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COURT OF APPEALS

STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

No. 213

ANTHONY S. PIGNATARO,

Appellant.

20 Eagle Street
Albany, New York 12207
November 12, 2013

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE VICTORIA A. GRAFFEO
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE ROBERT S. SMITH
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM

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1 CHIEF JUDGE LIPPMAN: 213, People v.
2 Pignataro.

3 Counselor, would you like any rebuttal
4 time?

5 MR. GREENBERG: Two minutes, please.

6 CHIEF JUDGE LIPPMAN: Two minutes, go
7 ahead, counsel.

8 MR. GREENBERG: Thank you. I'm Charles
9 Greenberg. I'm representing Anthony Picaro - - - I'm
10 sorry; Anthony Pignataro.

11 In his appeal of the resentencing pursuant
12 to 70.85 of the Penal Law, our position is, is that
13 this section is unconstitutional on its face, and as
14 applied to Mr. Pignataro, because it basically short-
15 circuits his right to withdraw his plea, by
16 establishing this automatic - - - by this automatic
17 procedure - - -

18 CHIEF JUDGE LIPPMAN: Why isn't the law
19 under the - - - the statute, why isn't the law now -
20 - - now consistent with defendant's understanding of
21 - - - of his sentence?

22 MR. GREENBERG: Because as - - - as - - -

23 CHIEF JUDGE LIPPMAN: You follow me? Why
24 isn't it now back in sync? Why can't that be done?

25 MR. GREENBERG: Well, because the - - - the

1 original plea was tainted by the unconstitutionality
2 by - - - by taking this plea without being informed
3 that he had the PSR (sic), but the - - - the post-
4 release supervision - - - that the original plea is
5 rendered unconstitutional, because it wasn't knowing
6 or voluntary.

7 JUDGE GRAFFEO: What's - - - what's the due
8 process violation? I mean, he's - - - we're
9 eliminating the PRS, so how under the federal cases -
10 - -

11 MR. GREENBERG: Well, it - - - it's uncon -
12 - -

13 JUDGE GRAFFEO: Is this - - - is - - - does
14 this still require the plea to be vacated?

15 MR. GREENBERG: It still does require the
16 plea to be vacated, Your Honor, because it - - - I
17 mean, had he known of the PSR (sic) being a
18 requirement, the entire procedure of getting the - -
19 - getting to that plea to begin with, would have been
20 very different. I mean, the entire negotiation would
21 have been quite different, and so that's why - - -

22 JUDGE GRAFFEO: Well, that's because it was
23 an illegal plea at that time, correct?

24 MR. GREENBERG: It was an illegal plea.

25 JUDGE GRAFFEO: But after the legislature

1 passed 70.85, haven't they indicated that it's now a
2 legal plea - - -

3 MR. GREENBERG: Yeah, but - - - but can - -
4 -

5 JUDGE GRAFFEO: - - - to eliminate the PRS,
6 so we don't have that - - -

7 MR. GREENBERG: Yeah, but what - - -

8 JUDGE GRAFFEO: - - - illegality aspect
9 anymore?

10 MR. GREENBERG: Not anymore, but the
11 problem is it doesn't cure the underlying
12 unconstitutionality of the plea. I mean, it
13 retroactively, Your Honor, declares something that
14 was unconstitutional at the time to now - - - is now
15 automatically le - - - constitutional or legal, by
16 virtue of the legislative fiat, if you will, or
17 legislative decree.

18 JUDGE SMITH: But how can you complain of
19 that? Isn't - - - isn't it to your benefit that they
20 - - - you can now legally get a sentence without PRS?

21 MR. GREENBERG: Well, what do you mean by
22 "to our benefit", though?

23 JUDGE SMITH: Well, my - - - I mean,
24 wouldn't the average guy rather have ten years
25 without PRS than ten years with?

1 MR. GREENBERG: It would - - - that
2 certainly the one - - - one of the concerns that Mr.
3 Pignataro would have is that if he goes - - - if the
4 plea is vacated, he goes back to plead reposture
5 (ph.). Some defendants may want that, but he, on the
6 other hand, is very adamant that his - - -

7 JUDGE SMITH: He wants - - - he wants his
8 plea back.

9 MR. GREENBERG: He wants his plea back.

10 JUDGE SMITH: But - - - but how can he
11 complain if he's getting exactly what he bargained
12 for the first time?

13 MR. GREENBERG: Well, I mean, he's
14 complaining because - - - I mean, had he known of the
15 PSR (sic) at the time, then he - - - then the logic
16 of his complaint is that the plea never - - - might
17 have happened very differently or the plea might not
18 happened at all. I mean, that's - - -

19 JUDGE SMITH: But, yeah - - - but if - - -
20 but if - - - you're saying he if - - - he would - - -
21 if he had known that he was going to get PRS, he
22 might not have taken the plea, and they're saying to
23 you, okay, congratulations, you're not getting it; no
24 problem, relax.

25 MR. GREENBERG: Okay, but then the prob - -

1 -

2 JUDGE SMITH: What's the problem?

3 MR. GREENBERG: The problem is, is that
4 still doesn't cure the underlying unconstitutionality
5 of the plea at the time that it was - - - I mean, he
6 - - - what - - - what the legislature is trying to do
7 with 70.85 is retroactively go back to all these
8 unconstitutional pleas, and then - - -

9 CHIEF JUDGE LIPPMAN: They're trying to
10 make sure that the law is consistent with his
11 understanding.

12 MR. GREENBERG: What do you mean by - - -
13 I'm sorry?

14 CHIEF JUDGE LIPPMAN: That the - - - that
15 the law - - - that his understanding is consistent
16 with what the law is. That's what that statute does.

17 MR. GREENBERG: Well, what the - - -

18 CHIEF JUDGE LIPPMAN: As opposed to a
19 situation like Hill, where - - - where the - - - his
20 understanding was inconsistent with the law.

21 MR. GREENBERG: Well, his understanding - -
22 -

23 CHIEF JUDGE LIPPMAN: Do you follow what
24 I'm saying? Why isn't it okay as long as now - - -

25 MR. GREENBERG: Well, because it doesn't

1 cure the - - -

2 CHIEF JUDGE LIPPMAN: You're just saying no
3 matter what you do, you can't - - - you can't change
4 it after the fact.

5 MR. GREENBERG: I mean, you can't change it
6 after the fact. And I - - - and I guess the - - -

7 JUDGE GRAFFEO: And that's true for all
8 over 3,700 individuals that have been - - -

9 MR. GREENBERG: Um-hum.

10 JUDGE GRAFFEO: - - - resentenced under the
11 statute?

12 MR. GREENBERG: And that would be true, I
13 mean, according to the theory that he's advancing - -
14 - that we're advancing is that - - - yes, I
15 understand that the elephant in the room is that you
16 have all these other pleas that could also be
17 rendered unconstitutional - - -

18 JUDGE RIVERA: So if we find Section 70.85
19 unconstitutional - - -

20 MR. GREENBERG: Yes.

21 JUDGE RIVERA: - - - that means that
22 everyone who did not object to the resentencing now
23 can object?

24 MR. GREENBERG: In theory. In theory that
25 could be a possibility. I mean I understand that

1 mechanism in 70.85 that allows him - - - allows the
2 defendant to do that. So that's another reason as to
3 why we would argue that this is an unconstitutional
4 statute on its face, because it just - - - it just
5 occurs automatically and it - - - it's - - - the
6 defendant has no say one way or the other whether
7 he's going to be resentenced.

8 CHIEF JUDGE LIPPMAN: He also has no PRS,
9 though.

10 MR. GREENBERG: He has no PSRS (sic).
11 Well, he has no PSRS (sic), and maybe some - - - some
12 defendants want that, but Mr. Pignataro has made it
13 very clear ever since I've been representing him for
14 almost a year over a well - - -

15 JUDGE GRAFFEO: What would have changed at
16 the time of his plea, because this is as if there is
17 no PRS?

18 MR. GREENBERG: That I cannot - - -

19 JUDGE GRAFFEO: So he entered - - - he
20 entered the plea without it. That was the benefit of
21 the bargain that he wanted.

22 MR. GREENBERG: That would be the benefit
23 of the bargain. As for what would have been changed,
24 that - - - that I cannot answer.

25 JUDGE GRAFFEO: I mean, I can understand

1 the illegality because - - - if the PRS was then
2 added, but here, under this statute, it can be wiped
3 away.

4 MR. GREENBERG: But it can be wiped away
5 without his consent.

6 JUDGE GRAFFEO: But isn't he getting some
7 kind of additional benefit then, beyond what he ever
8 would have done at the time he entered the plea?

9 MR. GREENBERG: But - - - but then his
10 response to that - - - I mean, I can understand, I
11 guess, he's getting this benefit, and then his
12 response is, is but he's still nevertheless entitled
13 to take the plea back.

14 JUDGE PIGOTT: You're suggesting that if at
15 the time of the plea - - - if we're saying that the
16 plea is unconstitutional - - -

17 MR. GREENBERG: Yes, the plea itself, not
18 the specific performance - - -

19 JUDGE PIGOTT: Right, that - - - that - - -

20 MR. GREENBERG: - - - of the sentence.

21 JUDGE PIGOTT: - - - had all of the cards
22 been face up on the table, and he was told fifteen
23 years plus five PRS, he may have said, I'm not doing
24 that, and his lawyer may have said, well, how about
25 ten plus five PRS - - -

1 MR. GREENBERG: Right.

2 JUDGE PIGOTT: - - - and that would have
3 been a wholly different plea, because everybody's
4 cards are on the table, than the one that he took,
5 and since we said in Catu that it's not the sentence
6 that was illegal, it was the plea itself, that that's
7 unconstitutional.

8 MR. GREENBERG: That is correct. And
9 that's exactly what the - - - what our argument is,
10 is that it's not the - - - it's not the pre - - -
11 it's not the - - - the specific performance of the -
12 - - of getting this bargained-for sentence, it is the
13 plea itself that's - - - that's wrong.

14 CHIEF JUDGE LIPPMAN: Okay, counsel,
15 thanks.

16 MR. GREENBERG: Oh, you're welcome.

17 CHIEF JUDGE LIPPMAN: Counsel?

18 MR. HILLERY: Good afternoon, Your Honors,
19 Michael Hillery on behalf of the People of the State
20 of New York. This is a case of genuine specific
21 performance. Mr. Pignataro received precisely the
22 sentence that he expected to receive.

23 CHIEF JUDGE LIPPMAN: Yeah, but he said - -

24 -

25 MR. HILLERY: Nothing more, nothing less.

1 CHIEF JUDGE LIPPMAN: But your adversary
2 says, obviously, it doesn't change the fact that what
3 happened at the time. You're - - - after the fact,
4 you're changing it. Why are you able to do that
5 after the fact? What's the rationale that now makes
6 it okay?

7 MR. HILLERY: With the advent of Penal Law
8 70.85, post-release supervision is not a direct
9 consequence as contemplated by this court under its
10 decision in Catu.

11 JUDGE PIGOTT: If you say so. But if you
12 don't say so, then it is. In - - - in other words,
13 the People get to decide which ones of these - - -
14 Judge Graffeo pointed out there may be 3,500 of them
15 out there - - - 3,700 - - - you get to decide which
16 among them you were willing to give up PRS, and which
17 you were not. It's not the defendants that can do
18 that, right?

19 MR. HILLERY: Well, if we seek to enforce
20 post-release supervision, in such cases, the
21 defendant has the right to withdraw his plea. He can
22 certainly exercise that right under the statute.

23 JUDGE SMITH: Isn't - - - isn't - - -

24 MR. HILLERY: It's to our - - -

25 JUDGE SMITH: Isn't your position that the

1 new statute is essentially a remedy - - - an
2 alternative remedy for a constitutional violation?

3 MR. HILLERY: It is a - - - it rectifies
4 what would be a due process violation.

5 JUDGE SMITH: Okay, but does - - - does it
6 - - - but if it did - - - if that's what it's doing,
7 does that really mean the PRS isn't a direct
8 consequence? I mean, it's - - - what the statute
9 does is it relieves certain defendants of this
10 consequence as a remedy for a failure to advise them
11 of it. But that doesn't make it less direct, does
12 it?

13 MR. HILLERY: Under 70.85, we've
14 effectively gone back in time. We're not resolving
15 an injury, if I could import a term from the last
16 case. It's as though there was no injury in this
17 case. Defendant was never told about PRS. That we
18 all agree on. He never did a day of PRS and will
19 never do a day of PRS.

20 JUDGE SMITH: Well, if he - - - if they had
21 out and out repealed PRS for everybody, I can see
22 that you're going back in time. But PRS is still out
23 there. It's just that certain people, because of
24 this - - - this sequence of events, certain people
25 will wind up not getting it.

1 MR. HILLERY: That's true, and if I'm
2 understanding Your Honor's question, then my answer
3 would be, defendant is still in a position to make
4 sure that he is get - - - under the statute, to make
5 sure that he is getting what he bargained for.

6 JUDGE PIGOTT: What about my example that -
7 - - that maybe at the time of the plea, the District
8 Attorney's Office would have made a different offer
9 had everybody known that PRS was going to be part of
10 it? He - - - he apparently did not know - - - and we
11 had a lot of cases about this where they just - - - I
12 mean, it just didn't come up, because everybody
13 thought it was a ministerial act, much of it being
14 done by docs.

15 And all of a sudden, you know, Catu showed
16 up and - - - and we created this - - - this thing.
17 So when there's a genuine not - - - you know, a
18 general ignorance of what's going on, maybe even
19 between both, why does one side get to say, well, I'm
20 - - - you know, I - - - I see that a mistake was made
21 and I want to correct the mistake, but the other side
22 doesn't?

23 MR. HILLERY: There are - - - to be sure -
24 - - many permutations here that are speculative and
25 theoretical, that I - - - I can't answer. I mean,

1 that's possible. It's also possible defendant could
2 have chosen to go to trial - - -

3 JUDGE PIGOTT: Right.

4 MR. HILLERY: - - - knowing about PRS, and
5 been acquitted. But we're dealing with the concrete.
6 We're dealing with what would have been a concrete
7 error and we're rectifying it.

8 JUDGE PIGOTT: So, if he said - - - if he
9 said, you know, I get what the DA is offering me that
10 there's no PRS, but if you went back, if I could go
11 back to that day, I would have said, there's five
12 years PRS, well, how about five years prison and five
13 PRS, and the DA might have said, fine. But what the
14 DA's doing now - - - or has the ability to do - - -
15 is - - - is they're the only ones that can change
16 this bargain. And - - - and I can't. And so, my due
17 process still is not due.

18 MR. HILLERY: Well, that's - - - if it's -
19 - - a difficult one for me to answer in all candor,
20 because it's possible, yes, that certain things would
21 have been different. The - - - the plea negotiations
22 might have been different had there been that
23 understanding.

24 What we're dealing with is a concrete issue
25 - - - a concrete problem; that being the defendant

1 was supposed to be told about post-release
2 supervision and was not. We are - - - what we are
3 ensuring is defendant, under that circumstance, is
4 going to receive exactly what he understood he was
5 going to receive, exactly what was represented to him
6 by the court.

7 JUDGE SMITH: Well, why wasn't that also
8 true in Hill?

9 MR. HILLERY: In Hill, the difference was
10 that there was an attempt at specific performance,
11 but it wasn't genuine specific performance, because
12 we had some combination of post-release supervision
13 and jail time, in order to accommodate defendant's
14 sentencing expectations. But defendant could have
15 done more jail time, theoretically, on account of a
16 violation of that post-release supervision.

17 JUDGE SMITH: So you think - - - you think
18 Hill depends on that - - - the observation in the - -
19 - in the footnote that says - - - that says the
20 defendant points out that he could - - - he might
21 want - - - there's a theoretical possibility that his
22 jail time could exceed the sentence.

23 MR. HILLERY: I think it's highly
24 significant. Highly significant.

25 JUDGE SMITH: When you read the opinion, it

1 doesn't look at though that's the key point in the
2 case. It's a footnote at the end.

3 MR. HILLERY: Yes, Your Honor. But I think
4 that is where the rub lies here. And I think in this
5 case - - - if I could just - - - I see my time is up,
6 if I could just finish my thought.

7 CHIEF JUDGE LIPPMAN: Go ahead; finish your
8 thought.

9 MR. HILLERY: The difference in this case
10 is we have genuine specific performance. Defendant
11 is only going to get that which he expected to get;
12 nothing more, nothing less.

13 CHIEF JUDGE LIPPMAN: Okay, counsel.

14 JUDGE RIVERA: Counsel, could I - - - I'm
15 sorry; could I just ask one question?

16 CHIEF JUDGE LIPPMAN: Go ahead, Judge
17 Rivera.

18 JUDGE RIVERA: So, if - - - if we determine
19 that it is - - - the statute is unconstitutional,
20 does that mean anyone who did not object to the
21 resentencing now may object?

22 MR. HILLERY: Yes; I mean, unless that
23 person had a notice and an opportunity to be heard,
24 yes. If that person was not advised to post-release
25 supervision at the time of the plea, the plea cannot

1 be said to be knowing and voluntary.

2 JUDGE RIVERA: No, no, no. I'm talking
3 about the resentencing. At the resentencing, under
4 70.85. Someone didn't object at that time. Can they
5 now object?

6 JUDGE SMITH: He's already been
7 resentenced.

8 JUDGE RIVERA: Right.

9 MR. HILLERY: Oh, I'm sorry; they've been
10 resentenced?

11 JUDGE RIVERA: Correct. If we hold the
12 statute unconstitutional, can they now come back and
13 say, you've got to vacate my plea?

14 MR. HILLERY: I don't think that would have
15 retroactive effect, Your Honor. I - - - I don't
16 think - - - many of these - - - many of these
17 determinations have a retroactive impact. I - - - I
18 think that would be a very unwieldy and - - -

19 CHIEF JUDGE LIPPMAN: Okay, counsel.

20 JUDGE RIVERA: Thank you.

21 CHIEF JUDGE LIPPMAN: Thanks.

22 MR. HILLERY: Thank you.

23 CHIEF JUDGE LIPPMAN: Counselor?

24 MS. DANZIG: May it please the court, my
25 name is Jody Danzig, appearing for the New York State

1 Attorney General's Office, which intervenes in this
2 case in order to defend the constitutionality of
3 Penal Law 70.85.

4 Your Honors, Penal Law 70.85 is
5 constitutional as applied to defendant, because it
6 authorized the trial court to reimpose exactly the
7 sentence that induced defendant's guilty plea. That
8 is a determinate prison term without the PRS.

9 What - - - what Penal Law 70.85 does, is it
10 accomplishes two things that were never possible
11 before the enactment of the statute. It gives the
12 defendant - - - as my colleague noted - - - true,
13 genuine specific performance, which was never a
14 possibility before. And as this court held in People
15 v. Torres, the 1978 case, involving the unfulfilled
16 promise to give the defendant youthful offender
17 treatment, what - - - a guilty plea - - -

18 JUDGE ABDUS-SALAAM: But counsel, didn't we
19 say in Hill that the broken promise cases don't apply
20 to this kind of problem?

21 MS. DANZIG: Well, in Hill - - -

22 JUDGE ABDUS-SALAAM: And wouldn't we - - -
23 wouldn't we be abandoning our Catu line of cases if
24 we now say, as your colleague argued, that it's not a
25 direct consequence?

1 MS. DANZIG: No, Your Honor, because in - -
2 - in Catu and - - - and the - - - the other post-
3 release supervision cases, this court never had an
4 opportunity to consider whether post-release
5 supervision was a direct consequence of - - - of the
6 guilty plea.

7 It wasn't until years later in the cases of
8 Sparber and Garner in 2008, that it became clear that
9 post-release supervision, if it's unpronounced, is
10 never part of the sentence. That's when it became
11 clear that perhaps post-release supervision was not a
12 direct consequence of the sentence, and therefore,
13 had no - - - therefore, the fact that the - - - the
14 plea court failed to advise the defendant of it - - -

15 JUDGE ABDUS-SALAAM: Haven't we already
16 decided that it is a direct consequence of a plea,
17 PRS?

18 MS. DANZIG: Yes, Your Honor, but those
19 cases need to be viewed through the prism of Garner
20 and Sparber, which - - - in which this court made
21 clear that post-release supervision is simply not a
22 part of the defendant's sentence.

23 JUDGE PIGOTT: You're suggesting that we -
24 - - that Catu was poorly worded?

25 MS. DANZIG: No, Your Honor, I'm only

1 suggesting that the issue was not squarely before
2 this court in Catu. But the court had no opportunity
3 even to consider whether post-release supervision
4 was, in fact, a direct consequence of the plea,
5 because it - - - if it's not pronounced by the
6 sentencing court, it was never part of the
7 defendant's sentence. And then, of course - - -

8 JUDGE PIGOTT: So - - - so you're arguing
9 today that PRS is collateral to the sentence?

10 MS. DANZIG: I'm sorry, Your Honor?

11 JUDGE PIGOTT: You're saying that PRS is
12 collateral to the sentence?

13 MS. DANZIG: We're arguing - - - our
14 alternative argument is that post-release supervision
15 is not a direct consequence of - - -

16 JUDGE SMITH: Was it before - - - was it
17 before Section 70.85 was enacted?

18 MS. DANZIG: Well, Your Honor, it's - - -
19 it's a combination of - - - of two things that makes
20 clear that it's not - - -

21 JUDGE SMITH: Well, try - - - can you try a
22 yes or no?

23 MS. DANZIG: We would say that it was never
24 a - - - a - - -

25 JUDGE SMITH: Then Catu must have been

1 wrong. Which Catu sure says it was.

2 MS. DANZIG: Your Honor, again, that - - -
3 that question was not squarely before - - - before
4 the court in Catu.

5 JUDGE PIGOTT: What was? I - - - I thought
6 that was exactly what we - - - was decided in Catu.

7 MS. DANZIG: Well, the question that wasn't
8 before the court in Catu was whether or not post-
9 release supervision was not a direct consequence of
10 the guilty plea, because it had never been imposed in
11 that case by the trial court. It might have been - -
12 - it was administratively added by the Department of
13 Correctional Services, but as this court made clear
14 in - - -

15 JUDGE SMITH: Well, you - - - you say it
16 wasn't before us. We sure acted like we thought it
17 was before us, didn't we?

18 MS. DANZIG: Your Honor, the - - - what
19 Sparber and Garner accomplished in 2008, and also
20 what Penal Law 7 - - - 70.85 accomplished in 2008 was
21 to - - - to make clear that the - - - that post-
22 release supervision is not a definite, immediate
23 consequence of - - - of a determinate sentence.

24 JUDGE PIGOTT: Isn't it mandatory?

25 MS. DANZIG: Under Jenna's Law, it's - - -

1 it is mandatory, but if it's not imposed by the
2 sentencing judge, it is not part of the defendant's
3 sentence - - -

4 JUDGE SMITH: That would be true - - - that
5 would be true of a prison term too, wouldn't it? If
6 the sentencing judge doesn't say it, he hasn't got
7 the prison term.

8 MS. DANZIG: That's correct, Your Honor.

9 JUDGE SMITH: So that's not a direct
10 consequence, either. We haven't got any direct
11 consequences left.

12 MS. DANZIG: Well, the question before the
13 court is - - - is - - - is the - - - was the
14 defendant's guilty plea involuntary, because the - -
15 - the plea court failed to pr - - - the plea court
16 failed to advise the defendant of a direct
17 consequence of - - - of the guilty plea. And our
18 argument is - - - contains two parts.

19 One part of our argument is that the - - -
20 the guilty plea was never involuntary to begin with.
21 But our other argument is that even if there was
22 involuntariness by the plea's court failure to advise
23 the defendant of the post-release supervision, that
24 involuntariness was cured by the specific performance
25 that was made available - - -

1 CHIEF JUDGE LIPPMAN: The question is, can
2 it be cured? Or - - - or is there a due process
3 violation and then it's over?

4 MS. DANZIG: In the People v. Torres, this
5 court recognized that there was an error so serious
6 in that case that it rendered the def - - - a
7 previously voluntary guilty plea, involuntary. In
8 fact, it rendered the guilty involuntary ab initio.

9 This court said that the - - - that the
10 broken promise - - - the court's failure to give the
11 defendant youthful offender's status amounted to a
12 broken promise that caused the guilty plea to be
13 involuntary. And - - - and - - - and yet even after
14 finding involuntariness in that case, this court did
15 not require vacatur of the guilty plea.

16 JUDGE SMITH: Would it - - - would it be -
17 - - would it be more precise - - - you said the - - -
18 the involuntariness was cured. Would it be more
19 precise to say the defendant had had a remedy for the
20 involuntariness?

21 MS. DANZIG: Well, what - - - what this
22 court stated in Hill was that the problem is that you
23 - - - you can't have a remedy that simply at - - -
24 attempts to render harmless the involuntariness of
25 the guilty plea. Specific performance - - -

1 JUDGE SMITH: Why not? I mean, maybe - - -
2 maybe that's why I didn't join Hill. I don't quite
3 understand why you can't.

4 MS. DANZIG: This - - - this court said in
5 Hill that what - - - the problem in Hill was that the
6 defendant's - - - the defendant ultimately was
7 sentenced or resentenced by the court - - - in that
8 case, pursuant to the court's inherent powers to
9 correct an illegal sentence, to a - - - to the - - -
10 to a sentence that was altogether different from the
11 one that induced his guilty plea.

12 And in that - - - the court - - - this
13 court found that objectionable precisely because the
14 defendant was not getting the sentence that he was
15 promised at - - - essentially from - - -

16 JUDGE SMITH: On the - - -

17 CHIEF JUDGE LIPPMAN: Now we've made the
18 law consistent with his understanding. Is that your
19 argument?

20 MS. DANZIG: Our argument is that specific
21 performance does much more than simply render
22 harmless the involuntariness of a guilty plea. What
23 the specific performance does is it removes the
24 involuntariness. It restores the voluntariness of
25 the guilty plea.

1 CHIEF JUDGE LIPPMAN: Because the law is
2 consistent with what his understanding is?

3 MS. DANZIG: Yes, and also - - -

4 CHIEF JUDGE LIPPMAN: Was, yeah?

5 MS. DANZIG: Yes, and it's because the
6 defendant ultimately is getting the sentence that
7 induced his guilty plea.

8 JUDGE PIGOTT: But let - - - why don't - -
9 - what do you do with a case where, as I called it,
10 all the cards are face up, you know, where the - - -
11 the people - - - and it's not their fault in most of
12 these cases - - - but where the people know that
13 there's a PRS card that can be played. Here's - - -
14 here's a - - - here's an alternative to fifteen
15 years. You know, we can give you ten and five, or we
16 can give you five and five. And he may have wanted
17 to make that, you know, one of those choices, but
18 nobody did that. Nobody talked about PRS.

19 And in this case, where you had somebody
20 who was very, very concerned about orders of
21 protection; he wanted to be able to see his kids. He
22 wanted to - - - if nobody ever told him, you know,
23 that there's going to be a permanent order of
24 protection - - - I don't if there is in this case or
25 not - - - and then he finds out there is one. I

1 mean, shouldn't he - - - shouldn't he be able to
2 vacate his plea and say, I - - - you know, I want to
3 - - - I want to, you know, vacate my plea because the
4 one thing I'm worried about is - - - are my children.

5 And would we say, well, if the DA says that
6 the permanent order of protection is gone, you've got
7 the remedy you want? Is that what we do?

8 MS. DANZIG: It is true that this statute
9 gives the District Attorney the - - - the power to
10 deter - - -

11 JUDGE PIGOTT: But in an order of
12 protection situation, maybe the judge says, I'm not
13 doing that. I - - - I'm not letting this guy
14 anywhere near his kids. Now what are you going to
15 do?

16 MS. DANZIG: The issue, Your Honor, is that
17 in this case, specific performance restores the
18 defendant to - - - restores the voluntariness of - -
19 - of - - -

20 JUDGE PIGOTT: I know your time is up, but
21 could the judge have rejected this? Could - - -
22 could - - - you know, when - - - when he comes back
23 for his 70.85 resentencing, the judge says I'm not
24 doing it. I'm going to vacate the plea.

25 MS. DANZIG: The defendant would have had

1 two options. I mean, the - - - yes, the judge could
2 have - - - could have done that, but the consent of
3 the People is required if no post-release supervision
4 is - - -

5 JUDGE PIGOTT: The judge can't do it?

6 MS. DANZIG: I'm sorry, Your Honor, if the
7 - - - would you repeat your question, please?

8 JUDGE RIVERA: The statute says "may",
9 doesn't it? A court "may"? Does the statute say
10 "may"?

11 MS. DANZIG: I'm sorry; I can't hear you.

12 JUDGE RIVERA: 70.85, does it say the court
13 "must" or does it say "may"?

14 MS. DANZIG: Oh, I'm sorry, Your Honor. It
15 - - -

16 JUDGE SMITH: It says "may".

17 MS. DANZIG: It says "may".

18 JUDGE RIVERA: It says "may", okay.

19 JUDGE GRAFFEO: So despite the fact that
20 the People might request no PRS, the judge could
21 disagree with the People's recommendation and vacate
22 the defendant's plea?

23 MS. DANZIG: It is possible.

24 JUDGE RIVERA: Okay.

25 JUDGE SMITH: But yeah - - - but - - - but

1 if the People - - - but if the People insist on PRS,
2 then the judge cannot overrule it.

3 MS. DANZIG: No, that's correct, Your
4 Honor.

5 JUDGE RIVERA: Okay. And - - - and if we
6 hold it unconstitutional - - - I'll ask the question
7 I've been asking - - - does that mean that everyone
8 else who did not object at the resentencing now gets
9 to come back and object - - -

10 MS. DANZIG: It - - - it - - -

11 JUDGE PIGOTT: - - - and ask to vacate?

12 MS. DANZIG: It might mean that, Your
13 Honor. And the numbers that we're talking about are
14 greater than 36- or 3,700.

15 JUDGE RIVERA: Why is it "might", not
16 definitely?

17 MS. DANZIG: It's - - - it's not clear
18 whether, as my colleague said, whether there would be
19 a retroactive - - -

20 JUDGE SMITH: Wouldn't there be a
21 preservation problem for all those people?

22 MS. DANZIG: Yeah - - - yes, Your Honor.
23 It's possible that there would be a preservation
24 issue.

25 CHIEF JUDGE LIPPMAN: Okay, counsel,

1 thanks.

2 Counsel, rebuttal?

3 MR. GREENBERG: Yes, Your Honor. Very
4 briefly. I guess - - - I guess to answer the
5 question as can - - - would the 3,700 cases come
6 back, let me address Judge Rivera's concern with
7 that. Maybe the way we can address that issue might
8 be is to say, well, if the sentence has already been
9 served, there is finality in that particular
10 conviction.

11 And that - - - that there - - - that if
12 this person's already out of the jail or the prison
13 they've been served, and that particular case, even
14 though, it was theoretically unconstitutional, that
15 you can say, well, it's been served, and at this
16 point, there's nothing you can really do - - - do
17 much about it at this point.

18 JUDGE ABDUS-SALAAM: Hasn't your client
19 almost served his entire fifteen-year sentence at
20 this point?

21 MR. GREENBERG: His conditional release day
22 is in December, so he would be out. And I believe
23 that given - - -

24 JUDGE ABDUS-SALAAM: So he wouldn't be
25 getting any benefit by our declaring the statute

1 unconstitutional, would he?

2 MR. GREENBERG: Well, he could still
3 theoretically - - - you see, it - - - you see, this
4 is, I think, the other elephant in the room, is that
5 if you declare it unconstitutional, when he comes
6 out, he will still have to serve the remaining one-
7 seventh under some kind of supervision, so he's not
8 just "out". But he - - -

9 JUDGE SMITH: If he gets his plea back,
10 presumably, he could wind up with an acquittal and a
11 clean record or at least that much cleaner than his
12 record would otherwise be.

13 MR. GREENBERG: That would be correct, but
14 on the other side of the coin, he could also going to
15 trial on murder in the second degree - - -

16 JUDGE SMITH: Yeah, I - - - yeah.

17 MR. GREENBERG: - - - and that could - - -
18 or attempted murder - - -

19 JUDGE SMITH: It's always a problem when
20 you ask to take your plea back, especially after you
21 served about ninety-eight percent of it.

22 MR. GREENBERG: That's correct too, and
23 he's certainly been made aware of that from my agency
24 as to that - - -

25 JUDGE RIVERA: Well, the People might

1 determine that they can't prosecute.

2 MR. GREENBERG: I'm sorry?

3 JUDGE RIVERA: The People might determine
4 they can't prosecute.

5 MR. GREENBERG: Judge, on this - - -

6 JUDGE RIVERA: Weakness in the case for
7 whatever reason, because of the passage of time.

8 MR. GREENBERG: The passage of time. I
9 understand from Michael - - - Mr. Hillery - - - that
10 one of the witnesses has died, or is no longer with
11 us.

12 JUDGE PIGOTT: I'm sorry; I can't quite
13 hear what you're saying.

14 MR. GREENBERG: I - - - Mr. Hillery has
15 told me that one of the witnesses has since passed
16 away, so I don't know whether that would have any
17 effect on the prosecution, but that certainly is a
18 consideration.

19 You know, we've also - - - we've been
20 hearing a lot about specific performance, but I want
21 - - - I just want to stress that specific performance
22 of the sentence isn't really the con - - - our
23 concern here. We admit, yes, there has been specific
24 performance of the sentence, but the issue as always
25 goes back to, but was the underlying plea, as you

1 point out with the poker analogy with the cards on
2 the table, was the plea itself a constitutional plea?

3 CHIEF JUDGE LIPPMAN: Okay, counsel,
4 thanks.

5 MR. GREENBERG: Thank you. Thank you very
6 much.

7 (Court is adjourned)

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

I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Anthony S. Pignataro, No. 213 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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