendant had waived his

1 Miranda rights.

2 JUDGE RIVERA: I understand. But now you  
3 got a federal officer going in, potentially a federal  
4 crime. Why not?

5 MS. SPENCER: He's already waived his  
6 rights. I'm no - - - not aware of any - - -

7 JUDGE RIVERA: To talk to the state. Why  
8 is he - - - he's now talking to the feds.

9 MS. SPENCER: There's no distinction; he  
10 waived his Miranda rights.

11 JUDGE RIVERA: Okay, that's your argument.  
12 All right.

13 MS. SPENCER: There - - - that's not an  
14 issue on appeal; neither, by the way, is the  
15 suppression ruling - - -

16 JUDGE STEIN: Could - - -

17 MS. SPENCER: - - - before this court. The  
18 issue - - -

19 JUDGE STEIN: Could you talk about the  
20 timeline of when that federal FBI agent actually went  
21 in and when, and what had happened before he went in  
22 and what happened after he went in, in terms of the  
23 statement made by the defendant?

24 MS. SPENCER: It's my understanding the  
25 defendant was arrested at about 2 p.m. on the federal

1 warrant; he had violated parole, absconded from his  
2 federal halfway house, and he was brought to the Mt.  
3 Vernon police headquarters. He's - - - he's given  
4 Miranda and waives them at approximately 3:20. I  
5 believe the FBI agent went in at approximately 5:30,  
6 and at some time - - - he didn't immediately - - -  
7 the defendant never spoke to the FBI agent, by the  
8 way. The defendant only wanted to speak to the Mt.  
9 Vernon detectives who he knew - - -

10 JUDGE STEIN: And the Mt. Vernon detective,  
11 didn't he testify that the defendant had started  
12 breaking down very early on in the discussion - - -

13 MS. SPENCER: He - - -

14 JUDGE STEIN: - - - that first he denied  
15 even being there, and then he said he was there but  
16 he wasn't involved, and then - - - so this - - - this  
17 process was happening over a period.

18 MS. SPENCER: Yeah.

19 JUDGE STEIN: It didn't happen suddenly  
20 when the FBI agent came in.

21 MS. SPENCER: Exactly, Judge Stein.

22 JUDGE STEIN: And it didn't happen right  
23 after the FBI agent left.

24 MS. SPENCER: Exactly. At some point  
25 thereafter, the defendant, who had, from the get-go,

1           upon first being apprehended, said, oh, hey, I've  
2           been meaning to talk to you guys, over the course of  
3           time went from not being a part of the van, to being  
4           there, and then ultimately admitting that he was the  
5           stabber, which - - - by the way, this wasn't a  
6           whodunit situation. This was a gang assault. The  
7           defendant had made statements about his admission to  
8           identified citizen witnesses.

9                         JUDGE READ: So he was - - - he was giving  
10           ground over a period of time?

11                        MS. SPENCER: Right. Right. Which is why  
12           - - - which is one the things the hearing judge  
13           pointed to in his suppression ruling, in - - - you  
14           know, in acknowledging that what - - - what the FBI  
15           agent did was not the gentlest nudge he ever heard,  
16           but analyzing the totality of the circumstances, it  
17           didn't rise to the level of overcoming his will, and  
18           up - - - he upheld - - - he didn't deny suppression  
19           of those statements.

20                        And as I said, this was not - - -  
21           defendant's guilt at trial was not going to rise and  
22           fall upon these statements. This was not the only  
23           proof of guilt. And that, of course, was part of the  
24           defendant's decision to enter a plea of guilty.

25                        JUDGE RIVERA: But the statement's powerful

1 - - - pow - - - but those statements are quite - - -

2 MS. SPENCER: Excuse me?

3 JUDGE RIVERA: Those statements are quite  
4 inculpatory, don't you think?

5 MS. SPENCER: They are, sure, but as I - -  
6 -

7 JUDGE RIVERA: What a powerful statement  
8 coming from the defendant, don't you think?

9 MS. SPENCER: Yes, statements which he made  
10 to identified citizen witnesses as well, which  
11 wouldn't have been subject to suppression, which of  
12 course went into his knowing and voluntary decision  
13 to obtain a favorable disposition after jury  
14 selection had already begun, and in exchange for that  
15 disposition, agreed to waive his right to appeal.

16 JUDGE RIVERA: All right. Can I ask about  
17 - - -

18 JUDGE ABDUS-SALAAM: Counsel, could you  
19 address - - -

20 JUDGE RIVERA: I asked - - - I'm sorry. I  
21 asked opposing counsel about - - - defendant's  
22 counsel about the - - - the defense counsel's  
23 withdrawal of the motions. He says it's not  
24 relevant, because the judge should have asked the  
25 defendant.

1 MS. SPENCER: It's highly relevant. The  
2 defense attorney is the one who filed the motions on  
3 defendant's behalf. The defense attorney has  
4 represented his interests all along, and it's  
5 reasonable to address the next question during the -  
6 - - the colloquy to the defense attorney. Mr.  
7 Scholar, are you withdrawing all motions? And it was  
8 done right after he waived his right to appeal.

9 It's very telling from that, irre - - -  
10 it's also a separate independent ground upon which  
11 defendant's claim regarding the suppression rule is  
12 foreclosed.

13 JUDGE RIVERA: Does it signify that perhaps  
14 - - - does it signify that perhaps the defendant  
15 might not be so familiar with legal jargon and what  
16 this means - - -

17 MS. SPENCER: Not at all, Your Honor.

18 JUDGE RIVERA: - - - including what  
19 Appellate Department Second Department - - -

20 MS. SPENCER: Not at all, Your Honor.

21 JUDGE RIVERA: No?

22 MS. SPENCER: Not at all. This defendant  
23 was not standing - - -

24 JUDGE ABDUS-SALAAM: That was my question,  
25 counsel. Could you - - - yeah, that was my question.



1 better if he said higher court, right?

2 MS. SPENCER: It may have been. I mean,  
3 this isn't - - -

4 CHIEF JUDGE LIPPMAN: Not - - - it may have  
5 been?

6 MS. SPENCER: Possibly. If it - - -

7 CHIEF JUDGE LIPPMAN: You should say to a -  
8 - - to a - - -

9 MS. SPENCER: It's a distinction without a  
10 difference.

11 CHIEF JUDGE LIPPMAN: Excuse me, counselor.  
12 You should say to a lay defendant that a particular -  
13 - - giving its name in our legal world makes more  
14 sense to you than just saying you can - - - that you  
15 can appeal to any higher court? Surely it would be  
16 better to say any higher court.

17 MS. SPENCER: Your Honor, this defendant  
18 repeatedly acknowledged under oath that he understood  
19 everything being said.

20 CHIEF JUDGE LIPPMAN: That's not my  
21 question to you. My question to you was, what would  
22 have been better, to be said - - - you're really  
23 arguing that it's better that the - - - that the  
24 judge said Appellate Division - - - that you could  
25 appeal to the Appellate Division Second Department?

1 MS. SPENCER: I think both would be better;  
2 a higher court, which is the Appellate Division  
3 Second Department.

4 CHIEF JUDGE LIPPMAN: Okay, counsel, thank  
5 you.

6 JUDGE RIVERA: If - - - if he had only said  
7 Court of Appeals, could he be arguing that he didn't  
8 understand - - -

9 MS. SPENCER: He wouldn't - - -

10 JUDGE RIVERA: - - - he could appeal to the  
11 Appellate Department?

12 MS. SPENCER: He couldn't actually appeal  
13 to the Court of Appeals.

14 JUDGE RIVERA: Well, I understand that.

15 MS. SPENCER: Yes.

16 JUDGE RIVERA: It's a hypothetical. I  
17 understand that.

18 MS. SPENCER: Yes, yes.

19 JUDGE RIVERA: That's what I'm asking you.

20 MS. SPENCER: That's what I'm saying.  
21 That's why specificity is better.

22 JUDGE ABDUS-SALAAM: Well, nor - - - nor  
23 could he have appealed to the Appellate Term Second  
24 Department - - -

25 MS. SPENCER: Exactly.

1 JUDGE ABDUS-SALAAM: - - - so that's the  
2 problem. I mean, if you're - - - if you're telling  
3 what court and it's the wrong court, there's no  
4 problem with that?

5 JUDGE FAHEY: This - - - isn't a better  
6 argument for you that the - - - the jurisprudence on  
7 waiver of appeal doesn't require a specific colloquy.  
8 Isn't that your better argument?

9 MS. SPENCER: Yes.

10 JUDGE FAHEY: And then - - -

11 MS. SPENCER: Yes, Judge Fahey. And I  
12 would love to get to it.

13 JUDGE FAHEY: It is, it is, but I - - - I  
14 just wanted to point it out to you, because it seems  
15 Nicholson has set the floor as to where we need to go  
16 here, and - - - and it does say "higher court" in  
17 Nicholson; it was decided with Lopez. And it seems  
18 to be below which we've said we're not going to go.

19 So it really turns for us on - - - the  
20 whole case turns for us on whether the phrase "higher  
21 court" is - - - is - - - has enough import to be  
22 distinguished from the higher court in this  
23 particular circumstances, which is your point, the  
24 Appellate Division Second Department, because the  
25 waiver of appeal is the case here, right?

1 MS. SPENCER: Yes.

2 JUDGE FAHEY: Okay.

3 MS. SPENCER: The waiver of appeal is the  
4 case here - - -

5 JUDGE FAHEY: So - - -

6 MS. SPENCER: - - - before this court. And  
7 I would ask this court, of course, as the Second  
8 Department did, to consider the defendant's age and  
9 background and experience. It is highly relevant - -  
10 -

11 CHIEF JUDGE LIPPMAN: Okay, counsel.  
12 Thanks, counsel.

13 MS. SPENCER: Okay.

14 JUDGE STEIN: Can I ask one more question?  
15 You're not - - - you're not - - -

16 CHIEF JUDGE LIPPMAN: Yes, sure, Judge  
17 Stein?

18 JUDGE STEIN: You're not conceding the  
19 suppression issue though, even though - - -

20 MS. SPENCER: Absolutely not.

21 JUDGE STEIN: Okay.

22 MS. SPENCER: Absolutely not. The  
23 suppression ruling is not before this court. Thank  
24 you.

25 CHIEF JUDGE LIPPMAN: Okay, thank you,

1 counsel.

2 Rebuttal?

3 MR. DIAMOND: Some very quick things, Your  
4 Honors. First, Judges, as to your point, while it's  
5 correct that no particular colloquy is required, if  
6 you make a specific representation, you're stuck with  
7 it, and the representation was Second Department  
8 Appellate Division, and now they're stuck with it.

9 JUDGE FAHEY: So you're saying if that was  
10 error, then - - - using Judge Lippman's example, then  
11 therefore, the waiver would be no good.

12 MR. DIAMOND: That's right.

13 JUDGE FAHEY: Okay.

14 MR. DIAMOND: That's correct, Judge.

15 JUDGE FAHEY: All right.

16 MR. DIAMOND: And just factually, I just  
17 want to contest the assertion that he was admitting  
18 all along. He was not. He was specifically denying,  
19 denying, denying, until 5:30 when Agent McDonald came  
20 in. He was there five minutes. And then when he  
21 left, the three Yonkers - - - the three Mt. Vernon  
22 police officers came back and anywhere between one  
23 and forty-five minutes - - - the record is not  
24 exactly clear - - - he confessed. So - - -

25 CHIEF JUDGE LIPPMAN: So you attribute the

1 confession directly to the FBI?

2 MR. DIAMOND: No question about it, Judge.

3 And I think the record is clear on that.

4 Thank you very much, Your Honors.

5 CHIEF JUDGE LIPPMAN: Okay, thank you both.

6 Appreciate it.

7 (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. Rasaun Sanders, No. 78, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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