

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

COURT OF APPEALS
STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

No. 78

STEVEN MYERS,

Appellant.

20 Eagle Street
Albany, New York
June 06, 2018

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE PAUL FEINMAN

Appearances:

JOHN A. CIRANDO, ESQ.
D.J. & J.A. CIRANDO, ESQS.
Attorney for Appellant
101 South Salina Street, Suite 1010
Syracuse, NY 13202

NICOLE K. INTSCHERT, ADA
ONONDAGA COUNTY DISTRICT ATTORNEY'S OFFICE
Attorney for Respondent
505 South State Street, 4th Floor
Syracuse, NY 13202

Sara Winkeljohn
Official Court Transcriber



1 CHIEF JUDGE DIFIORE: Number 78, the People of
2 the State of New York v. Steven Myers.

3 Counsel.

4 MR. CIRANDO: Good afternoon. May it please the
5 court, John Cirando from Syracuse, New York, on behalf of
6 the appellant, Steven Myers, and I'd like to reserve two
7 minutes for rebuttal, if I may?

8 CHIEF JUDGE DIFIORE: You may, sir.

9 MR. CIRANDO: Thank you. This is an appeal from
10 a judgment of conviction for the crime of burglary in the
11 third degree. Defendant was sentenced to serve two-and-a-
12 third to seven years after failing drug court. The issue
13 we wish to bring before the court today concerns the
14 adequacy of the waiver of the indictment.

15 JUDGE FEINMAN: So I want to be clear. Your
16 challenge isn't necessarily to the written waiver portion
17 of it but goes to whether or not there should have been
18 some sort of colloquy between the court and the defendant?

19 MR. CIRANDO: Yes, Your Honor.

20 JUDGE FEINMAN: All right. And my question to
21 you is assuming that that has to be knowing, voluntarily,
22 and intelligently made, that waiver, what is it that the
23 defendant has to do to preserve that challenge if anything?

24 MR. CIRANDO: Well, the Appellate Division
25 indicated that it was not necessary to preserve the



1 challenge. And - - -

2 JUDGE FEINMAN: And what's the rationale for
3 that?

4 MR. CIRANDO: The rationale for that was I
5 believe they - - - they relied on the - - - the Boston
6 case. And - - -

7 JUDGE FEINMAN: And that's the rationale that
8 you're - - -

9 MR. CIRANDO: Yes.

10 JUDGE FEINMAN: - - - promoting here?

11 MR. CIRANDO: Yes. Yes.

12 JUDGE FEINMAN: Okay. So assuming that that's
13 the case, how much does that allocation have to be?

14 MR. CIRANDO: How much does the - - -

15 JUDGE FEINMAN: How detailed? What - - - what is
16 the court supposed to ask?

17 MR. CIRANDO: Well, in the - - - the analogy that
18 - - - the first part of the answer would be the analogy to
19 the waiver of a jury trial. Which - - - like this statute
20 does not say anything about a colloquy in the statute
21 itself, but the courts have indicated that in waiving a
22 jury trial the defendant has to knowingly, voluntarily, and
23 intelligently realize what he is doing and - - - and agree
24 to do that.

25 JUDGE STEIN: Can a court accept or reject a



1 waiver of a jury trial?

2 MR. CIRANDO: Yes.

3 JUDGE STEIN: Okay. Can a court accept or reject
4 a waiver of the right to indictment if the statutory and
5 constitutional requirements are met?

6 MR. CIRANDO: Well, by constitutional
7 requirement, I would add the voluntariness and the
8 knowingly and the intelligent part. And I would say that
9 if that is not met - - -

10 JUDGE STEIN: Well but - - - but you're arguing
11 that the - - - that the only way to ascertain whether the
12 waiver is knowing, voluntary, and intelligent is to conduct
13 a colloquy.

14 MR. CIRANDO: Yes.

15 JUDGE STEIN: Right? And - - - and the People
16 are arguing I believe that - - - that the requirements of
17 appearing with counsel and signing a detailed written
18 waiver and the requirements of which are in the statute,
19 that all of that establishes that it's knowing, voluntary,
20 and intelligent.

21 MR. CIRANDO: That - - -

22 JUDGE STEIN: Right?

23 MR. CIRANDO: The only - - - the analogy I can
24 bring is to the - - - in the same sense as a waiver of a
25 jury trial.



1 JUDGE STEIN: But what I'm - - - my point is that
2 the - - -

3 MR. CIRANDO: Well, there has - - -

4 JUDGE STEIN: - - - with a waiver of a jury trial
5 we don't have those statute - - - that whole statutory
6 mechanism, and the court can decide for whatever reason,
7 presumably because it's not knowing, voluntary, and
8 intelligent, to reject the waiver. Whereas here, it seems
9 to me that the way it's set up because the court can't
10 reject it is it's an acknowledgment that if those
11 requirements are met then it meets the knowing, voluntary,
12 and intelligence test.

13 MR. CIRANDO: I - - - I don't think you - - - a
14 silent record cannot presume a proper waiver. I think the
15 court said this in People - - -

16 JUDGE STEIN: But the record isn't silent.

17 MR. CIRANDO: It - - -

18 JUDGE STEIN: The record shows the - - - that the
19 arguably again, that the - - - that the waiver was signed
20 in court as required with counsel and that the waiver met
21 all of the necessary requirements.

22 MR. CIRANDO: I would respectfully disagree that
23 as to the waiver - - - that the record demonstrates that
24 the waiver was actually signed in open court. There's
25 nothing in the record to verify that - - -



1 JUDGE FEINMAN: So - - - so prior to the - - -
2 prior to the acceptance of the waiver, there's nothing here
3 that indicates - - - there is later on during the plea
4 colloquy, there's nothing that indicates that the defendant
5 even could read or understand - - -

6 MR. CIRANDO: Right.

7 JUDGE FEINMAN: - - - English or otherwise. I
8 mean he's obviously conversing with the judge in English,
9 but that's a very different issue about whether he can read
10 and understand English.

11 JUDGE GARCIA: There's - - - counsel, as I
12 understand your argument was twofold. One is what we've
13 been talking about just now with Judge Stein, which is
14 there's no indication on the record that there was
15 compliance with the statutory requirements. Second, even
16 if so, you still have to have this colloquy.

17 MR. CIRANDO: Right.

18 JUDGE GARCIA: Is that correct?

19 MR. CIRANDO: Right.

20 JUDGE GARCIA: What I'd like to understand as to
21 part two if we - - - let's assume that a waiver is validly
22 executed and we now put in a new requirement that you have
23 to have some type of colloquy to elicit - - - to ensure
24 that it's voluntary and knowing. What's the effect of that
25 going to have on all the pleas like your client's where



1 judges who weren't told they had to do this before are - -
2 - we're now faced with a number of pleas that were
3 negotiated?

4 We have plea agreements, we have guilty pleas,
5 people who have served or are serving their sentences, and
6 now they're going to come - - - be coming up through the
7 pipeline, let's assume they're live appeals, and they'll
8 say, you know, you didn't engage in this colloquy. And now
9 we have a requirement that you don't have to preserve,
10 because we're saying no preservation is necessary, where we
11 have thousands of pleas that are going to be affected by a
12 rule that we put in.

13 MR. CIRANDO: Well, I don't know if the violation
14 of constitutional - - - of constitutional rights is - - -
15 should be tempered by such a - - - such a concern
16 initially. But - - -

17 JUDGE WILSON: What do you make of the fact that
18 the Constitution itself specifies a written waiver when it
19 was amended? Is that part of the right, or is at least
20 something that we can assume that the people who amended
21 the Constitution believed was sufficient?

22 MR. CIRANDO: Well, I - - - I still think to
23 waive a - - - to waive a constitutional right or to waive
24 your rights you - - - you have to do it knowingly,
25 voluntarily, and intelligently. And I think that - - -



1 that is the cloud that's over everything - - -

2 JUDGE FEINMAN: So - - - so - - -

3 JUDGE FAHEY: And why does that - - - I'm sorry,
4 you go ahead.

5 JUDGE FEINMAN: I'm sorry. So would it be enough
6 if the judge just said I see you signed the waiver in the
7 presence of your counsel, who has also signed the waiver,
8 did you have a chance to discuss it with your attorney? Is
9 that enough?

10 MR. CIRANDO: That wouldn't be enough to - - - to
11 have the defendant waive his right to appeal, so I don't
12 think it's - - - it's sufficient to have the defendant
13 waive the right - - -

14 JUDGE FEINMAN: So - - - so is part of your
15 argument that because this is of a constitutional dimension
16 we should certainly not have a lesser requirement than we
17 have for the violation - - - for the waiver of a statutory
18 right to appeal?

19 MR. CIRANDO: Right, yes.

20 JUDGE FEINMAN: Okay.

21 MR. CIRANDO: Yes, Your Honor.

22 JUDGE GARCIA: But to go back to Judge Wilson's
23 question, let's assume that the state constitution, the
24 drafters, intended this to be a knowing, intelligent, and
25 voluntary waiver, this would satisfy that, this written



1 form. We would essentially be saying our constitution
2 falls below the federal floor. That would have to be our
3 finding, right? That the state - - - it becomes the
4 reserve of our usual state constitution jurisprudence.

5 MR. CIRANDO: Usually, it's - - - it's the other
6 way around.

7 JUDGE GARCIA: But we would have to say this
8 violates the Constitution of the United States.

9 MR. CIRANDO: Well I - - - I think even in the
10 federal statute you - - - federal constitution you still
11 have to have it knowingly, voluntarily, and intelligently.

12 JUDGE GARCIA: But assume that our state
13 constitution doesn't require that, that we've said in the
14 state constitution that this extensive written waiver is
15 sufficient. To find that isn't, we'd have to say
16 essentially our state constitutional provision doesn't meet
17 the federal constitutional standard.

18 MR. CIRANDO: It's just - - - well, I think we're
19 talking about what is just a personal right, a personal
20 right which the defendant can waive, and if the defendant
21 is waving a personal right, such a personal right has to be
22 done knowingly, voluntarily, and intelligently. And I
23 would - - - I would fall back on that - - - that analysis,
24 Your Honor.

25 JUDGE FAHEY: I guess I - - - I struggle with the



1 idea that the only way that this can be done is by an oral
2 waiver in some form, a detailed oral waiver. Because if I
3 am correct, you're saying that the - - - the procedure
4 that's used to waive the right of appeal would be
5 insufficient.

6 MR. CIRANDO: No, I didn't - - - I didn't mean it
7 that way.

8 JUDGE FAHEY: Okay.

9 MR. CIRANDO: I meant - - -

10 JUDGE FAHEY: Explain that to me then.

11 MR. CIRANDO: - - - in response to Judge
12 Feinman's question that the - - - what he proposed was not
13 sufficient to waive someone's right to appeal, so it
14 shouldn't be sufficient to waive - - -

15 JUDGE FAHEY: I see.

16 MR. CIRANDO: - - - waive indictment.

17 JUDGE FAHEY: I see.

18 MR. CIRANDO: That - - - that was the analysis I
19 gave.

20 JUDGE FAHEY: So why - - - why do we need an oral
21 waiver on top of the written waiver? Because that's in
22 essence what you're asking, right?

23 MR. CIRANDO: For the same reason we need it in a
24 jury waiver, for the same reason we need it in an appeal
25 waiver.



1 JUDGE FAHEY: And that reason is what?

2 MR. CIRANDO: That we want to ensure that a
3 waiver of the constitutional right is knowingly,
4 voluntarily, and intelligently entered.

5 JUDGE FAHEY: I see.

6 JUDGE RIVERA: Well, counsel, just to clarify,
7 your argument is not that every item that might be included
8 in the written waiver has to be part of the colloquy, are
9 you?

10 MR. CIRANDO: No. No.

11 JUDGE RIVERA: No. I - - - I thought your
12 argument was that the court, as it has to for other types
13 of rights, has to be convinced that the individual is
14 knowingly and intelligently waiving the right.

15 MR. CIRANDO: Right.

16 JUDGE RIVERA: That could mean something as
17 simple as asking did you read it, and do you know what it
18 means?

19 MR. CIRANDO: Right.

20 JUDGE RIVERA: And did you discuss that with your
21 lawyer?

22 MR. CIRANDO: Right, or simply stating do you
23 know your case can be presented to the grand jury or you
24 have the opportunity to testify? And if - - - if that
25 takes place, the court then can have the opportunity to



1 determine if the evidence before the grand jury is
2 sufficient and if the procedures were followed. Do you
3 understand that and do you wish to waive those rights and
4 enter a plea of guilty to burglary in the third degree in
5 accordance with this plea-bargain? And then if he says yes
6 then you - - - you have him sign the waiver, do you
7 acknowledge your signature, pass it up to the judge, he
8 signs it. Then you go into talking about his - - - his
9 plea-bargain and then waiver of his right to appeal,
10 separate, separate, which I think this court has required.
11 And - - - and then I would say that the procedures in Judge
12 Jasen's (ph.) dissent in Sizemore (ph.) would have been
13 met. Thank you.

14 CHIEF JUDGE DIFIORE: Thank you, counsel.
15 Counsel.

16 MS. INTSCHERT: Hello, Your Honors; Nicole
17 Intschert for the People of the State New York. If I
18 could, I guess I would like to start with the question
19 about preservation. I believe that the - - - the second
20 contention here that we're were concerned about, the - - -
21 the requirement of an oral colloquy, is improperly before
22 this court. Inasmuch as I think the court is in agreement,
23 it's something above and beyond what is being required - -
24 -

25 JUDGE FEINMAN: Well, I haven't agreed to



1 anything yet. I just asked questions.

2 MS. INTSCHERT: My mistake. I apologize.

3 JUDGE RIVERA: Well, how is it unpreserved?

4 Isn't it clear that what he is saying is that what went on
5 here didn't comply with the Constitution? Haven't we said
6 what - - - if that's your claim that that doesn't require
7 preservation?

8 MS. INTSCHERT: And if - - - if this court were
9 to find that in fact, the lack of a colloquy did not comply
10 with the Constitution than it would, I submit, be a mode of
11 proceedings error that wouldn't require preservation. But
12 I don't think that based on what is in the - - - the
13 Constitution and what is under the statute right now, that
14 the oral colloquy is required, and I would ask this court
15 to consider - - -

16 JUDGE STEIN: This is one of those strange
17 situations where we have to decide that first to decide
18 whether it needs to be preserved or not, right?

19 MS. INTSCHERT: Agreed, Your Honor, yes.

20 JUDGE STEIN: Okay.

21 MS. INTSCHERT: And I - - - I think that Former
22 Presiding Justice Kaye's reasoning in People v. Page is
23 instructive. In People v. Page, of course, we were
24 considering the waiver of the right to trial by jury and
25 considering much I think the same issues here. There the



1 waiver of a right to trial by jury was attempted to be
2 effected orally. And it - - - the court - - - the case
3 came up all the way before this court, and the discussion
4 was whether the oral colloquy would suffice without a
5 written colloquy and the written - - - or, excuse me, a
6 written waiver. And the written waiver is what was - - -
7 what is and was required under the Constitution and under
8 the CPL. And Judge Kaye, as I think astutely, pointed out
9 that that is what the drafters of the Constitution and what
10 the people of the State to New York through the legislature
11 decided was necessary - - -

12 JUDGE RIVERA: That's not - - - that's not the
13 question. Because the statute - - - excuse me, the
14 Constitution says, "Such waiver shall be evinced by written
15 instrument," but his question or the issue he's posing is
16 how does the court know that the waiver is knowingly and
17 intelligently given? It's not whether or not there's a
18 writing. I mean it's not - - - it could not possibly be,
19 but you'll correct me otherwise, that People's position
20 that if the defendant either didn't speak English and the
21 waiver's only written in English or the defendant couldn't
22 read, that the simple fact that they sign that waiver with
23 their name means that they understood the waiver. Don't
24 you need the judge to ask something?

25 MS. INTSCHERT: Well, I would say that there



1 needs to be some - - - some sort of indication that there's
2 an understanding, at a minimum, of whether the defendant
3 can read and write. And in - - -

4 JUDGE FEINMAN: So how do we have that - - - so
5 accepting that concession, how do you have that evidence on
6 this record?

7 MS. INTSCHERT: I - - - it's a little bit out of
8 - - -

9 JUDGE FEINMAN: Before you get to the plea
10 colloquy?

11 MS. INTSCHERT: Admittedly, I'm not sure that my
12 recollection of the record is all that clear, but based on
13 my recollection, there - - - the court did not address the
14 defendant himself before we entered the waiver of
15 indictment. But I do think it's notable and instructive
16 that immediately thereafter we went right into taking a
17 plea, and in the course of taking the plea those sorts of
18 questions were asked and answered. And if at - - - if at
19 some point during the - - - the colloquy on the plea, how
20 old are you, do you speak and read and understand English,
21 have you had sufficient time to confer with your attorney,
22 are you under the influence of any drugs or alcohol, et
23 cetera, et cetera, if there had been some sort of issue
24 there, then I think we would have readily been aware that
25 the - - - there was an issue with the waiver of indictment.



1 JUDGE RIVERA: So if - - - if - - - since we're
2 looking at a statewide rule, if those questions had not had
3 - - - had been asked and you didn't have those answers - -
4 - because you make of course an excellent point, is it - -
5 - how then does the judge know that the waiver is valid and
6 knowing and intelligent?

7 MS. INTSCHERT: I'm afraid I don't have a good
8 answer other than it - - - it would seem that in other
9 cases where we're looking at the waiver of the right to a
10 trial by jury, the entry of the plea - - - excuse me, the
11 entry of the waiver of the right to trial by jury, was
12 found acceptable even though there wasn't an oral colloquy
13 that accompanied it. And I apologize because these cases
14 weren't in my brief, but there are a handful of cases from
15 the various departments of the Appellate Division saying
16 that looking at the other circumstances surrounding the
17 entry of the - - - or the waiver of the right to trial by
18 jury, it could be inferred that despite the lack of a
19 colloquy that the entry was knowing, voluntarily, and
20 intelligently done.

21 JUDGE FEINMAN: So I just want to address the
22 concern that I think was raised by Judge Garcia. It's not
23 your experience, is it, that there are literally hundreds
24 of thousands of pleas that could now be attacked based on
25 the failure to have any colloquy. I mean, it would be more



1 likely that most judges have asked something. You know,
2 maybe here just the judge forgot to do that.

3 MS. INTSCHERT: I'm inclined to believe that in
4 this particular instance, this was a one-time mistake that
5 I think the judge got distracted while he was at the bench
6 and forgot to engage in the colloquy that would have been
7 his normal practice.

8 JUDGE FEINMAN: Right, so are - - - are you
9 familiar at all with the sample colloquy that's up there
10 with the PJI charges - - -

11 MS. INTSCHERT: I've reviewed the model colloquy,
12 Your Honor.

13 JUDGE FEINMAN: - - - on the New York Court's dot
14 gov website?

15 MS. INTSCHERT: Yes.

16 JUDGE FEINMAN: Are you familiar with that?

17 MS. INTSCHERT: Yes, Your Honor.

18 JUDGE FEINMAN: All right. So is everything
19 that's in that sample colloquy required, or is it something
20 less?

21 MS. INTSCHERT: I - - - I would submit that it's
22 something less if I may refer - - -

23 JUDGE FEINMAN: Yeah, sure. Yeah, yeah.

24 MS. INTSCHERT: Thank you.

25 JUDGE STEIN: Well, have we - - - haven't we



1 generally with these types of colloquy said that there's no
2 specific - - -

3 MS. INTSCHERT: Catechism?

4 JUDGE STEIN: - - - catechism? Yeah.

5 MS. INTSCHERT: Sorry. I'm sorry, Your Honor. I
6 didn't mean to speak for you.

7 JUDGE STEIN: No, that's - - - that's okay.

8 MS. INTSCHERT: But I - - - I agree, and so I - -
9 - I can't - - - I certainly don't want to be responsible
10 for scripting what the colloquy should be. And I - - - I
11 just think that there's - - -

12 JUDGE RIVERA: But the conscientious judge being
13 aware of this script would be on notice, even if we have
14 never opined on this, that such a colloquy makes sense to
15 confirm that - - -

16 MS. INTSCHERT: Yeah.

17 JUDGE RIVERA: - - - the individual knows what
18 they're doing?

19 MS. INTSCHERT: I'm - - - I'm sure that judges
20 are aware, and I'm sure that it - - - and it does make
21 sense. I'm not at all saying that a colloquy is - - - an
22 oral colloquy in addition to the written waiver is a bad
23 idea. It's just that I don't think under the structure
24 that we have that it's necessary for there to be a specific
25 one or - - -

1 JUDGE FEINMAN: But - - - but the waiver at that
2 point goes to the very jurisdiction of the court, right?
3 Because this is happening in some sort of - - - whether
4 it's a - - - it's a Supreme Court part of what is up until
5 that point a pending felony complaint - - -

6 MS. INTSCHERT: Correct, Judge.

7 JUDGE FEINMAN: - - - for which the Supreme Court
8 or the county court would have no jurisdiction otherwise,
9 right?

10 MS. INTSCHERT: Right.

11 JUDGE FEINMAN: That would be still pending in
12 the lower, local criminal court, whether that's the
13 criminal court of the City of New York or some other local
14 court, right?

15 MS. INTSCHERT: Right.

16 JUDGE FEINMAN: So until you get jurisdiction
17 through the waiver, how can you cure it with the plea part?
18 And I'm - - - I'm going back to something you said earlier.
19 I mean don't you really need it up front?

20 CHIEF JUDGE DIFIORE: The question is can you do
21 a totality of the circumstances type analysis here.

22 MS. INTSCHERT: And I - - - and I think that you
23 can in the sense that I - - - I believe that's the sort of
24 suggested review that has come up through the Third,
25 Fourth, and I believe the Second Departments.



1 JUDGE RIVERA: Well, the point is it's a status
2 question. The status doesn't change from moments before to
3 moments later. Either the person knows English and - - -
4 and they can read, or they can't.

5 MS. INTSCHERT: That's correct, Judge.

6 JUDGE STEIN: Going back to some questions about
7 the effect of this, so aside from the - - - from pleas in
8 the pipeline, so to speak, would this have any effect, for
9 example, on predicate felony determinations?

10 MS. INTSCHERT: Truthfully, Your Honor, I'm not
11 sure that I know the answer to the question. I'm not sure
12 I can give you - - - the court an adequate answer to that
13 question. It certainly seems like it would implicate in
14 the lines of like a Catu sort of analysis, which as far as
15 I'm aware could lead to the implication that we have all -
16 - - all these kinds of procedural nightmares to go back and
17 - - - and fix or address one way or another. But beyond
18 that, I'm afraid I don't have that answer.

19 JUDGE RIVERA: But aren't we really - - - aren't
20 - - - wouldn't it really boil down to an ineffective
21 assistance of counsel claim? Counsel should have raised
22 it, they didn't, we've never opined on it, so maybe you
23 don't have the kind of Turner claim anyway. Aren't we
24 really talking about prospectively not retrospectively?

25 MS. INTSCHERT: I'm - - - Your Honor, I'm sorry I



1 don't know the answer. I would be happy to get back to you
2 if - - -

3 JUDGE RIVERA: Fair enough.

4 MS. INTSCHERT: - - - the court would like an
5 additional submission on that particular issue.

6 CHIEF JUDGE DIFIORE: Thank you, counsel.

7 MS. INTSCHERT: All right. Thank you, Your
8 Honors.

9 CHIEF JUDGE DIFIORE: Counsel.

10 MR. CIRANDO: I think, Judge Garcia, rather than
11 looking back - - - looking forward, it's my understanding
12 that now the - - - the - - - our largest county in the
13 state, New York County, is going to start utilizing
14 Superior Court informations in an effort to speedily
15 dispose of matters.

16 JUDGE FEINMAN: But - - - but there have been SCI
17 pleas in all the counties of the city for years. You have
18 Part F, and you have the N part, and the county part. So I
19 mean, the judges there are familiar with - - - with those
20 waivers. So - - -

21 MR. CIRANDO: There was - - -

22 JUDGE FEINMAN: But it - - - it's been done in
23 all - - - all the counties - - -

24 MR. CIRANDO: Okay.

25 JUDGE FEINMAN: - - - of the City of New York.



1 But the - - - the real concern I think that Judge Garcia
2 was expressing is are we now creating a rule that
3 retrospectively, if we adopt your position, endangers
4 literally thousands of otherwise settled pleas?

5 MR. CIRANDO: I don't believe so, Your Honor,
6 because I don't think that there's that many cases in the
7 state where there's absolutely no colloquy at all, and
8 that's what we have here.

9 JUDGE GARCIA: We're going to be setting some
10 kind of a floor, and I know we always say there's no
11 catechism for this.

12 MR. CIRANDO: Right.

13 JUDGE GARCIA: But then it will be did this meet
14 the non-catechism test? Did this meet that - - - did you
15 just say did you execute this extensive written waiver? Is
16 that enough? And we've never said there is any requirement
17 yet.

18 MR. CIRANDO: Right.

19 JUDGE GARCIA: So a judge who doesn't follow a
20 form or who accepts this in court written waiver in the
21 presence of counsel and thinks that's entirely appropriate
22 because we've never said otherwise and that case is live,
23 forget collateral attacks and ineffective assistance, there
24 are thousands of these cases I would imagine, plea cases,
25 in the pipeline right now. There's no preservation



1 requirement if we find this. And so we are going to start
2 to get - - - and other cases like this come to mind - - -
3 all these live cases first that say we didn't have to
4 preserve this error, there was nothing at all, no
5 catechism, nothing, or this was this, it didn't meet even
6 your minimal standard, and we are going to be reviewing or
7 the Appellate Divisions are going to be reviewing thousands
8 of these cases based on a new rule.

9 MR. CIRANDO: Didn't you have that same problem
10 when the court said that the guilty pleas were improper for
11 certain reasons?

12 JUDGE GARCIA: We did.

13 MR. CIRANDO: Didn't we have that same problem
14 when the court said that the notice or the waiver of appeal
15 can't just be done with a form? And - - - and more
16 importantly, I think it was an answer to Judge Feinman's
17 question where he - - - you said looking at what happened
18 subsequently during the proceedings to use it
19 prospectively, I don't think that would fly in the face of
20 this court saying that the guilty plea is a separate entity
21 and has to be resolved. The waiver of appeal is a separate
22 entity separate and distinct and has to be resolved. They
23 can't be lumped together. And I don't think the waiver - -
24 -

25 JUDGE FEINMAN: Well, here you're - - - I mean



1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

the argument would be that you can't do that because until such time that you get the valid waiver, the court doesn't - - - the Supreme Court or the county court, depending on what jurisdiction you're in, doesn't even have jurisdiction.

MR. CIRANDO: Right, and that's why we don't need to preserve it. Thank you.

CHIEF JUDGE DIFIORE: Thank you, counsel.

MR. CIRANDO: Thank you.

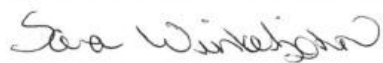
(Court is adjourned)



1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

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. Steven Myers, No. 78 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



Signature: _____

Agency Name: eScribers

Address of Agency: 352 Seventh Avenue
Suite 604
New York, NY 10001

Date: June 12, 2018

