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COURT OF APPEALS
STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

No. 11

ADAM CROWDER,

Appellant.

20 Eagle Street
Albany, New York 12207
January 14, 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

Appearances:

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Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: We're going to start
2 with number 11, People v. Crowder.

3 Counselor, do you want any rebuttal time?

4 MR. KINDLON: Yes, Your Honor, good
5 afternoon. I would request two minutes for rebuttal.

6 CHIEF JUDGE LIPPMAN: Two minutes, it's
7 yours. Go ahead.

8 MR. KINDLON: Thank you very much. May it
9 please the court, my name is Lee Kindlon, and I
10 represent the appellant, Adam Crowder. When a
11 defendant steps to the bar to take a guilty plea,
12 such a dramatic decision should be made with as much
13 knowledge as possible.

14 JUDGE PIGOTT: Does it really come down to
15 what - - - you know, when - - - when the judge said,
16 you know, I can do this to - - - you know, whatever
17 the PRS was - - -

18 MR. KINDLON: Right.

19 JUDGE PIGOTT: - - - that you were then on
20 notice, and so when everything else happened after
21 that, at some point, if you disagreed with what was
22 going on, you should have said, wait a minute, Judge,
23 as I understand it, we're getting, you know - - -
24 preservation.

25 MR. KINDLON: Preservation. The - - - I

1 guess, the big issue. In - - - in this case, there's
2 a couple of different factual wrinkles from some of
3 the decisions that this court has recently made.

4 JUDGE READ: Is that what it boils down to?
5 What we see as being closer to a McAlpin or Murray?

6 MR. KINDLON: Yes, Your Honor, although I
7 would say that Judge Lippman's decision just
8 recently, the October - - - People v. Turner, is also
9 - - -

10 JUDGE READ: That's in the mix, too?

11 MR. KINDLON: Yes, Your Honor. That sheds
12 a lot of light here.

13 CHIEF JUDGE LIPPMAN: What - - - what's the
14 rule, counselor, that you would like to see? Looking
15 at those cases, so many of them in the not so distant
16 past, what - - - what's the rule? When is - - - is
17 it all about at the plea? Is that the magic time?
18 What - - - what rule would you advocate based on
19 those cases?

20 MR. KINDLON: Your Honor, I would not
21 advocate a new rule. I'd simply request some - - -
22 some clarity of the rule that's - - -

23 CHIEF JUDGE LIPPMAN: No, I'm not saying
24 it's new - - - what clarity do you bring to our
25 decisions in terms of what the rule is now?

1 JUDGE READ: We hope somebody brings
2 clarity.

3 CHIEF JUDGE LIPPMAN: Somebody - - - yes.

4 MR. KINDLON: Respectfully, members of the
5 court, I would simply say that, yes, Your Honor, at
6 the plea. The direct consequences of that plea need
7 to be discussed.

8 JUDGE ABDUS-SALAAM: But counsel, what if,
9 instead of three days before the plea was actually
10 taken, the court informed the defendant twenty
11 minutes before the plea was taken that it's going to
12 be PRS plus whatever his sentence is in addition - -
13 - you know, the - - - the time that he's going to
14 serve. And then twenty minutes later the defendant
15 comes back and says, oh, I want - - - I - - - I'll
16 take the deal, but then PRS isn't mentioned. So
17 you're saying twenty minutes before wouldn't be
18 enough notice?

19 MR. KINDLON: Your Honor, I'm saying that,
20 you know, nine times out of ten, the first discussion
21 of a plea on a record is at the plea. This was
22 somewhat unique, because, you know, this case in
23 particular - - - we had a discussion about the
24 potential plea, I think it was a Tuesday when they
25 were hearings, and then we - - -

1 JUDGE ABDUS-SALAAM: Yes, three - - - about
2 three days before.

3 MR. KINDLON: - - - and then we came back
4 and - - - and pled, yes, Your Honor. But frankly, I
5 think what makes this decision, you know, somewhat
6 unique, or this series of events somewhat unique is
7 that the discussion - - - the three days prior about
8 what post-release supervision could be, and there was
9 a range. It was one-and-a-half to three, I think,
10 was the discussion, and then three days went by and
11 then we came back, and he - - - and - - -

12 JUDGE ABDUS-SALAAM: Yeah, that's what I'm
13 saying, if it happened twenty minutes beforehand, and
14 it was on the record, as you said.

15 MR. KINDLON: Right.

16 JUDGE ABDUS-SALAAM: And usually - - - I
17 don't know; some courts believe everything should be
18 on the record when it's in criminal court. So if
19 it's on the record, twenty minutes before, the
20 defendant talks to his lawyers, says, yeah, I want to
21 take the plea, and then at the plea, the court
22 doesn't mention PRS, you don't think that the
23 defendant has any ob - - - obligation to say, wait,
24 Judge, you told me twenty minutes ago, there was
25 going to be PRS; now you're not saying anything about

1 it?

2 MR. KINDLON: Correct, Your Honor. I do
3 not - - - I do not think that the defendant has an
4 obligation at that time, because that's what this
5 court has said a number of times. And I think the
6 lack of a mention of post-release during the plea - -
7 - the plea colloquy itself, when you're standing
8 there and you're talking about prison time and
9 everything else that you have to do in a plea - - -

10 CHIEF JUDGE LIPPMAN: What about Boyd?

11 MR. KINDLON: Boyd. And I know Your Honor
12 talked about Boyd in her dissent in the Turner case.
13 If I can just pull it out, Judge?

14 CHIEF JUDGE LIPPMAN: Sure.

15 JUDGE READ: It's there - - - it's
16 understandable - - - I have, frankly, a little bit -
17 - - I have trouble keeping track of them too; there
18 are so many.

19 CHIEF JUDGE LIPPMAN: Don't we all? Yeah.

20 MR. KINDLON: Yes, as I prepared my - - -
21 my stack of cases, it grew exponentially. And - - -

22 CHIEF JUDGE LIPPMAN: They all are - - - I
23 - - - I'm not saying this in a critical way of our
24 efforts - - - they all are kind of slicing this thing
25 very fine in terms of the different distinctions.

1 MR. KINDLON: Right, and - - - and I - - -
2 and again, I think some of the - - - you know, to do
3 down the factual rabbit hole of - - - of this case,
4 as - - - as we get into the, you know, discussion,
5 and I think Boyd was the - - - you know, there was a
6 sentence enhancement problem here.

7 JUDGE ABDUS-SALAAM: Right.

8 MR. KINDLON: And that also, there's a
9 flavor of this here, because, of course - - -

10 JUDGE RIVERA: Not the - - - not the
11 specific PRS period.

12 MR. KINDLON: Right, right, it - - -

13 JUDGE RIVERA: It's not plain in Boyd.

14 MR. KINDLON: Right, in - - - in this case,
15 there was the failure of the mention, then there was
16 the sentence enhancement - - -

17 JUDGE RIVERA: Right.

18 MR. KINDLON: - - - because, of course, Mr.
19 Crowder decided not to show up for his first few
20 sentences - - -

21 CHIEF JUDGE LIPPMAN: Well, I think what
22 we're trying to do is synthesize these different
23 cases; again, have some subtle and not so subtle
24 distinctions and - - - and where are we and what - -
25 - what makes sense in terms of each one obviously has

1 its own unique circumstances, but we want it to make
2 some sense, and we hope that each time we issue a
3 decision in this area that it makes some sense, but
4 that's why I was questioning what you think our cases
5 say vis-a-vis your particular situation.

6 JUDGE READ: Well, maybe I would say would
7 - - - what is this closest to? What is your factual
8 situation closest to in the many decisions we've
9 handed down in this area?

10 MR. KINDLON: Your Honor, I see a - - - I
11 see, no - - - to - - - to talk about them all, I
12 would say either Cornell or the majority in McAlpin,
13 because here we have a situation where there was no
14 discussion of post-release during the plea, and - - -

15 JUDGE PIGOTT: You - - - you were there,
16 right? You - - -

17 MR. KINDLON: Yes.

18 JUDGE PIGOTT: - - - were representing Mr.
19 Crowder.

20 MR. KINDLON: Me or a member of my firm,
21 yes, sir.

22 JUDGE PIGOTT: I want to go back to what
23 Judge Abdus-Salaam was talking about. It - - -
24 because it sounded in the transcript when - - - when
25 defendant came back a couple of days later - - -

1 three days later - - - because the judge said - - -
2 he was almost asking. He said, okay, this is a - - -
3 this is a two-year minimum on an attempted burglary.
4 That's my recollection. And no one corrected him.
5 Nobody said, you know, well, it specifically, Judge,
6 was, you know, what - - - you know, the PRS as well.

7 MR. KINDLON: Yes.

8 JUDGE PIGOTT: Does that play into your
9 scenarios at all?

10 MR. KINDLON: It does to the extent that -
11 - - I mean, I - - - the court, a number of times,
12 mentioned two years, two years, two years, maybe half
13 a dozen, I - - - you know, a rough count. The trial
14 court judge said this is the determinate period of
15 incarceration you're going to get, but never
16 throughout the plea colloquy did they talk about
17 post-release supervision on that day when he pled.
18 And to, kind of, dovetail some of these discussions,
19 I think the out could be - - -

20 JUDGE RIVERA: I thought he only mentioned
21 it at the very beginning?

22 MR. KINDLON: I'm sorry, Your Honor?

23 JUDGE RIVERA: I thought he only mentioned
24 it at the very beginning?

25 MR. KINDLON: He mentioned it - - - the

1 trial court judge mentioned it at the conference
2 three days prior, but - - -

3 JUDGE RIVERA: At the very beginning,
4 though.

5 MR. KINDLON: The very beginning of the
6 plea colloquy?

7 JUDGE RIVERA: No, the conference.

8 MR. KINDLON: At the conference, yes, but
9 during - - - on that - - - on that day, when he
10 stepped forward to plead guilty, there was no mention
11 at all.

12 JUDGE RIVERA: No mention at all.

13 MR. KINDLON: No.

14 CHIEF JUDGE LIPPMAN: Counsel - - -

15 MR. KINDLON: Yes, sir.

16 CHIEF JUDGE LIPPMAN: - - - from your
17 reading of our cases, do any of them, when there is
18 no mention of PRS at the plea, do any of them require
19 preservation when there's nothing that goes on at the
20 plea that - - - that involves PRS? In other words,
21 I'm trying - - - what's the one constant that you see
22 in all our many decisions in this area?

23 MR. KINDLON: Your Honor, I - - - the
24 constant began, I think, with - - - with [Kae'tu] or
25 Catu, I - - -

1 CHIEF JUDGE LIPPMAN: Yeah, right, well - -
2 -

3 MR. KINDLON: - - - don't know how to
4 pronounce it.

5 CHIEF JUDGE LIPPMAN: Catu, I think, go
6 ahead.

7 MR. KINDLON: The voluntariness of it all,
8 because PRS is - - - is a direct consequence of it
9 all. The failure to mention such a direct
10 consequence is - - - you know, impacts the
11 voluntariness, the knowledge of the defendant when he
12 or she pleads guilty.

13 CHIEF JUDGE LIPPMAN: And your position is
14 if you don't have it mentioned at the plea, it can't
15 be voluntary, is that - - -

16 MR. KINDLON: Correct, Your Honor. I - - -

17 JUDGE READ: Even if it's mentioned in
18 Judge Abdus-Salaa - - - Salaam's hypothetical, let's
19 say, at a conversation twenty minutes before the plea
20 on the record?

21 MR. KINDLON: Yes, Your Honor.

22 JUDGE RIVERA: Well, the reality is those
23 cases where we focused on the plea, we don't know if
24 it was mentioned in an agreement beforehand. Yet
25 we've taken the same position.

1 MR. KINDLON: Yes, Your Honor, that's very
2 true. I - - - like - - -

3 JUDGE RIVERA: The plea is - - -

4 MR. KINDLON: - - - we've discussed.

5 JUDGE RIVERA: - - - the moment that you've
6 got to have the knowledge.

7 MR. KINDLON: Yes, Your Honor. And then at
8 sentencing, which is where we get to the backend is -
9 - -

10 JUDGE ABDUS-SALAAM: The question is - - -

11 MR. KINDLON: Yes?

12 JUDGE ABDUS-SALAAM: - - - when do you
13 acquire the knowledge, right? Because if you acquire
14 the knowledge five minutes before the plea, and you
15 want to talk it over with your lawyer - - -

16 MR. KINDLON: Sure.

17 JUDGE ABDUS-SALAAM: - - - and you say,
18 yeah, I want the deal, and the - - - and the judge
19 mentions five minutes or twenty minutes or whatever
20 it is, the day of the plea, then you come back and
21 say, well, af - - - after the sentencing, I didn't
22 understand that - - - my plea - - - my plea was
23 involuntary because I didn't know about the PRS?

24 MR. KINDLON: Well, Your Honor, I think
25 that gets into a different discussion of, you know,

1 what kind of advice you got from your attorney and,
2 you know, did your attorney advise you what post-
3 release meant.

4 But if you're told that post-release is
5 included when you plead guilty, you know, I think the
6 court and the People, as stewards of the record, are
7 the ones saying, look, we mentioned it. If your
8 attorney didn't talk to you about it, you know,
9 that's an entirely different claim that you have to
10 bring forward about ineffective assistance - - -

11 CHIEF JUDGE LIPPMAN: Okay, counsel.

12 MR. KINDLON: - - - but I don't think we
13 have that here.

14 CHIEF JUDGE LIPPMAN: Thanks, counsel.
15 Appreciate it.

16 MR. KINDLON: Oh.

17 CHIEF JUDGE LIPPMAN: You'll have your
18 rebuttal.

19 MR. KINDLON: I'm done already. Thank you
20 very much.

21 CHIEF JUDGE LIPPMAN: Ten minutes goes fast
22 or slow depending on how you view it, you know?

23 MR. DWYER: I think it depends on where you
24 are with respect to the courtroom, Judge.

25 CHIEF JUDGE LIPPMAN: That may be.

1 MR. DWYER: Good af - - -

2 JUDGE RIVERA: It always - - -

3 MR. DWYER: Good afternoon, Your Honors,
4 Gerald Dwyer for the respondent. I think the on - -
5 - the only - - -

6 CHIEF JUDGE LIPPMAN: Coun - - - counsel,
7 let me - - - let me ask you a question.

8 MR. DWYER: Yeah, go ahead, Judge.

9 CHIEF JUDGE LIPPMAN: Why would it not
10 serve us well, based on the general principals
11 starting with Catu and all these different cases, why
12 wouldn't it be better to have a rule that says, if
13 it's not at the plea, it's not on the record, and
14 it's not voluntary?

15 MR. DWYER: Yeah. I - - - we've never done
16 that, Judge. I - - -

17 CHIEF JUDGE LIPPMAN: You know, I mean,
18 putting aside - - -

19 MR. DWYER: I'm not saying - - -

20 CHIEF JUDGE LIPPMAN: - - - our slicing the
21 salami so thin.

22 MR. DWYER: Yeah, it'd be - - -

23 CHIEF JUDGE LIPPMAN: What - - - what makes
24 sense in terms of this?

25 MR. DWYER: Because the way it is now, and

1 - - - and what I submit, I think this - - - this
2 court has struggled with it a lot, because you get a
3 lot of these cases.

4 CHIEF JUDGE LIPPMAN: Struggle is a weak
5 word. Go ahead.

6 MR. DWYER: Yes, right, Your Honor. I did
7 - - - poor choice of words, but - - -

8 CHIEF JUDGE LIPPMAN: Yeah.

9 MR. DWYER: - - - but we've had a lot of
10 these cases, because those of us that have done a lot
11 of criminal law know that, although it's a direct
12 consequence to defendants, it - - - it is an
13 insignificant - - - it - - - vis-a-vis the amount of
14 prison time, and that trickles through all of the
15 proceedings.

16 When we talk to - - - to defense lawyers,
17 we don't argue about - - - very much about PRS; we
18 argue about how much time they're going to get. And
19 that essentially - - - and - - - and obviously, it is
20 a direct consequence. You know, that's clear and it
21 should be. But I think that's why we - - -

22 CHIEF JUDGE LIPPMAN: The horse is out of
23 the - - - the horse is out of the barn on that issue;
24 go ahead.

25 MR. DWYER: Yeah, but that's why the trial

1 courts sometimes forget, and we end up - - - you end
2 up having to deal with this. Obviously, I sub - - -
3 submit that what Judge Abdus-Salaam was saying is
4 that it's more important that they have the
5 knowledge, then the particular time when. And I
6 think we have to look at every individual - - -

7 JUDGE RIVERA: But I think, counsel, that -
8 - - if I can get back to my - - - my point before - -
9 -

10 MR. DWYER: Yeah.

11 JUDGE RIVERA: - - - or my concern before
12 is, although perhaps here there's a record and
13 there's something - - -

14 MR. DWYER: Right.

15 JUDGE RIVERA: - - - for - - - for you to
16 argue on - - -

17 MR. DWYER: Right.

18 JUDGE RIVERA: - - - but it's not
19 necessarily the case in the other cases we've already
20 decided, and in any other case. It may not be - - -

21 MR. DWYER: Yeah.

22 JUDGE RIVERA: - - - so obvious what the
23 conversation was.

24 MR. DWYER: Yes. But I - - - I - - - and
25 to get to - - - really in support of what you're

1 saying, Judge Rivera, is that, let's go all the way
2 back to the arraignment.

3 JUDGE RIVERA: I'm just saying, if that's
4 the case, why not - - - I think what the Chief Judge
5 may be eluding to or suggesting or perhaps very
6 explicit, why not just have that bright-line rule?
7 We're looking at what happens at the plea.

8 MR. DWYER: Well, first of all, Your Honor,
9 it would - - - it would overrule a long line of
10 jurisprudence in this court where you've said there's
11 no particular litany that we require. If you Google
12 "no" - - - "no particular litany" with respect to
13 pleas, you'll get 10,000 cases.

14 JUDGE RIVERA: No particular litany doesn't
15 mean no mention of PRS. I mean, because that's right
16 against Catu, is it not?

17 MR. DWYER: But - - - but it really was
18 here, Your Honor, and I mean, the distinction here is
19 what happened is the trial court here is - - - is in
20 - - - is liable to be punished for giving a defendant
21 some - - - three days to talk to his lawyer - - -

22 CHIEF JUDGE LIPPMAN: Yeah, but how many
23 times do we have to say it? Do it at the plea, so we
24 know - - -

25 MR. DWYER: I - - -

1 CHIEF JUDGE LIPPMAN: - - - that it's
2 voluntary.

3 MR. DWYER: Okay. It - - - this is - - -

4 CHIEF JUDGE LIPPMAN: I mean, this is - - -

5 MR. DWYER: But - - -

6 CHIEF JUDGE LIPPMAN: Trial judges - - -

7 MR. DWYER: Yeah.

8 CHIEF JUDGE LIPPMAN: - - - should be on
9 notice by now.

10 MR. DWYER: Right.

11 CHIEF JUDGE LIPPMAN: No matter the slight
12 differences - - -

13 MR. DWYER: Right.

14 CHIEF JUDGE LIPPMAN: - - - we have as to
15 how we view it, they got to be on their list.

16 MR. DWYER: I'm sure - - -

17 CHIEF JUDGE LIPPMAN: Do it at the plea.
18 How difficult is this?

19 MR. DWYER: Judge Giardino would - - -

20 JUDGE RIVERA: Plus prosecutors are always
21 free to remind them.

22 MR. DWYER: That's true, Your Honor,
23 although sometimes, if the prosecutor takes things
24 over, it could be a problem.

25 JUDGE RIVERA: I didn't say take over;

1 merely remind them.

2 MR. DWYER: If they - - - yeah. But we do
3 run into that sometimes. But - - - but it goes back
4 to the mindsets of the individuals, Judge, and so
5 here we are. I would submit, Your Honors, that this
6 is not a good case for a bright-line rule because of
7 the second most critical fact.

8 The first most critical fact is that he's
9 told three days before, here's - - - here's the se -
10 - - plea, and here's the sentence proposed, and he's
11 asked before he goes out the door, do you have any
12 questions about the sentence? Okay, that's at - - -
13 right in the record of the April 18th decision. Do
14 you have any questions about the sentence? He asked,
15 you know, a lot of questions. Do you have any
16 questions about this? Do you have any questions
17 about that? But one of things he said is, do you
18 have any questions about the sentence?

19 And then when he comes back in on the 21st,
20 the court says, this is on for you to make up your
21 mind; what's your decision? And he says, I want to
22 take the plea. So it's essentially - - - I mean, we
23 would submit that's essentially - - - the offer was
24 made and this was it. And then the court goes on
25 into its colloquy - - -

1 CHIEF JUDGE LIPPMAN: But isn't the - - -
2 isn't the court remiss in its obligation at that
3 point - - -

4 MR. DWYER: In failing to reiterate?

5 CHIEF JUDGE LIPPMAN: Yeah.

6 MR. DWYER: That's the better practice,
7 Your Honor, but first of all, so he - - - he - - -

8 CHIEF JUDGE LIPPMAN: But how are we ever
9 going to get the better practice if we're loose in
10 terms of how this is done?

11 MR. DWYER: Because of what the standard
12 you've set, which is that he has to have knowledge,
13 and if he doesn't have knowledge, then he has to have
14 sufficient opportunity to object. And that's the
15 second critical fact here.

16 CHIEF JUDGE LIPPMAN: So you're - - -
17 you're - - - let me ask you the same question that I
18 asked your - - - your adversary. So - - - so what is
19 the rule when you put all our cases - - -

20 CHIEF JUDGE LIPPMAN: - - - together? When
21 - - - when do you have to have knowledge? If it's
22 not - - - if you can get knowledge that's not given
23 at the plea - - -

24 MR. DWYER: Right.

25 CHIEF JUDGE LIPPMAN: - - - when do you

1 have to get it?

2 MR. DWYER: I - - - I - - -

3 CHIEF JUDGE LIPPMAN: Or when can you get
4 it?

5 MR. DWYER: Yeah. I would submit that he
6 has to have - - - the courts have always said he has
7 to have sufficient knowledge. Does that mean timely
8 knowledge? I think there's an argument that there's
9 a timely element to it. So to go back to what I
10 started with Judge Rivera, when you get - - - arraign
11 somebody, the trial courts usually say you're charged
12 with a B-violent; you can get this as a sentence.

13 CHIEF JUDGE LIPPMAN: So is it - - - is it
14 three minutes, three days or - - - or thirty days?

15 MR. DWYER: I don't think that we can - - -

16 CHIEF JUDGE LIPPMAN: Each case is
17 different?

18 MR. DWYER: I know - - - yeah, exactly,
19 Judge.

20 CHIEF JUDGE LIPPMAN: Can we look into the
21 mind of the defendant - - -

22 MR. DWYER: Well, okay.

23 CHIEF JUDGE LIPPMAN: - - - and know
24 whether it's voluntary?

25 MR. DWYER: All right.

1 JUDGE RIVERA: Doesn't that just encourage
2 more litigation over this singular issue, rather than
3 just sticking with the bright-line rule that it's got
4 to be at the plea?

5 MR. DWYER: Well, I think it has to be
6 said, Judge, is a - - - is a pretty bright-line rule.
7 It can't be implied. It can't be - - - the court has
8 to say or the People have to say at some point in the
9 proceedings, either any plea will require post-
10 release supervision of X-amount, but the person has
11 an attorney there. These are - - - I mean, I think
12 that if they are so informed, irrespective of when,
13 they have the knowledge. And they should be - - -
14 impose that.

15 But this case is - - - is - - - is not a
16 good case to reverse for another critical reason and
17 that is, he had more than ample opportunity to
18 object. When he doesn't show up, the court adjourns
19 it for two weeks. Typical. Go see if you can find
20 him. They come back in two weeks. He's still not
21 there. The attorney says, I don't know where he is.
22 Typical scenario.

23 The court then imposes a sentence - - -
24 enhances the prison term and then says three years
25 PRS. And says, we'll make it formal - - - I'm not

1 sure what that means - - - we'll make it formal when
2 he's brought back in front of me. Twenty days later,
3 on August 17th, he is, in fact, picked up by the U.S.
4 Marshals and brought back.

5 So his attorney when he was - - - attorney
6 was present three weeks before - - - has the
7 sentence. The court says, have you had a chance to
8 talk to your client? Yes, I have. The court - - -
9 the first thing the court says at this confirmation
10 hearing is - - - reiterates the sentence. Okay, you
11 didn't show up two weeks ago. Because of that, I
12 gave you five years, and three years post-release, et
13 cetera, et cetera.

14 He then asks his attorney, "Is there any
15 reason - - - any legal reason, Mr. Calabrese" - - -
16 which is a member of Mr. Kindlon's firm - - - "that
17 you can think of as to why I should not confirm my
18 enhanced sentence based upon his failure to appear
19 for sentence?" So in this case, he invited an
20 objection.

21 He - - - the lawyer had known it three
22 weeks before. He reiterates it with the defendant in
23 the courtroom. The first thing when they walk in, he
24 asks the attor - - - the defendant, what do you have
25 to say for yourself; do you have anything you want to

1 say to me? He asks - - - and then he asks this
2 question of the attorney. So they - - - they had a
3 lot more opportunity than they did in Murray.

4 CHIEF JUDGE LIPPMAN: Knowing - - - knowing
5 - - - knowing our precedents - - -

6 MR. DWYER: Yeah.

7 CHIEF JUDGE LIPPMAN: - - - when you hear
8 the judge at the plea stage and they don't mention
9 PRS, can't you put your hand up and say, you know,
10 Judge - - -

11 MR. DWYER: Yeah.

12 CHIEF JUDGE LIPPMAN: - - - we - - - we
13 know the cases - - -

14 MR. DWYER: Right.

15 CHIEF JUDGE LIPPMAN: - - - and the
16 precedents - - -

17 MR. DWYER: Yeah.

18 CHIEF JUDGE LIPPMAN: - - - could you
19 please indicate that this includes PRS?

20 MR. DWYER: Well, you know, I - - -

21 CHIEF JUDGE LIPPMAN: Again, your - - -
22 your view would be that's the better practice?

23 MR. DWYER: I sent out the Padilla (ph.)
24 memo, you know, I sent - - - you know, I mean, you -
25 - - I actually went and talked to the judges, you

1 know. But you can't - - -

2 CHIEF JUDGE LIPPMAN: Well - - - well,
3 prosecutors, defense lawyers, and judges - - -

4 MR. DWYER: Well, you know, I mean - - -

5 CHIEF JUDGE LIPPMAN: - - - hear about the
6 same - - -

7 MR. DWYER: - - - it's in everybody's best
8 interests that defense lawyers not be accused of
9 incompetence, courts are not going to be reversed,
10 and prosecutors gets the pleas that they want, so - -
11 -

12 CHIEF JUDGE LIPPMAN: We agree.

13 JUDGE ABDUS-SALAAM: And it's too bad the
14 judge here was more concerned about confirming the
15 sentence than saying PRS at the plea. I mean - - -

16 MR. DWYER: Well, yeah, but - - -

17 JUDGE ABDUS-SALAAM: - - - he's going to be
18 careful now, but it's - - -

19 MR. DWYER: - - - you know, again, Judge,
20 you - - -

21 JUDGE RIVERA: You're going to have to walk
22 around with your memo. Write on the cover of the - -
23 -

24 MR. DWYER: Well, you know, Your Honors,
25 you're right, but I mean, the courts have those

1 questions that they're supposed to ask, and they take
2 some umbrage at prosecutors pretending that they have
3 a better knowledge sometimes. But if it's done
4 artfully, you know - - - gee, Your Honor, I'm sorry;
5 did I miss something? You didn't seem to - - -

6 CHIEF JUDGE LIPPMAN: To mention PRS, yeah.

7 MR. DWYER: - - - mention PRS. I agree,
8 Judge, it's the better practice, but in this case,
9 Judge, I mean, all of your cases have said, the
10 requirements are sufficient knowledge and - - - and
11 if you don't have that, a clear opportunity to
12 object, and in this case, I think arguably, he had
13 both, so that's why I think it has to be affirmed,
14 Your Honor. I didn't help you with the bright-line
15 rule, but I think - - -

16 JUDGE READ: Well, yeah - - - I guess
17 you're saying that should be the rule, as it now - -
18 -

19 MR. DWYER: I'm thinking it is already,
20 Your Honor. I think that is the rule.

21 JUDGE READ: Yeah.

22 MR. DWYER: But the question that - - -

23 JUDGE RIVERA: Synthesizing the cases,
24 that's what it boils down to.

25 MR. DWYER: Yeah, but I think, again, see I

1 - - - even I would be a little troubled because if -
2 - - at arraignment, the courts go through another
3 litany of telling the person what their exposures
4 are. And I can't tell you right now that they say
5 PRS then. I wouldn't be - - - some of you, I know,
6 may know that. But I wouldn't be surprised if they
7 did. Is that adequate? I don't think it probably
8 is, because it's not a plea - - - it has nothing to
9 do with plea, you know.

10 CHIEF JUDGE LIPPMAN: Okay, counselor,
11 thanks.

12 MR. DWYER: Thank you, Your Honors.

13 CHIEF JUDGE LIPPMAN: Thank you.

14 Counselor, rebuttal?

15 MR. KINDLON: Thank you very much.

16 I should draw from Your Honor's dissent in
17 People v. Turner, because you summarized the Louree
18 decision. "Louree recognized that the defendant has
19 the opportunity to withdraw a plea at any time before
20 imposition of the sentence". That is, if there's an
21 opportunity for the defense or the defendant to
22 object - - -

23 JUDGE PIGOTT: Here you got three pretty
24 bright lawyers. You got the judge, the DA and the
25 defense lawyer all sitting there and - - - and this

1 judge, you know, on the cold record, sounds to be
2 very accommodating. He's saying, you know, this is -
3 - - this is what I, you know, can get, you know - - -
4 and everybody seems to think it's fine. He wants
5 three - - - the defendant wants three days. They
6 come back and - - - I can understand why everybody
7 thinks, done deal. You know, there's nothing - - -
8 nothing here.

9 Now, your guy absconds. If he's gone for
10 three years, and comes back and makes this pitch, and
11 all of sudden you have problems with witnesses or
12 something like that, on the technicality that it was
13 mentioned pre - - - pre-sentence or pre-plea, but he
14 knew about it, and took the plea. And then as - - -
15 as Mr. Dwyer points out, he comes back and is given
16 another opportunity to object and doesn't. We never
17 - - - let's say, we're going to vacate the plea;
18 we're going to go to trial on this, even though these
19 witnesses are gone.

20 MR. KINDLON: Yes, Your Honor. And I think
21 that to build trapdoors into cases like this, I don't
22 think anybody wants and that's why the preservation
23 issue is such a big deal, and you know, is the
24 defense attorney or the defendant sandbagging to make
25 sure that they get this thing at the backend, but I

1 think plea bargains by their very nature - - - I
2 mean, everybody gets something that they want.
3 Everybody gets something that they don't want, but
4 the - - - the practical - - - you know, the rarity of
5 this in real life, I - - - I think that we don't
6 really have to worry about making a rule that
7 suddenly encourages litigation to go through the
8 roof. I think the - - -

9 JUDGE ABDUS-SALAAM: Well, what's rare
10 about this? It sounds like it happens unfortunately
11 too often, because Mr. Dwyer says he's sent out a
12 Padilla memo; he's talked to the judges; he's talked
13 to his - - - his staff. What's so rare about it? We
14 - - - we have so many of these cases.

15 MR. KINDLON: Well, respectfully, Your
16 Honor, of the thousands of plea bargains that go
17 through our system, you know, not just in Albany
18 County, but throughout New York State, only a few of
19 these have ever reached the Court of Appeals, and so
20 that's why this is an opportunity to make that
21 bright-line rule.

22 JUDGE RIVERA: Your light went off.

23 MR. KINDLON: Yeah.

24 JUDGE RIVERA: But let's just touch his - -
25 - his last point, which is the sentencing, the

1 confirm - - - confirm sentencing.

2 MR. KINDLON: Yes, Your Honor.

3 JUDGE RIVERA: When - - - when the judge
4 asked, is there any reason I shouldn't impose this
5 enhanced sentencing, why - - - why isn't it
6 considering that at the top of that confirmation of
7 sentencing in the court, mentions the PRS, and some
8 time goes on about why you didn't show up, all this.
9 Time has passed. And he's saying, you know, there's
10 - - - you've had a lot of time before that day, but
11 at that moment, you had a lot of time. What - - -
12 what - - - why doesn't that carry the day? It sounds
13 rather compelling.

14 MR. KINDLON: Your Honor, the - - - the
15 confirmation hearing of the sentence, the sentence -
16 - - a sentence had already been imposed weeks before.
17 So, you know, again, the defendant - - - if he has an
18 opportunity to object, it's at that moment at
19 sentencing. That had already passed. You know, the
20 reality is Mr. Crowder wasn't there to object in
21 trying to withdraw his plea, you know, which again,
22 is a factual - - - a unique fact in this case.

23 JUDGE RIVERA: We should not look what
24 happens during the confirmation - - -

25 MR. KINDLON: No, Your Honor - - -

1 JUDGE RIVERA: - - - is that - - - at all.

2 MR. KINDLON: - - - not at all. It was

3 valid - - -

4 JUDGE PIGOTT: Wasn't he back at that time?

5 I mean - - -

6 MR. KINDLON: What's that?

7 JUDGE PIGOTT: - - - when he was given the

8 five, he was there, wasn't he?

9 MR. KINDLON: When he was - - - no.

10 JUDGE PIGOTT: The second time. He never -

11 - - he's never appeared ever since?

12 MR. KINDLON: No, I'm sorry, Your Honor.

13 When he was - - - at the confirmation hearing, he was

14 there.

15 JUDGE PIGOTT: Right. Now, why at that

16 point didn't you say, by the way, Judge, you got to

17 vacate this plea, because all of the sudden you're

18 talking PRS and - - - and I was there at the - - - at

19 the plea and you didn't mention PRS, and therefore

20 this plea is unstable.

21 MR. KINDLON: Because, Your Honor, based

22 upon past precedent, we didn't have to. And - - -

23 JUDGE PIGOTT: You - - - you thought to

24 yourself, I don't have to preserve this; I can appeal

25 it directly. Therefore, I'm not going to advise the

1 court that - - - that PRS wasn't mentioned at the
2 plea?

3 MR. KINDLON: Going through our brain at
4 that moment, Your Honor, I think everybody was just
5 concerned that Adam was alive, and, you know, it's
6 not a question on it today, but there was the
7 calculation that was big, but, yes, Your Honor, there
8 was, you know, based upon past precedent, the idea
9 that this doesn't meet - - - need to be preserved
10 because it's a voluntariness issue.

11 JUDGE PIGOTT: So you knew that you had a -
12 - - you had an invalid plea, and you allowed the
13 court to sentence somebody, knowing that you could
14 then appeal all of that?

15 MR. KINDLON: No.

16 JUDGE PIGOTT: Okay.

17 MR. KINDLON: But I knew that there was a
18 question.

19 CHIEF JUDGE LIPPMAN: Okay. Thank you
20 both. Appreciate it.

21 (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. Adam Crowder, No. 11 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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