To be argued by
Patrick Michael Megaro
(10 Minutes)

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NEW YORK SUPREME COURT

APPELLATE DIVISION - SECOND DEPARTMENT

THE PEOPLE OF THE STATE OF NEW YORK

A.D. Docket # 2014-05811

Plaintiff-Appellee,

-against-

Nassau County Court
Indictment # 2089N-12

KEVIN P. WASHINGTON,

Defendant-Appellant

INITIAL BRIEF FOR DEFENDANT-APPELLANT

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APPELLATE DIVISION : SECOND JUDICIAL DEPARTMENT

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THE PEOPLE OF THE STATE OF NEW YORK, **Docket # 2014-05811**

-against- **STATEMENT PURSUANT TO**

KEVIN P. WASHINGTON, **CPLR § 5531**

Defendant-Appellant Nassau County Indictment # 2089N-12

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1. The indictment number in the court below was 2089N-2012

2. The full names of the original parties were the People of the State of New York against Kevin P. Washington.

3. This action was commenced in the Nassau County Court by filing Indictment # 2089N-2012.

4. This is an appeal as of right from a judgment of conviction on four counts of Robbery in the First Degree, Penal Law § 160.15(3) and one count of Petit Larceny, Penal Law § 155.25 entered against him in the Nassau County Court on the 24th day of April, 2014, upon his plea of guilty (Hon. Alan L. Honorof), and determinate sentences thereon of 8 years imprisonment plus 5 years of Post-Release Supervision, and one year definite, respectively, all sentences to run concurrently.

5. The Defendant-Appellant is appealing on the original record.

Dated: May 1, 2015

PATRICK MICHAEL MEGARO

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : SECOND JUDICIAL DEPARTMENT

----------X

THE PEOPLE OF THE STATE OF NEW YORK, **Docket # 2014-05811**

-against- **STATEMENT PURSUANT TO**

KEVIN P. WASHINGTON, **CPLR § 2105**

Defendant-Appellant Nassau County
Indictment # 2089N-12

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PATRICK MICHAEL MEGARO, an attorney duly admitted to practice law before the Courts of the State of New York, hereby certifies pursuant to CPLR § 2105, that the forgoing papers constituting the Record on Appeal have been personally compared by me with the originals filed herein and found to be true and complete copies of those originals and the whole thereof now on file in the office of the Clerk of the County of Nassau.

Dated: May 1, 2015

PATRICK MICHAEL MEGARO

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : SECOND JUDICIAL DEPARTMENT

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THE PEOPLE OF THE STATE OF NEW YORK, **Docket # 2014-05811**

-against- **CERTIFICATE OF COMPLIANCE**

KEVIN P. WASHINGTON,

Defendant-Appellant Nassau County
Indictment # 2089N-12

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PATRICK MICHAEL MEGARO, an attorney duly admitted to practice law before the Courts of the State of New York, hereby affirms as follows under penalty of perjury pursuant to 22 NYCRR § 670.10.3(f):

The foregoing brief was prepared on a computer. A proportionally spaced typeface was used, as follows:

Name of typeface:	Times New Roman
Point Size:	14
Line Spacing:	Double

The total number of words in the brief, inclusive of point headings and footnotes and exclusive of pages containing the table of contents, table of citations, proof of service, certificate of compliance, or any authorized addendum containing statutes, rules, regulations, etc., is 3,645.

Dated: May 1, 2015

PATRICK MICHAEL MEGARO

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PRELIMINARY STATEMENT

This is an appeal from a judgment of conviction entered in the Nassau County Court (Hon. Alan L. Honorof, C.C.J.) on April 24, 2014 against the Defendant-Appellant upon his plea of guilty to four counts of Robbery in the First Degree, Penal Law § 160.15(3) and one count of Petit Larceny, Penal Law § 155.25, and concurrent sentences there of 8 years determinate plus 5 years of Post-Release Supervision, and one year definite, respectively. Timely notice of appeal was served and filed on May 27, 2014.

This is an appeal as of right. Defendant-Appellant is appealing on the original record and is represented by Patrick Michael Megaro, Esq. Defendant-Appellant the only original defendant in this action, remains incarcerated pursuant to the judgment of conviction appealed herein. No stay of execution of the judgment is in effect.

QUESTION PRESENTED

Whether the Record Clearly Establishes a Knowing, Voluntary, and Intelligent Waiver of Constitutional Rights When the Trial Court was Actually Aware of Defendant-Appellant's History of Mental Illness and Psychiatric Treatment, the Trial Court Ordered an Article 730 Mental Competency Examination, and No Inquiry Was Made of the Defendant-Appellant's Psychological State Until After the Plea Had Already Been Entered?

STATEMENT OF FACTS[1]

Background

After he was identified in a photographic array, on September 14, 2012, Kevin P. Washington was arrested by officers from the Nassau County Police Department and charged in multiple felony complaints with several robberies committed on different dates. (R.1-R.10, R.15-R.17). Altogether, he was charged with four counts of Robbery in the First Degree, four counts of Criminal Possession of a Weapon in the Third Degree, and one count of Petit Larceny. The dates of the occurrences were June 27, 2012; August 1, 2012; August 16, 2012; August 27, 2012; and September 11, 2012.

Pre-Plea Proceedings

Indictment # 2089N-2012 was filed on December 28, 2012 in the Nassau County Court, charging Washington with the same nine counts indicated in the felony complaints. (R.21-R.24). On March 7, 2013, he was arraigned on the Indictment and entered a plea of not guilty. (A:2). The case was then adjourned for motion practice. (A:4).

[1] References to the May 23, 2013 hearing will be designated as "H" followed by page number, references to the October 23, 2013 plea proceeding will be designated as "P" followed by corresponding page number, and references to the sentencing hearing held on April 24, 2014 will be designated "S" followed by page number. References to the Record on Appeal will be designated "R" and page number, and references to the Confidential Record on Appeal will be designated as "C.R" and corresponding page number.

On May 23, 2013, Washington appeared before the Honorable Alan L. Honorof in the Nassau County Court, whereupon the following transpired:

> MR. SHANAHAN: Yes, Judge, this would be my application. Judge, as the Court is aware, my client has another matter pending in Suffolk County, it's a robbery in the second degree. I've been informed by his attorney in Suffolk County, Susan Ambro, that a 730.30 exam was conducted on that case and I've spoken to my client and have learned some of his background and some of his psychiatric history and I think at this point, Judge, I would also asks (sic) for a 730.30 exam be conducted here.

(H:2).

Without further inquiry, the trial court ordered a mental competency examination, and the case was adjourned. (H:3). Thereafter, in accordance with local Nassau County practice, the case was on the court calendar several times but nothing was entered upon the record until October 23, 2013.

The 730 Report

A report was prepared pursuant to the County Court's May 23, 2013 order, dated September 23, 2014. (C.R.1-C.R.7). According to the report, the examination took only forty minutes to complete. (C.R.3). In that examination, it was revealed that Defendant-Appellant had been under the care of a psychiatrist and had been previously prescribed anti-depressant medication and other psychotropic medications as well. (C.R.3, C.R.6 - C.R.7). His treating psychiatrist confirmed the prescription of several different medications, and related a diagnosis

of mood disorder and bipolar disorder, as well as a personality disorder. (C.R.6). There was also indications that he had experienced auditory hallucinations for approximately three years prior, hearing voices during a waking state. (C.R.7). Notably, the examiners confirmed that Washington had been receiving prescribed psychotropic medications while at the Nassau County Correctional Center (NCCC) awaiting trial. (C.R.6).

The Plea Proceeding

Five months after the County Court ordered the 730 examination and any further transactions were placed on the record, Washington appeared in the Nassau County Court on October 23, 2013. At the start of the court appearance, counsel withdrew his previously-entered plea of not guilty, and entered pleas of guilty to Counts # 1-4 in the Indictment charging him with Robbery in the First Degree, and Count # 9 Petit Larceny, in exchange for a sentence of ten years imprisonment. (P:2-3). The court then allocated Washington as follows:

> THE COURT: Were you employed at time of these incidents?
> THE DEFENDANT: Yes.
> THE COURT: What were you doing?
> THE DEFENDANT: I was working security.
> THE COURT: Interesting. Do you feel in good physical and mental health as you stand here today?
> THE DEFENDANT: Yes.
> **THE COURT: Have you taken any alcohol or any drugs in the last twenty-four hours?**
> **THE DEFENDANT: No.**

THE COURT: Have you ever been treated, confined to a hospital for any mental illness?
THE DEFENDANT: No.

(P:4) (emphasis added).

After the court went through the factual basis of the plea and the waiver of Constitutional rights, the plea was entered and accepted by the court. (P:4-14). After the plea was already entered and a date for sentencing scheduled, the following transpired:

MR. SHANAHAN: And, Judge, I explained to my client and his family who was in the courtroom this morning, that the Court's commitment was a cap of eight years and on date of sentence, we were going to ask the Court to consider something less. I'm going to be submitting a presentence report **as well as some letters from his family and his psychiatrist.**
THE COURT: I will consider something less, but I'm going to have to be persuaded with some very strong sentiments.
MR. SHANAHAN: Yes, your Honor.
THE COURT: All right. December 10.
MR. SHANAHAN: Thank you, Judge.
THE COURT: December 10.
MR. SHANAHAN: Judge, there was a 730.30 exam which we were not opposing. The result was that he was competent. Neither party was asking for a hearing, but I believe we had to put that on the record.
THE COURT: Okay.
MR. SHANAHAN: And we had to confirm the findings. I think the Court has to confirm it.
THE COURT: All right. Then I'm confirming those findings.
MR. SHANAHAN: Thank you, Judge.

(P:14) (emphasis added).

The Pre-Sentence Report

Prior to sentencing, the Nassau County Department of Probation completed a Pre-Sentence Investigation Report, which informed the County Court:

> The defendant has some health issues. A psychiatric evaluation was ordered by Judge Honorof under Indictment 2089N-2012. **NCCC records indicate the defendant is taking medication, failed the suicide screening, and has a history of mental illness**.

(C.R.15).

The Sentencing

On April 24, 2014, Washington appeared in the Nassau County Court for sentencing. At the sentencing, defense counsel argued:

> We asked at one point for a 730.30 examination, because this was so out of character for Mr. Washington after speaking with his family and his friends.
> ...
> Apparently, back in 2010 or 2011, he had the beginnings of a divorce and that seems to have set him off. He began seeing a psychiatrist and a psychologist who gave him medication which included Klonopin and Abilify. We believe that it may have had some effect on his actions in this case. His family is convinced that that is what caused him to do the things he did in this case.

(S:4).

When given the opportunity to address the court, Defendant-Appellant stated as follows:

> THE CLERK: Sir, do you wish to address the Court before sentence is imposed? Do you have anything to say to the judge?
> THE DEFENDANT: Yes. First, I would like to apologize to the judge, to my family. Like Mr. Shanahan said, I was going through a divorce. I started seeing a psychologist. They started giving me medication, because this is something that is not in my character to have ever done at 40-something years old. Why I would start doing something like that in my right frame of mind?
> **So I ask for forgiveness and I would even like to make restitution to these gas stations that I apparently robbed. I was not in my right mind. I don't remember half the stuff that I pled out to**.

(S:4) (emphasis added).

After that exchange, the County Court asked defense counsel if he was waiving any right to reopen the plea based upon what Defendant-Appellant had just stated in open court. (S:4-5). No further inquiry was made of Defendant-Appellant.

Thereafter, the County Court imposed sentences of eight years imprisonment followed by five years of Post-Release Supervision on each of the four felonies, and one year definite on the misdemeanor, all sentences to run concurrently. (S:5-6). Defendant-Appellant timely filed a Notice of Appeal, and this appeal follows. R.165 – R.168).

ARGUMENT

WHERE THE TRIAL COURT WAS ACTUALLY AWARE OF DEFENDANT-APPELLANT'S DOCUMENTED HISTORY OF MENTAL ILLNESS AND HIS TREATMENT WITH PSYCHIATRIC MEDICATION, AND WHERE THE COURT ORDERED A MENTAL COMPETENCY EXAMINATION, THE FAILURE TO CONDUCT A SUFFICIENT INQUIRY PRIOR TO THE ENTRY OF THE GUILTY PLEA, DURING THE PLEA ALLOCUTION, AND AT SENTENCING WHERE THE DEFENDANT-APPELLANT MADE STATEMENTS THAT CAST DOUBT ON THE KNOWING AND VOLUNTARY NATURE OF HIS PLEA WAS ERRONEOUS BECAUSE THE COURT FAILED TO CREATE A CLEAR RECORD OF A KNOWING, VOLUNTARY, AND INTELLIGENT WAIVER OF CONSTITUTIONAL RIGHTS

"[A] plea of guilty is more than an admission of conduct; it is a conviction. Ignorance, incomprehension, coercion, terror, inducements, subtle or blatant threats might be a perfect cover-up of unconstitutionality." Boykin v. Alabama, 395 U.S. 238, 242-243 (1969). If a defendant's guilty plea is not knowingly, voluntarily, and intelligently made, the Due Process Clause is violated and the plea is void. Id. at 243, see also McCarthy v. United States, 394 U.S. 459 (1969); Brady v. United States, 397 U.S. 742 (1970). The same applies under the Due Process guarantees enshrined in the New York State Constitution. People v. Hill, 9 N.Y.2d 189, 191 (2007); People v. Flumefreddo, 82 N.Y.2d. 536 (1993); Chaipis v. State Liquor Authority, 44 N.Y.2d 57, 63-64 (1978).

It is axiomatic that when accepting a guilty plea from a criminal defendant, a court is required to make a sufficient record that clearly establishes that the

defendant's guilty plea is knowing, intelligent and voluntary. While a state court judge is not required by federal constitutional law to engage in any particular interrogatory "catechism" akin to that required of federal courts by Federal Rule of Criminal Procedure 11 (see Siegel v. New York, 691 F.2d 620, 626 (2d Cir.1982)), the validity of a guilty plea is reviewed by examining the totality of the relevant circumstances. Brady v. United States, 397 U.S. 742, 749 (1970); Willbright v. Smith, 745 F.2d 779, 780 (2d Cir.1984) (per curiam).

In determining whether a guilty plea is made knowingly, voluntarily and intelligently, a court must consider all the relevant facts and circumstances in the case, including, but not limited to, the nature and terms of the agreement and the age, experience, and background of the accused. Iowa v. Tovar, 541 U.S. 77, 78 (2004). Thus, at a minimum, a court is required to fully inquire of a pleading defendant that he or she (1) understands what is happening in court, (2) understands that he or she has certain rights, and that by pleading guilty, he or she giving up those rights, and (3) that he or she is giving up those rights in a free, knowing, and intelligent manner after considering alternate options available to them.

A. The Trial Court Failed to Inquire as to Whether Appellant Was Mentally Competent to Enter a Guilty Plea and Whether He Knowingly, Voluntarily, and Intelligently Waived his Rights Prior to Entry of the Plea

"A finding that a defendant is competent to stand trial, however, is not all that is necessary before he may be permitted to plead guilty or waive his right to counsel." Godinez v. Moran, 509 U.S. 389, 400 (1993). A trial court has an obligation to conduct a hearing whenever there is doubt concerning a defendant's competence. Godinez, supra at 408 (Kennedy, J. concurring), citing Drope v. Missouri, 420 U.S. 162 (1975). While the Court of Appeals has further elaborated that there is no "uniform mandatory catechism of pleading defendants," the Court has held that all the relevant circumstances surrounding the plea must reflect that the defendant knowingly, voluntarily and intelligently relinquished his or her rights. People v. Harris, 61 N.Y.2d 9, 16-17 (1983). Instead of a uniform allocution, the Court of Appeals held that "[o]verall, a sound discretion, exercised in cases on an individual basis is preferable to a ritualistic uniform procedure." Harris, supra, at 17, citing People v. Nixon, 21 N.Y.2d 338 (1967).

Applying these bedrock principles of law, in Saddler v. United States, 531 F.2d 83 (2d. Cir. 1976), the Second Circuit reversed a conviction where the trial court had been "alerted by [a] flurry of warning flags" that called into question the validity of the guilty plea, including repeated hospitalizations and attempted suicide, but nevertheless failed to conduct a sufficient inquiry into the defendant's

competence to enter a guilty plea. In reversing, the Second Circuit held that in carrying out its duty to satisfy itself that a guilty plea is knowingly, intelligently and voluntarily entered, a court is under a duty to ascertain whether a defendant is mentally competent to enter such a plea.

Here, a reading of the plea hearing transcript leads to the inevitable conclusion that had defense counsel said nothing about the 730 examination, the County Court would have accepted the plea and set the matter for sentencing without any inquiry at all. By virtue of statements made on the record by defense counsel, his request for a 730 examination, the report from the 730 examination itself, the County Court was actually aware that there was a question regarding Defendant-Appellant's mental competence. This prior advance knowledge should have raised the "flurry of warning flags" for the County Court to conduct a full and sufficient inquiry prior to acceptance of a guilty plea, particularly so where the court had information that Washington had been taking psychotropic medications at the Nassau County Correctional Center, and had been treated for mental illness in the past and during his pre-trial detention, but denied both during his allocution.

In United States v. Rossillo, 853 F.2d 1062 (2d. Cir. 1988), the Second Circuit held that where the trial court was actually aware that the defendant was taking medication for medical condition, the court was required to question defendant about medication that he was taking for heart condition, possible effects

of medication on his decision to plead guilty, and ability to understand the plea proceedings and the constitutional rights he was waiving. In holding that the plea allocution was insufficient to permit a finding of a valid, knowing, intelligent and voluntary waiver of constitutional rights, the Second Circuit clarified this principle of law that:

> [I]f there is any indication, as there was in this case, that defendant is under the influence of any medication, drug or intoxicant, it is incumbent upon the [trial] court to explore on the record defendant's ability to understand the nature and consequences of his decision to plead guilty. We know of no other way to ensure both that defendant understands the constitutional rights that he is relinquishing by pleading guilty and that the plea is truly voluntary. see McCarthy v. United States, 394 U.S. 459, 465 (1969) (emphasis original)

Id.

Despite this "flurry of warning flags" as to Washington's mental competence, at no time did the trial court inquire whether Defendant-Appellant had taken sufficient medication that would have enabled him to knowingly and voluntarily plead guilty. Beyond a cursory question as to whether he generally understood the proceedings, there was no inquiry to justify a finding that he did have the mental capacity to understand the plea in light of everyone's knowledge that he was taking psychiatric medication, the very purpose of which is to alter an individual's thought process.

Confronted with a mentally-ill man whose attorney had clear doubts about his mental health and well-being, who had limited and minor prior contacts with the criminal justice system, no one ever asked him such basic questions as: Have you taken your medication today? Is your mind clear?" Nor did the court ask Washington to clarify his answers, which were clearly at odds with the information at the court's disposal. In sum, the trial court failed to address the necessary and relevant circumstances related to this case, particularly the Defendant-Appellant's diminished mental capacity due to his mental illness and medication regimen. Given the facts and circumstances related to this case and this particular individual, the trial court failed to create a sufficient, clear record that Defendant-Appellant knowingly, voluntarily, and intelligently waived his constitutionally-protected rights or that he was competent, or that he understood the ramifications of entering a guilty plea.

Even after the plea was accepted and defense counsel mentioned the 730 examination results as an afterthought, the court never made any further inquiry as to Defendant-Appellant's mental faculties, or whether he was on medication, or whether he even understood what had just occurred. Rather, the few pro forma questions that were asked of him were met with a monosyllabic response. At no time during the plea allocution did the trial court ever touch upon the single, dominating issue that would have enabled the trial court to make a determination

that Defendant-Appellant was knowingly, voluntarily, and intelligently waiving his constitutionally-protected rights by pleading guilty. The issue of Kevin Washington's mental competency and mental health was simply ignored by all parties to this plea.

This failure of the trial court to conduct a sufficient inquiry, given its actual knowledge of the history and circumstances peculiar to Defendant-Appellant, rendered the allocution legally deficient.

B. The Trial Court's Failure to Conduct a Further Inquiry Into Whether Defendant-Appellant Knowingly and Competently Entered a Guilty Plea Was Erroneous Where Defendant-Appellant Made Statements at Sentencing that Cast Doubt on the Knowing and Voluntary Nature of the Plea

In People v. McKennion, 27 N.Y.2d 671, 672-673 (1970), the Court of Appeals held that "where, after a plea of guilty has been entered, and before sentence, defendant states to the court he is not guilty, or that he believes he is not guilty, the rule has developed that the court should not, except in extraordinary circumstances, then impose sentence, but either grant an application to allow the plea to be withdrawn; or conduct a hearing to determine whether the application has merit." citing People v. Beasley, 25 N.Y.2d 483 (1969), People v. Serrano, 15 N.Y.2d 304 (1965).

Here, the statements made by Defendant-Appellant at sentencing clearly cast doubt on the validity of the plea. His statements established a defense to the robberies of diminished mental capacity, and thus, lack of intent. They also cast

doubt on the voluntariness of the plea itself; he told the court that he did not even remember the things for which he had admitted legal guilt, undercutting the knowing nature of the plea. Faced with this scenario, the trial court was under an obligation to inquire of Defendant-Appellant further. However, the court failed to perform this task, instead relying upon the statement of defense counsel, who at that moment was transformed into a witness. Because the court failed to conduct an adequate inquiry, the plea must be set aside, and the conviction reversed.

C. The Waiver of the Right to Appeal Was Invalid; Even If the Waiver Was Valid, the Claims Raised in this Appeal Survive a Waiver of the Right to Appeal

It is the responsibility of the judge presiding over the plea and waiver to make it clear to the defendant that an appeal waiver "'is separate and distinct from those rights automatically forfeited upon a plea of guilty.'" People v. Brown, 122 A.D.3d 133, 137 (2d. Dept. 2014), quoting People v. Bradshaw, 18 N.Y.3d 257, 264 (2011). An appeal waiver is invalid where, for example, "the court lumps the waiver of the right to appeal in with 'the panoply of trial rights automatically forfeited upon pleading guilty,' such as by misadvising the defendant: "[W]hen you plead guilty you waive your right to appeal." Id. (internal quotations omitted).

Here, the record reveals that the waiver of the right to appeal was lumped in along with all the other Constitutional rights that Defendant-Appellant was waiving during the allocution. There was no distinction or separation of the right to appeal from the other rights that Washington was giving up by entering the plea.

Even assuming arguendo that the waiver of right to appeal was valid, the claims raised herein survive the waiver.

> A guilty plea does not, however, extinguish every claim on appeal. The limited issues surviving a guilty plea in the main relate either to jurisdictional matters (such as an insufficient accusatory instrument) **or to rights of a constitutional dimension that go to the very heart of the process (such as the constitutional speedy trial right, the protection against double jeopardy or a defendant's competency to stand trial**).

People v. Hansen, 95 N.Y.2d 227, 230 (2000) (emphasis added).

Likewise, this Court has held "[a] defendant cannot waive, as part of a plea bargain, a question as to his competency to stand trial. Similarly, a challenge to a defendant's competency remains outside the ambit of a valid appeal waiver." People v. Leach, 115 A.D.3d 677 (2d. Dept. 2014) (internal citations omitted).

The claims raised in this appeal go to the heart of the criminal process: the Defendant-Appellant's knowing and voluntary waiver of valuable Constitutional rights. Accordingly, the claims survive any waiver of the right to appeal.

CONCLUSION

Based upon the foregoing, Defendant-Appellant Kevin P. Washington respectfully requests this Court reverse his conviction, vacate the conviction, and grant such other and further relief as this Court may deem just, proper and equitable.

Dated: May 1, 2015

Respectfully Submitted,

PATRICK MICHAEL MEGARO