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COURT OF APPEALS  
STATE OF NEW YORK

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PEOPLE,

Respondent,

-against-

(Papers sealed)  
No. 193

JAMES BROWN,

Appellant.

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PEOPLE,

Respondent,

-against-

No. 194

TERRENCE YOUNG,

Appellant.

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PEOPLE,

Appellant,

-against-

No. 195

EARL CANADY,

Respondent.

-----

20 Eagle Street  
Albany, New York  
November 14, 2016

Before:

CHIEF JUDGE JANET DIFIORE  
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  
ASSOCIATE JUDGE MICHAEL J. GARCIA

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Sara Winkeljohn  
Official Court Transcriber

1 CHIEF JUDGE DIFIORE: Okay. The first matter in  
2 this trilogy of cases is appeal number 193, the People v.  
3 James Brown.

4 Counsel.

5 MS. MUSCATELLO: Good afternoon, Your Honor.

6 CHIEF JUDGE DIFIORE: Good afternoon.

7 MS. MUSCATELLO: May I please reserve two minutes  
8 for rebuttal?

9 CHIEF JUDGE DIFIORE: Two minutes?

10 MS. MUSCATELLO: Two minutes, please.

11 CHIEF JUDGE DIFIORE: You may.

12 MS. MUSCATELLO: Hello. May it please the court,  
13 my name is Danielle Muscatello, and I represent the  
14 appellant in this matter, James Brown. I've raised several  
15 issues in my brief, but I want to start with the speedy  
16 trial issue. First, the trial court, I think, clearly  
17 erred in this case by refusing to conduct a hearing. There  
18 was clearly a factual dispute raised by the defendant's  
19 papers and the prosecutor's moving papers. There was a  
20 factual dispute as to includab - - - includability and  
21 times that were excludable. And I think this court  
22 recently held in People v. Allard, unanimously, that where  
23 there is a factual dispute, unless the prosecutor can come  
24 forward with conclusive documentary proof, that the 30.30  
25 claim has no merit.

1 JUDGE STEIN: But what - - - what created this  
2 factual dispute? What were the facts in dispute, or - - -  
3 or are you just saying that the fact that - - - that there  
4 was a dispute over whether it was illusory or not requires  
5 a hearing?

6 MS. MUSCATELLO: I think, first, there - - - the  
7 claim is two parts. First, there was a factual dispute as  
8 to excludable time. There - - -

9 JUDGE STEIN: So anytime that there is a - - -  
10 that there is a certificate of readiness or a statement of  
11 readiness and the defendant raises a question of - - - of  
12 whether that was illusory or not, anytime there - - - there  
13 has to be a hearing?

14 MS. MUSCATELLO: There has to be a structured  
15 inquiry from the court. This court has always held that  
16 the burden of establishing reasons that the People become  
17 unready after announcing readiness, that the burden is on  
18 them to articulate on the record, to put objective facts on  
19 the record, to create a record for appellate review as to  
20 why they're subsequently unready. Now whether it's a  
21 hearing, whether it's calling the prosecutor in to answer  
22 questions that's assigned to the case, I don't know that  
23 the court has to necessarily rule on that. What I'm saying  
24 is that when the People file a - - - moving to the  
25 certificate of readiness issue, when the People file an

1 off-calendar certificate of readiness, it's a powerful tool  
2 because they can stop the clock.

3 JUDGE PIGOTT: I'm sorry - - -

4 MS. MUSCATELLO: When they - - - when they - - -

5 JUDGE PIGOTT: That microphone is too high for  
6 you. It's not your fault but I - - -

7 MS. MUSCATELLO: Are you having trouble hearing  
8 me?

9 JUDGE PIGOTT: I am a little bit.

10 MS. MUSCATELLO: All right. Well, I'm a little  
11 nervous, too, so - - - is that better?

12 JUDGE PIGOTT: Much better.

13 MS. MUSCATELLO: Okay.

14 CHIEF JUDGE DIFIORE: Don't be nervous. Just  
15 keep your voice up.

16 MS. MUSCATELLO: Sure. No problem. What I'm  
17 saying is that when the People file an off-calendar  
18 certificate of readiness, that's a powerful tool because  
19 they can stop the clock.

20 JUDGE PIGOTT: Where did that come from?

21 MS. MUSCATELLO: The certificate of readiness?

22 JUDGE PIGOTT: The off-calendar - - - the whole  
23 idea, the whole concept? As near as I can tell, it - - -  
24 it grew out of a federal case?

25 MS. MUSCATELLO: I'm not aware of that federal

1 case, Judge. But I read it as having come out of one case,  
2 People v. Stirrup - - -

3 JUDGE PIGOTT: Right.

4 MS. MUSCATELLO: - - - where it was - - - where  
5 it was upheld. In that case, though, the People were then  
6 ready on the next date, and the case proceeded. There was  
7 also - - -

8 JUDGE STEIN: It seems to me that there's a  
9 different situation and being in court and saying I'm not  
10 ready and giving a reason. And if we're going to allow and  
11 - - - and encourage, or whatever, these - - - these off-  
12 calendar certificates of readiness, then where is the  
13 opportunity to provide that explanation at that time?

14 MS. MUSCATELLO: Well, the opportu - - - well,  
15 there's - - - there's a couple ways. I mean I think that  
16 once - - - if the People come into a court after filing an  
17 off-calendar statement of readiness and they say we're not  
18 ready today, the court should then say, if the People don't  
19 offer it, why aren't you ready today? What has changed?  
20 What changed between the last adjourn date and this adjourn  
21 date that you weren't ready then, you're not ready now - -  
22 -

23 JUDGE RIVERA: Well, why - - - why - - -

24 MS. MUSCATELLO: - - - you were ready in between.

25 JUDGE RIVERA: Why do you have to do that if it

1 may never matter? Why would you have to do that if it  
2 never matters? I - - - I see the advantage of it, of  
3 course, retroactively. If you get to the point where that  
4 particular time period matters that it would be the better  
5 course for the People to have - - -

6 MS. MUSCATELLO: But - - -

7 JUDGE RIVERA: - - - set up some type of record  
8 that they can easily go back to.

9 MS. MUSCATELLO: But as litigants - - -

10 JUDGE RIVERA: If it doesn't matter, why are we  
11 going to have judicial resources spent on what potentially  
12 may be the defense counsel arguing about that issue?  
13 Again, it may never matter.

14 MS. MUSCATELLO: It matters because the record  
15 matters.

16 JUDGE GARCIA: But I think what - - - just to  
17 follow up on Judge Rivera's question is isn't this all part  
18 of a 30.30? So I think we get a little bit distracted by  
19 when you have to do this and when does the court have to  
20 ask the prosecutor who comes in and says now I'm not ready.  
21 Isn't this really always in the context of a 30.30 motion?  
22 So either a yes, something may have happened then or when,  
23 as I think Judge Rivera is saying, it becomes an issue and  
24 they file this 30.30 motion and then you get into the 30.30  
25 process, do you get enough to have a hearing, are there

1 things on the record that totally rebut that allegation  
2 already that they've gone over that there was illusory in  
3 this case?

4 MS. MUSCATELLO: Right.

5 JUDGE GARCIA: So I tend to look at that idea of  
6 when does the judge have to inquire along the same lines.  
7 It seems irrelevant to me, that this is always in the  
8 context of a 30.30. So if they haven't before, they'll do  
9 it now. And if they have before, maybe that's enough on  
10 the record to get you not a hearing or not enough so you  
11 get a hearing. But I think this whole idea - - - because  
12 what I'm afraid that becomes is then the but the judge  
13 didn't do it then so that's error.

14 And that's really not what we're talking about  
15 here. We're talking about the 30.30 motion. So why isn't  
16 it just when the defense raises a 30.30 motion, some of  
17 that may be on the record, some of it may not be on the  
18 record, but now we're going to examine what the state of  
19 the record is and do we need a hearing, do we need further  
20 representations from the People.

21 MS. MUSCATELLO: But then taking - - - taking  
22 that scenario to its conclusion, if no record is made at  
23 the time - - -

24 JUDGE GARCIA: Right.

25 MS. MUSCATELLO: - - - the court makes no

1 inquiry, the People offer no information on the record, a  
2 30.30 motion is made down the line.

3 JUDGE GARCIA: Right.

4 MS. MUSCATELLO: The question then - - - and  
5 that's why this disc - - - this case is important for this  
6 court is then and then - - - then what do we do?

7 JUDGE FAHEY: What you're saying is there's no -  
8 - -

9 MS. MUSCATELLO: We just - - -

10 JUDGE FAHEY: - - - record when you make the  
11 motion because there's a presumption of validity to the  
12 off-calendar statement of readiness. And then when the  
13 court says well, presume they're telling the truth, there's  
14 no record then, and then six months later you make a - - -  
15 a year later you make a 30.30 motion and there's no record  
16 showing at the time what you could have answered at the  
17 time like we're not ready because the police officer got  
18 sick or got in a car accident the night before or we lost a  
19 witness, whatever the reason is, there's no record made  
20 because it's presumed valid at that point.

21 MS. MUSCATELLO: Correct. While it may not see  
22 incredibly clear - - -

23 JUDGE FAHEY: So - - - so let me just be clear  
24 here. So what you're really going after is the presumption  
25 of the validity of the declaration of the People and that

1 if challenged, it has to be explained.

2 MS. MUSCATELLO: Abs - - - absolutely.

3 JUDGE GARCIA: But isn't that on the People,  
4 then? I mean if they don't make that record at the time,  
5 and as Judge Fahey says it's a year-and-a-half later,  
6 they're going to have to explain if you made a showing and  
7 dates - - - the days are off, you know, you've gone over,  
8 so they have to come forward and say on that date why were  
9 we not ready after we were ready. So it's not hurting the  
10 defendant that they didn't make the inquiry at that time.  
11 I mean it may just be the People now can't reconstruct  
12 their reason.

13 MS. MUSCATELLO: But if the - - - but if the - -  
14 - if they're not required to put a reason on the record,  
15 then courts are left to just these presumptions. They're  
16 left to what their state of mind - - -

17 JUDGE FAHEY: So just so we're clear then. So  
18 you're asking that they have to put a reason on the record  
19 when - - - when they declare readiness?

20 MS. MUSCATELLO: I think the appropriate rule and  
21 a way to curb abuses that happen regularly in the trial  
22 courts with speedy trial is to require the People to make a  
23 record when challenged if they file an off-calendar  
24 certificate of readiness and then they are not ready on the  
25 next date, the burden is on them to articulate what

1 changed.

2 JUDGE FAHEY: Okay.

3 MS. MUSCATELLO: To make that record.

4 JUDGE STEIN: Well, when you say when challenged,  
5 you mean when challenged that - - - that day in court? Or  
6 are you saying when challenged on the 30.30 motion?

7 MS. MUSCATELLO: I - - - I understand. I think  
8 that - - - I think the court should always - - - I practice  
9 in the trial court level. I think that when they - - -  
10 when the People say that they're not ready and they offer  
11 no reason, I think the court should, as a routine matter -  
12 - -

13 JUDGE ABDUS-SALAAM: Well, what about the  
14 defendant? Does the - - - does the defense counsel have  
15 any responsibility to ask the court to make the inquiry?

16 MS. MUSCATELLO: No. But I do. I think it's  
17 prudent. I think that's - - -

18 JUDGE RIVERA: And - - - and what happens when  
19 you do?

20 MS. MUSCATELLO: Sometimes they ask and sometimes  
21 they don't.

22 JUDGE PIGOTT: Well, let - - - let me ask you a  
23 basic question. I - - - I got the impression some of these  
24 off-calendar certificates of readiness are mailed; is that  
25 not true? Are they just - - -

1 MS. MUSCATELLO: That they're mailed?

2 JUDGE PIGOTT: Yeah.

3 MS. MUSCATELLO: Yes. They're often mailed.

4 JUDGE PIGOTT: Well, how do you object then?

5 MS. MUSCATELLO: Well, you can't object at the  
6 time. You can only go into court on the very next day - -

7 -

8 JUDGE PIGOTT: Yeah. Nice - - -

9 MS. MUSCATELLO: - - - and see what happens. And  
10 - - -

11 JUDGE STEIN: What about here when - - -

12 JUDGE RIVERA: You're not objecting to the  
13 certificate of readiness? You - - - you only want to  
14 object when they come in and say I know I said I was ready,  
15 either in court or through this certificate of readiness -  
16 - -

17 MS. MUSCATELLO: Correct. They can - - -

18 JUDGE RIVERA: - - - off the record, but I'm not  
19 ready right now.

20 MS. MUSCATELLO: Correct.

21 JUDGE STEIN: What if the defendant isn't there?  
22 Like if the defendant's not there?

23 MS. MUSCATELLO: If - - - if you're in a pre-  
24 readiness context, it doesn't matter.

25 JUDGE STEIN: No, no. I'm talking about post-

1           readiness. Here there - - - there were a couple of  
2           occasions after a filing of an off-calendar, no?

3                   MS. MUSCATELLO: No. In - - - in this case, the  
4           People - - - the first statement of readiness, the very  
5           first statement of readiness came 2 - - - I think 237 days  
6           after the action commenced, and the first statement of  
7           readiness was by way of an off-calendar statement of  
8           readiness. The People had never announced ready to proceed  
9           before. So this case had never transitioned into a post-  
10          readiness context, posture.

11                   CHIEF JUDGE DIFIORE: Thank you, counsel.

12                   MS. MUSCATELLO: Thank you.

13                   CHIEF JUDGE DIFIORE: Ms. Wertheimer.

14                   MS. WERTHEIMER: Good afternoon, Your Honors;  
15          Sylvia Wertheimer for the People.

16                   CHIEF JUDGE DIFIORE: Ms. Wertheimer, did the  
17          People meet its burden to establish a sufficiently clear  
18          record as to why they were not ready on that day?

19                   MS. WERTHEIMER: The People did not have an  
20          obligation to establish a record as to why they weren't  
21          ready on that day because there was the presumption of  
22          validity, which this court properly applied. And what  
23          happened on that day is that the defense - - - defense  
24          counsel was not there. The defendant requested a new  
25          attorney. It would have been entirely superfluous for the

1 People - - - what was going to drive the adjournment, the -  
2 - - the obligation to - - - to give an explanation from an  
3 adjournment relates to whether or not that adjournment is  
4 going to be chargeable to the People going forward.

5 JUDGE ABDUS-SALAAM: Well, what about once there  
6 was new counsel, new defense counsel, and new defense  
7 counsel said they said they were ready, now they say  
8 they're not ready? Was there any obligation to explain  
9 then?

10 MS. WERTHEIMER: Well, their - - - that happened  
11 six months later after the People had ans - - - had  
12 answered ready four times. The judge was the same judge,  
13 and he knew that what had happened at the time was that he  
14 had given the defendant new counsel. Their opposition is  
15 that you - - - the judge could have made an inquiry but he  
16 was not required to because there is absolutely nothing in  
17 the record that the rule should be that before you're  
18 entitled to an inquiry the defendant has to point to  
19 something in the record other than the mere fact that there  
20 was a change in readiness stat - - -

21 JUDGE PIGOTT: Well, let's talk generally, maybe  
22 not this case or this case, if you choose. But when - - -  
23 on July 9th, you're not ready, we're not ready. And on  
24 August 8th, you were not ready. And in between there was a  
25 letter saying we're ready. And doesn't the defense have a

1 right to say you're not ready in the beginning of July,  
2 you're not ready in the beginning of August, somehow in  
3 between you got ready and now you're not ready?

4 MS. WERTHEIMER: Well, the - - - the defendant  
5 was not there at - - -

6 JUDGE PIGOTT: I don't care about that. I'm  
7 asking you in terms of a rule.

8 MS. WERTHEIMER: If the defendant were there and  
9 asked for the - - - and asked for such an explanation,  
10 certainly, you should give it. But just to say that is  
11 like saying - - -

12 JUDGE PIGOTT: If I make a motion or if your - -  
13 - if your counsel makes a motion on August 8th and says  
14 this is the second time in a row and - - - that they're - -  
15 - you know, I'm here, I'm ready to try this case, and  
16 they're not ready. But in the meantime, they file this  
17 document saying they're ready. I think they owe somebody,  
18 like you, Judge, an explanation.

19 MS. WERTHEIMER: First of all, the defense  
20 counsel in this case was not there.

21 JUDGE PIGOTT: Let's forget this case.

22 MS. WERTHEIMER: Okay. Okay. But - - -

23 JUDGE PIGOTT: In any case. I'm going to make  
24 one up. July 9th, they're read - - - the People say  
25 they're not ready. August 8th they say they're not ready.

1 In between, not this case, but in between somebody files a  
2 certificate of readiness saying we're ready. Don't they  
3 owe an explanation to somebody to say well, how - - - how  
4 did you get ready in between and lose it?

5 MS. WERTHEIMER: Well, if they're asked and if  
6 the People had been asked, they would have. But I'm - - -  
7 I would say that what - - - what - - -

8 JUDGE FAHEY: And I thought - - - so - - - so you  
9 would say then that there is no presumption of validity the  
10 court should ask in that situation. Which is what - - -

11 MS. WERTHEIMER: Well, there is a presumption of  
12 validity which is why, when the court did not ask, you  
13 should not have a speedy trial - - -

14 JUDGE FAHEY: Hold on. Let - - - let me take - -  
15 -

16 MS. WERTHEIMER: - - - dismissal and - - -

17 JUDGE FAHEY: No. Let's take a step back. I  
18 think you all practice in the criminal justice system.  
19 This is a very profound issue that transcends these cases.  
20 I think we'd all agree to that. As far as I can tell, this  
21 is the only - - - we are the only state in the country that  
22 has a ready system. Every other system and the federal  
23 government has a trial system. You don't - - - you come I  
24 and you got to go to court and you have a trial date and  
25 there's a certain which - - - within which you have to be

1 in trial. I can find no other state, except for the State  
2 of New York, that says you can go in and declare readiness  
3 and then time accrues after that. And that dates back to  
4 the mid-seventies and the Rockefeller drug laws.

5 This - - - this system has evolved to create some  
6 rather harsh consequences, I think we'd all agree. People  
7 on sitting on mis - - - thousands of people sitting on  
8 misdemeanor charges for years that the courts  
9 administratively have tried to address but really, we don't  
10 have the - - - the ability to do that. But it seems to me  
11 that if we're to look at this case, while we have no  
12 legislative rights or responsibility, what Judge Pigott is  
13 focused in on is - - - is the nature of an illusory  
14 declaration that's unchallengeable and because of the  
15 volumes the court deals with, it comes up quite often. So  
16 how do we address that problem?

17 MS. WERTHEIMER: Well, it's not unchallengeable  
18 at all if somebody raises it. What we're saying is they're  
19 - - -

20 JUDGE FAHEY: Well, unless - - - unless you're  
21 the person sitting in jail. Because you're sitting there  
22 and you could have gotten out and time could have been  
23 counted. But if it's challenged - - - I was the city  
24 court, and then, if they're not challenged, all of a  
25 sudden, what turns into a one-week adjournment is very

1 easily, for court congestion, a six-week adjournment or - -  
2 - or a two-month adjournment. And - - - and that time  
3 isn't counted. At least if it's post-readiness, that time  
4 isn't even counted against anyone except for the initial  
5 week.

6 MS. WERTHEIMER: Well, what - - -

7 JUDGE FAHEY: My point is is that it does create  
8 incredibly harsh injustices to those who are in within the  
9 system and inefficiencies within the system itself.

10 MS. WERTHEIMER: What I would say is first of  
11 all, is that, yes, there are potential problems and that  
12 the approach that - - - from Judge Graffeo's opinion in  
13 Sibblies of a rebuttable presumption of validity - - -

14 JUDGE FAHEY: Um-hum.

15 MS. WERTHEIMER: - - - that that could handle and  
16 address those issues. What I'm - - -

17 JUDGE FAHEY: You're talking about - - - excuse  
18 me. Just so I'm - - - you mean Judge Graffeo's side of the  
19 Sibblies - - -

20 MS. WERTHEIMER: Yes. That that would - - -

21 JUDGE FAHEY: - - - the Sibblies equation. Yeah.

22 MS. WERTHEIMER: - - - that that would be  
23 sufficient. And in Sibblies, in fact, it did result in  
24 saying that the - - - the - - -

25 JUDGE ABDUS-SALAAM: But also - - -

1 JUDGE RIVERA: But - - - but their point is that  
2 how - - - how are they going to be able to get past the  
3 reality that if there is no record they're going to have  
4 nothing to point to and - - - and that the opportunity to  
5 create a record is, of course, in the People's control  
6 because you're the ones who know why you're not ready.

7 MS. WERTHEIMER: Okay. And the People - - -

8 JUDGE RIVERA: They're - - - all they're going to  
9 do is speculate and - - - and point out, using the  
10 hypothetical that we've been talking about, you weren't  
11 ready on this date, you weren't ready on that date, but you  
12 were magically ready between those two dates.

13 MS. WERTHEIMER: What I - - - what I would say is  
14 what - - - starting to - - - you can't have speedy trial  
15 law develop on the - - - the notion of a presumption of  
16 invalidity. It sounds like there's a presumption that the  
17 prosecutors are just lying and file a certificate of - - -

18 JUDGE RIVERA: Well, why can't - - - no, no, no.  
19 The question is - - -

20 MS. WERTHEIMER: Well - - -

21 JUDGE RIVERA: - - - whether or not when you come  
22 back and say I'm not ready that you have to have a record  
23 so that the court can determine whether or not that's  
24 illusory.

25 MS. WERTHEIMER: And in this - - -

1 JUDGE RIVERA: Isn't the fact that we already  
2 have the statute pointing to a concern that desp - - -

3 MS. WERTHEIMER: That definitely - - -

4 JUDGE RIVERA: - - - that despite best efforts,  
5 that cases are not moving quickly enough? We've already  
6 got that.

7 MS. WERTHEIMER: Yes. We've got that. And in  
8 this case, when we said that we were not ready again, it -  
9 - - the defense was not there. Defense counsel was not  
10 there. This case would not have gone forward.

11 JUDGE STEIN: Aren't you just saying that when  
12 asked you have to justify what the - - - what the reason -  
13 - -

14 MS. WERTHEIMER: Contemporaneously.

15 JUDGE STEIN: - - - that you're not ready is?

16 MS. WERTHEIMER: Yeah.

17 JUDGE STEIN: Yes.

18 JUDGE ABDUS-SALAAM: Contemporaneously?

19 MS. WERTHEIMER: But the fact that you didn't  
20 give the contemporaneous explanation at the time should not  
21 retroactively invalidate your certificate of readiness.  
22 It's presumed the prosecutor - - -

23 JUDGE STEIN: So you're not saying that you don't  
24 have to explain.

25 MS. WERTHEIMER: No.

1 JUDGE STEIN: You're not saying you have no  
2 obligation?

3 MS. WERTHEIMER: No. Absolutely not. We're just  
4 saying - - -

5 JUDGE ABDUS-SALAAM: You just said, though, when  
6 I asked you in the next court date, counsel, when new  
7 counsel was appointed for the defendant and that counsel  
8 raised the issue of - - - of potential illusory readiness,  
9 you said they didn't have - - - that the People didn't have  
10 - - -

11 MS. WERTHEIMER: Well, he - - - he didn't - - -

12 JUDGE ABDUS-SALAAM: - - - to respond because the  
13 judge knew all about the case.

14 MS. WERTHEIMER: Well, he - - - he didn't raise -  
15 - - I'm - - - what I'm saying is then when you're looking  
16 at it later on at the time. Now that - - - it was a little  
17 bit peculiar here because the defendant, it was a new  
18 counsel, didn't really raise this illusory issue until the  
19 reply papers because he wasn't aware there had been a  
20 certificate of readiness. And when you look at the record  
21 here, everybody was in court ready to go ahead. There have  
22 been three prior answers of ready by the People. There was  
23 absolutely nothing on this record that they point to other  
24 than the fact that we weren't - - - that there was a change  
25 in readiness status to suggest that there was anything

1           illusory. You can't presume that certificates of readiness  
2           are illusory.

3                   JUDGE PIGOTT: No. But I - - - maybe - - -

4                   MS. WERTHEIMER: There are problems.

5                   JUDGE PIGOTT: Maybe you're misunderstanding the  
6           tautology here. If you're not ready in July and you're not  
7           ready in August, don't you owe an explanation on why, at  
8           some period of time in between, you were ready and then not  
9           ready?

10                  MS. WERTHEIMER: If asked, you would give an  
11           explanation. But if the defense - - -

12                  JUDGE PIGOTT: Well, why - - - why - - -

13                  MS. WERTHEIMER: - - - counsel is not there - - -

14                  JUDGE PIGOTT: Why are you filing it at all? In  
15           other words, you're saying well, we can file anything we  
16           damn well please and if nobody asks, it's okay.

17                  MS. WERTHEIMER: Well, the - - -

18                  JUDGE PIGOTT: Why don't you have a - - - why  
19           don't you, on your certificate of readiness - - - I still  
20           don't know why we have on them, but if you have an off - -  
21           - off-calendar certificate of readiness say we are ready  
22           because in July we were missing a cop - - - and - - - and  
23           now he's here and we can do it? As opposed to then showing  
24           up in August and say well, we lost him again and - - - so  
25           there's some continuity of this thing. It really doesn't

1 look good when - - - and then the judge says I'm denying it  
2 and I'm denying you a hearing as to why.

3 MS. WERTHEIMER: The - - - the judge - - - well,  
4 again, you can't presu - - - there are plenty of totally  
5 reasonable reasons, practical reasons that the People  
6 become unready.

7 JUDGE PIGOTT: Wouldn't the hearing help?

8 MS. WERTHEIMER: A hearing later on? That would  
9 mean that there would be a hearing, as somebody said, every  
10 time you just say - - -

11 JUDGE PIGOTT: What is - - -

12 MS. WERTHEIMER: - - - there was - - - there was  
13 an off-calendar - - -

14 JUDGE PIGOTT: What is your definition of a  
15 hearing? I - - - you know, we - - - we get into - - - I  
16 think a hearing is a two - - - two lawyers standing in  
17 front of the judge saying what we went on here. That's a  
18 hearing. You - - - you don't need testimony. You don't  
19 need - - -

20 MS. WERTHEIMER: Okay. The prosecutor - - - the  
21 prosecutor in the court at the time was not the court - - -  
22 prosecutor who had filed the certificate of readiness.  
23 And, Your Honor, you asked before what's the origins of  
24 certificates of readiness.

25 JUDGE PIGOTT: Yeah.

1 MS. WERTHEIMER: The origins of certificates of  
2 readiness was cases - - - case law from this court, and it  
3 recognized the fact that there's a problem in the system  
4 that's not entirely due to the People in that the People  
5 ask for a specific adjournment. The court, because their  
6 calendar was very congested, they give adjournments for  
7 much longer periods of time. And so the People have the  
8 right then not to be charged with all of that time. They  
9 can file a certificate of readiness. This court has  
10 repeatedly stated the certificates of readiness are  
11 appropriate and proper and aren't needed for the system to  
12 function properly. And with all due respect, I don't think  
13 there can be a presumption that they're invalid.

14 JUDGE RIVERA: Well, I don't think - - - I don't  
15 think she's challenging the certificate of readiness. So -  
16 - -

17 MS. WERTHEIMER: Well, they're suggesting that -  
18 - -

19 JUDGE RIVERA: So let's just dial it back a  
20 moment. So you say we're going to have hearings at all  
21 different points in - - - in this prosecution, but as I  
22 understand it, their argument is the point in time you make  
23 the 30.30 motion, the record doesn't establish that,  
24 indeed, you've got reasons for being unready that would  
25 then not lay the charge on you for those days. That they

1 can get a hearing and you're going to have to explain. I  
2 mean if the People have explained throughout, maybe the  
3 record's there. If they haven't, why isn't the defendant  
4 entitled to have you just explain to the judge why you made  
5 these choices at particular points in time - - -

6 MS. WERTHEIMER: Well, if that was - - -

7 JUDGE RIVERA: - - - so that you haven't exceeded  
8 the amount of time you have under the statute?

9 MS. WERTHEIMER: If there were true, then the  
10 remedy in this case - - -

11 JUDGE RIVERA: Yeah.

12 MS. WERTHEIMER: - - - should not be a speedy  
13 trial dismissal or charge - - - or saying that this was  
14 illusory but sending it back for a hearing.

15 JUDGE FAHEY: So you - - - you think a remittal  
16 would be the correct remedy?

17 MS. WERTHEIMER: No. I don't. I think the  
18 correct thing would be affirmance. But I think that - - -

19 JUDGE FAHEY: I didn't think I'd get you to agree  
20 to that.

21 MS. WERTHEIMER: But I think that barring - - -  
22 if you're not going to agree, I mean, I very, very firmly  
23 believe that there was absolutely nothing in this record -  
24 - - everything pointed to the fact that this certificate of  
25 readiness was - - - was genuine. It was when we said we

1 were going to be ready. Was the only one we ever made in  
2 this case. The - - - the time surrounding it were times  
3 when the defense counsel wasn't there. What is the point  
4 of a prosecutor maintaining readiness at a time when the  
5 defense counsel isn't even going to be there and the case  
6 can't possibly go to trial?

7 JUDGE RIVERA: I guess you could have said that  
8 when they made the motion.

9 MS. WERTHEIMER: Well, okay.

10 JUDGE RIVERA: Could have made the argument,  
11 right?

12 MS. WERTHEIMER: But what happened - - - what  
13 happened is - - -

14 JUDGE RIVERA: You could have avoided all the  
15 appeals.

16 MS. WERTHEIMER: Well, perhaps. But the court,  
17 which had been there and which had seen the defense counsel  
18 asking for more - - - for new - - - for new attorneys said  
19 I don't need it. So the court prevented us from even  
20 having one opportunity. We didn't refuse. We can go back  
21 and say the prosecutor wasn't there because - - -

22 JUDGE RIVERA: The silence in the record is what  
23 causes the problem, right?

24 MS. WERTHEIMER: Well, it's not in the record  
25 because the court said we didn't have to give an

1 explanation, but that shouldn't invalidate a case. And  
2 again, there - - - there are other kind of speedy trial  
3 times too. Again, Your Honors, I - - - I understand that  
4 there are problems. This is a multi - - - multiple problem  
5 here with these. It's the People, it's court congestion,  
6 it's defense counsel being unready when the People are  
7 ready, there are lots of things happening here. But - - -

8 JUDGE ABDUS-SALAAM: But your bottom line,  
9 counsel, I just want to be clear. If the defendant  
10 challenges or the court asks on an - - - an appearance  
11 after a certificate of readiness is filed, then it's your  
12 position that, if given the opportunity, the People should  
13 explain why they're not ready?

14 MS. WERTHEIMER: Absolutely. But that barring -  
15 - - but barring that there is the presumption of validity  
16 that this court acknowledged in - - - has acknowledged and  
17 said in Sibblies recently applies and that unless - - -  
18 there does have to be a little bit of a threshold burden.  
19 Unless the defendant can point to something to suggest that  
20 that presumption of validity is inaccurate, then you don't  
21 - - -

22 JUDGE STEIN: Would it be enough, as Judge Pigott  
23 has asked, if you have a - - - you have a ready - - - I'm  
24 sorry. You have a not ready - - - you have two not readies  
25 and with a ready in the middle - - -

1 MS. WERTHEIMER: No.

2 JUDGE STEIN: - - - is that enough to - - - to  
3 require - - -

4 MS. WERTHEIMER: No. That - - -

5 JUDGE STEIN: That's not enough to require you to  
6 explain?

7 MS. WERTHEIMER: No. That's not enough. That's  
8 because - - - because that assumes that there's something  
9 inherently suspicious about changing readiness status. And  
10 that's not what this court has ever said.

11 JUDGE STEIN: What if there's five - - - a series  
12 of five of those?

13 MS. WERTHEIMER: Yes. If there's a pattern, yes.  
14 Absolutely.

15 JUDGE RIVERA: Well, we - - - we've never said we  
16 assume that you're ready.

17 MS. WERTHEIMER: There's a presumption of  
18 validity - - -

19 JUDGE RIVERA: Where - - - where did the majority  
20 of the court say that? What case?

21 MS. WERTHEIMER: The - - - well, the Judge - - -  
22 I was talking about Judge Graffeo's opinion.

23 JUDGE RIVERA: Okay. But that's not a majority  
24 of the court.

25 MS. WERTHEIMER: She was - - -

1 JUDGE RIVERA: It's just a rule you would like  
2 now a majority of the court to adopt, correct?

3 MS. WERTHEIMER: She was - - - she was relying on  
4 People v. Carter.

5 JUDGE RIVERA: I understand. But it was still  
6 not a majority of the court.

7 MS. WERTHEIMER: People v. Carter - - -

8 JUDGE RIVERA: But you're - - - you're arguing  
9 that a majority of the court should adopt that as the rule?

10 MS. WERTHEIMER: People v. Carter was a - - - was  
11 a majority. Yes. We - - - I - - - we are saying that  
12 Judge Graffeo's - - -

13 JUDGE RIVERA: Thank you.

14 CHIEF JUDGE DIFIORE: Thank you, Ms. Wertheimer.

15 MS. WERTHEIMER: Thank you.

16 CHIEF JUDGE DIFIORE: Ms. Muscatello.

17 MS. MUSCATELLO: Thank you.

18 JUDGE RIVERA: Counsel, let's say - - - let's say  
19 we agree with you about the hearing. When - - - when the  
20 judge listens to the arguments, what - - - what kind of  
21 excuses are not going to be good enough? What's - - -  
22 what's going to be the standard that's applied at that  
23 hearing for the judge to know - - - to figure out whether  
24 or not the time should be excused?

25 MS. MUSCATELLO: Well, Judge Lippman suggested

1 the exceptional circumstance which is articulated in  
2 30.30(3)(b) and in 30.30(4)(g).

3 CHIEF JUDGE DIFIORE: So what would an  
4 exceptional circumstance be? What if a police officer is  
5 unavailable suddenly on vacation or his wife is having a  
6 baby or she's having a baby?

7 MS. MUSCATELLO: I think it really depends on the  
8 facts of the case. It really depends on the record that  
9 exists. This court has said previously, I think in People  
10 v. Price, there is no - - - and more recently, there is no  
11 set definition as to what exactly an exceptional  
12 circumstance is.

13 JUDGE GARCIA: But why do we need to get into  
14 those labels? Isn't the issue really was it illusory or  
15 not, right? That's what they're deciding. So why do we  
16 have to say is it an exceptional circumstance? If it isn't  
17 an exceptional circumstance, then it was illusory? I mean  
18 isn't what the judge is really just determining in that - -  
19 - which I think should be a 30.30 hearing, right. Isn't  
20 the judge's job just to say you've made this motion, you're  
21 over the time, one of the factors is it once ready-unready,  
22 it's four times ready-unready, looking at all that and  
23 hearing the reasons for those things, was the filing of  
24 that statement for that period illusory? And isn't that  
25 the purpose? Why do we have to set an extraordinary excuse

1 standard?

2 MS. MUSCATELLO: I don't know that we do, and I  
3 didn't expressly advocate for it in my brief. What I  
4 advocate for is a structured inquiry - - -

5 JUDGE GARCIA: Right.

6 MS. MUSCATELLO: - - - that the People have to  
7 held to the burden of the explaining the change - - -

8 JUDGE ABDUS-SALAAM: And when - - - when does  
9 that happen? When does that structured - - -

10 MS. MUSCATELLO: - - - in the circumstances. I'm  
11 sorry, Your Honor. I didn't - - -

12 JUDGE ABDUS-SALAAM: When does that structured  
13 inquiry occur?

14 MS. MUSCATELLO: It should happen - - -

15 JUDGE ABDUS-SALAAM: You just heard - - - you  
16 just heard your adversary say it - - - it should only  
17 happen if there is something in the record, essentially,  
18 not just a statement of unreadiness and then a statement of  
19 readiness off the record and then unreadiness. That's not  
20 enough. So when should it occur?

21 MS. MUSCATELLO: I disagree. I think that when  
22 the People file this off-calendar certificate - - - which  
23 by the way, they could supplement with an affirmation  
24 indicating what has changed. They've spoken to their  
25 complaining witness. They have their officer scheduled.

1 But putting that aside, if they come in on the next court  
2 date, I think they court should have an obligation to ask  
3 what changed, and I think defense counsel doing their job  
4 should say what - - - what changed. And right there there  
5 should be an inquiry.

6 JUDGE FAHEY: So wouldn't it make more sense to  
7 talk about what Judge Garcia is saying? You have your  
8 30.30 hearing, you come in, and you make your argument on  
9 illusory. Either they've made a record or they haven't,  
10 and they're stuck with the record that they made.

11 MS. MUSCATELLO: But then if you're at the point  
12 of the hearing - - -

13 JUDGE FAHEY: Um-hum.

14 MS. MUSCATELLO: - - - and no record has been  
15 made, what we're seeing is in the trial court level and - -  
16 -

17 JUDGE FAHEY: That it's presumed valid.

18 MS. MUSCATELLO: If it's presumed valid and no  
19 inquiry is made and - - - and you do what the court, what  
20 the First Department did in Brown, and you shift that  
21 burden of proof to the defendant to point to something in  
22 the record and there is nothing in that record, the  
23 defendant's not going to be able to make that argument.

24 JUDGE RIVERA: But I guess I'm not just - - - I'm  
25 just not understanding this structured inquiry. What - - -

1           isn't that still that the judge has to sit there and then  
2           measure the responses against some benchmark to decide yes,  
3           this is a reason that is satisfactory under the law, they  
4           shouldn't be charged, or no, this reason is not  
5           satisfactory under the law and so they're going to be  
6           charged?

7                       MS. MUSCATELLO:  Yes.  And I don't use - - - I  
8           don't use the word hearing because I don't - - - I don't  
9           foresee this as, you know, sending it out to a - - - and  
10          calling in witnesses and making extended oral arguments.  
11          For - - - a hearing is - - - is an inquiry to get some  
12          facts on the record as to what changed.

13                       And I just want to finish - - - I see my time has  
14          expired, but, you know, there's this concern about good  
15          faith and bad faith and - - - and is my argument imputing  
16          the integrity of prosecutors.  And I think that we can stay  
17          away from that and just say, of course, as officers of the  
18          court we presume that our representations are valid.  But  
19          we need to deal with objective facts, and a record is  
20          created with objective facts when you do what I'm asking  
21          the court to do, which is to make this inquiry and to  
22          require the People to - - - to explain that change of  
23          circumstance.

24                       JUDGE GARCIA:  But what if they haven't made that  
25          inquiry?  What if the judge doesn't ask, the People don't

1 volunteer, and the defense counsel doesn't ask for it, and  
2 then later there's a 30.30 motion? Now what I'm concerned  
3 about is at that point are we going to say on review, well,  
4 you didn't ask - - - you know, the People didn't offer and  
5 the judge didn't ask so you're out. So the time is not  
6 counted. If we adopt a rule that says you have to make  
7 that record and nobody asks for it and then later there's a  
8 30.30 motion, then is our rule going to be because you  
9 didn't make that earlier record you're charged for that  
10 time?

11 MS. MUSCATELLO: Yes. I - - - I think it is  
12 unless, you know - - - and again, but I think it - - - I  
13 think it depends on the facts of the case. If you look at  
14 - - -

15 JUDGE GARCIA: But that's a hearing later then.

16 MS. MUSCATELLO: But - - - but, look, I mean,  
17 some of these trial court decisions - - -

18 JUDGE RIVERA: I thought that was your - - - I  
19 thought your position is if the - - - if the record doesn't  
20 show you that it's illusory, you get the hearing and then  
21 they have - - - in other words, a second bite of the apple.

22 MS. MUSCATELLO: That's - - -

23 JUDGE RIVERA: They could have at the moment that  
24 they came in and said they're not ready have made a record.  
25 They didn't. Now they've got a chance to do that.

1 MS. MUSCATELLO: Come in and do it. But the  
2 burden should never be on the defendant.

3 CHIEF JUDGE DIFIORE: Thank you, counsel.

4 MS. MUSCATELLO: Thank you.

5 CHIEF JUDGE DIFIORE: Okay. The second appeal in  
6 this series of cases is number 194, the People of the State  
7 of New York v. Terrence Young.

8 MR. GARELICK: Good afternoon; John Garelick for  
9 appellant Terrence Young. Reserve - - - I'd like to  
10 reserve four minutes for rebuttal.

11 CHIEF JUDGE DIFIORE: Four minutes, sir?

12 MR. GARELICK: Yes, please.

13 CHIEF JUDGE DIFIORE: You may have it.

14 MR. GARELICK: At the outset, it's interesting to  
15 note in this case that the motion court and the Appellate  
16 Term had different rationales for their - - - for their  
17 decisions, and we would argue they were both wrong. The  
18 motion court stated, in effect, that even if the People's  
19 desire to get more evidence, in this case it was minutes  
20 that they wanted, even if it impaired the defendant's right  
21 to go to trial, that this did not have any bearing on their  
22 readiness. This is exactly wrong. This court very  
23 recently in Clark had an opportunity to reinforce the  
24 notion that the whole point of requiring People's readiness  
25 is to move forward trials. So you can't just bifurcate

1           them and treat one as completely unrelated to the other.  
2           And if the People are doing something that's preventing the  
3           trial from moving forward, they should be charged with that  
4           time.

5                       And the Appellate Term state - - - stated  
6           essentially what the Appellate Division had stated in  
7           Sibblies. The Appellate Term said "The statement of  
8           readiness was not illusory because the People could have  
9           proceeded with a prima facie case." This court, under both  
10          concurrences in Sibblies, made it very clear that that is  
11          not the test. The test is whether or not the People are,  
12          in fact, ready to go to trial. By their own assessment,  
13          they're saying we're not ready because we still need  
14          something.

15                       JUDGE PIGOTT: Am I wrong? Why is - - -

16                       MR. GARELICK: They're not ready.

17                       JUDGE PIGOTT: Why is this record so nice? I  
18          mean it seemed like every time there was an adjournment,  
19          there was a reason. Which was kind of - - - you know, made  
20          this thing a little easier to read than, you know, others.

21                       MR. GARELICK: Right. Well, so the critical - -  
22          - the critical explanation for not being ready was on the  
23          fourth adjournment. And after filing their off - - - off -  
24          - -

25                       JUDGE PIGOTT: Right. But - - - but before that,

1           you know, they - - - I was looking at them here. I think  
2           once the police officer wasn't available, once ADA was  
3           working night court. But each time, I mean, the court was  
4           given a reason why there was an - - - there was an  
5           adjournment. Neither was an - - - there was no objection  
6           and everybody seemed to understand and the thing moved.  
7           And I - - - I get your point on the - - - on the  
8           administrative thing, but is - - - just looking at the  
9           record, is this the type of record that we ought to be  
10          looking at in all of these cases, in your view?

11                   MR. GARELICK: Well, in other words, should a  
12          certificate of readiness been required, a new one?

13                   JUDGE PIGOTT: A softball, so-to-speak. This is  
14          a - - - this is a nice record. And - - -

15                   MR. GARELICK: Right.

16                   JUDGE PIGOTT: And looking at some of the others,  
17          it's not. And - - -

18                   MR. GARELICK: Yeah. And this is a case where -  
19          - - where the People repeatedly showed up not ready. And  
20          the reasons they - - - though their - - - though their  
21          reasons were given, they weren't particularly good reasons.

22                   JUDGE PIGOTT: Were there - - - were there off-  
23          calendar certificates of readiness?

24                   MR. GARELICK: There was an off-calendar  
25          certificate of readiness filed between the third

1 adjournment in which they came not ready and the fourth  
2 adjournment where they - - - where they came not ready.

3 JUDGE STEIN: Well, are you saying that they have  
4 an obligation to make sure that on each adjourn date that -  
5 - - that their witnesses are there ready to go?

6 MR. GARELICK: Yes. Yes. If they know that the  
7 trial is - - - is ready to move forward on a certain date,  
8 they should exercise due diligence to have their witnesses  
9 ready on that date. But I would note that - - -

10 JUDGE STEIN: But - - - but there's - - -

11 MR. GARELICK: Yes.

12 JUDGE STEIN: - - - ready and there's physically  
13 present. I mean, you know - - -

14 MR. GARELICK: Right.

15 JUDGE STEIN: - - - what is - - - exactly is  
16 ready, and how does this work? So each of these  
17 adjournments, the - - - the expectation on the part of both  
18 parties is that they're going to show up and they're going  
19 to start a trial?

20 MR. GARELICK: Right.

21 JUDGE STEIN: Is that - - - is that really the  
22 expectation, or is that - - -

23 MR. GARELICK: Well - - -

24 JUDGE STEIN: - - - kind of aspirational?

25 MR. GARELICK: That's a hard question to answer,

1           frankly, as a practical matter. I mean there's - - - there  
2           are times when a judge says - - - he expressly states on  
3           the record this is a firm date, we're going forward on this  
4           date, and so on and so forth, but that doesn't change the  
5           legal standard. And I think for 30.30 to work properly,  
6           when a trial case is on for trial, the prosecutor shouldn't  
7           say, well, but that's not really - - - it's not really on  
8           for trial. It should mean something. And in this  
9           particularly case - - - you know, in this case, there were  
10          multiple occasions where the prosecutor was told this case  
11          is going to be on for trial on a certain - - - on a certain  
12          date, and particularly, after the third time they showed up  
13          not ready and the court said, listen, I'm going to need a  
14          certificate of readiness from you. Because - - - I think  
15          implicitly what the court found at that point is they had  
16          lapsed into unreadiness. And we need a new certificate of  
17          readiness from you, and the case is on January 12th.

18                   JUDGE RIVERA: Well, so they come in. The judge  
19                   gives them six - - - six weeks out. They go back, they  
20                   tell the witnesses. Two of them say I can't be there that  
21                   day. What are they supposed to do at - - - should they do  
22                   something in that moment when they know or wait for the  
23                   sixth week and then come in and say my witness is  
24                   unavailable but don't count - - - don't count the time  
25                   against me?

1 MR. GARELICK: If the - - - they have a date set  
2 for the trial.

3 JUDGE RIVERA: Yes.

4 MR. GARELICK: And then in the interim they've  
5 lost one of their witnesses because - - -

6 JUDGE RIVERA: Yes.

7 MR. GARELICK: For - - - for an unexceptional  
8 reason, something that they cannot control? They should  
9 charge - - -

10 JUDGE RIVERA: Witness says - - - witness says  
11 I've got a vacation. It's similar to what he Chief Judge  
12 asked before of counsel. Witness says I'm sorry. I've had  
13 this vacation. We're not even going to be in the country.  
14 I can't change it. I cannot be there on that day.

15 MR. GARELICK: Well, there's a certain amount of  
16 time the prosecutor's allowed to use to be ready for trial.  
17 And if they've already used up so much time that now their  
18 witness's availability is gone and they cannot get to trial  
19 within the amount of time required by statute, the defense  
20 should not be the one to suffer as a consequence. And yes,  
21 it is the prosecutor's obligation - - -

22 JUDGE STEIN: But every time they do that - - -

23 MR. GARELICK: - - - under that - - -

24 JUDGE STEIN: - - - when they say they're not  
25 ready then going forward, for the time they say their

1 witness is not going to be available because they're on  
2 vacation or whatever reason, that time is charged against  
3 them. That's the rule. The question is - - -

4 MR. GARELICK: Right.

5 JUDGE STEIN: - - - is whether we're going to  
6 charge previous time against them when we're talking about  
7 the illusory certificate of readiness. To me, those are  
8 two different things.

9 MR. GARELICK: If the - - - if - - - for example,  
10 looking at the specific facts in this case, okay. And  
11 there's a certain amount of time passed between the court's  
12 order for them to file a new certificate of readiness and  
13 when they actually filed it, okay, a couple weeks, I  
14 believe it was. And it wasn't that long off. It wasn't  
15 that long off from when the court was supposed to - - -  
16 when the case was actually going to appear in court. So I  
17 would ask why would a prosecutor file a certificate of  
18 readiness on that date unless they've determined that their  
19 witness is going to be available on the - - -

20 JUDGE GARCIA: I guess what Judge Stein - - -

21 MR. GARELICK: - - - date the trial's set for.

22 JUDGE GARCIA: - - - seems to be asking is okay,  
23 so they filed a certificate of readiness, I know this isn't  
24 this case, and then four - - - or three or four conferences  
25 the defense lawyer comes in and says I can't do it, and

1           it's put off, put off, you get to a date, they come in, and  
2           they say we're not ready, our witness can't make it.  
3           Should they then be charged all of that time from the  
4           initial certificate of readiness? Isn't it really looking  
5           at - - - at that date you filed, was that illusory or not?  
6           And I think, clearly, there it wasn't. If, now, because of  
7           this date that's been pushed off, one of their witness is  
8           unavailable.

9                         MR. GARELICK: You're saying - - - you're talking  
10           about the hypothetical situation - - -

11                        JUDGE GARCIA: Right.

12                        MR. GARELICK: - - - you're proposing - - -

13                        JUDGE GARCIA: But we have to make a rule here so  
14           - - -

15                        MR. GARELICK: I understand. Listen and this was  
16           referred to in, of course, the last argument. This - - -  
17           the notion of stopping the clock with an off-calendar  
18           certificate of readiness is something that this court  
19           approved of. It came up with, essentially. It's not in  
20           the statute. And I think it's reasonable to say, well, if  
21           you can stop the clock by filing the certificate of  
22           readiness, that that should not just mean you're ready that  
23           day. And in - - - in essence, that's - - - that's just  
24           meaningless.

25                        JUDGE GARCIA: Right. And there may be a showing

1 - - -

2 MR. GARELICK: It should mean - - -

3 JUDGE GARCIA: - - - that you weren't ready that  
4 day and there may be facts that can show it.

5 MR. GARELICK: Right.

6 JUDGE GARCIA: And maybe you have them. But if  
7 it's a question of you come in and you say this date's been  
8 adjourned for defense counsel several times, we were ready,  
9 and now, four months later, our witness got - - - you know,  
10 is on vacation or whatever I think Judge Rivera was saying,  
11 should that then make their initial filing illusory?

12 MR. GARELICK: I would, you know, speak  
13 specifically to a certificate of readiness, an off-calendar  
14 certificate of readi - - - readiness filed to stop the  
15 clock, as in this case, as it was in this case. It should  
16 have some relationship to the date the court's going to be  
17 on. In other words, if I say to you I will be ready - - -  
18 okay, you know, a trial's scheduled for two weeks, and I  
19 say to you I'm ready, the reasonable assumption means I'll  
20 ready to be - - - ready to go to trial in two weeks.

21 JUDGE GARCIA: Right.

22 MR. GARELICK: And that's - - -

23 JUDGE GARCIA: And then two weeks happens and the  
24 defense counsel comes in and says you know what, all your  
25 witnesses are here, but I can't do it today.

1 MR. GARELICK: That's different then because - -  
2 -

3 JUDGE GARCIA: Right. But then it gets adjourned  
4 two more weeks, and then the def - - - the prosecutor says  
5 you know what, my witness is now in another courthouse.  
6 Should they then be charged all of that time from the  
7 initial certificate of readiness?

8 MR. GARELICK: I'm not sure - - - I'm not sure  
9 what the answer to that is but I think that the question  
10 that's - - -

11 JUDGE FAHEY: Isn't - - - isn't the answer to  
12 that as to whether or not the declaration at the time it  
13 was made or the COR was illusory?

14 JUDGE GARCIA: Right.

15 JUDGE FAHEY: So it really comes down to the  
16 definition of what illusory is. And under Judge Garcia's  
17 scenario, it couldn't be illusory, right? You can't say  
18 that that's illusory if they come in ready.

19 MR. GARELICK: We're looking at specifically, in  
20 my case, and in Sibblies - - -

21 JUDGE FAHEY: But stay with me on my question,  
22 not on yours.

23 MR. GARELICK: Okay.

24 JUDGE FAHEY: That could not be illusory, could  
25 it?

1 MR. GARELICK: Under that scenario, I don't know.  
2 I - - - I don't know.

3 JUDGE FAHEY: It's okay to say yes sometimes.

4 MR. GARELICK: It's possible. It's possible that  
5 - - -

6 JUDGE FAHEY: You know, there are going to be  
7 cases that will be illusory and that won't be illusory.

8 MR. GARELICK: Right. Right.

9 JUDGE FAHEY: It's not like you got - - -

10 MR. GARELICK: It's not - - - it's not shown to  
11 be illusory - - -

12 JUDGE RIVERA: Well, but - - -

13 MR. GARELICK: - - - in the way it is - - -

14 JUDGE FAHEY: All right. Okay.

15 JUDGE RIVERA: It's not illusory. The problem is  
16 that the People have to clarify that.

17 MR. GARELICK: Right. But - - -

18 JUDGE RIVERA: Isn't that the point that they  
19 have to put forward that information so that the judge can  
20 make that determination? Of course, it's not illusory.  
21 You're telling me your - - - your witnesses were ready at  
22 the time you said so as opposed to just because you've got  
23 the certificate of readiness - - -

24 MR. GARELICK: Yes.

25 JUDGE RIVERA: - - - and then you - - - you say

1           you're not ready. Everyone presumes you were always ready.

2                   MR. GARELICK: That's right. And I see my time's  
3           up - - -

4                   JUDGE RIVERA: I thought that was the - - -

5                   CHIEF JUDGE DIFIORE: Thank you, counsel.

6                   MR. GARELICK: Just one - - - could I just make  
7           one final point or - - -

8                   CHIEF JUDGE DIFIORE: Please.

9                   MR. GARELICK: If you're dealing with a  
10          situation, as occurred in Sibblies and as occurred here  
11          where the People make a declaration of readiness and at the  
12          next adjournment date they are not ready, that's an  
13          extremely distinction situation from - - - to the  
14          hypothetical that's been put to me. It's possible that in  
15          the hypothetical it would not be necessary or even prudent  
16          to find the declaration illusory. But in this case,  
17          there's good reason to.

18                   CHIEF JUDGE DIFIORE: Thank you, sir.

19                   Counsel.

20                   MR. JOBLove: May it please the court, my name is  
21          Leonard Joblove for the respondent. The denial of the  
22          speedy trial motion was proper for two independent reasons.  
23          First, with respect to the sixty-day period at issue, the  
24          time from November 13th, 2009, to January 12th, 2010, the  
25          People are chargeable only with the seven days that they

1 requested and not with any of the time beyond that. On  
2 November 13th, 2009, the People made a record. They were  
3 not ready for trial because the assigned ADA was  
4 unavailable, was assigned to night arraignment court. And  
5 the People requested an adjournment of one week, but the  
6 court adjourned the case for a total of 60 days to January  
7 12th.

8 The operative principles that this court has held  
9 is that the People can be chargeable with post-readiness  
10 delay only if that delay is actually attributable to the  
11 People and that the post-readiness delay attributable to  
12 the court is not chargeable to the People. So in light of  
13 those principles, in a situation like this where post-  
14 readiness the People request a discrete period of time and  
15 the court, in effect, says I can't put the case down for  
16 that date, I'm going out to a longer date, the People are  
17 chargeable with the amount of time they requested and not  
18 the time that's attributable to the court under those  
19 rules. The - - - the time that's attributable to the court  
20 - - - excuse me, to the People is the time that they  
21 requested and not the balance of the delay that was  
22 attributable to the court.

23 JUDGE PIGOTT: But the - - - to go back, I mean,  
24 you talked from November, but in June the defendant was not  
25 ready, right. And there was a lot - - - and there was a

1 lot of discussion over trying to get - - - I mean why he  
2 didn't take a - - - but in - - - if I got this right, is it  
3 August when the - - - the police officer was unavailable?

4 MR. JOBLove: Your Honor, this is a case where  
5 after the People filed the initial off-calendar statement  
6 of readiness in February of 2009, there were four  
7 consecutive court dates where the People showed up and said  
8 on the record in court the People are ready for trial.  
9 Then there were - - -

10 JUDGE PIGOTT: Oh, you're saying that breaks the  
11 chain?

12 MR. JOBLove: No. I'm saying it sets a context  
13 here in terms - - -

14 JUDGE PIGOTT: Okay.

15 MR. JOBLove: - - - the People had repeatedly  
16 announce their readi - - - readiness for trial both off-  
17 calendar and then repeatedly in court, and the defense in  
18 his 30.30 motion, or at any time in the criminal court,  
19 never challenged the validity of any of those status of  
20 readiness.

21 JUDGE PIGOTT: Why don't say in Aug - - - then in  
22 September the police officer was unavailable and you wanted  
23 an adjournment. In November, the police officer was not  
24 available and you wanted an adjournment to November 13th.  
25 On November 13th, you're right, that's when the ADA

1           apparently was not there, and you wanted an adjournment.  
2           You got an adjournment until January 12th, and then you  
3           filed your statement of readiness on Febr - - - on December  
4           18th.

5                         MR. JOBLove:    Correct.

6                         JUDGE PIGOTT:  Did you have any obligation - - -  
7           in other words, the January 12th date was satisfactory to  
8           you, I presume?

9                         MR. JOBLove:  It wasn't the date the People  
10          requested.  The People requested seven days for the  
11          discrete reason that the assigned ADA was assigned to night  
12          court.  The court then adjourned it for a longer date.  So  
13          under the - - - the principle stated by this court in  
14          Cortes and Goss about attribution of post-readiness delay -  
15          - -

16                        JUDGE PIGOTT:  The court's.

17                        MR. JOBLove:  Yes.  And this really goes back to  
18          - - -

19                        JUDGE PIGOTT:  Then you weren't ready in January,  
20          either.

21                        MR. JOBLove:  That's correct, Your Honor.  And  
22          the assistant made a clear record about the reason for that  
23          subsequent unreadiness that was wholly consistent with the  
24          previous - - - the initial statements of readiness was  
25          consistent with the reason that the prosecutor gave on

1 November 13th why are we asking for seven days because the  
2 assistant, who is assigned to the case, has another court  
3 assignment. We asked for a week based on that.

4 JUDGE PIGOTT: But didn't you - - - didn't you in  
5 January say you're not ready because you want to get that  
6 NYCHA hearing?

7 MR. JOBLove: Correct, Your Honor. And the  
8 record also made clear the prosecutor first learns that  
9 that NYCHA hearing had even happened only the very day  
10 before, the night before.

11 JUDGE PIGOTT: Is that - - - is that a good  
12 reason, in your view, for the People to ask for an - - - an  
13 adjournment and not have it charged to them?

14 MR. JOBLove: Well, there's two parts to that  
15 question.

16 JUDGE PIGOTT: Right.

17 MR. JOBLove: Is it a good reason to ask for the  
18 adjournment? That was the discretion of the prosecutor.  
19 It was prudent to be thorough to say I'd like to actually  
20 see who said what at this hearing before - - -

21 JUDGE PIGOTT: But this is the 90 days - - -  
22 isn't this the discount?

23 JUDGE ABDUS-SALAAM: Yes.

24 JUDGE PIGOTT: Where do you go?

25 MR. JOBLove: Excuse me, Your Honor?

1                   JUDGE PIGOTT: I mean what's the - - - where do  
2 you go with the discount? I mean you're - - - how much  
3 testimony are you looking for?

4                   MR. JOBLove: I - - - I couldn't blame the  
5 assistant for being thorough and wanting to know what the  
6 witnesses have said in sworn testimony.

7                   JUDGE STEIN: Well, I'm confused about that,  
8 though.

9                   MR. JOBLove: I know the hearing - - -

10                  JUDGE STEIN: Because I think, on the one hand,  
11 you were arguing that it didn't really affect your  
12 readiness, that - - - that you would like to have this  
13 transcript and see what's in it but it - - - you were still  
14 ready. But yet you declared that you weren't ready. And  
15 when - - - right?

16                  MR. JOBLove: Yes. And, Your Honor, a fair  
17 reading of the record - - - to the extent the assistant may  
18 have been trying to have it both ways, if the People are  
19 actually requesting an adjournment, then they're not ready  
20 for trial. And so, ultimately, in answering the 30.30  
21 motion, and certainly, in this court, on that date the  
22 People said they were not ready. They asked for a week.  
23 They subsequently filed a statement of readiness the next  
24 day and were able to explain, in the answer to the 30.30  
25 motion, that what happened was that very next - - - by the

1 very next day they had obtained and reviewed this  
2 transcript of the Housing Authority hearing.

3 But I think that the crucial point and the  
4 distinction from Sibblies is that in this case, the People  
5 filed - - - well, had previously announced ready, were  
6 temporarily unready because the assigned assistant was on  
7 night court duty for a week, filed a statement of readiness  
8 on December 18th, perhaps out of an excess of caution given  
9 that the court on November 13th had purported to charge  
10 time to the People until they filed a statement of  
11 readiness. But then on January 12th, reported a reason,  
12 just didn't say, oh, we're now - - - now we're not ready,  
13 but said we're not ready and the reason is because there's  
14 been a change in circumstance, namely, the assigned ADA's  
15 discovery of the existence of this hearing and a reason  
16 given for why - - -

17 JUDGE GARCIA: But let's say you discovered that  
18 a week before you came in. I mean I think here you said it  
19 was a day before. Shouldn't the People be charged the week  
20 or, in this case, the day because you weren't ready, as of  
21 a certain time, right? You're not ready as of a week  
22 before when you learned - - - not this case, but let's say  
23 this is - - - these are the facts. So a week before you're  
24 coming in, you know you're not going to be ready because  
25 you need this hearing. So as of that time, you're really

1 not ready anymore. You have an obligation or at hearing  
2 later if it's determined you learned it a week before, do  
3 you get charged with a week?

4 MR. JOBLove: Well, no, Your Honor. Because  
5 there is no - - - this court has spoken of the People's  
6 continuing obligation to be ready for trial but that really  
7 doesn't mean 24/7 365 days a year the People have to have  
8 their witnesses ready to go. What it means is that even  
9 after the People have initially made an announcement of  
10 readiness for trial, they have to subseq - - -

11 JUDGE GARCIA: Right. I think if your witness  
12 went on vacation for a week in that period, you wouldn't  
13 have to say later we weren't ready for that week where  
14 nobody really wanted us to be. But if it at a certain  
15 point you realize you're not going to be ready, you are no  
16 longer ready because you need something and later there's a  
17 30.30 motion and it comes out that as of that period of  
18 time a week before this court appearance you were not ready  
19 because you needed this other thing, why aren't you charged  
20 the week? Not the whole period from when you filed a  
21 statement of readiness, but when that statement was no  
22 longer real?

23 MR. JOBLove: But - - - but I think the answer  
24 is, Your Honor's hypothetical about the witness being on  
25 vacation for a week in between court dates illustrates the

1 point. Yes. For the week - - - the week that the witness  
2 was on vacation, the People weren't ready for trial. But  
3 they're not required by the statute to be continuously  
4 ready. I think the - - -

5 JUDGE GARCIA: Agree. But at some point when you  
6 go in now you're no longer ready. And if there's a hearing  
7 later and it's determined that you, in fact, weren't ready  
8 for a week before that hearing when you came in and said we  
9 weren't ready, why are you charged with that?

10 MR. JOBLove: Well, you're not charged with it  
11 because let's back up on the facts of this case. We're  
12 talking about the validity of the statement of readiness  
13 filed on December 18th.

14 JUDGE GARCIA: Right.

15 MR. JOBLove: Which by the way - - -

16 JUDGE GARCIA: Not - - -

17 MR. JOBLove: - - - as the criminal court said,  
18 was unnecessary and redundant because under the rule about  
19 attribution of post-readiness delay, the People are only  
20 charged with the seven days they requested.

21 JUDGE GARCIA: Right.

22 MR. JOBLove: But if - - - addressing the  
23 question of the validity of that statement of readiness, it  
24 amounts to ultimately, were the People both able and  
25 willing to proceed to trial at that point. Sibblies was a

1 case where the problem for the People was they were relying  
2 on the theory that as long as we were able to proceed, it's  
3 good enough, and it didn't matter - - - matter that we  
4 weren't really willing because we didn't want to proceed  
5 until we had the police officer's medical records.

6 JUDGE PIGOTT: Is it - - - is it possible that  
7 January 12th when - - - when the People said they're not  
8 ready because they want to get this NYCHA hearing, could  
9 the court have said I'm not - - - I'm not giving you an  
10 adjournment for that?

11 MR. JOBLove: Of course, Your Honor. The court  
12 can always say I'm not going to give an adjournment to the  
13 People, which is a reason why, in terms of attributing  
14 delay to the People, well, the court makes the decision to  
15 grant the People's request for an adjournment. But  
16 ultimately, it's the court's decision whether to grant or  
17 deny their request for an adjournment. But - - -

18 JUDGE PIGOTT: Because I find - - - I find that  
19 incred - - - not incredible but I mean it just seems odd to  
20 me that for a - - - you can find a lawyer and you can't  
21 find - - - and then you got - - - you get records from an -  
22 - - from an administrative agency. I would have thought  
23 this would have been about a two-hour trial any day of the  
24 week by any lawyer in your - - - in your office with the  
25 officer who, you know, arrested this letter and they got

1 into their - - - into the kerfuffle and you're done. And  
2 here we are, it was thirteen months and they're still - - -  
3 still worrying about this hearing. I - - -

4 MR. JOBLove: Well, yes - - - yes, Your Honor.  
5 And - - - and the delay - - - the delay is to be avoided by  
6 30.30 is strictly addressed to the question of  
7 prosecutorial readiness. And here's a case where - - -

8 JUDGE PIGOTT: Yeah. But it's - - - but it's  
9 with the idea that the defendant is the one that wants the  
10 speedy trial, not you. In - - - in other words, he wants -  
11 - - he wants to - - - or she wants this thing over with.  
12 And so the People keep saying well, you know, there's an  
13 administrative hearing and oh, wait a minute, there's a  
14 case in front of the Supreme Court that we want to wait for  
15 that to come down and oh, wait a minute, the Court of  
16 Appeals might have a - - - have something to say about  
17 that. We want an adjournment of four years and we'll - - -  
18 and we'll get back to you on this - - - this discount.

19 MR. JOBLove: But - - -

20 JUDGE PIGOTT: That would be silly.

21 MR. JOBLove: Talking about this case, that's not  
22 what happened where on five different dates the People came  
23 into court - - - what - - - what Chief Judge Lippman  
24 referred to as readiness on the ground, the People came  
25 into court on five dates and they said we're ready for

1 trial. Four dates in a row that happened, and it didn't  
2 go. There are other reasons why trials get delayed.  
3 Sometimes it's on the defense. Sometimes it's because of  
4 court calendar congestion.

5 JUDGE RIVERA: But - - - but in this one, your  
6 reason at - - - the one we're talking about now was, as you  
7 say, because the prosecutor wanted to be particularly  
8 comprehensive in preparation. That's a strategic choice.

9 MR. JOBLove: Yes.

10 JUDGE RIVERA: And so why - - - why shouldn't the  
11 People be held to account for those days?

12 MR. JOBLove: Well, and they were. Because - - -

13 JUDGE RIVERA: As opposed to when the witness is  
14 not available, right. That we appreciate.

15 MR. JOBLove: Yes. And the prosecutor is held  
16 accountable because on January 12th by saying the People  
17 aren't ready they requested a week. It turned out they  
18 didn't need a week because they got those minutes faster  
19 than they expected and had them by the next day and filed a  
20 statement of readiness.

21 JUDGE RIVERA: Well, let's go back to Judge  
22 Garcia's hypothetical. As opposed to knowing about the  
23 minutes the day before, if it had been ten days before the  
24 day you're back in court.

25 MR. JOBLove: Right.

1                   JUDGE RIVERA: Why shouldn't those ten days  
2 count?

3                   MR. JOBLove: Because the way the time is  
4 counted, it doesn't matter, in general, what's happening  
5 between court dates. If we - - - putting aside the seven  
6 day post-readiness request application of that rule, just  
7 relying on the statement of readiness for trial the People  
8 filed on December 18th, at that time there's an explanation  
9 given. In the 30.30 answer, the record shows that the  
10 prosecutor contacted the arresting officer; he was  
11 available to testify on that date. There's an explanation  
12 given for why the People became unready on January 12th.  
13 They just - - - change in circumstance subsequent to  
14 December 18th. They just learned about this Housing  
15 Authority hearing.

16                   JUDGE RIVERA: No. But what I'm saying is if it  
17 had not just been the day before, why wouldn't all the  
18 other days have counted? Let's say - - - let's go with  
19 Judge Garcia's hypothetical, it's a week before that you  
20 actually learned this.

21                   MR. JOBLove: Yes, Your Honor. And there are two  
22 reasons. Because the two different reasons why the denial  
23 of the 30.30 motion was proper. One is that a  
24 determination is made when the court is granting that  
25 adjournment on November 13th and setting it out to January

1 12th, there's a question, how much of that delay is  
2 actually attributable to the People? It's the seven days  
3 that are requested. It's almost a common sense conclusion.  
4 And the balance of that time is attributable to the court.  
5 End of discussion. Because the court has already set and  
6 adjournment date and the question is how do we apportion  
7 the chargeability or responsibility for that time?

8 JUDGE RIVERA: Because once - - - once you know -  
9 - - so let - - - let - - - when you get that adjournment  
10 date, you're working on - - - let's work on this  
11 assumption. The ADA thinks in that moment, yes, January  
12 12th is going to work. No problem. I'll be ready on that  
13 day. Now if the ADA knows a week or two weeks before then  
14 that they're not going to be ready on that day.

15 MR. JOBLove: Right. But the - - - the  
16 prosecutor is not responsible for making a prediction of  
17 future readiness. That the prosecutor has an obligation -  
18 - -

19 JUDGE RIVERA: Well, but you agree to the day.  
20 Do you not agree to the day because I understand that's the  
21 day I've got to be ready for trial? I agree to that day?  
22 Otherwise, wouldn't you have turned to the judge and said -  
23 - - or the ADA would have turned to the judge, Judge, we  
24 won't be ready on that day?

25 MR. JOBLove: Well, if the prosecutor - - -

1                   JUDGE RIVERA:  So doesn't - - - doesn't he have  
2                   the responsibility to do that if they know when the day is  
3                   being discussed that that day they will not be ready to say  
4                   so?

5                   MR. JOBLove:  Your Honor, if the prosecutor had  
6                   that information two months in advance, it would certainly  
7                   be prudent to say that.  But if the prosecutor doesn't say  
8                   that and then shows up in court on January 12th and is not  
9                   ready for trial, generally speaking, that's going to start  
10                  the clock running again unless there's something - - -

11                  JUDGE STEIN:  Are you - - - are you saying that  
12                  once the January 12th date is set there's no way of backing  
13                  it up no matter what?  Even if you knew a week earlier, you  
14                  can't - - - you couldn't come in, you know, earlier or - -  
15                  - I mean if - - - well, yeah.  You couldn't change that.  
16                  That time period was set by the court because of court  
17                  congestion, period.

18                  MR. JOBLove:  Yes.  Short of - - -

19                  JUDGE STEIN:  Isn't that - - -

20                  MR. JOBLove:  You know, it would be a harder case  
21                  if, at the time the People say we're asking for seven days  
22                  and the court said I'm going to adjourn it to January 12th,  
23                  but if you file a statement of readiness and move to  
24                  advance it, I will do it and promptly put down the case for  
25                  that date, that would make the causation a little more

1           ambiguous about, well, is the delay to January 12th really  
2           all attributable to the People. But that's not what  
3           happened here. In fact, the court said time charged to the  
4           People, which under Berkowitz doesn't really change  
5           anything, because the court can't change the applicable  
6           rule of law just by saying so.

7                         But the People - - - the court never said I'm  
8           going to advance the case if the People file a statement of  
9           readiness, and then the People did file a statement of  
10          readiness and the court didn't advance the case and defense  
11          counsel didn't move to advance the case. They could have.  
12          The court always has the authority to advance the case if -  
13          - - if that suits the court, but that's not what happened  
14          here.

15                        And ultimately, onto the statement of readiness  
16          in terms of was it a valid or an illusory statement of  
17          readiness, yes, the People subsequently learned about the  
18          Housing Authority hearing, but at the time they made that  
19          statement of readiness, their police officer was available,  
20          they were willing to proceed to trial, they were able to  
21          proceed to trial, and the fact that a new witness is  
22          subsequently discovered at a later date, that happens. But  
23          that doesn't mean that if the People had been sent out to  
24          trial on that date, they weren't willing and able to  
25          proceed. And that has to be the test for the statement of

1 present readiness.

2 And my opponent is suggesting that we somehow  
3 have to be in a position to promise not only that we could  
4 have tried the case on the day we filed the statement of  
5 readiness, but to predict the future and assure that we  
6 would be able to proceed on the court date. And that's  
7 contrary to the notion stated by this court that a  
8 statement of readiness has to be a statement of present  
9 readiness, not an expectation of future - - -

10 CHIEF JUDGE DIFIORE: Thank you, Mr. Joblove.

11 MR. JOBLove: Thank you.

12 CHIEF JUDGE DIFIORE: Mr. Garelick.

13 MR. GARELICK: I think that my adversary is using  
14 the rule that you cannot just make a statement of future  
15 readiness as kind of a sword rather than a shield or  
16 something like - - - to that effect. But the point of that  
17 rule is that it's not adequate just to say I will be  
18 available in the future.

19 JUDGE PIGOTT: Yeah. But isn't he right that - -  
20 -

21 MR. GARELICK: It's not adequate - - -

22 JUDGE PIGOTT: - - - that's why I asked if - - -  
23 if he said we need this NYCHA hearing and the judge says  
24 no, you don't, you know, you're either - - - we're either  
25 trying this thing now or I'm going to dismiss it, he's

1 ready to go trial with the cop and, you know, whatever else  
2 he's got but not the NYCHA thing.

3 MR. GARELICK: Well, the test for readiness, I  
4 mean, has to have some relationship to the prosecut - - -  
5 prosecutor's own assessment of their readiness. They're  
6 saying they're not - - - they said they weren't ready  
7 without this hearing. So as to what would have happened if  
8 the judge had said well, too bad you have to go to trial?  
9 I mean I suppose that could happen to any number of  
10 circumstances - - -

11 JUDGE PIGOTT: Or the defense lawyer could have  
12 said that. Said, Judge, that's nonsense. What, I got to  
13 sit around waiting for NYCHA to get - - - to - - - you  
14 know, to do their hearing, you know, before my client - -  
15 - see, I'm of - - - of the belief - - - maybe you can  
16 disabuse me of this, that usually time benefits the  
17 defense. And, you know, if there's adjournments, you know,  
18 we don't lose a lot of sleep over them. And - - - but, you  
19 know, when it gets close, it get close. But it's - - - in  
20 a situation like this there's nothing to say that they  
21 wouldn't have - - - not have been able to try that thing on  
22 the date when they were looking for the NYCHA, I forget the  
23 date, January 12th, right?

24 MR. GARELICK: Yeah. I'm not really sure,  
25 though, how that - - - how relevant that is, though, to the

1 determination of the 30.30 motion, though. I mean if - - -  
2 if - - - the question is it chargeable time? I mean 30.30  
3 - - - I mean there's a strict system set up for it.  
4 There's a statutory system that's supposed to operate a  
5 certain way. And just, again - - - if I can just - - -  
6 what I was referring to and if the - - - you know, the  
7 point the People said they were ready in this off-calendar  
8 declaration of readiness, there was a date certain for  
9 trial, and I think it's reasonable to except that that  
10 certificate means when they say that they're saying - - -

11 JUDGE GARCIA: Counsel - - -

12 MR. GARELICK: - - - we're going to be ready at  
13 that date.

14 JUDGE GARCIA: So one of the issues we look at is  
15 was that initial statement of readiness illusory, right.  
16 And if there is this change, and let's go back to this  
17 hypothetical, where you learn there's something there and  
18 now you say I need this and I really need it, and I didn't  
19 know about it before.

20 MR. GARELICK: Right.

21 JUDGE GARCIA: The statement made a month before  
22 was not illusory. They really were ready to go to trial at  
23 that point.

24 MR. GARELICK: I - - - I would disagree with  
25 that. And actually, in fact, this case is not, on its

1 facts, distinguishable from Sibblies. Neither - - -  
2 neither concurrence of Sibblies - - -

3 JUDGE GARCIA: Why is it - - - what I'm  
4 struggling with is let's assume it wasn't. Why is it an  
5 all or nothing proposition, then? It seems like then you  
6 would want all of the time from the statement that was  
7 filed, which some may say was not illusory, and the  
8 prosecution would want none of that time. But why isn't  
9 that, and all we're talking about are these factual issues,  
10 up to a judge at a hearing to then determine what should be  
11 charged to the People? And if it was, at some point, they  
12 weren't ready and they should get four days charged in that  
13 period, why isn't that within the discretion of the judge?  
14 Why does it have to be we get everything not counted or  
15 everything counts against them?

16 MR. GARELICK: Well, what we're discussing is a  
17 syst - - - what should be the system for how the judge  
18 decides it in the first - - -

19 JUDGE GARCIA: Right.

20 MR. GARELICK: - - - in the first instance.

21 JUDGE GARCIA: But are you arguing that  
22 everything in that case should be charged against them?

23 MR. GARELICK: Yeah. I would argue that if you  
24 file a statement - - - a certificate of readiness and in  
25 subsequent circumstance establish that that certificate of

1           readiness was illusory - - - and what that - - - what that  
2           means, illusory, is that you were not ready - - -

3                   JUDGE ABDUS-SALAAM:   But, counsel - - -

4                   MR. GARELICK:   - - - at that time.

5                   JUDGE GARCIA:   But when?

6                   MR. GARELICK:   Why shouldn't you be charged for  
7           that?

8                   JUDGE GARCIA:   But when?   When your witness then,  
9           at a subsequent date, that's adjourned three times for  
10          defense counsel, is in - - - you know, on vacation or - - -  
11          why should you be charged for all that time when you  
12          actually - - -

13                   MR. GARELICK:   You shouldn't.

14                   JUDGE GARCIA:   - - - were ready?

15                   MR. GARELICK:   Well, you shouldn't, Judge, and I  
16          wouldn't argue that you should.   But if you say you're  
17          ready and you come in not ready, that's a different  
18          situation.

19                   JUDGE ABDUS-SALAAM:   Counsel, you said in this  
20          case - - -

21                   JUDGE GARCIA:   But they're not ready.

22                   JUDGE ABDUS-SALAAM:   I'm sorry.

23                   JUDGE GARCIA:   I'm sorry.   Go ahead.

24                   JUDGE ABDUS-SALAAM:   You said this case was like  
25          Sibblies, but it isn't, is it?   Because in Sibblies, the -

1 - - you know, the People knew that the police officer had  
2 been injured and there would be medical records. In this  
3 case, the People learned a night before, two days before,  
4 whatever the adjourn date was, that there was a NYCHA  
5 hearing. Could they have anticipated that that would  
6 happen?

7 MR. GARELICK: I mean it's factually different in  
8 that way that you could say that in Sibblies because of the  
9 nature of the - - -

10 JUDGE ABDUS-SALAAM: Yeah.

11 MR. GARELICK: - - - that they should have  
12 anticipated this. But it's important to note, I think,  
13 that in both concurrences in - - - neither concurrence in  
14 Sibblies re - - - found bad faith or in any way relied on  
15 bad faith. What was at - - - at bottom was this that even  
16 if the People, in good faith, said they were ready, it  
17 turned out that they were not. By their own  
18 acknowledgment, they were not. Therefore, when they said  
19 they were ready, they shouldn't have been credited with  
20 that time. And the issue of - - - it's not - - - there's  
21 no requires no presumption of bad faith - - -

22 JUDGE STEIN: I don't think - - - I don't think -  
23 - -

24 MR. GARELICK: I'm not saying that the People  
25 were lying.

1 JUDGE STEIN: I don't think bad faith is the  
2 issue.

3 MR. GARELICK: Right.

4 JUDGE STEIN: I think that the issue in Sibblies  
5 was is that you knew you didn't have these medical records,  
6 so therefore, that's - - - that's evidence that you were  
7 not actually ready.

8 MR. GARELICK: Judge, that's actually not in  
9 either of the concurrences that the notion that they knew.  
10 And - - - and I don't think that that was an essential  
11 element of either - - - of either concurrence.

12 JUDGE PIGOTT: I think one - - - part of it was  
13 that you needed those - - - that was evidence in order to  
14 prove the assault. I mean the - - -

15 MR. GARELICK: Well, the People actually asserted  
16 that they didn't need the evidence to - - - to prove the  
17 assault. They said we have a prima facie case without it.

18 JUDGE PIGOTT: Right.

19 MR. GARELICK: Right. Well, that was also their  
20 argument on appeal. And so - - -

21 CHIEF JUDGE DIFIORE: Thank you, counsel.

22 MR. GARELICK: I see my time is up. Thank you.

23 CHIEF JUDGE DIFIORE: The final appeal in this  
24 trilogy is 195, People of the State of New York v. Earl  
25 Canady.

1 Counsel.

2 MR. LIEBERMAN: Good afternoon; my name is Seth  
3 Lieberman. I'd like to reserve three minutes for rebuttal  
4 time.

5 CHIEF JUDGE DIFIORE: You may, sir.

6 MR. LIEBERMAN: Okay. So the rules that are  
7 currently in place work. There's a problem, sometimes,  
8 perhaps, with the execution of the rules. But in my  
9 particular case, there are two periods at issue. First  
10 period is the period from March 2nd, 2011, to April 19th,  
11 2011. And on March 2nd, the People requested a six-day  
12 adjournment. The court adjourned the case to April 19th,  
13 and this was a post-readiness requested. The People had  
14 filed a valid statement of readiness earlier. And this - -  
15 - based on the same principle that my colleague, Leonard  
16 Joblove referred to earlier, People would only be  
17 chargeable with the time that they requested because that's  
18 the - - - the time that's actually attributable to them.  
19 And then after that March 8th date that the People asked  
20 for, it's attributable to the court, to court congestion.  
21 So consequently - - -

22 JUDGE STEIN: What was the point of the  
23 certificate of readiness, in that - - - that April 18th  
24 certificate of readiness?

25 MR. LIEBERMAN: They - - - it - - -

1 JUDGE STEIN: That - - - that just totally  
2 baffles me.

3 MR. LIEBERMAN: It baffles - - - baffles me, as  
4 well, because it was - - - was unnecessary. It was  
5 unnecessary. It - - -

6 JUDGE STEIN: Well, it - - -

7 MR. LIEBERMAN: There was no legal reason to - -  
8 - to file it.

9 JUDGE STEIN: It's making a statement that we're  
10 ready.

11 MR. LIEBERMAN: It is, but it's - - - it's  
12 legally irrelevant to the calculation of 30.30 time here  
13 because you'd already had a request to the March 8th date.  
14 The court rejected it. Said no, you don't have to be ready  
15 on March 8th, because I'm not going to have a trial on  
16 March 8th. I'm not going to have a trial until - - - until  
17 April 19th. And so we weren't - - -

18 JUDGE ABDUS-SALAAM: Isn't - - - isn't the  
19 problem here that you were asking for a series of short  
20 adjournments which - - - which later determin - - - it came  
21 out that you had not been in touch with your complaining  
22 witness - - -

23 MR. LIEBERMAN: Okay. Okay.

24 JUDGE ABDUS-SALAAM: - - - for some time.

25 MR. LIEBERMAN: That's - - - that's the second

1 period. So the - - - the March 2nd to April 19th period  
2 did not deal with that. This - - - this 106-day period  
3 subsequently where on two different dates we came in, on -  
4 - - on the first date we came in and asked for a short - -  
5 - short adjournment because the arresting officer was  
6 unavailable. And then on the second date, we came in, and  
7 the reason why we asked for an adjournment was that the  
8 assigned assistant was out of the office.

9 JUDGE PIGOTT: What dates are you talking about?

10 MR. LIEBERMAN: Excuse me?

11 JUDGE PIGOTT: What dates are you talking about?

12 MR. LIEBERMAN: So this is November 9th of 2011.  
13 That was the first adjournment, and that was adjourned to  
14 January 12th. And then on January 12th, it was adjourned  
15 to February 23rd.

16 JUDGE PIGOTT: The troubling one is the - - - the  
17 one that Judge Stein's talking about because was that - - -  
18 was that an - - - one of these off-calendar certificates?

19 MR. LIEBERMAN: Well, it - - - it shouldn't be  
20 troubling because that's actually a very straightforward -  
21 - -

22 JUDGE PIGOTT: You misunderstood my question.  
23 Was that an off-calendar certificate of readiness, and was  
24 that a document that was filed?

25 MR. LIEBERMAN: Yes. It was. But it was - - -

1 JUDGE PIGOTT: When you do that are you swearing  
2 to the truth of it? Because it - - - it just seemed  
3 really, really odd that on the 18th you say we're ready for  
4 trial and you swear to that, and then on the 19th, you say  
5 you're not.

6 MR. LIEBERMAN: It is odd. It is odd. But it -  
7 - -

8 JUDGE PIGOTT: It's almost perjurious.

9 MR. LIEBERMAN: It - - - excuse me?

10 JUDGE PIGOTT: It's almost perjurious, is my  
11 point.

12 MR. LIEBERMAN: No, no, no, no, no.

13 JUDGE PIGOTT: Wait a minute. Now wait a minute.  
14 I know you - - - you're blowing it off saying well, I don't  
15 know why they did it.

16 MR. LIEBERMAN: No, no, no, no. We - - -

17 JUDGE PIGOTT: Please let me finish my point.

18 MR. LIEBERMAN: Sure.

19 JUDGE PIGOTT: And I don't know why they did it,  
20 we didn't have to do it, and everything else. But it seems  
21 to me that if somebody files a document in court, they got  
22 to back it up. And they can't simply say, well, I filed  
23 but, you know, I didn't really mean and - - - and, you  
24 know, we just filed it for convenience.

25 MR. LIEBERMAN: No, no, no. Can I - - - I'd like

1 to make a couple points.

2 JUDGE PIGOTT: Certainly.

3 MR. LIEBERMAN: First, is there's no reason to  
4 believe that that statement of readiness was false in any  
5 way because - - -

6 JUDGE FAHEY: Well, there was no explanation,  
7 though, on the record on this.

8 MR. LIEBERMAN: That's right. But actually, you  
9 know, the defense attorney provided the explanation in his  
10 motion papers. He didn't challenge the validity of that  
11 statement of readiness. In fact, he implicitly conceded  
12 that it was a valid statement of readiness because he never  
13 argued that the one day from April 18th to April 19th was  
14 chargeable to the People. And in his motion papers, he  
15 said on that April 19th court date the People didn't have  
16 their file. That's a reason why the People weren't ready.  
17 And in fact, there's - - -

18 JUDGE PIGOTT: Now see now you think that's a  
19 valid reason for not being ready at a court date that - - -  
20 you know, to - - - to try a case, I don't have my file?  
21 The day after you - - - you know, you file this thing  
22 saying you're ready. I - - - it doesn't look good for the  
23 People in this particular situation. And it troubled me  
24 because, you know, we - - - as you can tell, we've been  
25 going through this thing and there's a lot of reasons why

1 the courts have problems, there's a lot of reasons why  
2 defense counsel has problems, a lot of reasons why the  
3 People. And here's a situation where it seems like, ah,  
4 we'll just file a notice - - - a certificate of readiness.  
5 Who cares? And then you go to court and say, oh, give me  
6 an adjournment. I don't have my file.

7 MR. LIEBERMAN: The - - -

8 JUDGE PIGOTT: And by the way, who cares about  
9 speedy trial because, you know - - -

10 MR. LIEBERMAN: No. That - - - that was not what  
11 was going on here.

12 JUDGE PIGOTT: I know. I'm just trying to give  
13 you what I think is the impression that - - -

14 MR. LIEBERMAN: No, no, no. But then I - - -

15 JUDGE PIGOTT: - - - one can get.

16 MR. LIEBERMAN: Right. But the thing is the file  
17 is important to be able to go to trial because the file  
18 contains all the records - - -

19 JUDGE PIGOTT: I know that, sir.

20 MR. LIEBERMAN: - - - all the materials.

21 JUDGE PIGOTT: I - - - I've been there, but  
22 that's not my point. I'm not saying - - - I'm saying you  
23 can't go to court without your file.

24 MR. FINE: No, no, no. But this wasn't the same  
25 assistant. This wasn't - - - this - - - what happens - - -

1 JUDGE PIGOTT: Okay.

2 MR. LIEBERMAN: Okay. Let me - - - this is not  
3 on the record, but I can explain to you. The - - - there  
4 are courts where an assistant will go in with 100 cases.  
5 It's not the assistant's cases but he's - - - this  
6 assistant is standing up on the case, and the - - - and the  
7 - - - he's supposed to have the files on each of those  
8 cases. And if, for some reason, the file doesn't get into  
9 the court, the file's not there. But that's - - - that's  
10 not the assistant who's going to be trying the case. But  
11 putting - - - putting that aside - - - and I - - - and I  
12 want to go back to the period that you referred to.

13 JUDGE STEIN: But let me be - - - yeah, and I  
14 want - - - I want to hear about that.

15 MR. LIEBERMAN: Oh.

16 JUDGE STEIN: Just - - - I just - - - just to  
17 finish. I'm sorry, that - - - just one more thought. So  
18 what you're saying is is that the lack of the file wasn't  
19 the reason for the adjournment? There was a different  
20 reason?

21 MR. LIEBERMAN: No, no, no.

22 JUDGE STEIN: Oh.

23 MR. LIEBERMAN: No, no.

24 JUDGE STEIN: All right. Sorry.

25 MR. LIEBERMAN: The - - -

1 JUDGE STEIN: Answer Judge Abdus-Salaam's  
2 question.

3 MR. LIEBERMAN: All right. Okay. So with  
4 respect to that - - - that period, the 106-day period, so  
5 on - - - on February 23rd, the assistant comes in and says  
6 starting - - - basically, it seems to be referring to this  
7 period in February, was able to get in touch with the  
8 complainant's family but not the complainant himself. And  
9 also says that doesn't seem that we - - - the People were  
10 in touch with complainant since the previous September.

11 But the - - - the question here is that the  
12 request for an adjournment on both November 9th and January  
13 12th were reasonable requests for the People to believe  
14 that they could have been ready on their - - - on the court  
15 date that they requested given that previously they had  
16 been in contact with the complainant. They had been in  
17 contact with the complainant in June of 2011 and September  
18 2011 when they answered ready on both of those court dates  
19 and said that the witness was on alert. And then actually,  
20 on February 23rd, they said, okay, we're going to file a  
21 statement of readiness when we find - - - get in touch with  
22 the witness. And it was - - - only took eight - - - it was  
23 eight days later that the People filed a statement of  
24 readiness.

25 So it was reasonable for the People to assume,

1 even if - - - if - - - they may not have even thought on -  
2 - - on either November 9th or January 12th - - - they might  
3 not have been thinking about the delegate or the witness at  
4 that - - - at that point, but they were - - - they were  
5 focused on other issue why they weren't ready. But they  
6 would have also had reason to believe that the - - - the  
7 witness would have been available on the court dates that  
8 they requested. But at the - - - at the very worst for the  
9 People in this case, there's - - - there's - - - if there's  
10 an unresolved factual question dealing with how this time  
11 should be charged to the People, the remedy is to remit it  
12 to the lower court for a hearing. It can't be resolved - -  
13 - this court isn't in a position to resolve any of the  
14 factual issues because there was no hearing.

15 CHIEF JUDGE DIFIORE: Thank you, sir.

16 Counsel.

17 MR. FINE: Your Honor, Andrew Fine from the Legal  
18 Aid Society representing Earl Canady.

19 CHIEF JUDGE DIFIORE: Good afternoon.

20 MR. FINE: The - - - the question regarding the  
21 unavailability of the complainant, the People cannot be  
22 heard to claim in this case that they could have tried the  
23 case without the complainant because they acknowledged on  
24 the record on February 23rd that when, in fact, they could  
25 not find the complainant they said that they weren't ready

1 and couldn't proceed. In their opposition to the motion to  
2 dismiss - - -

3 JUDGE STEIN: Well, did they say they couldn't  
4 find the complainant?

5 MR. FINE: They said he was unavailable.

6 JUDGE STEIN: They said that the last time - - -  
7 they couldn't - - - oh, I thought that they said that they  
8 weren't able to reach her on a particular date. Or - - -

9 MR. FINE: No. They said he was - - - they said  
10 he was - - - I believe that the term was - - -

11 JUDGE STEIN: Okay.

12 MR. FINE: - - - unavailable. Let me see.

13 JUDGE STEIN: That's all right.

14 JUDGE PIGOTT: Well, you weren't ready anyway,  
15 right?

16 MR. FINE: No. But there's no obligation under  
17 30.30, Your Honor, for a defendant to be ready for trial.  
18 It was a prosecution-readiness obligation. This court has  
19 held many times the defendant does not have to - - - have  
20 to demand a trial. The defendant does not have to make - -  
21 - oppose a prosecution's - - - argue that a pros - - -  
22 establish that, in fact, he is - - - he is not ready for  
23 trial. The only obligation that a defense lawyer has is to  
24 make the appropriate motion at the appropriate time.

25 JUDGE FAHEY: So - - - so let me ask you this.

1 Is the April 18th, '11, 2011, certificate of readiness, is  
2 that illusory?

3 MR. FINE: In my view, it is. And that - - -  
4 that's what the - - -

5 JUDGE FAHEY: Why so?

6 MR. FINE: That's what the Appellate Division  
7 held, Appellate Term held.

8 JUDGE FAHEY: Right. Why?

9 MR. FINE: The reason is is because when you - -  
10 - when the prosecutor originally made a six-day request for  
11 an adjournment on March 2nd, and then - - - basically,  
12 nothing happened on March 8th, which was the date that the  
13 prosecutor had asked for. The court put the - - - put the  
14 case over until April 19th. April 18th, nearly six weeks  
15 later, they filed a certificate of readiness. When, in  
16 fact, you have a situation like this when you have a - - -

17 JUDGE FAHEY: Well, let me - - - let me stop you.  
18 So they came in the next day and they didn't have their  
19 file so they weren't ready to go forward.

20 MR. FINE: Yes. And the - - - and the - - -

21 JUDGE FAHEY: And there was no - - -

22 MR. FINE: There are two possible explanations  
23 for the certificate of readiness filed on the 18th, other  
24 than that the People just didn't know what they were doing,  
25 which I don't think is an appropriate explanation. One

1 explanation is that perhaps they weren't really ready on  
2 the 8th, which is the time they specifically requested,  
3 they were actually not ready until the 18th of April, which  
4 is four - - -

5 JUDGE STEIN: But the question is did they need  
6 to be ready on the 8th? Because the - - - the court has  
7 adjourned it, and then - - - and we've got this - - - this  
8 rule, apparently, this post-readiness request rule that  
9 once the court adds time onto it the People are not - - -  
10 it's not chargeable to the People.

11 MR. FINE: Your Honor, that is only true for - -  
12 - to a certain extent. That is not true if the People's  
13 request for the adjournment itself is a request for a short  
14 period of time for adjournments it itself illusory. We've  
15 cited cases in our brief, and the prosecution does not  
16 dispute their validity. They say that if the - - - a short  
17 adjournment request is illusory in - - - in this case, the  
18 defendant - - - the People asked for a six-day adjournment.  
19 The court granted them forty more - - - forty-one more  
20 additional days. There is case law that says that if they  
21 - - - the size of an adjournment request is illusory, that  
22 basically has the same effect as if - - -

23 JUDGE RIVERA: So what - - -

24 MR. FINE: - - - there's - - -

25 JUDGE RIVERA: What's illusory about the six-day

1 request?

2 MR. FINE: If, in fact, the - - - the  
3 circumstances demonstrate that they were not ready or could  
4 not have been ready on March the 8th, as they claimed that  
5 they would be by - - - by asking only for those six days,  
6 that is an illusory declaration. I've cited - - - I've  
7 cited a number of cases in my brief.

8 JUDGE PIGOTT: I guess - - -

9 JUDGE RIVERA: But I'm saying what on the record  
10 shows it's illusory? I'm - - - I'm - - -

11 MR. FINE: It is - - - it is a legal argument.  
12 There is no - - -

13 JUDGE RIVERA: I see.

14 MR. FINE: The prosecution never explained what  
15 the basis was for that six-day request.

16 JUDGE PIGOTT: Didn't he say - - - didn't he say  
17 the lawyer was engaged?

18 MR. FINE: I don't believe so, Your Honor. I  
19 just believe that they just simply asked for six days. And  
20 in - - - in fact, the situation here is first of all - - -

21 JUDGE STEIN: I thought they said the ADA was on  
22 trial?

23 MR. FINE: Was - - - was the ADA - - - I'm sorry.  
24 If that's - - - if that's accurate. But in fact - - -

25 JUDGE RIVERA: So - - - so then is it illusory if

1 they come in and say I need these additional days because  
2 counsel's - - - the other ADA's on trial?

3 MR. FINE: If the court - - - if the prosecutor  
4 had said that, yes, there would have been a legitimate  
5 explanation. But he - - - basically, when - - - when, in  
6 fact, you - - - you serve an off-calendar readiness  
7 declaration six weeks later under circumstances where  
8 you're saying you're ready now even though the case is not  
9 in court, then you're not ready tomorrow on the 19th when  
10 the case is in court, that throws into question your  
11 previous explanations for the delay.

12 JUDGE STEIN: So that - - - you're saying that's  
13 the significance of the - - - if they had never filed that  
14 418 certificate of readiness, which nobody asked them to,  
15 and as far as I understand, once you've announced your  
16 readiness, you don't have to continue to do that every  
17 time. But so if they had never filed that, where would we  
18 be? What would be chargeable?

19 MR. FINE: There would be - - - there would be no  
20 argument regarding that adjournment because their - - -

21 JUDGE STEIN: So the fact that they - - - some -  
22 - - for some reason voluntarily filed this - - - this  
23 certificate of readiness, now we're going to go back and  
24 say - - -

25 MR. FINE: Because - - -

1 JUDGE STEIN: - - - that all the time before that  
2 was illusory?

3 MR. FINE: Your Honor, because, A, it calls into  
4 the question the legitimacy of their six-day request. And,  
5 B, it also calls into question when they really were ready  
6 in this case. Were they ready on March 8th, as they  
7 originally indicated that they would be? Or were they only  
8 ready on the 18th, which is when they asked for it.

9 JUDGE RIVERA: If they came in on the 19th and  
10 said we're not ready - - -

11 MR. FINE: That's right. Which to me means - - -

12 JUDGE RIVERA: - - - you - - - would you count  
13 all the way back to March 2nd?

14 MR. FINE: No. All the way back to March 8th is  
15 all that we ask for in this case - - -

16 JUDGE FAHEY: This case - - -

17 MR. FINE: - - - because we - - -

18 JUDGE FAHEY: This case is startlingly unusual.

19 MR. FINE: Yes, it - - - yes, it is.

20 JUDGE FAHEY: In fairness to it, it's you have -  
21 - - first off, it means the New York City standard of it  
22 was almost a year-and-a-half from - - - from I think when  
23 the information was filed until when the case actually went  
24 to trial; is that right?

25 MR. FINE: Yes.

1 JUDGE FAHEY: About a year-and-a-half. So it's  
2 over - - - almost over 400 days. On the motions, on the  
3 30.30 motion, apparently, the court ruled once in  
4 defendant's favor, then once - - - granted People's motion  
5 to reargue.

6 MR. FINE: Right.

7 JUDGE FAHEY: Then granted defendant's motion to  
8 reargue again.

9 MR. FINE: Yes.

10 JUDGE FAHEY: And so basically the court flipped  
11 three times. Is that right?

12 MR. FINE: The court - - -

13 JUDGE FAHEY: The trial court.

14 MR. FINE: The court flipped twice.

15 JUDGE FAHEY: Twice. I see.

16 MR. FINE: The court flipped twice.

17 JUDGE FAHEY: I see.

18 MR. FINE: I'd just like to address something  
19 that Judge Pigott said before which is that, well, the  
20 defendant's usually better off when he's - - - as long as  
21 he's out, the defendant's really better off if the case  
22 doesn't go to trial. The - - - the fact of the matter is,  
23 we have a right to - - - there is a constitutional right to  
24 a speedy trial. That's not our argument here. But the  
25 reason 30.30 exists is to facilitate a defendant's right to

1 - - -

2 JUDGE PIGOTT: I wasn't suggesting anything like  
3 that. I - - - I was just talking because I used to do this  
4 work, and I was never, you know, rushing to the courthouse  
5 saying I wish the DA would get over here so we could - - -

6 MR. FINE: But as Judge - - - as Chief - - -

7 JUDGE PIGOTT: Because - - -

8 MR. FINE: As Chief Judge Lippman wrote in his  
9 concurrence in Sibblies, a defendant has a right to be  
10 tried, and it's true very few cases in the criminal system,  
11 in fact, go to trial, less than five percent. Perhaps one  
12 reason is circumstances like they have in New York where  
13 you have time after time the prosecution making short  
14 requests for adjournments, the court putting the case over  
15 for weeks afterwards, and then the next time the case is  
16 called the People are not ready again. Ultimately, the  
17 defendant is going to throw up his hands and give up.

18 JUDGE RIVERA: Counsel - - - counsel, why isn't  
19 he - - - why isn't - - - why aren't the People correct that  
20 even if - - - if we're concerned here that what would be  
21 required is to send this back for a hearing, that you can't  
22 just say on the record because they come in and they have  
23 the certificate of readiness on the day before the 19th and  
24 then the 19th they say they're not ready, that's not enough  
25 to get you to a factual record that establishes that it was

1           illusory to begin with and that it's got to be sent back.  
2           Why isn't he right about that?

3                         MR. FINE:   We would certainly be satisfied with  
4           that, Judge.   We don't believe it's necessary, but we would  
5           be satisfied by remand for a hearing because we don't know  
6           right now why that - - - why that readiness declaration on  
7           the 18th was filed.   We don't know if it's because the  
8           prosecution - - -

9                         JUDGE RIVERA:   And then what will - - - what will  
10          the judge be looking for?   What would be the standard the  
11          judge will use at that hearing to determine what, if any,  
12          days are chargeable to the People?

13                        MR. FINE:   I believe that Chief Judge Lippman's  
14          standards requiring a showing of exceptional circumstances  
15          would be appropriate because this is a situation - - - and  
16          I'd like to get back to the - - - to the complainant's  
17          absence, if I could, before I finish the argument.   It's  
18          extremely important.   The - - - the reason we have an  
19          exceptional situation here, where you really shouldn't have  
20          a presumption of readiness, a presumption of validity for  
21          the People's readiness declaration.   When you have a  
22          situation in which the prosecution is ready out of court  
23          but not ready in court and the defendant - - - and - - -  
24          and there's a sandwich in between.   Here's the courthouse  
25          doors.   The prosecutor is not ready the case is in court.

1           Prosecutor is ready the case is out of court. Prosecutor  
2           is not ready the case is in court. When you have that over  
3           and over again, it's an unusual standard, and we can't go  
4           back before Stirrup and say that there is no such thing as  
5           a valid off calend - - - as a off-calendar readiness  
6           declaration. The horse has left the barn on that question.

7                    JUDGE RIVERA: Well, but you don't need a patt -  
8           - - are you arguing that you've got to have this pattern to  
9           show it's illusory?

10                   MR. FINE: No. I'm - - - we're arguing simply  
11           right now that there is no basis to have a presumption of  
12           validity through all readiness declarations, including  
13           those made off-calendar. To me, the prosecut - - - there  
14           is such a thing as a valid off-calendar readiness  
15           declaration. Stirrup makes that clear. If the prosecution  
16           can provide a legitimate explanation for why they are not  
17           ready in court after having just previously announced that  
18           they were ready out of court, we give them the benefit of  
19           the doubt and the - - - and the off-calendar readiness  
20           declaration is appropriate.

21                    JUDGE STEIN: Do they have to give that  
22           explanation at that court appearance, or can they do it  
23           when the defendant moves to dismiss pursuant to 30.30?

24                    MR. FINE: I think a contemp - - -  
25           contemporaneous declaration would be far preferable.

1           Because then - - -

2                         JUDGE STEIN:   Preferable, but in - - - in terms  
3           of - - - of satisfying the inquiry, it would be enough if  
4           they did it later on?

5                         MR. FINE:    If the prosecution doesn't say  
6           anything at the time of the date in the question, then six  
7           months later in response to a 30.30 motion says, oh, by the  
8           way, the complainant had just had a heart attack that day  
9           and I didn't notice - - - I didn't mention it when I was in  
10          the courtroom, but I'm mentioning it now - - -

11                        JUDGE STEIN:   Well, then - - - then the court  
12          could say, well, okay, there - - - you know, there's a - -  
13          - there's a question here, there's a credibility question  
14          or whatever and let's have a hearing, right?

15                        MR. FINE:    Yes.   And I - - - and I - - - and we  
16          were not opposed to that.   We were not - - -

17                        JUDGE RIVERA:   But what - - - what if they say -  
18          - - if they just say it was not illusory, we stand by our  
19          certificate of readiness?   Does that - - -

20                        MR. FINE:    No.

21                        JUDGE RIVERA:   - - - because they haven't given  
22          it, an explanation, does that trigger the requirement for a  
23          hearing?

24                        MR. FINE:    I believe that there - - - when there  
25          is an explanation given, there is a - - - there is a

1 requirement for a hearing. If they refuse to grant an  
2 explanation and they say we stand as we stand, we - - - we  
3 simply say that the readiness declaration was - - - was  
4 valid, then you'd be left with the presumption of validity,  
5 which I don't think is appropriate in this kind of a  
6 situation.

7 JUDGE RIVERA: That's what I'm saying. Your  
8 argument then is that when a motion is filed, they can't  
9 just say it's presumed valid, we meant it - - - we meant it  
10 when we said it, we meant it when we submitted that  
11 certificate of readiness? Your - - - your argument is they  
12 must give an explanation.

13 MR. FINE: That's right. Because - - -

14 JUDGE RIVERA: And if the explanation is the kind  
15 that the judge is satisfied I don't need a hearing, so be  
16 it. But if the judge feels they still need a hearing then  
17 they need some - - - that - - -

18 MR. FINE: Yes.

19 JUDGE RIVERA: - - - that triggers a hearing?

20 MR. FINE: Yes. Because otherwise, you'd have a  
21 situation where you encourage this policy of the  
22 prosecution jumping from ready out of court to ready - - -  
23 to unready - - - unready as soon as they got to court.

24 JUDGE RIVERA: So - - - so under your rule, the  
25 prosecutor will always have to give - - -

1 MR. FINE: An explanation.

2 JUDGE RIVERA: It doesn't matter. Once - - -  
3 once that motion is filed, once the defendant files that  
4 motion, the rule - - - the statute 30.30, they're going to  
5 have to give an explanation it sounds - - - sounds to me  
6 like what you're saying.

7 MR. FINE: Yes.

8 JUDGE RIVERA: Because it triggers, at a minimum,  
9 a hearing.

10 MR. FINE: Yes. I would agree with that  
11 thinking.

12 JUDGE FAHEY: But you - - - but you only mean in  
13 the context of when they declared readiness and afterwards  
14 they say no, not ready.

15 MR. FINE: That's right. If there's an inquiry -  
16 - -

17 JUDGE FAHEY: All right. So it's only post-  
18 readiness?

19 MR. FINE: That's right. It's a post-readiness  
20 interim adjournment or any interim readiness declaration on  
21 a - - - on an out of court date where there is unreadiness  
22 before - - -

23 JUDGE FAHEY: Don't give me too much. Just - - -

24 MR. FINE: - - - and unreadiness after.

25 JUDGE FAHEY: - - - stick with post-readiness.

1 You're giving me too much. You're going down a - - -

2 JUDGE ABDUS-SALAAM: Well, I - - -

3 JUDGE FAHEY: Yeah. Go ahead.

4 MR. FINE: Well, I - - - I would like to just  
5 talk - - - I know that my time is up. Just for thirty  
6 seconds.

7 JUDGE ABDUS-SALAAM: When do you - - - when do  
8 you say that explanation has to be given? On the next  
9 appearance or when the 30.30 motion is filed?

10 MR. FINE: I think that if - - - if the request  
11 is made, there certainly - - - it certainly should be given  
12 contemporaneously. If there is no request made, I think it  
13 would be far preferable to require the prosecutor to make  
14 the explanation anyway. But I think that if the prosecutor  
15 makes the explanation in the motion papers, that might well  
16 be sufficient.

17 JUDGE ABDUS-SALAAM: Who has to make the request?

18 MR. FINE: The defense attorney, if there - - -  
19 the defense attorney is the person - - - no. I - - - I  
20 actually think - - - I'm sorry. I actually think that the  
21 - - - that the court should make the request. Because it's  
22 the criminal justice here which is - - - which is in  
23 control. Not the defense lawyer. The purpose - - - the  
24 basis of this system is to keep the court system running  
25 smoothly, and that's for the benefit of the public, not

1 simply the benefit of the defendant. Your Honor, the  
2 prosecutor - - - the complainant was - - -

3 JUDGE RIVERA: May I ask is that because the  
4 court has to determine at that point in time what, if any,  
5 days to charge? Is that why you're saying it? The judge  
6 at that moment - - -

7 MR. FINE: No. I'm saying - - - I'm not - - -

8 JUDGE RIVERA: Or is it for the obvious - - -

9 MR. FINE: I'm saying because - - -

10 JUDGE RIVERA: Excuse me. The obvious point of  
11 you're - - - you're trying to ensure that there's a  
12 contemporaneous record which will facilitate this should  
13 you ever need this?

14 MR. FINE: Yes. I agree with that. But I also  
15 think there's an institutional obligation, and there should  
16 be an institutional obligation on the court's part to - - -  
17 to make an inquiry when you have this kind of unique  
18 situation. The complainant in this case was out of - - -  
19 was out of touch with the prosecution for four months.  
20 There were three adjourn dates during this period. They  
21 gave other excuses for why, in fact, they were unready.  
22 They do not even now contend, in any way shape or form,  
23 even in their papers now or in their papers then, that, in  
24 fact, they did not need the complainant to go to trial,  
25 that they could have gone to trial without the complainant.

1                   There - - - this issue is fully reserved for  
2 review. It was made by in the original - - - the argument  
3 was made both in the original motion paper and in the  
4 reargument motion that - - - that, in fact, this is a per  
5 se 30.30 violation. More than four months of time went by  
6 without there being any explanation for it. We know what  
7 the explanation was. The complainant was unavailable, and  
8 our - - - our client should - - - should get an affirmance  
9 on that basis alone.

10                   CHIEF JUDGE DIFIORE: Thank you, Mr. Fine.

11                   MR. FINE: Thank you.

12                   CHIEF JUDGE DIFIORE: Counsel.

13                   MR. LIEBERMAN: Okay. Well, with respect to - -  
14 -

15                   JUDGE RIVERA: Counsel, can I just ask before you  
16 get to that. At the very end, defense counsel was arguing  
17 that when you have a certificate of readiness filed and  
18 then at your adjournment date the People come in and say  
19 they're not ready, that that - - - I thought he was arguing  
20 that that's a unique situation.

21                   MR. LIEBERMAN: No. It happens - - - happens all  
22 the time.

23                   JUDGE RIVERA: That's what I thought the People's  
24 position - - -

25                   MR. LIEBERMAN: And - - -

1 JUDGE RIVERA: - - - is in all of these cases.

2 MR. LIEBERMAN: And it doesn't - - - and it  
3 doesn't call into question the off-calendar statements of  
4 readiness. There's so many reasons - - - so for example,  
5 the People can announce off-calendar that they're ready,  
6 and on the court date, the defendant isn't produced. That  
7 time going forward would be charged to the People because -  
8 - -

9 JUDGE STEIN: But even when it's challenged,  
10 either by defense counsel or by the court, do you agree  
11 that - - - that you have to give an explanation for why  
12 you're not ready?

13 MR. FINE: If - - - if the court asks, yes. The  
14 - - - the question is if the defense - - -

15 JUDGE STEIN: If the court asks or the defendant  
16 - - -

17 MR. LIEBERMAN: Well, is it the - - -

18 JUDGE STEIN: - - - maybe makes a 30.30 motion.

19 MR. LIEBERMAN: Well, the - - - right. Right.

20 JUDGE STEIN: Okay. Okay.

21 MR. LIEBERMAN: The defendant wouldn't  
22 necessarily always be legally entitled to an answer unless  
23 there's some prima facie case.

24 JUDGE STEIN: Well, why not? What - - - what's  
25 the big deal?

1 MR. LIEBERMAN: You - - -

2 JUDGE STEIN: You say you're not ready, then give  
3 a reason why.

4 MR. LIEBERMAN: No. Well, it's - - - it's not a  
5 big - - - big deal. The question is what should be the  
6 legal consequence if the - - - if the defense attorney asks  
7 for it and the court says it's unnecessary because - - -

8 JUDGE STEIN: Well, the legal consequence is that  
9 then the defendant has the right to say, mm, okay, I think  
10 - - - I think that prior statement of readiness or  
11 certificate of readiness was illusory, and then you may or  
12 may not get into a hearing situation, depending upon how  
13 the court feels about that.

14 MR. LIEBERMAN: Right. Well, a record could  
15 always be made with respect to that. But I - - - I'd really  
16 like - - -

17 JUDGE RIVERA: At any point in time, or is this  
18 dependent upon on that - - -

19 MR. LIEBERMAN: No, no. Any - - -

20 JUDGE RIVERA: - - - 30.30 motion? At any point  
21 in time?

22 MR. LIEBERMAN: Well, certainly, at the time of  
23 the motion a record can be made. It's not re - - - it's  
24 not limited to what's stated on the transcript. But if - -  
25 - if I could just - - -

1 JUDGE RIVERA: Just if I can ask, on that motion,  
2 so they - - - if the defendant said that's illusory, you -  
3 - - you concede you then have to give an explanation or it  
4 triggers a hearing?

5 MR. LIEBERMAN: If - - - if the defendant in his  
6 motion papers says it was illusory? The People should come  
7 back and explain why it's not illusory, sure. But that - -  
8 - that would - - -

9 JUDGE RIVERA: Explain - - - no, no, no. Explain  
10 - - -

11 MR. LIEBERMAN: Not why it isn't. Why it - - -  
12 why it's valid. Excuse me.

13 JUDGE RIVERA: Why - - - yes.

14 MR. LIEBERMAN: Yeah.

15 JUDGE RIVERA: Explain why they were not ready  
16 after they had indicated they were ready.

17 MR. LIEBERMAN: In light of - - -

18 JUDGE RIVERA: That's really what - - - isn't  
19 that what the difference is between the defendant's  
20 position and the People's position? They're - - - they're  
21 saying you got to explain that reason. You can't - - - you  
22 can't - - - they're arguing it can't be a presumption. You  
23 really got to explain why you weren't ready after you filed  
24 the certificate of readiness.

25 MR. LIEBERMAN: Well - - - well, you have to give

1 an explanation that doesn't call into question the  
2 statement of readiness.

3 JUDGE RIVERA: Um-hum. And that explanation  
4 can't be I filed a statement of readiness, right? It has  
5 to be something more than that.

6 MR. LIEBERMAN: Right.

7 JUDGE RIVERA: Okay.

8 MR. LIEBERMAN: Right. But my case really  
9 shouldn't be about statements of readiness because that  
10 first period, that statement of readiness is irrelevant to  
11 the determination of the chargeability of the time. That's  
12 - - - what's governing that - - - the chargeability of that  
13 period is solely the - - - that post-readiness request rule  
14 that if the People ask for a limited adjournment and the  
15 court says no, I can't put it on that - - - for that date,  
16 I'm going to put it on for a later date, the People are not  
17 chargeable with that - - -

18 JUDGE RIVERA: So if you hadn't have of filed the  
19 certificate of readiness, you just come in on the 19th and  
20 say I'm not - - - on April 19th I'm not ready, you don't  
21 get charged all the way back until the - - -

22 MR. LIEBERMAN: Well, how - - -

23 JUDGE RIVERA: - - - date that you first  
24 requested?

25 MR. LIEBERMAN: But why should you be? You're

1 not making a promise - - -

2 JUDGE RIVERA: What if defense counsel says I  
3 need an explanation, Your Honor?

4 MR. LIEBERMAN: Wait. I - - -

5 JUDGE RIVERA: He should be - - -

6 MR. LIEBERMAN: Explanation of what?

7 JUDGE RIVERA: The People should put an  
8 explanation of why they're not ready today on the 19th.

9 MR. LIEBERMAN: But why would that - - -

10 JUDGE RIVERA: Well, because if the judge is  
11 giving you the date of the 19th, if you were not going to  
12 be ready, should you not have told the judge we're not  
13 going to be ready on the 19th? Why would you wait until  
14 the 19th to say that? Why hold this system up?

15 MR. LIEBERMAN: No. But the - - - but the rule -  
16 - - the rules in place are who is responsible for the delay  
17 post-readiness.

18 JUDGE RIVERA: I know. I understand that. I'm  
19 asking a different question. I'm asking a different  
20 question.

21 MR. LIEBERMAN: But how - - - how does it change  
22 anything? The responsibility for the readiness, how - - -  
23 how does it change - - -

24 JUDGE STEIN: Let me try to ask it a different  
25 way. If you don't have a good reason for your unreadiness

1 on the 19th, maybe it reflects on the fact that you really  
2 weren't ready in the first place. Maybe.

3 MR. LIEBERMAN: How - - - I - - -

4 JUDGE STEIN: But if you have a reason then - - -  
5 then that should get you off the hook. So all you have to  
6 do is provide your reason.

7 MR. LIEBERMAN: I - - - I mean I think you have -  
8 - - you have to be very precise about what these rules are  
9 going to be. The rules in place should work. Courts can  
10 make inquiries. There can be hearings. There just - - -  
11 these rules are just not - - - and in certain cases, are  
12 not being executed properly. Okay. This post-readiness  
13 request rule - - -

14 JUDGE RIVERA: I know. I understand the rule.  
15 But my point is if - - - if the People know that they will  
16 not be ready on that date - - -

17 MR. LIEBERMAN: Know when? Know when?

18 JUDGE RIVERA: Well, that could be what you  
19 explain when you come in and you say you're not ready and  
20 defense counsel says - - - or the court asks you for an  
21 explanation. In your case, right, in your argument would  
22 be we just found out yesterday. We were ready up until  
23 yesterday, Your Honor.

24 MR. LIEBERMAN: In - - - in my case, we asked for  
25 a week.

1 JUDGE RIVERA: I understand.

2 MR. LIEBERMAN: And the court says no.

3 JUDGE RIVERA: Right. But - - -

4 MR. LIEBERMAN: I mean I can't - - - I can't do  
5 anything - - -

6 JUDGE RIVERA: No, no, no. But my question  
7 wasn't about - - -

8 MR. LIEBERMAN: - - - until the next day.

9 JUDGE RIVERA: I understand that. But then the -  
10 - - when the court gives another day, if - - - if you're  
11 conceding and acknowledging, acquiescing to that day are  
12 you not saying then I'll be ready on that day?

13 MR. LIEBERMAN: Right. But you can't predict - -  
14 - you - - - listen, you either know for certain you're not  
15 ready or you're thinking who knows what's going to happen  
16 that day because a lot of things can happen by then.

17 JUDGE STEIN: That's the question. If you knew  
18 for certain you wouldn't be ready or you didn't think you'd  
19 be ready, that's - - - that's really what's - - - that's  
20 the whole concept of whether it was illusory or not, isn't  
21 it?

22 MR. LIEBERMAN: No. I think that this is a  
23 different question because this is about if un - - - if  
24 they ask - - -

25 JUDGE RIVERA: Well, it's not like the People are

1 saying okay, I've got the 19th, hopefully we'll be ready.  
2 I don't know, maybe we'll be ready. Maybe we won't.

3 MR. LIEBERMAN: The People have already announced  
4 their readiness for trial on - - - let's just go with - - -  
5 work with my facts. March 2nd, they have a - - - a  
6 singular reason for why they're not ready on that date.  
7 The attorney who's assigned to the case is on trial.

8 JUDGE RIVERA: Right.

9 MR. LIEBERMAN: Okay. He's - - - he's going to  
10 be done in six - - - six days. They request March 8th.

11 JUDGE RIVERA: Um-hum.

12 MR. LIEBERMAN: The court says no. I can't do it  
13 on March 8th. I'm going to put it on April 19th. Now  
14 listen, the - - - the attorney in court or - - - may have  
15 information at that moment or that's not a good day for a  
16 whole variety of reasons. But assuming that at that point  
17 the attorney has no reason to know that that's not - - -  
18 that that's not a good date, he says fine, okay.

19 JUDGE RIVERA: If the People, the next day, find  
20 out that's not a good date, should they inform the court?

21 MR. LIEBERMAN: But when - - - when - - -

22 JUDGE RIVERA: So that we're not all wasting time  
23 on the 19th?

24 MR. LIEBERMAN: When? When? If they - - - if  
25 they find out sometime between March 2nd and April 19th

1 that it's not a good date, yeah, it's - - - it's a good  
2 idea not to waste everybody's time to have to come into  
3 court on April 19th.

4 JUDGE RIVERA: I guess the question is is it more  
5 than a good idea but perhaps required by the law?

6 MR. LIEBERMAN: I'm not sure if that's a 30.30  
7 issue or just an administrative issue or, you know, what's  
8 a good use of resources. You could always set up an  
9 another court date by telephone. You don't have to go into  
10 court to set up a new court date. But in this particular  
11 case, the - - - it's purely a question of was the delay  
12 between March 8th to April 18th - - - because that one day  
13 between April 18th and April 19th is not challenged. The  
14 defendant did not say below in court criminal that the  
15 statement of readiness was illusory. And it's irrelevant  
16 whether it was illusory or not. But because from March 8th  
17 to April 18th that - - - that delay was attributable to the  
18 court. The court couldn't do a trial. It was basically  
19 saying I can't do a trial on March 8th, March 9th, all the  
20 way through.

21 JUDGE FAHEY: No. But I - - - yeah, I  
22 understand. We understand. Yeah. Thank you.

23 CHIEF JUDGE DIFIORE: Thank you, Mr. Lieberman.

24 (Court is adjourned)

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

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. James Brown, No. 193, People v. Terrence Young, No. 194, and People v. Earl Canady, No. 195 were prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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