COURT OF APPEALS

STATE OF NEW YORK

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PEOPLE,

Respondent,

-against-

NO. 73

ANTHONY BLUE,

Appellant.

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20 Eagle Street
Albany, New York
September 10, 2024

Before:

CHIEF JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE MADELINE SINGAS
ASSOCIATE JUDGE ANTHONY CANNATARO
ASSOCIATE JUDGE SHIRLEY TROUTMAN
ASSOCIATE JUDGE CAITLIN J. HALLIGAN

Appearances:

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CHIEF JUDGE WILSON: Next case on the matter is People v. Anthony Blue.

MR. DANNER: Good afternoon, Your Honors, and may it please the court. My name is Scott Danner, and with the Office of the Appellate Defender. I represent the appellant, Anthony Blue. I'd like to focus on the counsel-waiver issue.

CHIEF JUDGE WILSON: Do you wish to save any time for rebuttal?

MR. DANNER: Thank you, Your Honor, for the reminder. I'd like to save four minutes.

CHIEF JUDGE WILSON: Okay.

MR. DANNER: Thank you.

More than fifty years ago, in Matter of Lawrence S., this court announced the rule that governs this appeal: That to be valid, a counsel waiver must be made with an apprehension of the nature of the charges, the statutory offenses included within them, and the range of allowable punishments. This court then applied that rule in that case - - -

JUDGE TROUTMAN: When you're looking at - - - do you look at the whole record here with respect to the - - - from beginning with the defendant's arraignment, being advised of the charges against him, to understand whether or not he's clearly apprised of what risks he's facing?

MR. DANNER: Yes, Your Honor. You look at the whole record to evaluate a question at a point in time. You need to understand what the defendant knew when he waived. So you're looking at the whole record to understand the defendant's knowledge at that point. So that would include everything preceding that point, certainly, including the arraignment, including, in this case, the hearing in - - -

JUDGE TROUTMAN: So when the defendant is initially arraigned on the indictment, he's given a copy of the indictment, advised of the nature of the allegations against him, are they not apprised of possible penalties if they are convicted and the people prove their case?

MR. DANNER: Well, I think they are. And in this case, he was warned of the nature of the charges. He did understand it's reflected in the record that he faced second degree burglary. I think it might have been said that that's a C felony. So the nature of the charges and the statutory offenses in this case were disclosed.

And I think as a typical matter, and as a best practice, it would be a good thing if at arraignment, maximum penalties were disclosed, but they weren't disclosed here. And in fact, maximum penalties were never disclosed and certainly not disclosed before he waived. That's a necessary condition in addition to the nature of

the charges in the statutory offense.

JUDGE GARCIA: And what would the specificity be? Like, what are the maximum sentence on each count? You know, what - - - what would they have to be told?

MR. DANNER: Sure. So we know at a minimum there has to be the range of allowable punishments, and we're trying to articulate what does that mean, the range. So to Your Honor's question - - -

CHIEF JUDGE WILSON: Well, it has to be according to the quote you read, apprehension of the range, which may be a little different than a - - - you know, an exact set of numbers.

MR. DANNER: Well, that's right, Your Honor. And I don't think in this case you need to approach the degree of precision that is required in a particular case, given that we have next to nothing in the pre-waiver colloquies here. But as a general matter, I think if the court wanted to announce a sufficient rule, the min/max on each charge count with a warning that they could be run consecutive.

JUDGE HALLIGAN: But what if - - -

JUDGE SINGAS: But what if it's not so clear? What if somebody's a predicate, and you're waiting until after trial to do a predicate hearing? Or what if the trial judge gets it wrong? What are the consequences then?

MR. DANNER: Well, two questions there. On the

predicate, that's an enhancement that could, potentially, based on facts not known at the time, change the sentence. And we're not saying that the judge has to say anything other than what is known. And what is always known is the statutory min/max, the possibility of consecutive, and the possibility of enhancements. So if those are on the record, you've given the defendant everything that is readily known at the judge's fingertips and gives them the best information without speculating what may happen, and that is adequate.

JUDGE HALLIGAN: It seems - - - it seems to me that our cases have generally eschewed a bright-line rule or a rule that requires the use of some very specific words. But it sounds to me like the rule you just proposed to us is of a different sort. And so how do you reconcile the more specific and granular rule you're requesting with what I take to be a different approach in our precedent?

MR. DANNER: Well, Your Honor, I don't know that it is a different approach. In terms of bright-line rules, there are constitutional minimums that must be conveyed. That's the point of Lawrence S. That's the point of the United States Supreme Court law and all the Federal Circuit law, that the range of allowable punishments is - - - sets a constitutional floor.

In terms of the concerns about catechism, cases

like Providence - - -

JUDGE HALLIGAN: Yes.

MR. DANNER: - - - they're really referring to, are you reciting the right words in the searching inquiry in the last colloquy? That's not what we're saying. We're saying you can look at the record of the whole - - - as a whole. You should, including the arraignment, which will often have the range of allowable punishments stated with the charges - - -

JUDGE HALLIGAN: So - - - it's your view that we cannot - - - or court could not review a record and conclude, based on a range of statements, that the defendant apprehended the range of allowable punishments or that, you know, such a finding was a reasonable one for the trial court to make. It - - - can we - - - can we do that, or does there need to be a specific recitation with respect to numbers? I took you to be suggesting the latter, but maybe I misunderstood.

MR. DANNER: So we're not advocating a specific recitation, to Your Honors point, and I do believe the court can look at the record as a whole to evaluate the defendant's knowledge at a state in time.

Your question as to do there have to be numbers, I think the answer is yes. Range is expressed in numbers. Sentences are imposed in numbers. If you're trying to

figure out, did the defendant have the right information to make this very momentous decision, that's the best information possible.

CHIEF JUDGE WILSON: So there's a point, I think, in the record, although, I'm not certain if this is before or after, but I think it's during the colloquy where the judge is trying to convince him that maybe he should not represent himself, that she says, you don't need to go to jail for twenty-five, thirty, forty years.

MR. DANNER: Yes, Your Honor. That is a post waiver statement. That occurred - - - let's see here - - - on June 6th. That's right - - - sorry - - - September 29th. This is almost nine months after he's waived and gone pro se in February of 2014. That sort of post-waiver information cannot retrospectively or retroactively cure a deficient waiver. This court held that in Crampe

CHIEF JUDGE WILSON: So would that statement, if made before the waiver, had been sufficient?

MR. DANNER: That's a much closer case. I think - - - and this gets at another question I'd received, this is whether - - - what happens if you get an inaccurate number. Right? And so if you're giving a range like this that isn't sort of the min/max on each count, and it's not precise, then I think you have to look at the facts of each case and look at all of the other factors to decide, is it

sort of close enough? And I understand that's not a satisfying bright-line rule, but that's the rule that gets applied in plea cases in this - - -

JUDGE HALLIGAN: I thought your - - -

JUDGE CANNATARO: So it sounds like you're promising us a whole new strain of appeals where there's a dispute over whether the court was in the ballpark when it gave out these numbers.

MR. DANNER: Well, I don't think this case has to invite it, Your Honor, because this isn't an inaccurate-range case. This is a no-range case.

JUDGE CANNATARO: But - - -

JUDGE HALLIGAN: So just to clarify, I thought you responded to Judge Troutman's question by saying that the entire record was what we should look at in evaluating this, but I took you to be saying to the chief a moment ago that any statements made post waiver can't be considered, so - - - so which one is it?

MR. DANNER: It - - - yeah, to clarify, they can be considered to the extent they bear on the knowledge at the point of waiver. So for example - - - and this is not our case - - - if the post-waiver statement was, oh, yes, judge, I was told before I pled or before I waived counsel by my lawyer that the range was this, that is in. And the Ninth Circuit addresses this hypothetical in U.S. v.

Erskine, which I encourage the court to read. That is not what we have here. What we have here is, nine months later, the court says twenty-five, thirty, forty, and we're supposed to infer - - - the respondent asks us to infer based on that statement, and the lack of a verbal expression of surprise on the record, that Blue must have known that that was the range before he waived. And that is not a legitimate inference. He could have learned at any point between his waiver and September that that was the range, or he could have jumped up out of his chair and it not been trans - - -

JUDGE HALLIGAN: So I take it your position is if a post-waiver statement appears to reflect or further explicate some understanding that's on the record before the waiver, is that - - - is that - - -

MR. DANNER: Sure. And I can - - -

JUDGE HALLIGAN: - - - more or less - - -

MR. DANNER: Yes, Your Honor. And I apologize for interrupting. I think the clearest case would be the defendant stands up and says, oh, I've known all along. I was told. I cracked the penal law. I did the math myself, and here's what it was.

JUDGE RIVERA: So what - - - what were the numbers? Because you say the range is numbers. You got to give numbers. What were the numbers that the judge had to

provide to the defendant before the defendant actually waived?

MR. DANNER: I'm going to answer after the caveat that because we have no range here, it needn't be reached. But with that said, our rule or our proposal for stating a minimally sufficient that will work in every case would have been - - -

JUDGE RIVERA: Uh-huh.

MR. DANNER: - - - three and a half - - - these are two - - - these are six C violent felonies - - - three and a half to fifteen. That's in the penal law. The fact that they're violent C felonies is in the indictment. This is all known. There's six of them. They could be stacked depending on how the facts come out at trial. There could be enhancements depending if the people charged one later. And that's it. And that's all known information that is not requiring the judge to do anything other than look at the indictment and look at the penal law, which is something trial judges do in this state every day.

JUDGE HALLIGAN: And so is it your view that - - - that we can't assume that the defendant can infer anything from the severity or number of the charges? I mean, obviously, you know, there will be a wide range in terms of the severity of the charges themselves and - - - and often the number.

MR. DANNER: Well, I don't think that the defendant can infer the range of allowable punishments from a characterization or an adjective. Right. We have here, you're facing a serious charge. That was inadequate - - -

JUDGE HALLIGAN: No. No. I mean, from the charges themselves as set forth in the indictment.

MR. DANNER: I see. No, Your Honor, I don't think so. I think a - - - a - - -

JUDGE HALLIGAN: Why is that - - - why not?

MR. DANNER: Well, uncounseled by hypothesis, this is a defendant waiving his counsel, layperson, doesn't necessarily have any conception of what charges or sentence - - -

JUDGE HALLIGAN: You're charged with - - - you're charged with murder, as opposed to, you know, you're charged with, you know, a petty larceny. Obviously, someone will infer that there's a meaningful distinction between the exposure from those two sets of charges, so - - -

MR. DANNER: I think that's fair. Although, Your Honor, there would be a difference. But the question is, is a relative difference between a major charge and a minor charge enough to convey the range of a - - -

JUDGE TROUTMAN: What about here? When the defendant begins, he wants to be pro se, and the court

says, that's a big mistake. You face a lot of time. The defendant says, I understand, but I'm making my decision. I want to do this. That's not an indication that it - - - prior to that time, because of the differences he's had with respect to what he wants done with his case, that he's not making an informed decision.

MR. DANNER: Well, I don't think it meets the minimum standard of a warning him of the range of allowable punishments. A lot of time - - - the phrase, a lot, means a lot of different things to a lot of different people. All right. A lot of time is one thing to a twenty year old - - -

JUDGE TROUTMAN: But taking into account you've been arraigned, there is an indictment. We're talking felonies. We're not talking misdemeanor county time. There's a big difference. It seems that that should be some indication this is serious. And the judge doesn't just limit it to, you're facing a lot of time. The judge goes into particulars. But the defendant seems to be more fixated with respect to what he wants to do, which is pursue 30.30 challenges and other - - - the things he wants, and that the attorney is not being a part of the team adopting what he wants.

Isn't knowing and intelligence more than just giving a number, it's telling the defendant the risks.

There's a trained lawyer on the other side, and this judge goes through a lot. And you're saying, even though the judge is emphasizing, "big mistake," and it says that more than once, says, a lot of time, that's just not enough.

MR. DANNER: Your - - - Your Honor, it's not enough where the - - - where the actual punishment is not disclosed. And in this case, this court has said as much. This ca - - - this court said as much in Lawrence S. In Sawyer, the defendant was warned that you're facing serious charges. And Kaltenbach, the defendant was warned you're facing serious charges. Serious, a lot, huge, these are relative terms. These are subjective terms.

JUDGE TROUTMAN: But it also depends on what else occurred within the record itself.

MR. DANNER: If there were other information in the record that the defendant understood the range, the worst that could happen - - - right. He's facing an important choice - - -

JUDGE TROUTMAN: But again, you're focusing simply on the range of punishment, not with respect to other information that the court specifically telling the defendant about the risks themselves of representing oneself.

MR. DANNER: Yes, Your Honor, I am drawing that distinction, and I think both are necessary. And I think

that's borne out in the case law, so - - -

CHIEF JUDGE WILSON: Can I ask you to turn - - - I'm sorry - - - to the speedy-trial issue.

MR. DANNER: Yes, Your Honor. The dispositive question on the speedy-trial issue is whether fifty-seven days - - - it's called the contested period in the briefs - - - was properly excluded from the count. That turns on whether or not the time that ran while Mr. Blue's codefendant, Puello, was making motion practice, whether that time was countable or chargeable as to Mr. Blue, who at that time had not been arraigned.

JUDGE HALLIGAN: Could you specifically address the People's argument regarding 200.40?

MR. DANNER: Yes, Your Honor - - -

JUDGE HALLIGAN: And why - - - why that shouldn't control our interpretation here.

MR. DANNER: Yes, Your Honor. The - - - 240 does not define the term joined for trial. It defines joinder, but it does not use the phrase joined for trial. And in fact, no other provision of the CPL uses the phrase joined for trial other than 30.30(4)(d), and that's interesting. And then - - - and so we need to interpret this unique phrase in the context of this provision, which also refers to the defeat of the of the applic - - - of the exclusion by a motion to sever.

JUDGE SINGAS: So is there a difference between joinder on indictment and joinder for trial? Is that your position?

MR. DANNER: Well, given that the different phrases are used, I think they ought to be given different meaning, and particularly in the context of this clause, where the only way to stop the exclusion is to move to sever. I think we give meaning to join for trial by looking to the fact of arraignment, which is the first time with - - -

JUDGE SINGAS: And where is it - - - and - - - and what authority are you invoking arraignment? Where in the statute does - - - does it say anything about arraignment?

MR. DANNER: Well - - -

JUDGE SINGAS: I think the statute reads pretty clearly on its face.

MR. DANNER: Well, I think at best the statute we believe is ambiguous and can't be interpreted for the result. The defendant, who has no opportunity to stop this exclusion, by moving to sever it, can have this time run against him. The first moment at which the defendant can protect himself from his co-defendants dilatory tactics is upon arraignment, we can make a motion to sever. And so the statute shouldn't be interpreted in a way that allows a

completely innocent, unknowing defendant to lose valuable statutory rights when another interpretation is available that upholds that right by saying that a defendant only becomes joined for trial, which again is a unique statutory phrase, upon arraignment.

JUDGE HALLIGAN: But - - -

CHIEF JUDGE WILSON: So the judge at one - - - I'm sorry - - - the judge at one point was going to hold a factual hearing to determine whether the defendant knew and absconded or was - - - didn't know. Is that the remedy you would ask for on this?

MR. DANNER: Well, the remedy we would ask for is dismissal of the indictment, Your Honor. But as an alternative - - -

CHIEF JUDGE WILSON: And why is that - - - yeah - - - why is that not a better - - - well, I understand why it's not better for you.

MR. DANNER: Yes, Your Honor. But it's - - - well, it's ultimately the People's burden to establish the applicability of exclusion. They did not establish the applicability of C, the absconding exclusion. And I don't know that they should be relieved of that in this court. The Appellate Division had the same argument - - -

JUDGE HALLIGAN: But I thought that the court - - -

MR. DANNER: - - - and didn't - - - I apologize, Your Honor.

JUDGE HALLIGAN: I thought that the court declined to decide that. It is your view that - - - that that has been determined?

MR. DANNER: The court did decline to decide it. That's accurate, Your Honor. And then the Appellate Division did not send it back for a hearing on this issue, but did not charge under C, did not find the absconding on the record that exists.

So I think under Lafontaine, this court may send the issue back, and I think that may be an appropriate remedy in this case to determine whether or not he absconded.

JUDGE HALLIGAN: And I - - -

JUDGE SINGAS: And just - - - I'm sorry.

Can I just ask you the practical implications of a rule if we adopted your rule?

MR. DANNER: Yes, Your Honor.

JUDGE SINGAS: So suppose that we have two co-defendants on the same indictment being charged with different amounts of time, and at some point, the People decide they have to do a hearing for one of the defendants because they have sixty days charged, and then they're going to find themselves in a position of doing one hearing

and calling witnesses for one co-defendant, and then maybe later on, doing the same hearing with the same witnesses for another co-defendant.

And isn't that across purposes with what the legislature was intending by instituting this statute, by saying, look, when you have two co-defendants in - - - in - - - for judicial economy, we're going to treat them as one so that we avoid these kinds of issues. But I think you're inviting these kinds of issues if we adopt your rule. Am I wrong about that?

MR. DANNER: Well, Your Honor, I - - - this - - - the legislature could have said that once you're co-indicted, your time runs the same. That's it. But it didn't. It added an exclusion where if you show good cause for severance, you can get out, if you're the defendant, from that co-running of time. And that remedy - - - that out, which the legislature chose to give in its wisdom, is not being respected if the time can run against them while they have no ability to protect themselves.

JUDGE SINGAS: But the legislature - - -

MR. DANNER: So I'm saying - - -

JUDGE SINGAS: - - - also didn't put in the word arraignment. And it could have. It knew how to. There's certainly other sections of the CPL where they talk about arraigned versus unarraigned defendants. They chose not to

here, and I think they did so for a reason.

MR. DANNER: Well, Your Honor, I'd suggest if there are two available interpretations, one of which results in - - - in this defendant and all defendants being powerless to protect themselves from the dilatory tactics of their co-defendants. The court should favor the available interpretation that requires arraignment to find the defendant ready for trial.

JUDGE RIVERA: As - - - as I recall, I think they countered that, given that 30.30 would be raised later anyway, any argument about the - - - the possibility of a severance could be raised later also.

MR. DANNER: They do raise that possibility.

JUDGE RIVERA: Okay. Uh-huh.

MR. DANNER: That's not the position, I'll say, that is taken by the people in lower courts. That's not the rule that's been applied in lower courts. And it raises a host of questions. Are we going to allow a defendant who has a good motion to sever, who's been arraigned, to wait until the speedy-trial clock would run to say, oh, wait, never mind. I'm going to raise my hand and move to sever, and you know, it turns out I get the indictment dismissed. It would invite a whole other host of questions.

So while that is a position in a brief, that's

not the reality on the ground, and that's not the reality Mr. Blue faced or defendants face all over the state.

CHIEF JUDGE WILSON: Thank you.

MR. DANNER: Thank you.

MR. TISNE: May it please the court. I'm Philip Tisne on behalf of the respondent. Defendant had a general understanding of his sentence exposure in this case. Together with the extensive and unchallenged warnings about the specific risks associated with proceeding without a lawyer, defendant's general awareness about his sentence exposure was more than enough for this defendant to make an informed decision about whether he wanted to waive counsel.

JUDGE RIVERA: So if there had been none of those general statements - - - none of those general statements about the potential sentence, would - - - would then they succeed on this appeal?

MR. TISNE: Well, what I'd like to do - - -

JUDGE RIVERA: Is it a necessary component, even if you accept your argument that it can be a general statement?

MR. TISNE: Yes. So our view is that some awareness on the defendant's part of their sentence exposure is required to knowingly waive the right to counsel.

JUDGE HALLIGAN: And to your adversary's comments

about - - - about remarks after the waiver, why should we or could we take a exchange following the waiver, which isn't clearly tethered to, you know, the defendant's own understanding or to some prior exchange - - - some prior colloquy between the judge and the defendant, as relevant to what the defendant understood at the time of waiver.

MR. TISNE: So I'd like to answer that question by first starting with the information that predates the waiver, and then talk to you about why the information that postdates the waiver is relevant to the pre-waiver information.

JUDGE HALLIGAN: Yeah. Thank you.

MR. TISNE: And Judge Troutman, as you recognized, this defendant was told at arraignments that he was facing six counts. He was told that they were violent felonies. He was told that they could run successively. He had a criminal history. His most recent conviction was - - - he received a sentence for - - - of eleven years on a nonviolent felony - - - on a single nonviolent felony. And he knew that he was being offered twelve years on a plea to the charge in this case. So that is twelve years to a plea to a single of the violent felonies that he faced.

Just there alone, the defendant must have known that he faced either a maximum of sixty-six years or seventy-two years if all of those counts ran consecutively.

We know this because when we get to the time of the plea colloquy and the defendant asks to waive counsel and defen - - - the lawyer - - - the judge says, you can't do this. It's a terrible idea. You're facing a ton of time. The defendant says, I know, but I'm making my decision anyway.

All of that goes to show that the defendant had a general awareness, at least, about the consequences that he faced if he was convicted after trial. Very significant prison sentence. Many decades in prison.

Now, to your question, Judge Halligan, the statements after - - -

JUDGE HALLIGAN: Uh-huh.

MR. TISNE: - - - the plea colloquy are relevant to that because they substantiate the fact that, before, he did know what he was talking about when he said, yeah, I know it's a bunch of time - - -

JUDGE HALLIGAN: If he knew exactly why that's the case, if you would, why - - - why is it substantiating something that he knew previously as opposed to something he comes to realize in the moment?

MR. TISNE: Well, I - - - I suppose there might be a case where something changes in the interim - - -

JUDGE HALLIGAN: Uh-huh.

MR. TISNE: - - - and a superseding indictment or new information - - -

JUDGE HALLIGAN: But absent that, you assume it reflects the knowledge that he's had since the day he walked in the door?

MR. TISNE: Exactly. But absent that, if we assume that the things that he says after his pro se colloquy reflect the information that he had before he waived the colloquy. And here after the colloquy, he said - - - the judge says, listen - - - I mean, the judge says this just about every three months in this case. Your exposure in this case is huge. I'd need a calculator to - - - to come up with your exposure. At one point, he says, you're facing twenty-five to thirty to forty years. You don't need to do this. Don't - - - and those were in the context of a plea negotiation. But the defendant says, yeah, I know what my exposure is, and I know what I'm doing here. All of that reflects what the defendant said to the judge at the plea colloquy, and what he learned before the plea.

JUDGE TROUTMAN: With respect to plea discussions, and he's talking to his lawyer before the lawyer is discharged, is that also relevant that he complains that the lawyer is just wanting to talk about taking a plea, that there was some discussion, and that they - - - he did have knowledge of exposure?

MR. TISNE: I think all of that goes to show that

the defendant knew what he said when, at the plea colloquy, the judge said, you're facing a ton of time here, and the defendant said - - -

JUDGE RIVERA: But why - - - why is all this guesswork a better rule than here's the minimum, here's the maximum? It might differ, but that's at a minimum what you should take into consideration.

MR. TISNE: Though, there are two answers, I think, to that question.

JUDGE RIVERA: Better than one. Yes.

MR. TISNE: So the better answer, the more important answer, is that it is not going to be the case that every case giving an exact number is the best way forward. This case - - -

JUDGE RIVERA: Well, that's not even what's required. It's just a range. Nobody's talking about the exact number - - -

MR. TISNE: It's a range of number - - -

JUDGE RIVERA: Right.

MR. TISNE: So now we're saying - - - we're hearing them say, well, you needed to give the range. If he was a predicate, it was twenty-one to ninety. If he was - - - if he wasn't - - - if he wasn't a predicate, it was twenty-one to ninety. If he was a predicate, it was thirty to ninety.

In their brief they say, actually, you know, you should have calculated it according to the statutory cap that DOCCS administers, so really it's going to be twenty. So in this case it's not quite so simple to come up with an - - -

JUDGE HALLIGAN: But what - - - what is - - -

JUDGE RIVERA: But that - - - isn't that troubling? You're telling me that a court won't even know - - - can't even say to a defendant this is the range?

MR. TISNE: No. No. No.

JUDGE RIVERA: I mean, you got to know something.

MR. TISNE: I - - - and I - - - so there was, I think - - -

JUDGE RIVERA: How can he know if the court doesn't?

MR. TISNE: So I think there was confusion about whether this defendant was a predicate, just because there was some question about how long - - -

JUDGE TROUTMAN: But even - - -

JUDGE RIVERA: But that's about the enhancement. He's already said that. So - - -

MR. TISNE: I'm sorry?

JUDGE RIVERA: But that's about of a potential for an enhancement, right?

MR. TISNE: But - - - but my point is - - -

JUDGE TROUTMAN: But let me ask you this. Quite simply, I did pleas all the time and started out with, this is what you're charged with, and would give them the potential maximum sentence of a C violent or of a B. Doesn't mean that's what they're going to get. They're factors that affect whether it's more, whether it's less. But why can't the court just say, here's the max potentially you could face?

MR. TISNE: Okay.

JUDGE TROUTMAN: Wouldn't that be better?

MR. TISNE: The court certainly could. I think my answer was getting to the possibility that there might be cases where it is a little more complex. I think you'll hear - - -

JUDGE TROUTMAN: Uh-huh.

MR. TISNE: - - - about another one of those cases later today - - -

JUDGE TROUTMAN: But - - - but may - - - doesn't may take that into account?

MR. TISNE: I'm sorry? Doesn't - - -

JUDGE TROUTMAN: May. It's - - - it may happen.

MR. TISNE: It may. So - - -

JUDGE TROUTMAN: This is your worst-case scenario.

MR. TISNE: The - - - the second answer then, if

you don't find that particularly satisfying, is that the thing that we're focused on here is not what the court says, but what the defendant knows. And it doesn't matter that the court says you're getting seven to fifteen on each count, or they're going to be stacked, or anything like that. What matters is, did the defendant have a knowledge about what their sentencing exposure was sufficient to make an informed and knowledgeable decision about whether they wanted to waive the assistance of counsel? And I think - - -

JUDGE CANNATARO: But doesn't your first argument cut against the second argument? If the court's not even in a position to offer a somewhat reliable range or set of numbers, whatever you want to call it, then how can we expect the defendant to understand it? And even in this case, I'm struck by the fact that, you know, a post - - - post-motion colloquy talks about twenty-five, you know, thirty, forty years, and you're telling us that what he understood was sixty-six to seventy-two. There's - - - there seems to be all sorts of different notions of what the right number is here.

MR. TISNE: I'm - - - the sixty-six to seventy-two was just based upon the information that was told to him, specifically at his arraignment. His actual maximum was ninety. In their brief, they say the thing that he

needed to be told was that he was facing twenty years, a much different maximum. Now, they've changed their position, and they're saying, actually, he needed to be given the range on each count and told about the possibility that they could be more than just - - -

JUDGE CANNATARO: But could you address the underlying concern that it's - - - these numbers are not so easy to ascertain, and they must be all the more difficult for a nonlawyer, nonjudge to ascertain. So how - - - how can we just assume that they understand these things?

MR. TISNE: Fair enough. And I - - - I don't think it is going to be every case where the number is going to be difficult. I think the judge could, in this case, have said, listen, I don't care whether you're a predicate or not, you're facing three and a half to fifteen on each count, and when you add those up and they're stacked, you get a twenty-one to ninety range. That's - - - that's knowable. The judge could have said that.

JUDGE CANNATARO: But he didn't have to.

MR. TISNE: I don't think that is the case for every case, but I do think that is a possibility here. And then - - -

JUDGE TROUTMAN: So are you acknowledging that there may be an instance, without giving more specific information on exposure, that it could be insufficient?

MR. TISNE: I think in every case, the question is going to be whether the defendant had sufficient information about their sentencing exposure - - - the potential sentencing exposure to make an informed decision about whether to waive counsel, in addition to all of the other information that they need to know about how terrible an idea it is to waive the right to counsel and go it alone through hearings and trial.

You know, we don't - - - we haven't talked too much about the fact that this defendant got essentially a model colloquy on that information, length, you know, eighteen pages in the transcript about, you know, how you're going to have to go to hearings by yourself, you're going to have to go to trial, and the judge - - -

JUDGE RIVERA: But that part of the colloquy is not at issue. And you've already said that, yes, indeed, they have to have some knowledge of this particular range of the punishment, so that's the only one we're focused on.

MR. TISNE: But the bedrock question, Judge Rivera, is whether the defendant has enough information to make a knowing waiver. And all of this information has to be viewed in totality and - - - to come up with an answer about that. And we think - - - I mean, the federal cases don't require a specific number - - - a knowledge of a specific number. They required a general understanding - -

-

JUDGE RIVERA: But you agree they require some information about the range?

MR. TISNE: As I conceded earlier, yes.

JUDGE RIVERA: But that that - - - right.

MR. TISNE: The general understanding - - -

JUDGE RIVERA: So that's all we're focused on. That that is the one - - - they argue this is the one thing that was not expressly stated to the defendant.

MR. TISNE: A defendant has to have a general understanding of their sentencing exposure is what I was saying.

JUDGE RIVERA: Yes. You're saying if you look at the whole record, we can draw this conclusion that this defendant had that information, even if the judge didn't use numbers at the time?

MR. TISNE: One hundred percent.

JUDGE HALLIGAN: Can I ask you, Counsel, to address the 30.30 point? And specifically, can you start by telling me does the record show - - - my understanding is the defendants were indicted at the same time, yes?

MR. TISNE: That's correct.

JUDGE HALLIGAN: And they were arraigned at different times, right, which is what gives rise to the issue before us. Does the record tell us why? Is it

because - - -

MR. TISNE: They were arraigned at different times?

JUDGE HALLIGAN: Yeah. Is it because the defendant was not in the - - - available, in the jurisdiction, findable, or is there - - - is there some additional reason? What - - -

MR. TISNE: Yeah. So defendant and Puello had been charged separately in a different case.

JUDGE HALLIGAN: Uh-huh.

MR. TISNE: And so they were in sort of communication. Their counsel was - - - their appointed counsel was in communication with the DA's office when this arrest dropped. When the indictment was filed, they arranged for a sort of voluntary surrender to be arraigned on the indictment.

Puello showed up. Blue didn't. The intention of the people at the 30.30 motion was to put on evidence that he had absconded to Florida, and I think the record shows that they, through diligent efforts, found him in Florida and brought him back, and that's why you get his arraignment several months later.

JUDGE HALLIGAN: And what's your response to your adversary's arguments about why we should read 4(d) in the way that he suggests? I know you rely on 240, but - - -

but he suggests that that's not, first of all, the only reading of 30.30 that - - - that is available and some reasons why we shouldn't read it that way.

MR. TISNE: Sure. The - - - there's nothing in 4(d) that talks about pre and post-arraignment time. It doesn't distinguish between them. There are other provisions in 30.30 that - - -

JUDGE HALLIGAN: But do you agree - - - sorry - - - do you agree it doesn't - - - it doesn't preclude the reading that - - - that your adversary is proposing?

MR. TISNE: I mean, it doesn't preclude it, but in other situations - - - well, yes, it does preclude it because the - - -

JUDGE HALLIGAN: How - - - what - - - what words - - -

MR. TISNE: - - - the legislature has indicated that it knows how to identify pre and post-arraignment time, and it wants to, and it hasn't done that here. It hasn't done that in in other provisions of 30.30. And in those other provision, courts have not hesitated.

JUDGE HALLIGAN: Okay. But nothing on the text of the provision itself which precludes the reading, I take it?

MR. TISNE: I mean, other than the absence of the language, no.

JUDGE HALLIGAN: Uh-huh.

MR. TISNE: No, there is not.

JUDGE HALLIGAN: Understood.

MR. TISNE: The - - - I think my response to my adversary's point is that joinder and joinder for trial are effectively the same thing. There is a distinction between them that he's trying to draw. But defense lawyers, prosecutors, courts, this court, have used the terms interchangeably. When you look at the exclusion, it doesn't really make sense to say joinder without joinder for trial.

CHIEF JUDGE WILSON: Well, suppose we change the facts up a bit so that we assume that Mr. Blue has no idea he's being - - - been indicted. Let's assume we know that for this hypothetical. And we assume that he's left the jurisdiction for a vacation that was planned a long time ago and did that without any idea that he was supposed to be in court, and that the - - - your office knew exactly where he was and decided not to go after him. The time still should not run?

MR. TISNE: Well, that might be a situation where the exclusion doesn't apply because the time that's to be excluded is unreasonable. The exclusion applies where the time period to be excluded is un - - - is reasonable and where - - - effectively where good cause for a severance is

not shown. You know, if you could make an argument later when he does his 30.30 motion about good cause for a severance, then certainly that might support defeating the exclusion. Or if you could argue that there was something unreasonable about applying the exclusion under the facts of his particular case - - -

JUDGE HALLIGAN: Even though he couldn't have, in fact, moved to sever in that window because he hadn't been arraigned.

MR. TISNE: Well, and - - - and the possibility of making a severance motion is irrelevant. And in fact - - -

JUDGE HALLIGAN: Why is that? If that's part of the remedy, why is that - - -

MR. TISNE: Well, but it's not part of the remedy.

JUDGE HALLIGAN: What - - -

MR. TISNE: The exclusion doesn't turn on the availability of a severance motion. It says, do you have good cause to make a - - - to sever your case from your defendant's.

JUDGE HALLIGAN: Okay.

MR. TISNE: The federal statute - - - I mean, the - - - the federal statute is written differently to require a motion. The state statute doesn't.

JUDGE HALLIGAN: And so fair point. But - - - but so what you're asking us, I think, to conclude, is that I have good cause to sever, but I could not, in fact, sever in that window. That seems to me to be a little bit of an artificial construct. That's why I'm asking.

MR. TISNE: No, I don't - - - it's - - - I don't think it requires the second piece of that argument. He doesn't have to say, but I - - - but I couldn't have moved to sever. It's enough for him to say, I had good cause to sever, and the - - - and all the other - - -

JUDGE HALLIGAN: I could have severed if I could have severed. I - - - it just - - - one last question, if I can. I know your red light is on. I wanted to follow up on Judge Singas' question with your adversary about the practical implications of the interpretation that your adversary is proposing. I mean, on the ground, what does that actually mean, if anything? If we were to read it as - - - as he suggests.

MR. TISNE: I mean, the point of the exclusion is to sync up defendants and multi-defendant cases because the strong policy of this state is to encourage joint trials.

JUDGE HALLIGAN: Yep.

MR. TISNE: I - - - you know, as I stand here right now, I don't think I could tell you how it's going to work on the ground if all of a sudden you have to start

comp - - - computing time differently for co-defendants and multi-defendant cases and how that works when you've got not just two defendants like here, but fifteen defendants, and some are in state, and some are incarcerated, out of state. Who knows how that works? I suspect that it's not going to be easy.

JUDGE HALLIGAN: Would it frequently or you know, not frequently in your experience be the case that you would actually have defendants who are indicted at the same time and arraigned at different times for whatever reasons?

MR. TISNE: It's - - - it is unfortunately not within my experience - - -

JUDGE HALLIGAN: Okay. Thank you.

MR. TISNE: - - - to give you an answer on that question. But I do want to try very quickly, if I can, to get - - - to answer your question in a satisfactory way, because I feel like I didn't before, which is to say there - - - a motion isn't required at the time that the - - - of the period that the defendant is trying to exclude.

So in this case, you know, Blue is not in - - - is not arraigned. Puello does his motion schedule. And defendant wants to defeat the exclusion as to that time? I think probably the way this works in most cases is you go into the future and the defendant makes a severance motion later down the line in the case.

JUDGE HALLIGAN: Uh-huh.

MR. TISNE: Something happens. Maybe there's a - - - I don't know, a Bruton problem or something like that, and he wants to get out of the case. And all of a sudden, at that point, he says, okay, my severance motion is granted. We're separate. Now, we've got a 30.30 problem, so let's go back and look. And the question then becomes, okay, well, this time that you excluded earlier as to my co-defendant, should that still be excluded as to me now that - - - now that we're severed.

And their view is that, well, it wouldn't - - - you wouldn't be able to defeat it because you didn't make the severance motion at the time. But that's the - - - I think, the point. The statute doesn't require you to have made the severance motion a severance motion then. All you have to show is that the good cause for a severance existed then. And if it did, then you can defeat the exclusion.

There is - - - that is a case where there's a severance motion, true, but it is not a severance motion that has to happen at the time of the - - - the period that you're seeking to exclude. And so all this talk about how, well, this defendant didn't have a way to protect himself is sort of a red herring because he protects himself down the line by making an argument, saying at the time of the period that sought to be excluded, I could have - - - I had

good cause to make an exclusion.

JUDGE CANNATARO: Is that a common occurrence, this sort of retrospective exclusion of time? I mean, do we see that down in the courts - - -

MR. TISNE: I mean, all 30.30 issues are - - - are litigated like that. 30.30 is always retrospective. It's never prospective. You don't litigate 30.30 time at the time of the period happens. And in fact, rules from this court say that you - - - if there is a statement on the record at the time of a period that says, okay, this is going to be time that's not chargeable to the People, and later on, you litigate a 30.30 motion, that's statement characterizing the period at issue is not going to be binding. It's what the court determines later when you issue the 30 - - - when you litigate the 30.30 - - -

JUDGE CANNATARO: And that applies irrespective of being pre-arraignment time. That doesn't change the practice - - -

MR. TISNE: Yeah. That's with respect to every exclusion.

JUDGE CANNATARO: Okay.

CHIEF JUDGE WILSON: And to get that result down the line, he would have to have a meritorious joinder argument on some other basis, not on the 30.30 basis. The 30.30 would be raised if he could - - - if he prevailed on

a joint - - - on a misjoinder - - -

MR. TISNE: Severance.

CHIEF JUDGE WILSON: - - - right - - - on severance? Yeah.

MR. TISNE: Yeah. I mean, so I think most likely those cases arise in severance. I think it's conceivable that a defendant would have a valid severance motion, but would not want to make it - - -

CHIEF JUDGE WILSON: Yeah. Right.

MR. TISNE: - - - and then would be able to show retrospectively that good cause existed for the severance motion, even if you didn't want to make it. I mean, I'm not sure there are many cases where a defendant who has a severance motion doesn't make it.

I will just say before I sit down that the warrant issue is not preserved, and this court can't reach it.

Thank you, Your Honors.

MR. DANNER: Thank you, Your Honors.

I heard respondent to concede that, in fact, it is a necessary element of a valid pro se waiver that the defendant have an understanding of the range of allowable punishments. The question then is, did - - - is there an adequate record in this court for this court to conclude that Mr. Blue had such an understanding? And there isn't.

All we have are general statements and presumptions and speculation based on Mr. Blue's background, statements in the record of relative terms, and nothing that conveys the actual sentencing range that he was facing. That requires a reversal of this court's - - -

CHIEF JUDGE WILSON: I think - - - I think counsel somewhat amended his statement. It said a understanding of his sentencing exposure.

MR. DANNER: Yes, Your Honor. And I'll - - - I'll take sentencing exposure because there's no adequate record that he understood that either. What Mr. Blue heard was a - - - a offer of twelve, which is not the same thing as his maximum sentence in this case, and it's not close. In cases - - -

CHIEF JUDGE WILSON: So would you - - - would you be concerned at all if we took your math that you gave us the last time and he'd been told, you have an exposure of ninety years, when actually it would be capped at twenty? Would that bother you?

MR. DANNER: In the plea context, this comes up, Your Honor. And - - - and - - -

CHIEF JUDGE WILSON: Well, I know, but how about in the waiver context?

MR. DANNER: It also comes up in the waiver context in the federal cases. And so the question when the

number is wrong is whether it's materially wrong. And you can look at other factors, including the defendant's background, what was realistic and what else was conveyed. We see this in U.S. v. Fore, the Second Circuit case where a realistic range was given and an unrealistic higher range wasn't. The court said that's fine because a realistic estimate was given.

Similarly in Hammett, which is the Tenth Circuit case that we cite, the max range, the ninety in your example was given, and the Tenth Circuit said, that's great. As long as you've done that, this is an easy case. The problem in that case was that there is speculation about what he would actually serve.

So I - - - I don't know that I would be troubled by the ninety, Your Honor. I think the best practice is to say, here's six, here's the min/max, and they could be run consecutively, and they could be capped by the penal law. But what's not sufficient is to give nothing - - -

CHIEF JUDGE WILSON: Well, that's what I was trying to get at. Suppose there's - - -

MR. DANNER: Yes.

CHIEF JUDGE WILSON: Suppose there's no mention of capped by the penal law because that's - - - I mean, originally, I think when you came and said what you'd like him to say is whatever - - - three and a half to fifteen,

six counts, period.

MR. DANNER: Well, six counts could be consecutive - - -

CHIEF JUDGE WILSON: Could be. Right. Could be consecutive.

MR. DANNER: Yeah. Could be consecutive.

CHIEF JUDGE WILSON: So I do fifteen by six. Run them together, I get ninety.

MR. DANNER: Yeah. I think the best - - -

CHIEF JUDGE WILSON: Wouldn't you have a worry that that is impinging on his right to represent himself by dramatically overstating what amount of time he could spend in prison?

MR. DANNER: It may, Your Honor, but the reason we've focused on those particular warnings is because that is the federal constitutional floor that's been recognized as clearly established Supreme Court precedent. Those are - - - and - - - that comes from Von Moltke itself, or what you're warning are the nature of the charges and the range of allowable punishments there under. Other things, like the capping statute, may be extraneous to that.

A better rule, Your Honor, would be a rule that would require that a warning of both consecutive, and that if consecutive, there may be a cap. But I - - - but I - - - focusing in on what the federal courts have held is

minimally necessary, you do need the range on each count, and I believe you also do need a range that it could be consecutive to give them a realistic picture of what they're facing.

Briefly. I see my white light is on. There's been talk about he had a general understanding of his range of allowable punishments based on this or that, or this term or these relative terms. That's not appropriate, Your Honor. This court indulges every presumption against waiver, and it requires the searching inquiry not just to ensure that the defendant is informed, but to ensure an adequate record for appellate review.

Based on things, what does this judge mean by big, what does this defendant understand by big, what must he have been told off the record is inconsistent with this court's cases requiring specific warnings in this case concerning the range of allowable punishments.

JUDGE RIVERA: What about his argument that - - - I may have misheard him? You can correct me - - - that at arraignment, defendant understood it was at least - - - or it could go up to seventy-two years?

MR. DANNER: Well, I don't - - - I don't think that's right, Your Honor. He was being offered a plea of twelve on all six counts. There's nothing to suggest in the record, and certainly not stated in the record, that he

was looking at a plea or a potential of six times twelve. He was looking at a plea of twelve. If we're doing the math, he was facing ninety. So that's not what the warning was at all.

So if he'd been told, you're facing up to fifteen on each count, I think that's minimally sufficient. I think that's necessary. And I think what he had here does not anywhere give a reliable, nonspeculative basis to think that he actually understood the max that he was facing, the worst that could happen.

CHIEF JUDGE WILSON: Thank you.

MR. DANNER: Thank you.

(Court is adjourned)

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

I, Christian C. Amis, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Anthony Blue, No. 73 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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