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COURT OF APPEALS

STATE OF NEW YORK

PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

NO. 87

VICTOR THOMAS,

Appellant.

PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

NO. 88

NICOLE L. GREEN,

Appellant.

PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

NO. 89

STORM U. LANG, a/k/a STORM U.J. LANG,
a/k/a STORM LANG,

Appellant.

20 Eagle Street
Albany, New York
October 23, 2019

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



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1 CHIEF JUDGE DIFIORE: The first appeal on this
2 afternoon's calendar is appeal number 87, The People of the
3 State of New York v. Victor Thomas.

4 Counsel?

5 MR. O'NEILL: Thank you, Your Honor, and good
6 afternoon, Your Honors. May it please the court, Louis
7 O'Neill for Mr. Thomas, and I respectfully request one
8 minute for rebuttal.

9 CHIEF JUDGE DIFIORE: Of course.

10 MR. O'NEILL: Your Honors, both waivers in this
11 case, the written waiver and the oral waiver, are invalid
12 for different reasons. The written waiver is invalid as a
13 volitive of public policy, whereas the oral waiver is kind
14 of a greatest hits of everything they're not supposed to do
15 during an oral colloquy to obtain a waiver.

16 The courts of this State have enunciated a group
17 of rights that can never be waived. And therefore, this
18 court cannot allow a no-notice-of-appeal waiver that waives
19 any judicial check on the - - -

20 JUDGE GARCIA: But what's the practical
21 difference between saying that and saying you don't have a
22 right to appeal, which we've said isn't true? You can
23 appeal, for example, Constitutional speedy trial, right.
24 And saying, okay, you have no right to appeal. And we say,
25 of course, you still have these rights. And what you've



1 waived is what's waivable. What's the substantive
2 difference between that and saying you can't file a notice
3 of appeal?

4 MR. O'NEILL: It's an enormous difference, Your
5 Honor, and that's that it strips the court of its subject
6 matter jurisdiction. The no-notice of appeal waiver
7 removes all jurisdiction from the court to review anything
8 that might survive that would be unwaivable.

9 JUDGE GARCIA: So - - -

10 MR. O'NEILL: It doesn't matter - - -

11 JUDGE GARCIA: - - - let's say I had a
12 Constitutional speedy trial claim, and I have that
13 provision in my waiver. And I don't file. Is there any
14 relief?

15 MR. O'NEILL: Well, in that case, if you don't -
16 - - if you don't file your notice of - - - yeah, you've
17 lost jurisdiction. The court has no jurisdiction.

18 JUDGE GARCIA: And the court can - - - can never
19 hear my Constitutional speedy trial claim?

20 MR. O'NEILL: No, because you've - - - you've
21 waived the jurisdiction of the court.

22 JUDGE STEIN: Well, how is the waive - - - how is
23 - - - how is that different from waiving any other right to
24 seek relief in a court that - - - and we've said, as long
25 as it's knowing, voluntary, and intelligent, you can waive



1 all sorts of rights. You can waive Constitutional rights,
2 and so I - - - I'm not sure I understand the argument that
3 it's depriving the court. The court still has
4 jurisdiction, but you've waived your right to ask the court
5 to exercise that jurisdiction.

6 MR. O'NEILL: As a practical matter - - -

7 JUDGE STEIN: Isn't that - - -

8 MR. O'NEILL: - - - the court can never hear
9 those unwaivable things, because the mechanism of the
10 appeal is such that once the notice is filed, then the
11 record gets created, the appellate lawyer gets assigned,
12 and - - -

13 JUDGE FAHEY: But - - - but isn't the real - - -
14 at the core of it, what - - - isn't the core of it - - -
15 first off, two things. There's a difference between the
16 oral and the written waiver, and also the perception of the
17 person who's having it - - - an - - - an admonition from
18 the court is different than a written waiver that's
19 prepared, say, by the DA's office, and then you have to
20 sign it, and then it's made part of the record. Would you
21 - - - would you say that there's a difference between the
22 two?

23 MR. O'NEILL: Absolutely, and we can highlight
24 that in this case.

25 JUDGE FAHEY: Right. And here the oral waiver,



1 of - - - waiver, of course, was good. So - - - so - - -
2 let me just finish. Let's - - - let's - - - let's assume
3 that we think the oral waiver was not so - - - was - - -
4 didn't cover anything, but there wasn't affirmatively
5 incorrect information given as it was in the written
6 waiver.

7 In the written waiver, there was affirmatively
8 incorrect information. So you got two problems. What's
9 the source of the waiver? And secondly, is there a
10 distinction to be drawn from information that the court
11 fails to give you that you're getting somewhere else, or if
12 the court gives you affirmatively incorrect information?
13 Because then it affects what you know and how you evaluate
14 it.

15 MR. O'NEILL: Exactly, Your Honor. And that's
16 what happened here, because the no-notice-of-appeal waiver
17 tells the appellant, you can't appeal anything, when, in
18 fact, that is not true. That is a misstatement.

19 JUDGE FEINMAN: Well, well, hold on a second.
20 Let's focus on the language of the written waiver. "Waives
21 any and all rights to appeal, including the right to file a
22 notice of appeal from the judgment of conviction herein,
23 with the exception of any Constitutional speedy trial claim
24 which may have been advanced, the legality of the sentence,
25 my competency to stand trial, and the voluntariness of this



1 plea and waiver."

2 MR. O'NEILL: Those are the four Seaberg
3 traditional waivers, but, Your Honor, those are not written
4 in stone. The law is dynamic and evolving. And we've
5 identified at least twenty things that - - -

6 JUDGE FEINMAN: So your position is that that
7 doesn't alert the person signing this that there are things
8 that survive?

9 MR. O'NEILL: The contrary, it alerts them that -
10 - - it's in black and white - - - only these four things
11 survive, when in fact, courts of this state have found at
12 least twenty different items not covered by the four
13 Seaberg waivers that survive. So - - -

14 JUDGE FAHEY: So what's the - - - what's the
15 remedy?

16 MR. O'NEILL: The remedy is to at - - - the - - -
17 the appellate court - - - the Appellate Division need this
18 court's guidance with a bright line rule that if the no-
19 notice of appeal - - - appeal waiver language appears,
20 bright line - - -

21 JUDGE FAHEY: So - - - so are you mandating a
22 particular - - - are you asking for - - - and not only
23 mandating - - - are you asking for a particular colloquy
24 that - - - that we would - - -

25 MR. O'NEILL: No, certainly not. That is not



1 this court's jurisprudence, not the State's practice at
2 all, just - - -

3 JUDGE RIVERA: But what if the waiver said you
4 waive the right to file notice of appeal, except for claims
5 that are nonwaivable? What if you just said that?

6 MR. O'NEILL: Well, that's better, but it's not -
7 - - it's not, again, giving - - - these rights are so
8 important that - - -

9 JUDGE RIVERA: Why is that not good enough?

10 MR. O'NEILL: Because these rights are so
11 important that we need a bright-line guidance that
12 discouraging appeal - - - well, let's even get deeper. The
13 Supreme Court has just - - -

14 JUDGE RIVERA: You're not arguing - - - somewhat
15 apropos to what Judge Fahey - - -

16 MR. O'NEILL: Well - - -

17 JUDGE RIVERA: - - - Fahey is asking about.
18 You're not arguing that at some point, whether it's the
19 written waiver or in the oral colloquy, anybody has to go
20 through at least all the types of claims that have so far
21 been identified as nonwaivable. You're not taking that
22 position.

23 MR. O'NEILL: No, the Supreme Court has, just
24 last year, in Garza v. Idaho said it is per se
25 ineffectiveness not to file a waiver - - - a notice of



1 waiver of appeal. And that is not some ministerial task.
2 That is - - - the reason that the court used the word
3 "ministerial" in that case, to show how simple it is. You
4 got to do this. If you are - - - don't do that, you've
5 violated the Sixth Amendment and you are, per se,
6 ineffective. Of course, the court must have a bright line
7 rule, that if this language is in the waiver, the whole
8 thing is void.

9 Turning to the oral waiver, as I mentioned, this
10 is kind of a greatest hits of all the mistakes you don't
11 want to make. The oral waiver happened after the
12 allocution of the plea. I would draw the court's attention
13 to page A-90 of the record. This began at 11:55 a.m. The
14 People said, this offer's on the table today only. The
15 system had lost the defendant. They found him at 11:55,
16 right before lunch, and they rushed through the process.
17 It couldn't have been - - - they delegated the - - - the
18 court delegated the explanation of the waiver to defense
19 counsel, and elicited "yes, sir" answers, one-word answers,
20 that this court has found to be part of a problematic
21 colloquy.

22 More importantly, this - - - this waiver - - -
23 the court specifically carved out a suppression hearing.
24 It said, and I - - - and I quote, "This waiver covers the
25 plea we're doing today, and the sentence that will take



1 place in two weeks." It didn't use the word "conviction",
2 which we've seen in Sanders and a variety of the cases that
3 use the word "plea." And it didn't use the word "judgment"
4 which could be subject to debate to say a plea and
5 sentence. It carved out a suppression hearing. And that's
6 why there was no protest from the defendant or defense
7 counsel, because he was told by the judge, it's carved out.
8 The notion - - -

9 CHIEF JUDGE DIFIORE: Contin - - - complete your
10 sentence.

11 MR. O'NEILL: Oh, I - - - I see my time has
12 expired already, Your Honor. May - - - may I briefly
13 address the - - - the third issue?

14 There is no record evidence that this interaction
15 between the police and defendant was anything but the
16 functional equivalent of - - - of an interrogation. The
17 picture, the photograph alone, showing the defendant
18 dispositive - - -

19 JUDGE RIVERA: Let me ask you this. If - - - if
20 when the defendant first asked, what am I being arrested
21 for, they had answered that question, the officers
22 arresting him, is that an interrogation?

23 MR. O'NEILL: No. If - - - if they'd answered
24 immediately.

25 JUDGE RIVERA: Why is it an interrogation later?



1 MR. O'NEILL: Because we've got to look at the
2 interrogation environment, which is not one minute, as the
3 People will focus on. It's fifteen, twenty minutes in
4 three different locations.

5 JUDGE RIVERA: Yeah, but he - - - he's constantly
6 asking for that information - - -

7 MR. O'NEILL: And - - -

8 JUDGE RIVERA: So they finally supply it.

9 MR. O'NEILL: But upon arrest - - -

10 JUDGE RIVERA: Why isn't it interrogation?

11 MR. O'NEILL: Upon arrest - - -

12 JUDGE RIVERA: Yes.

13 MR. O'NEILL: - - - Det. Rodriguez said, they
14 want to talk to you; the detective wants to talk to you.
15 Miranda triggers then, and it was never given. Then they
16 called ahead, saying to Det. Gross, we got him; he's
17 coming. And then at the station, Det. Gross, breaking
18 protocol, comes down with a photograph within one minute,
19 and says, you're going to talk about this, with a
20 dispositive inculpatory evidence. There's no record view
21 other than this is an interrogation.

22 Thank you, Your Honors.

23 CHIEF JUDGE DIFIORE: Thank you, Counsel.

24 Counsel?

25 MR. BRAUN: Thank you. Good afternoon, Your



1 Honors. And may it please the court, Justin Braun for the
2 office of Darcel D. Clark. If I may get to the last point
3 first, before the waiver. This court can't reach the
4 question, because it's a mixed question of law and fact.
5 Rivers is right on point about that. And it must affirm
6 unless there is no possible view of the evidence that would
7 support the conclusion reached by both the Appellate
8 Division and the suppression court in this case, with
9 regard to Huntley.

10 But here, there's, of course, a lot of evidence.
11 This was a very belligerent defendant. There was no
12 breaking of protocol whatsoever in this case, because what
13 happened was he was taken to the front desk. There was not
14 going to be any sort of extensive interview there, but
15 because he was so belligerent and possibly endangering the
16 officers and the other arrestees, they had to do something
17 to try to get this under control. And in this case, they
18 showed him the photograph. They showed him the photograph
19 without any intention - - -

20 JUDGE RIVERA: What - - - what - - - what did the
21 officer say when he showed him the photograph?

22 MR. BRAUN: He - - - as far as I can tell, if I
23 have my - - - my memory serves, he just showed - - - he
24 said, this is why you're here. He showed him the
25 photograph, which we have - - -



1 JUDGE RIVERA: He didn't say I want to talk to
2 you about this?

3 MR. BRAUN: No.

4 JUDGE RIVERA: He didn't say we're going to
5 discuss this?

6 MR. BRAUN: As far as I remember, no, and - - -
7 and we have legion - - - because this deals with federal
8 case law - - -

9 JUDGE RIVERA: Why - - - why - - - why is he not
10 given his Miranda rights? Why is he not informed at the
11 point of his arrest?

12 MR. BRAUN: Well, he wasn't informed at the point
13 of his arrest because in that particular case, he was - - -
14 the officer that went to go get him, was not the detective
15 - - -

16 JUDGE RIVERA: No, why don't they give him his
17 Miranda rights when they cuff him?

18 MR. BRAUN: Because that wouldn't have been
19 proper protocol. The protocol was to interview him at the
20 precinct in an interview room under - - - under those sorts
21 of situations. So the - - - the off - - -

22 JUDGE RIVERA: So it's not proper to tell him you
23 - - - you don't have - - - you don't have to choose to
24 speak to anyone in the ride down? You don't have to keep
25 asking questions?



1 MR. BRAUN: Well, I - - - again, he - - - in this
2 - - - the - - - the case law of this case has been very
3 clear that there's no requirement that you have to
4 Mirandize at the scene of arrest.

5 And furthermore, we've had legion cases that have
6 said, where they ask - - - where they're asking, you
7 know -- nothing's being said, but they're asking. You're
8 allowed to provide an innocuous answer. You're even
9 allowed to say, we're going to talk to you about it, at the
10 correct time and place, which is what happened in this - -
11 -

12 JUDGE RIVERA: Or we'd like to talk to you about
13 it.

14 MR. BRAUN: Correct, yes.

15 JUDGE FEINMAN: So - - -

16 JUDGE RIVERA: If they invoke their rights, you'd
17 not going to be talking to them about it, correct?

18 MR. BRAUN: Correct, yes. And - - - and because
19 this is Miranda, it's federal case law. And the federal
20 case law on this is pretty clear that an innocuous showing
21 of evidence, particularly where there's exigent
22 circumstances like this, is not a violation of the rights.

23 JUDGE RIVERA: But - - - but here is - - - is the
24 officer in part saying that they're not answering the
25 question because of - - - he knows him; he knows how he



1 reacts, this kind of thing?

2 MR. BRAUN: It's quite the opposite.

3 JUDGE RIVERA: And is that part of not giving him
4 the Miranda?

5 MR. BRAUN: Quite - - - quite the opposite. This
6 office - - - this officer would not have wanted to wound
7 him up. He already had a physical altercation with him.
8 The defense theory doesn't make sense, that he's - - - that
9 he was conspiring with the other officers to find the
10 perfect avenue by which he would make this sort of
11 inculpatory statement, with this confluence of events. It
12 - - - it just doesn't make sense.

13 JUDGE FEINMAN: So we, of course, don't reach
14 that issue if we uphold the waiver, right?

15 MR. BRAUN: Correct.

16 JUDGE FEINMAN: All right. So why is the waiver
17 valid here?

18 MR. BRAUN: Okay, the waiver is valid here for a
19 number of reasons. Here, the no-notice-of-appeal waiver
20 was coupled - - - was obviously discussed in a way that
21 showed that some rights survive, some appellate rights
22 survive, even a waiver of appeal, and suppression wasn't
23 one of them. So in this particular case, it was entirely
24 clear that the suppression was not going to - - -

25 JUDGE FAHEY: You know, the - - - the - - - the



1 problem is, is - - - is what I asked counsel before. It
2 seems that the language that was used actively gave
3 incorrect information. Would you agree with that?

4 MR. BRAUN: I would not agree with that, because
5 - - -

6 JUDGE FAHEY: You say all the information in this
7 waiver was - - - was correct?

8 MR. BRAUN: I - - - I don't think this waiver has
9 problematic language in the sense that it says you're
10 waiving your rights - - -

11 JUDGE FAHEY: Well, let me just stop you. "You
12 won't be able to hire an attorney to file an appeal for
13 you; you won't get an assigned attorney to file an appeal
14 for you; you won't be able to file your own appeal. You
15 won't get waiving fees. There's just going to be no review
16 by any court." Oh, no, that's from Green.

17 MR. BRAUN: Yeah, I'm sorry; I think we're
18 looking at a different waiver.

19 JUDGE FAHEY: It seemed liked all - - - all of
20 the active language that was wrong in this one were all in
21 the written waiver, and I'm wondering if a distinction
22 needs to be drawn between the written waiver and the oral
23 waiver that the judge gives?

24 MR. BRAUN: Well, yes, and this court has held
25 numerous times that the combination - - -



1 JUDGE FAHEY: So - - - so - - - so would we be
2 saying - - - let's assume that I'm correct, that - - - that
3 the written waiver was overbroad. If we affirm, we'd be
4 saying, as long as a judge doesn't give actively incorrect
5 information, that the - - - the waiver will stand?

6 MR. BRAUN: Well, I - - - yes, I mean, we have
7 case law that specifically says, where there's an ambiguous
8 or - - - or problematic waiver, the combination of the oral
9 and - - -

10 JUDGE FAHEY: Well, I don't remember in this one.
11 Did - - - did - - - this is Thomas. Did your office
12 prepare the waiver?

13 MR. BRAUN: Our - - - our office did prepare this
14 waiver, yes. But what I would say is, again, as Your
15 Honors have pointed out, the filing of a notice of appeal
16 is the mechanism by which a - - - by which a defendant
17 relinquishes his right to appeal. It's a statutory
18 mechanism. It's not the same as a fundamental
19 Constitutional right, even though you have - - - obviously,
20 you can't waive Con - - - certain Constitutional rights as
21 well. But you have thirty days under statute to file the
22 notice. And under Garza, that's - - -

23 JUDGE RIVERA: So - - - so what - - - what - - -
24 what did the People gain from that part of the waiver, to -
25 - - to waive my right to file a notice of appeal?



1 MR. BRAUN: Well, to be honest, we found in
2 practice that we didn't gain anything which is why we don't
3 use it anymore.

4 JUDGE RIVERA: Is that why you no longer use it?

5 MR. BRAUN: Yes.

6 JUDGE RIVERA: Yes. So if you didn't gain
7 anything, it means it can't really promise you anything,
8 then how is it valid?

9 MR. BRAUN: Well, it's - - - it's - - -

10 JUDGE RIVERA: Right? The - - - the contractual
11 agreement, there has to be something you're giving up - - -

12 MR. BRAUN: Right.

13 JUDGE RIVERA: - - - or getting?

14 MR. BRAUN: Right.

15 JUDGE RIVERA: Right?

16 MR. BRAUN: Well, I mean, it - - - it - - - it
17 does - - - in a sense we didn't gain anything, in the sense
18 that it didn't make a material difference in our appeals,
19 because just like in this appeal, people were filing their
20 appeals anyway, and people were getting their claims heard
21 anyway. But it is a waivable right. It is a
22 consideration. It is something, that we decided over time,
23 it wasn't worth it anymore to have the lawyers - - - by the
24 way, he was - - -

25 JUDGE RIVERA: I guess, my - - - my - - -



1 MR. BRAUN: Yeah.

2 JUDGE RIVERA: - - - my question was, and I - - -
3 I thought you had said the answer to this is no. And my
4 question was whether or not you have any recourse for the
5 breach of this promise?

6 MR. BRAUN: No, we don't - - -

7 MR. BRAUN: You don't.

8 MR. BRAUN: - - - not in this particular case.

9 JUDGE RIVERA: You don't.

10 MR. BRAUN: So, yes, we don't, which is why this
11 is not coercive. And by the way, it also does - - -

12 JUDGE RIVERA: But I'm - - - I'm just saying, how
13 could it be a valid agreement?

14 MR. BRAUN: Well, I mean, if - - - if - - - if
15 Your Honors want to say that that particular clause needs
16 to excised for that reason, that's possible, but it is a
17 statutory right that can be waived.

18 JUDGE FAHEY: But don't you - - - don't - - -
19 maybe I - - - this is something I've - - - but don't you
20 gain the benefit of - - - of not having to deal with an
21 appeal?

22 MR. BRAUN: That's the hope, yes. Yes, it's - -
23 - it's to - - -

24 JUDGE FAHEY: Well, it's a - - - okay.

25 MR. BRAUN: And - - - and - - - and whereas the -



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JUDGE RIVERA: No, but my point is that's always true with a waiver. That is the point of the waiver. But you can't stop them, and you're telling me you have no recourse if they actually file a notice. You have recourse if they file, right, an appeal, and they are trying to get a merits review of claims that they had actually waived, as opposed to the nonwaivable - - -

MR. BRAUN: I - - - I think it's a - - -

JUDGE RIVERA: - - - grounds.

MR. BRAUN: - - - distinction without a difference, because either way we have to answer their claims.

JUDGE RIVERA: It means something - - -

MR. BRAUN: Well, ei - - -

JUDGE RIVERA: - - - to them, no?

MR. BRAUN: - - - either way we have to - - - if I may make a - - -

CHIEF JUDGE DIFIIORE: Please.

MR. BRAUN: - - - quick point? There's no divestment of jurisdiction here by the failure to file a notice of appeal. That's clear from Seaberg, which re - - - which rejects that any jurisdiction is infringed by waiver. And again, by Lopez, that you're always free to - - - to waive your rights as a relinquishment.



1 And then I would also just point out, just as a
2 last thing, this was a negotiated freely-bargained plea.

3 JUDGE STEIN: Can - - - can I just ask you - - -

4 MR. BRAUN: Yes.

5 JUDGE STEIN: - - - can - - - can we invalidate
6 this particular waiver without overruling Ramos?

7 MR. BRAUN: Can you inval - - - in - - - in what
8 way, Your Honor?

9 JUDGE STEIN: Well - - -

10 MR. BRAUN: I'm not sure I follow.

11 JUDGE STEIN: Ramos seemed to indicate that - - -
12 that if you said things that were overbroad, that didn't
13 invalidate the entire - - -

14 MR. BRAUN: Yes, I mean, there - - - the - - -
15 the - - -

16 JUDGE STEIN: - - - right?

17 MR. BRAUN: As I was - - - I'm sorry; I - - - I
18 didn't mean to interrupt, but as - - - as I discussed
19 earlier, because it speaks in quasi contract, because Garza
20 says it speaks in quasi contract, because Garza says this
21 is purely ministerial act, yes, it is possible to excise a
22 clause like that. Thank you.

23 CHIEF JUDGE DIFIORE: Thank you, Counsel.

24 Counsel?

25 MR. O'NEILL: Thank you, Your Honor. A few quick



1 points. The People - - -

2 JUDGE RIVERA: Well, why - - - why can't we just
3 do that? Let's say we agree with you on the part that
4 refers to the notice of appeal, but disagree otherwise, can
5 we just excise it? Why - - - why does the entire waiver -
6 - -

7 MR. O'NEILL: I'll answer both your questions at
8 once. Because if this no-notice-of-appeal language were
9 not in this particular waiver - - -

10 JUDGE RIVERA: Yeah.

11 MR. O'NEILL: - - - it's the waiver we've seen a
12 million times. It's a normal waiver that's been accepted
13 many times. The point is different. That there has to be
14 a bright line rule that this language invalidates the
15 entire waiver, because it's hoodwinking appellants - - -
16 hoodwinks dependents - - -

17 JUDGE GARCIA: In what way, though? If the focus
18 is on, and always has been on in our cases in this area,
19 voluntary, knowing, how does this change that analysis,
20 because you have this phrase in there?

21 MR. O'NEILL: How can you explain to a defendant
22 that - - - facing serious time - - - that you're going to
23 avoid your Sixth Amendment obligations to file a notice of
24 appeal, which is required to be done - - -

25 JUDGE GARCIA: But if you have a right to appeal,



1 which is laid out in that waiver form, Constitutional
2 speedy trial, doesn't that give you the idea that you have
3 to file a notice of appeal to do that?

4 MR. O'NEILL: No, Your Honor, because it's giving
5 false information, because there are twenty and more things
6 that can never be waived under this State's jurisprudence.

7 JUDGE GARCIA: Well, one, the twenty or more
8 things kind of counsels against any kind of litany, but to
9 Judge Stein's point, in the past, where we have had an
10 overbroad provision, where we've said you waive everything;
11 no court will ever hear anything, we've said that's a valid
12 waiver, because you knew what you were waiving. You
13 thought you were waiving everything, but you were waiving
14 certain appellate rights. And to the extent that's
15 overbroad, we're not going to enforce it. What's the
16 difference here?

17 MR. O'NEILL: The difference is here's there's -
18 - -

19 JUDGE GARCIA: Wouldn't we have to change the way
20 we approach waivers?

21 MR. O'NEILL: Absolutely not. Absolutely not,
22 Your Honor. This is a - - - here, we have a situational
23 coercion situation. The defendant had no understanding of
24 what this could possibly mean, either in the written
25 waiver, which was never explained by the judge, so the



1 judge delegated that - - - and in the oral colloquy, there
2 was absolutely no understanding what this could mean for
3 those other rights that survive besides the - - - the
4 Seaberg four, we'll call them.

5 CHIEF JUDGE DIFIORE: Thank you, Counsel.

6 With respect to the next two appeals on the
7 calendar, 88 and 89, People v. Nicole Green, and People v.
8 Storm Lang, we'll hear from each of the appellants, and
9 then we'll hear from the respondent.

10 Thank you, Counsel.

11 MR. SPECYAL: Good afternoon, Your - - - Your
12 Honors, James Specyal for Ms. Green. Can I reserve one
13 minute of my time?

14 CHIEF JUDGE DIFIORE: One minute, sir?

15 MR. SPECYAL: Yes, please.

16 CHIEF JUDGE DIFIORE: You may, of course.

17 MR. SPECYAL: Thank - - - thank you.

18 I will actually start with something that Judge
19 Fahey had touched on - - -

20 JUDGE FAHEY: A good place to start, Mr. Specyal.
21 That's always a good place to start; there you go.

22 MR. SPECYAL: Well, you actually read the part of
23 the colloquy - - -

24 JUDGE FAHEY: I read yours instead of his, so I -
25 - - it's all right.



1 MR. SPECYAL: So - - -

2 JUDGE FAHEY: It's not the only mistake I've made
3 in my life, but.

4 MR. SPECYAL: Well, for me it's great. So here,
5 in both the colloquy and the written wa - - - waiver,
6 there's things that are just plain wrong, and there's
7 things that are contradictory. At one time, county court
8 said, there's going to flat - - - flat out be no review by
9 any other court.

10 JUDGE FEINMAN: So is that different - - - when -
11 - - when we start talking about - - - Lopez talked about
12 mischaracterization of the right to appeal. Is that
13 different from just being overbroad?

14 MR. SPECYAL: Yes, Judge.

15 JUDGE STEIN: Okay, and how is it different, and
16 - - - and how does it apply here? Is it the fact that it's
17 talking about review, like 440 review and habeas review,
18 which I - - - I don't think is considered part of what we
19 generally think of as the right to appeal to a higher
20 court, right?

21 MR. SPECYAL: Right.

22 JUDGE STEIN: So is - - - is that the distinction
23 or what is it?

24 MR. SPECYAL: The - - - I think the key that
25 here, is that it's not just overbroad, it's that it's



1 logically inconsistent. The waiver - - - there are
2 statements that are made that are just incompatible with
3 other statements that are made. For instance, in the
4 written waiver, at the top it says, can't fi - - - file a
5 brief, can't have counsel, and then at the bottom, it says,
6 oh, wait, there's some things that you can bring up in a
7 brief. So on the same page, it says you can do this, but
8 you can't do that.

9 JUDGE STEIN: And how is that different from
10 saying you can't file a notice of appeal, but there are
11 certain - - - and you know, now I'm sort of talking about
12 the previous case, but there are certain things that are
13 excluded from that?

14 MR. SPECYAL: Well, I - - -

15 JUDGE STEIN: That's inconsistent too. Do you -
16 - - do you think that falls into the same category?

17 MR. SPECYAL: I think that it's similar. What I
18 would say is here, there's even more than one state - - -
19 statement that's wrong, and incompatible with other
20 statements.

21 JUDGE FAHEY: You know what I'm wondering, and
22 this is kind of a question, everybody that comes up. Is
23 there a difference between a judge not leaving something
24 out, because judges may leave something out, but whether a
25 judge actively gives wrong information or incorrect legal



1 advice, from a judge doing it, than a written waiver giving
2 incorrect legal advice?

3 MR. SPECYAL: Well, Judge, I think that coming
4 from a judge is cer - - - certainly hurts - - -

5 JUDGE FAHEY: This - - - this waiver, I'm
6 assuming, this was also drafted by the district attorney's
7 office?

8 MR. SPECYAL: Yes.

9 JUDGE FAHEY: Okay.

10 MR. SPECYAL: As far as I know.

11 JUDGE FAHEY: So the district attorney will
12 address that, but that's as far as the written waiver goes.
13 But as far as the language over a judge, you have no
14 control over that?

15 MR. SPECYAL: Right.

16 JUDGE FAHEY: Right, okay.

17 MR. SPECYAL: Right. And - - -

18 JUDGE FAHEY: Well, what's the difference - - -
19 how would you address the public policy concern or - - - or
20 is there even a public policy concern about a trial court
21 giving - - - I don't think it's ac - - - an active
22 negligent act on a judge's part, but misleading information
23 - - -

24 MR. SPECYAL: Well - - -

25 JUDGE FAHEY: - - - making a mistake?



1 MR. SPECYAL: Oh, I'm sorry.

2 JUDGE FAHEY: Yeah, just like making a mistake.
3 Just like I did. I read the wrong thing. Now reading the
4 wrong thing, if that was one of your fundamental rights,
5 would - - - would that vitiate your right?

6 MR. SPECYAL: Ye - - - yes. And I also think
7 here, the - - -

8 JUDGE FAHEY: Well, why is that? Because it goes
9 to what Judge Garcia was asking. Does it affect the nature
10 of what you know, whe - - - whether your plea was knowing,
11 intelligent, or voluntary?

12 MR. SPECYAL: Well, do - - - do - - - do you mean
13 whether the - - - the plea was or the waiver was?

14 JUDGE FAHEY: The waiver.

15 MR. SPECYAL: Sorry, oh, okay. Yeah, so I think
16 it does, because here, you would have to say, okay, well,
17 the judge is saying things that are different and making
18 all of these misstatements that are inconsistent with each
19 - - - each other, so I don't see how anyone in Ms. Green's
20 shoes could say, okay, well, I understand what I'm giving
21 up.

22 JUDGE FAHEY: Well, you mean, it affects would he
23 know.

24 MR. SPECYAL: What you knowing, and intelligent
25 and vol - - - voluntary. And also I would say here, that



1 when county court says you can't get counsel, for instance,
2 well, county court is also the same court that assigns us
3 to these cases. So they're telling pe - - - people, oh,
4 no, you can't get counsel, when in fact, they can.

5 JUDGE GARCIA: Would any lawyer tell their client
6 that? I mean, there's a colloquy in most of these and I
7 don't remember in this particular one, but have you
8 discussed the written waiver with your counsel, right? And
9 I think on some of the forms it says, I've discussed this
10 with my lawyer.

11 MR. SPECYAL: Right.

12 JUDGE GARCIA: Would a lawyer say to them, you
13 know, you may have a right to Constitutional speedy trial
14 claim, but you know, I can't represent you? Is that - - -
15 would that be competent advice?

16 MR. SPECYAL: If - - - if the lawyer said that
17 you can chan - - - challenge that on appeal, the speedy
18 trial - - -

19 JUDGE GARCIA: Yeah, if you bring an appeal, I
20 can't represent you, because you just waived the fact that
21 you can have a lawyer, so good luck with it, you know, but
22 we just waived that. Would any - - - is that competent
23 advice by a lawyer?

24 MR. SPECYAL: No, if - - - if you're telling them
25 that they're waiving some - - - something that they can't



1 waive - - -

2 JUDGE GARCIA: And they are saying in these
3 written waivers, that they've discussed the terms with
4 their lawyers, and I think in some, at least, they confirm
5 that in court, right?

6 MR. SPECYAL: Well, they con - - - they confirm
7 it that it says that the defendant had signed it. There's
8 no talk of whether they really read it - - - read it or
9 understood what they mean, other than the - - - the judge
10 said, well, have you looked at this with counsel? Yes.
11 One - - - there's one word, yes - - - yes, sir.

12 JUDGE GARCIA: Well, it says, I signed this after
13 explaining - - - having it explained by the court and by my
14 attorney, and the attorney signs it, and the defendant
15 signs it.

16 MR. SPECYAL: Right. Right. Well, I think it
17 would be great if we could count on counsel to tell their
18 clients the right things all the time, and fle - - - and
19 flesh out these waivers and - - - and have them say this is
20 right; this is wrong. But we can't, I don't think, just
21 give them the - - -

22 JUDGE RIVERA: Well, but I thought in part, you -
23 - - your argument was about the judge's duty.

24 MR. SPECYAL: Right, that's - - -

25 JUDGE RIVERA: Now we - - - we don't have an



1 ineffective assistance of counsel claim.

2 MR. SPECYAL: Right.

3 JUDGE RIVERA: That's - - - the point is what's
4 the judge's duty.

5 MR. SPECYAL: Right, we - - -

6 JUDGE RIVERA: So what's the judge's - - -
7 what's, in your mind, the rule for what's the judge's duty?
8 It - - - in part, sounded like you were suggesting perhaps
9 saying less, not more? Is that the position you're taking?
10 To avoid the misrepresentation problem that Judge Fahey
11 just mentioned.

12 MR. SPECYAL: Right, while I would like a bright
13 line rule that any misrepresentation is wrong, I don't
14 think in this case you need to go that far, because this
15 one has so many things that are wrong with it. In the - -
16 - in the colloquy and the waiver, as far as where the judge
17 says there's no review by any other court, and in the
18 written waiver, can't file an appeal.

19 JUDGE RIVERA: And - - - and in part are you
20 arguing that there's no way, whatever the - - - the lawyer
21 might have said that that would overcome these
22 inconsistencies, this confusion?

23 MR. SPECYAL: No, and I think that's the case,
24 due to the fact that, whether - - - that there has to be
25 evidence on the face of the record that the waiver was made



1 knowing and in - - - and intelligently. And here, just
2 saying, well, we've talked about this with counsel, yes;
3 Ms. Green's says yes. I mean, that doesn't really go into
4 depth. If she read the waiver, if she understood what she
5 was read - - - reading, which is why I think we need the
6 court to make sure, because what the court says is really
7 what's going to end up being on the record, for the most
8 part. But I see my time is up.

9 CHIEF JUDGE DIFIORE: Thank you, Counsel. Thank
10 you.

11 MR. SPECYAL: Thank you - - - thank you very
12 much.

13 CHIEF JUDGE DIFIORE: Counsel, with respect to
14 Storm Lang defendant?

15 MS. MINISTERO: Thank you. May it please the
16 court, may I also reserve one minute for rebuttal?

17 CHIEF JUDGE DIFIORE: You may.

18 MS. MINISTERO: First, the integrity of the
19 system cannot withstand an assault by judges intentionally
20 misrepresenting to indigent defendants, fees will not be
21 waived, counsel will not be appointed. And second, the
22 language of CPL 195.20 is clear and unambiguous. And if
23 this court were to allow the information that is required
24 in that statute to appear in a form that is not executed by
25 the defendant, the legislative policy would be - - -



1 JUDGE GARCIA: Let's go to your first point,
2 Counsel. So really what you're asking us for is a rule of
3 deterrence, right, a punitive rule? There was, in your
4 view, an intent to mislead here, and we should have a
5 bright-line rule, per se rule, that those waivers are
6 invalid.

7 MS. MINISTERO: Absolutely, Your Honor. Clearly,
8 this was an intentional act by - - -

9 JUDGE FAHEY: Why - - - why do you say it's
10 intentional? Because it - - - it's used in more than one
11 colloquy, is that what you're saying?

12 MS. MINISTERO: It's used in more than one
13 colloquy, and he not only - - -

14 JUDGE FAHEY: Let's - - - let's - - - let's just
15 stay with the oral waiver, not the written waiver, okay?
16 Go ahead with the writ - - - because the oral waiver is the
17 judge's waiver. So let's - - - let's assume for now I - -
18 - I'm more concerned about the judge than - - - any judge
19 than - - - than particularly the written wavier, okay. Go
20 ahead.

21 MS. MINISTERO: Okay, yeah, because he embraces
22 all of the affirmative misrepresentations in the written
23 waiver. And it's incumbent upon the court, not defense
24 counsel, to make a record, that it - that the waiver is
25 knowing, intelligently, and voluntarily made. And not all



1 defendants are savvy and all de - - - not all defense
2 counsels are competent and diligent.

3 JUDGE GARCIA: So should we look at the
4 defendant's background?

5 MS. MINISTERO: Absolutely, as you always have.
6 And Mr. - - -

7 JUDGE GARCIA: So not a per se per-se rule, but
8 it would be misconduct, plus a defendant's background?

9 MS. MINISTERO: Certainly with Mr. Lang's
10 background, an eighteen-year-old. However, if a judge is
11 routinely saying to defendants, you cannot have fees
12 waived, you cannot have counsel appointed - - -

13 JUDGE GARCIA: But I think you have to really
14 choose, right? Are we going to have a per se rule, or are
15 we going to have a sometimes per se rule, if it's an
16 eighteen-year-old, or are we going to have - - -

17 MS. MINISTERO: I would say a per se rule,
18 especially with the way that this language and the court
19 who was - - -

20 JUDGE GARCIA: And what is the most egregious
21 language here, do you think?

22 MS. MINISTERO: Saying to indigent defendants you
23 will not have fees waived, you will not have counsel
24 appointed, you have no hope. You're - - -

25 JUDGE GARCIA: So it's that part of the written



1 waiver essentially?

2 MS. MINISTERO: Yes, Your Honor. I thi - - - I
3 would say so.

4 Getting back to the 195.20 - - -

5 JUDGE STEIN: So what - - - what - - - why should
6 the requirements for stating a time in a waiver in an
7 indictment be more onerous than the requirements for the
8 indictment itself?

9 MS. MINISTERO: Because that is the law. First -
10 - -

11 JUDGE STEIN: But - - - but - - - so le - - -
12 let's assume that the - - - the legislature meant that to
13 be what it is, right. What makes it jurisdictional? And
14 that - - - and, you know, let's just assume that it was
15 wrong, but how - - - why is it jurisdictional?

16 MS. MINISTERO: Well, we cannot begin - - - first
17 of all, the - - - it is - - - it remains for the
18 legislature to rewrite the law. But secondly, we cannot -
19 - -

20 JUDGE STEIN: But there are a lot of statutory
21 requirements that don't render something jurisdictionally
22 invalid.

23 MS. MINISTERO: This is not an individual right.
24 It's a public right. And - - - and the - - - this - - - a
25 waiver of indictment actually does divest the court



1 completely of its jurisdiction to go forward.

2 JUDGE STEIN: But there - - - there - - - some of
3 the courts seems to be applying some distinction between
4 when - - - when the time was knowable - - - was known or
5 knowable. If there's that distinction, how can it be
6 jurisdictional when it's knowable, and not jurisdictional
7 when it's not?

8 MS. MINISTERO: Well, the - - - all of this
9 court's precedent requires strict adherence. It doesn't
10 talk about knowable or unknowable. First of all, you would
11 have to go against all of your precedent. But secondly,
12 there's always between, on or about, that's all - - - all
13 the way throughout all pleadings. You can always have an
14 approximate time is what it calls for. Between, on or
15 about, such-and-such time.

16 JUDGE STEIN: Well, what if you're talking about
17 a - - - a three-month-old victim. How - - - how would you
18 allege the time? What if - - - what if it was somehow
19 discovered at some point through a medical examination, and
20 there wasn't a way to - - - to pinpoint the time? You
21 could pinpoint days or whatever that the person had access
22 to the child or whatever it may be, but - - - but there
23 just wouldn't be any way to accurately allege a time. So
24 then what happens?

25 MS. MINISTERO: I would say that - - - Your



1 Honor, that the court is obligated to give effect to the
2 plain words of the meanings that the legislature has put in
3 - - - into this statute, firstly.

4 JUDGE WILSON: Does your - - -

5 MS. MINISTERO: Secondly - - -

6 JUDGE WILSON: Does your argument turn on the
7 time? I thought you were also arguing that the waiver
8 didn't include the dates and places?

9 MS. MINISTERO: Right, it doesn't include date,
10 time, or place. And if we start parsing out, okay - - -

11 JUDGE FAHEY: Well, let - - - let me just - - -
12 let's say this. Here's the problem there. If we apply
13 this single waiver rule, that - - - that - - - if that's
14 being applied tonight, don't you really take care of the
15 date and place, and we're really left with the time
16 question?

17 MS. MINISTERO: No, because the defendant does
18 not have to execute the - - - the - - - the only thing in
19 front of the defendant waiving this fundamental right that
20 they have to execute and puts in front of the defendant
21 what right I'm waiving - - -

22 JUDGE FAHEY: That - - - that's your argument in
23 - - - in opposition to the single document rule. I
24 understand that. But let's assume it's in place, all
25 right? So then what are you left with? You're left with



1 time, right? That's not covered by the single-document
2 rule. The cou - - - the requirement for, in this case, for
3 the approximate time is not there. It's not met, even if
4 you apply the single document rule. Am I correct about
5 that?

6 MS. MINISTERO: Yes.

7 JUDGE FAHEY: All right. If I'm correct about
8 that, then if I understand your argument correctly, that
9 the only way you could get around that, is to say, is it an
10 element of the crime, but of course, the statute here
11 defines that, not - - - not the criminal or the penal law
12 statute.

13 MS. MINISTERO: The statute - - -

14 JUDGE FAHEY: So - - - so that's the problem. Do
15 I have your argument correct?

16 MS. MINISTERO: Yes. But the Con - - - the
17 Constitution also mandates that the waiver be evidenced by
18 a written instrument, signed by the defendant. And if we
19 start to parse out time, date, and place - - -

20 JUDGE FAHEY: Well, u - - - usually what happens,
21 I think - - - you guys have more experience than probably
22 most of us on seeing these, but at least some of us - - -
23 but usually they'll say from sundown to sunset, or for a
24 twenty-four-hour period, or during - - - during all times
25 on such-and-such dates. That would meet the requirement

1 then, wouldn't it?

2 MS. MINISTERO: It would.

3 JUDGE FAHEY: Yes, and they'd be upon information
4 and belief. So it's not an onerous requirement to really
5 meet. The question is whether or not, like Judge Stein
6 says, is it jurisdictional? Does it throw it out entirely?

7 MS. MINISTERO: Yes, and the People are
8 requesting situational expedience on the backs of
9 defendants, Your Honor.

10 CHIEF JUDGE DIFIORE: Thank you, Counsel.
11 Counsel?

12 MS. GORMAN: Thank you. Shirley Gorman with the
13 Genesee County DA's Office.

14 To start with, the last issue. As the court
15 knows, it's the People's position that the jurisdictional
16 requirement is defined by the Constitution. As this court
17 indicated in Myers, and the time, as the Judge indicated,
18 if it can't be knowable, cannot be jurisdictional.

19 The indictment does not require a time. So how
20 can the requirement that it be in the waiver of indictment
21 - - -

22 JUDGE FAHEY: But you would agree this - - - if
23 we're down to the question of the time, this is not onerous
24 requirement. Just like I said, you could say at all times,
25 on such-and-such a date. You could say on all times for a



1 two-week period. So it's - - - it's - - - that's an
2 approximate time, so as a matter of fact, any date that you
3 made reference to could be the approximate time, if you
4 equated the two. It's - - - I've seen them written that
5 way. That's why I'm asking, Ms. Gorman.

6 MS. GORMAN: And - - - and obviously, if - - -
7 because it is time of day, not date - - -

8 JUDGE FAHEY: Here's my point, though. If it's
9 such an easy requirement, then why wouldn't it be - - - it
10 - - - it's not hinging on a particular element of a crime.
11 Why wouldn't it be there if it's required?

12 MS. GORMAN: Why would it be - - -

13 JUDGE FAHEY: Why wouldn't it be there, if it's
14 required?

15 MS. GORMAN: It - - - could it be there? Of
16 course. It could be there. But the question is, whether -
17 - -

18 MS. GORMAN: Just what Judge Stein said. Is it
19 jurisdictional?

20 MS. GORMAN: Right.

21 JUDGE FAHEY: Right.

22 MS. GORMAN: And attorneys' failure to raise it
23 becomes the issue, because it's not preserved.

24 JUDGE GARCIA: Right.

25 MS. GORMAN: It can only then be addressed by an



1 appellate court, if it's jurisdictional. So the - - - and
2 in these cases, time is not an element of the crime, so
3 obviously, that might be different in a case where an
4 element of the crime does require a given time.

5 Now with respect to the waiver of appeal. This
6 court held in Bryant, that a waiver of appeal where a judge
7 said, no review at all will occur, was appropriate. That's
8 clearly not true, because in every case, there could be
9 review. The only issue reviewed could be, was the waiver
10 of appeal valid. But inaccuracies that go to leading a
11 defendant astray about whether he can appeal, if a court
12 misrepresents and tells a defendant, you will be able to
13 appeal this issue, he relies on that in signing a waiver of
14 appeal, and then finds out during his appeal, that's not an
15 issue he can appeal, because it was waived with his waiver
16 of appeal, then clearly there's tremendous prejudice to a
17 defendant.

18 In a situation like this, as courts are holding,
19 when it's overbroad, enforce the enforceable. You have
20 defendants who are - - -

21 JUDGE WILSON: But what about - - - what about
22 the problem that when you tell a defendant you can't hire a
23 lawyer, we won't appoint a lawyer for you, you can't even
24 file anything on your own, that there are some number of
25 people who are going to say, I'm not going to appeal. I'm



1 not going to try to appeal, because the judge already told
2 me I can't have a lawyer and I can't do it on my own.

3 MS. GORMAN: Well, in - - -

4 JUDGE WILSON: Is - - - isn't there a - - - a - -
5 - you know, sort of a chilling effect from overbroad - - -
6 you know, as you find in a speech in a way, from overbroad
7 waivers?

8 MS. GORMAN: Again, there are attorneys there who
9 know to the contrary.

10 JUDGE FAHEY: Of course, that's not their job.

11 MS. GORMAN: And it - - - it is a situation where
12 it's an attempt to avoid appeals by people who are
13 forfeiting the issues that are waivable. And by being
14 explicit, if a defendant is prepared to waive more than
15 necessary, than - - -

16 JUDGE RIVERA: Yeah, but it's one thing to say
17 you're waiving particular kinds of claims and arguments and
18 grounds, and it's another thing to say, nobody's going to
19 help you to figure that out. That was Judge Wilson's
20 point, right?

21 MS. GORMAN: And we - - -

22 JUDGE RIVERA: We might - - - we might have some
23 waive rationally, saying that - - - what you're arguing as
24 this overbroad, just enforce what was actually enforceable
25 under the law, is very different from basically telling



1 someone, you're out in the cold; you're on your own.

2 MS. GORMAN: And the explanation in the written
3 waiver - - - clearly in the oral waiver, the judge said,
4 you won't have these situations, never talked about the
5 exclusions. Whereas, in the written waiver, the exclusions
6 are included. It says - - - it lists everything the judge
7 said you're giving up, and then it says, I waived my right
8 to appeal - - -

9 JUDGE FAHEY: So this is kind of like - - -

10 MS. GORMAN: - - - with the exclusion of - - -

11 JUDGE FAHEY: - - - the same situation that we
12 had in - - - before it said the opposite. Here the written
13 waiver may

14 have been all right, but the oral waiver seemed
15 to have more defects. So should we treat them differently?
16 As a policy matter, should we have the judge giving active
17 misinformation to be a different matter, than the DA making
18 errors on it written waiver? Is there a difference between
19 those?

20 MS. GORMAN: I think you look at both together.

21 JUDGE FAHEY: Right.

22 MS. GORMAN: And - - - and if one is accurate - - -
23 -

24 JUDGE FAHEY: Well, wou - - - wouldn't we judge
25 them by the role of the person in the courtroom, and what



1 they're particular job is? And a judge's job is different
2 from the DA's job.

3 MS. GORMAN: And - - - and clearly because these
4 waivers are signed in the courtroom, it is, in effect, the
5 judge's waiver, in a - - -

6 JUDGE FAHEY: So let me follow through on that.
7 Then if that's the case, and it's coming from a judge, then
8 doesn't that affect the knowing element of the KVI - - -
9 knowledge, voluntary, and intelligent - - - with knowledge,
10 and voluntariness, and intelligence - - - doesn't it
11 affect, at least, the first prong, and then necessarily
12 everything else?

13 MS. GORMAN: The - - -

14 JUDGE FAHEY: You see, the reason I ask is
15 because it seems in this situation, where a - - - we could
16 end up with the case similar to Santiago in the First
17 Department, where everything is out, or some different
18 remedy that parses it, and say, well, as long as they
19 didn't actively tell you wrong rights, then you're probably
20 okay. You see the difference?

21 MS. GORMAN: I - - - I do, and I would point out
22 that with respect to the judge's verbal colloquy, the
23 defendant is asked, did you have time to talk to your
24 attorney about this? And if there were any confusion, a
25 defendant at that point, would say, no, or but now I have



1 questions from what you've told me. And of course, these
2 waivers are used routinely, so attorneys have those
3 waivers. It's not like they walk in the courtroom - - -

4 JUDGE FAHEY: Well, that - - - that - - - that's
5 true with the written waivers. I don't know if that's true
6 with the oral waivers that the judge gives. They aren't -
7 - - they don't have those in writing ahead of time, unless
8 the court sticks with the model colloquy, which didn't
9 happen in this case.

10 MS. GORMAN: Right.

11 JUDGE FAHEY: Right.

12 MS. GORMAN: No, I mean - - - and I'm not sure
13 when the model colloquy was drafted.

14 JUDGE FAHEY: So you've been doing this awhile,
15 and you've seen a lot of these things. Let's say we say
16 that this whole waiver has to get thrown out. You've done
17 a lot of appeals. How do you think it will affect the - -
18 - the appeal practice itself?

19 MS. GORMAN: Realistically, it will involve
20 writing a brief on one issue, instead of two, because we
21 still have to write a brief on the issue which underlies
22 the argument - - -

23 JUDGE FAHEY: The underlying merits issue.

24 MS. GORMAN: - - - and the court - - -

25 JUDGE FAHEY: The reason I ask is I just want to



1 make sure that it - - - it wasn't going to be overwhelming
2 or the world wasn't going to collapse. It's - - - it's
3 good for us to know that in terms of the courts itself.

4 MS. GORMAN: But I think that everybody wants
5 finality.

6 JUDGE FAHEY: True.

7 MS. GORMAN: Defendants should want finality.
8 They should not be walking out of the room thinking that
9 they've waived appeal, it's over, and then they spend two
10 or three years waiting for the real end. And - - -

11 JUDGE RIVERA: Except you yourself said, it's
12 never over, right?

13 MS. GORMAN: I'm sorry?

14 JUDGE RIVERA: You - - - you've actually said at
15 the beginning, there - - - there are always issues - - -

16 MS. GORMAN: There are issues.

17 JUDGE RIVERA: - - - that can be appealed, so
18 it's not - - - I understand the aspiration for finality,
19 but in practice, the reality is that there are nonwaivable
20 grounds that a defendant may seek to raise on appeal.

21 MS. GORMAN: And - - -

22 JUDGE STEIN: But isn't the reality that if - - -
23 if all of these are thrown out completely, it's not just
24 the nonwaivable grounds that will survive? It will be
25 otherwise waivable grounds that will survive. So - - - so



1 while, it may, for you, affect how many issues you brief,
2 the reality is, is that it could result in significantly
3 more reversals.

4 MS. GORMAN: It - - - it will result - - -

5 JUDGE RIVERA: Assuming error below.

6 MS. GORMAN: I'm so - - -

7 JUDGE RIVERA: You've got to have an error to
8 reverse on.

9 MS. GORMAN: Well, it could be harsh and
10 excessive. I mean, that could be - - -

11 JUDGE RIVERA: It could be what? I'm sorry.

12 MS. GORMAN: Harsh and excessive, because if
13 there are issues, they - - - that are typically waivable,
14 but still got to the Appellate Division, and it's a
15 question about the sentence. And so although everybody
16 thought they had an agreement, all of a sudden, the
17 agreement is vitiated, because the Appellate Division
18 decides the sentence was harsh.

19 JUDGE WILSON: Let - - - let me ask about - - -

20 JUDGE STEIN: As I understood your briefing, you
21 seem to draw some distinction between waivable or
22 nonwaivable rights, and issues that really go to the
23 characterization of what the right to appeal is. And I'm
24 referring particularly to references to 440 motions, and -
25 - - and - - - and habeas corpus. Do you see a distinction



1 there? Is that - - -

2 MS. GORMAN: I - - - I - - - I see, if again a
3 court misleads a defendant about having a right to appeal,
4 which he doesn't have. But when there are errors involving
5 not adequately explaining to him what rights he will have
6 when he thinks he's losing them, that I don't see - - -

7 JUDGE STEIN: So you would - - - you would lump
8 that in with - - - with all the other things that we've
9 been talking about - - -

10 MS. GORMAN: Yes.

11 JUDGE STEIN: - - - here.

12 MS. GORMAN: Yes.

13 JUDGE WILSON: Can I just ask - - -

14 MS. GORMAN: And I would point out, because the
15 Green case is the situation where there was a waiver of the
16 right to appeal, left the room, found out the PRS had to
17 longer, came back in the room, and we are left with, does
18 the defendant have to know the maximum sentence before the
19 words "I waive my right to appeal" are said? Is this part
20 of the plea bargain? Is this part of the colloquy about
21 knowing, intelligent, and voluntary plea, this condition of
22 the plea that the waiver of appeal be waived?

23 So the - - - only if this court finds that the
24 sentence must be explained before the waiver of appeal is
25 elicited, would that be a problem in Green, because she



1 came back in and said, I understand the PRS has to be two
2 years longer, but I want the plea to sustain.

3 JUDGE WILSON: Can I just go back to - - -

4 JUDGE FEINMAN: So - - - so - - -

5 JUDGE WILSON: - - - what your practice is when
6 there's an appeal waiver, do you - - - because I - - - at
7 least my impression is, not - - - not for you, but
8 generally, that when I see the Appellate Division briefs,
9 and there's an appeal waiver, they will say - - - the - - -
10 the district attorney will say, there's a waiver here. But
11 then when - - - will also brief the merits, almost
12 invariably.

13 And then what the Appellate Division is doing is
14 sometimes standing on the wavier only, but more frequently
15 doing one or the other, either saying the waiver is not
16 valid and then reaching the merits, or saying we're not
17 going to deal with whether they - - - a waiver is valid,
18 even if it is invalid, and then they dispose of it on the
19 merits.

20 Is that - - - is my impression, right? And what
21 do you do? Do you brief both when there's a waiver? Do
22 you brief the me - - - merits and the waiver?

23 MS. GORMAN: You - - - you have to brief both the
24 waiver issue and the underlying issue that's argued,
25 usually harsh and excessive, because you can't assume the



1 court - - - because we have no way of knowing for sure
2 what's valid as a waiver of appeal, you also have to argue
3 the same - - - the other issue. And of course, there are
4 times, when arguing that other issue means there's oral
5 argument.

6 JUDGE FEINMAN: So - - - so if you don't know,
7 how does the defendant know?

8 MS. GORMAN: I'm sorry.

9 JUDGE FEINMAN: If you don't know what's a valid
10 waiver of appeal, how is a defendant supposed to know?

11 MS. GORMAN: Well, I - - - I think that - - -

12 JUDGE FEINMAN: I don't mean defense counsel. I
13 mean the defendant.

14 MS. GORMAN: No, I understand. And the problem
15 is, that no matter - - - a waiver of appeal that says, the
16 only issues which survive are these four, is now being
17 challenged because there are other issues, so "only" is
18 wrong; therefore, we should be allowed to find the waivers
19 invalid.

20 JUDGE FEINMAN: So - - -

21 MS. GORMAN: There's always another argument.

22 JUDGE FEINMAN: Specific to the Green case, what
23 is the effect of our holding in Johnson? And - - -

24 MS. GORMAN: If - - -

25 JUDGE FEINMAN: - - - and how does that play into



1 the analysis?

2 MS. GORMAN: If the appeal waiver were invalid in
3 that case, the court would have to remit to the Appellate
4 Division to deal with the merits of the harsh and excessive
5 argument, because they did not give an advisory opinion, in
6 effect.

7 JUDGE WILSON: And it would probably - - -

8 MS. GORMAN: They end - - -

9 JUDGE WILSON: - - - have been easier for the
10 Appellate Division to deal with that, than have to worry
11 about the waiver. I mean, right, pretty straightforward.

12 MS. GORMAN: Right. Okay? Thank you.

13 CHIEF JUDGE DIFIORE: Thank you.

14 Counsel?

15 MR. SPECYAL: Thank you.

16 First, I - - - I just wanted - - - I want to say
17 that the misstatements by the court, the court either knew
18 or should have known those were wrong. And that's due to
19 the fact that when, for instance, the court says, oh, you
20 can't get counsel, but that's the court that assigns
21 counsel, in this case, us. And there - - - and that was
22 happening for - - - for years. These judges were both on
23 the bench for a long time, and time after time, they're - -
24 - they're saying no, you can't get counsel, and then giving
25 the cases to my of - - - office.



1 So I think having courts say things that are
2 wrong and that they should know are - - - are wrong, going
3 to Muniz, just as a matter of public po - - - policy cannot
4 be a good thing, and - - - and I don't think it's the right
5 way to go.

6 JUDGE FEINMAN: If you were invalidating this
7 waiver, and - - - and trying to distinguish this from some
8 of our waiver cases, would it make more sense to you to do
9 it based on the - - - the misinformation about the right to
10 counsel or the fact that it was included in the waiver that
11 he can't bring a 440? And why?

12 MR. SPECYAL: In terms of - - - if I understand
13 your question here, in terms of, like, basically which is
14 worse?

15 JUDGE FEINMAN: I suppose that's one way to raise
16 the question. I - - - I'm just trying to figure out what's
17 a more workable rationale.

18 MR. SPECYAL: Well, I think that saying that she
19 could not have counsel is worse, because then, some of
20 these people might not ask for counsel, and then who - - -
21 and then who knows, they'll be no one to look at the cases
22 and see even if there could be a 440.

23 JUDGE STEIN: So - - - so how is that not
24 inconsistent with what we said in Ramos, though?

25 MR. SPECYAL: Whereas the language was overbroad



1 there, is that what you - - -

2 JUDGE STEIN: Well, yeah, it talked about - - -
3 oh, well, yeah, no, I'm sorry. It actually mentioned it as
4 a right of appeal, but then said, yes, that - - - that I'm
5 giving up those rights.

6 MR. SPECYAL: Right.

7 JUDGE STEIN: So, yeah.

8 MR. SPECYAL: Right. In - - - in - - - in Ramos,
9 it's - - - I - - - I think if I remember right, it's - - -
10 it's just that it was overbroad. Where this is not - - -

11 JUDGE STEIN: It specifically mentioned those
12 rights to - - - to assign counsel and poor person relief.

13 MR. SPECYAL: Right.

14 JUDGE STEIN: So - - - and that's what - - - if I
15 understand correctly Judge Feinman's question and what
16 you're talking about, is that's - - - that's the most
17 serious. But we've said it's okay.

18 MR. SPECYAL: Well, I think here - - - I do think
19 that that's an issue. But also that goes to whether it's
20 knowing, intelligent, or voluntary. And I think just that
21 there's this constant bar - - - barrage of statements that
22 are false.

23 JUDGE GARCIA: What other statements are false
24 besides those?

25 MR. SPECYAL: Oh, well, you have, for instance,



1 no - - - no other review by any court.

2 JUDGE GARCIA: But we've said that's okay before.
3 We've said in one of our cases that where they say, you're
4 not going to get this reviewed by other - - - no other
5 court will look at this, we've said that's okay.

6 MR. SPECYAL: Right, but then, in - - - in the
7 same part, the judge says, okay, well, some - - - this
8 waiver only goes to some is - - - issues. So he says some
9 issues, and then says, no review. So both can't - - -
10 can't be true. It's - - - it's - - - it's not just that
11 it's overbroad. It's that it's contradictory, because
12 they're logically inconsistent.

13 The defendant would have to say some - - -
14 something like, okay, I understand that I retain some of my
15 rights, but I also at the same time, understand I don't
16 retain any of my rights. They can't think both are true,
17 which goes to the fact that the waiver isn't made
18 knowingly, and intelligently, because - - -

19 JUDGE GARCIA: But it - - - it seems what the
20 theory of our prior cases has been in the worst-case
21 scenario of that problem, you thought you waived more than
22 you really did. It's not like you thought you waived less.
23 I may only have these limited rights, or I may have no
24 rights. What - - - you know, we've said, well, you
25 actually do have the limited rights, but you - - - you



1 know, even if you thought you were waiving everything,
2 you'll still have those.

3 So I don't understand how you distinguish this
4 case based on those factors?

5 MR. SPECYAL: Well, with - - - to that - - - that
6 point going back to something Judge Wil - - - Wilson had -
7 - - has said, we only can get these cases, because our
8 clients want to file an appeal, so if people were to
9 actually think that, okay, can't - - - can't get counsel,
10 can't file a - - - a brief, who knows what - - - what would
11 happen. There may be an issue with merit and no one would
12 ever get a chance to take a look at it.

13 JUDGE GARCIA: I think that is the main point
14 here - - -

15 MR. SPECYAL: Yeah.

16 JUDGE GARCIA: - - - and I think your - - - your
17 colleague made that point very clearly, that this is really
18 a deterrent rule.

19 MR. SPECYAL: yes.

20 JUDGE GARCIA: Because your clients clearly
21 understood or their lawyers understood, and they're here
22 and they're challenging various things.

23 MR. SPECYAL: Right.

24 JUDGE GARCIA: But this would be a deterrent rule
25 for other defendants.



1 MR. SPECYAL: Right.

2 JUDGE GARCIA: And I think that's a legitimate
3 argument.

4 MR. SPECYAL: Yeah, right. I - - - it - - - it
5 would and going back to what I start - - - started with,
6 the court should have known that - - - that what he was
7 telling Ms. Green wasn't true, so it's not only a
8 deterrent, it's - - - it's one that the court knows is
9 wrong, so why use a deterrent that they know isn't true, as
10 of a matter of public po - - - policy, I don't think - - -

11 JUDGE GARCIA: No, I mean, our rule would be a
12 deterrent. I'm sorry, if - - - as far as confusing - - -

13 MR. SPECYAL: Oh, sorry.

14 JUDGE GARCIA: No, no, I wrongly articulated it.
15 But I mean, our rule saying this is invalid really would
16 act more as a deterrent from this practice - - -

17 MR. SPECYAL: Right.

18 JUDGE GARCIA: - - - then it would a statement
19 that in this particular case, this defendant didn't
20 understand what they were waiving.

21 MR. SPECYAL: Yes, that's true, but I also think
22 in here, there's - - - there isn't enough on the record to
23 know that she actually un - - - understood either, because
24 of just all of the contradictory statements, I think
25 prevent anyone from logically understands and in due to the



1 fact that they don't know which - - - which ones are true,
2 and which ones are true and which ones are not true.

3 JUDGE RIVERA: But take your - - - your last
4 point, well, just before this point -- I'm sorry - - - was
5 that there's something particularly troubling when a judge,
6 if they don't know, but should obviously know - - -

7 MR. SPECYAL: Yes.

8 JUDGE RIVERA: - - - because it's so obviously
9 incorrect, should not confirm or perhaps create great
10 confusion by repeating the error - - -

11 MR. SPECYAL: Right.

12 JUDGE RIVERA: - - - in the waiver.

13 MR. SPECYAL: Yes.

14 JUDGE RIVERA: That is a different case from just
15 an overbroad waiver.

16 MR. SPECYAL: Yes. That's - - - that - - - that
17 is, I think, quite a bit different - - -

18 CHIEF JUDGE DIFIORE: Thank you, Counsel.

19 MR. SPECYAL: Thanks.

20 CHIEF JUDGE DIFIORE: Thank you.

21 Counsel?

22 MS. MINISTERO: This court should require the
23 People to comply with the statute 195.20 rather than
24 steering around it. And in accordance with the
25 Constitution, the CPL and all of its established precedent

1 rule that Mr. Wa - - - Lang's waiver of indictment was
2 jurisdictionally defective.

3 CHIEF JUDGE DIFIORE: Thank you.

4 (Court is adjourned)

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I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of The People of the State of New York v. Victor Thomas, No. 87, The People of the State of New York v. Nicole L. Green, No. 88, and The People of the State of New York v. Storm U. Lang, No. 89 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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