

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

COURT OF APPEALS

STATE OF NEW YORK

PEOPLE,

Appellant,

-against-

No. 191

LUCIANO ROSARIO,

Respondent.

PEOPLE,

Appellant,

-against-

No. 192

MARCOS LLIBRE,

Respondent.

20 Eagle Street
Albany, New York 12207
November 16, 2015

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM (By Video)
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY

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

Appearances:

ROBIN NICHINSKY, ESQ.
CENTER FOR APPELLATE LITIGATION
Attorneys for Appellants Rosario and Llibre
120 Wall Street, 28th Floor
New York, NY 10005

DAVID P. JOHNSON, ADA
BRONX COUNTY DISTRICT ATTORNEY'S OFFICE
Attorneys for Respondent in No. 191
198 East 161st Street
Bronx, NY 10451

HOPE KORENSTEIN, ADA
NEW YORK COUNTY DISTRICT ATTORNEY'S OFFICE
Attorneys for Respondent in No. 192
One Hogan Place
New York, NY 10013

1 CHIEF JUDGE LIPPMAN: We're going to start
2 with 1 - - - number 191 and 192.

3 Counsel?

4 MS. NICHINSKY: Good afternoon, Your
5 Honors. First I'd like to reserve two minutes for
6 rebuttal time.

7 CHIEF JUDGE LIPPMAN: Two minutes, you're
8 on. Go ahead.

9 MS. NICHINSKY: Okay, may it please the
10 court, my name is Robin Nichinsky. I represent
11 appellants Luciano Rosario and Marcos Llibre.

12 As this court and the United States Supreme
13 Court have held, no defendant should lose his
14 fundamental right to appeal due to ineffective
15 assistance of counsel. When that happens - - -

16 CHIEF JUDGE LIPPMAN: Counsel, what's the
17 difference between the two cases?

18 MS. NICHINSKY: Well - - -

19 CHIEF JUDGE LIPPMAN: I mean, the
20 meaningful difference. We know they're two different
21 - - -

22 MS. NICHINSKY: Well, both of the - - -

23 CHIEF JUDGE LIPPMAN: - - - defendants,
24 obviously.

25 MS. NICHINSKY: Both of the defendants made

1 credible and sufficient allegations pursuant to
2 Syville that they were - - -

3 CHIEF JUDGE LIPPMAN: But tell us what the
4 difference in the two scenarios are?

5 MS. NICHINSKY: Okay, in the case of Mr.
6 Rosario, he was not informed of the right to appeal
7 at all. He had a two-page plea and sentence. He
8 said nothing at all. Nothing was said to him. He
9 was asked nothing.

10 CHIEF JUDGE LIPPMAN: This was the second
11 time that this was - - - the second time - - -

12 MS. NICHINSKY: Yes, the first plea - - -

13 CHIEF JUDGE LIPPMAN: - - - he was going to
14 be allocuted?

15 MS. NICHINSKY: - - - was aborted because
16 he was un - - - unable to allocute. He was confused.

17 CHIEF JUDGE LIPPMAN: On the first - - -
18 the first time, right?

19 MS. NICHINSKY: The first time. He gave
20 multiple - - -

21 CHIEF JUDGE LIPPMAN: So what happened on
22 the second time?

23 MS. NICHINSKY: The second time, they
24 didn't let him talk at all. He said nothing.

25 CHIEF JUDGE LIPPMAN: Talked - - - who

1 talked?

2 MS. NICHINSKY: The court talked to the
3 lawyer.

4 CHIEF JUDGE LIPPMAN: And what did the
5 lawyer say?

6 MS. NICHINSKY: The lawyer said he's going
7 to allocute to the same thing as before - - - or he
8 was going to plead guilty.

9 CHIEF JUDGE LIPPMAN: He asked if he
10 waived?

11 MS. NICHINSKY: He didn't allocute.

12 CHIEF JUDGE LIPPMAN: Did - - - did he
13 asked if he waived? Did the judge ask the law - - -

14 MS. NICHINSKY: The judge did not ask Mr.
15 Rosario anything. He asked the lawyer.

16 CHIEF JUDGE LIPPMAN: The lawyer. What did
17 the lawyer say? He asked if - - - if the defendant
18 waived, right?

19 MS. NICHINSKY: The lawyer said - - - the
20 court said to the lawyer, do you waive three things
21 at once: allocution, the right to appeal - - - a
22 waiver of the right to appeal, and a third thing, I
23 guess an SCI, something related to the - - -

24 CHIEF JUDGE LIPPMAN: Okay, and what was -
25 - -

1 MS. NICHINSKY: - - - to the SCI.

2 CHIEF JUDGE LIPPMAN: What was in writing?
3 Was there anything in writing?

4 MS. NICHINSKY: Nothing in writing.

5 CHIEF JUDGE LIPPMAN: And what did the
6 attorney for the - - - the original attorney say
7 about what had been - - - what the defendant had been
8 told about appeal?

9 MS. NICHINSKY: Nothing. I mean, she said
10 he waives his right to appeal as part of that three -
11 - - the listing of three things.

12 CHIEF JUDGE LIPPMAN: No, no, but - - -

13 MS. NICHINSKY: There was nothing on the
14 record.

15 CHIEF JUDGE LIPPMAN: - - - wasn't there
16 something about the original attorney in Rosario said
17 that, well, I normally tell them about the right to
18 appeal?

19 MS. NICHINSKY: Oh, oh, you're saying that
20 afterwards that she said it was her practice?

21 CHIEF JUDGE LIPPMAN: Yes.

22 MS. NICHINSKY: Actually, she - - - she
23 told her boss that it was her practice.

24 JUDGE FAHEY: Yeah, I didn't think there
25 was any response from her at all.

1 MS. NICHINSKY: No, she said she didn't
2 remember the case at all.

3 CHIEF JUDGE LIPPMAN: Yes, but that's her
4 normal practice.

5 MS. NICHINSKY: And she - - - according to
6 her boss - - - she didn't tell this to me - - - her -
7 - -

8 CHIEF JUDGE LIPPMAN: Okay, so - - - all
9 right - - -

10 MS. NICHINSKY: She told her boss it's
11 normally her practice. I would say that she has a
12 responsibility to write that down.

13 CHIEF JUDGE LIPPMAN: Okay. I - - - okay -
14 - -

15 MS. NICHINSKY: Her file didn't indicate
16 anything.

17 CHIEF JUDGE LIPPMAN: For the time being,
18 I'm just getting the difference. All right. That's
19 Rosario?

20 MS. NICHINSKY: Yes.

21 CHIEF JUDGE LIPPMAN: What about Llibre?
22 What's the difference? What happened there?

23 MS. NICHINSKY: Mr. Llibre was misadvised
24 about the right to appeal. He - - - the appellate
25 process was not explained to him. He wasn't told he

1 had thirty days to file a notice of appeal. And what
2 he was told about waiver was improper and was
3 misleading and invalid.

4 CHIEF JUDGE LIPPMAN: But he signed certain
5 things, right?

6 MS. NICHINSKY: He signed a waiver, but the
7 - - - the issue that he has in this case is an issue
8 that survived the waiver. So even if you found there
9 was a valid waiver, which I submit was not a valid
10 waiver - - -

11 CHIEF JUDGE LIPPMAN: Let's get the facts
12 first. He signed - - - he signed the waiver, right?

13 MS. NICHINSKY: He signed in court - - -

14 CHIEF JUDGE LIPPMAN: And on the - - - on
15 the form it was checked that - - - that - - -

16 MS. NICHINSKY: - - - in court he signed a
17 waiver - - -

18 CHIEF JUDGE LIPPMAN: And on - - - and on
19 the form in court, what did it say, that - - - that -
20 - -

21 MS. NICHINSKY: In court, the judge orally
22 said, well, you know, you're not really - - - there's
23 not much to waive here anyway. It's the same court
24 that also told him that he would have immigration
25 consequences if he was in the country not legally,

1 which this court remitted on in the Peque case - - -
2 the defendant in Peque. That was the only case in
3 Peque that was remitted. It was the same judge,
4 giving the same language on immigration consequences.

5 CHIEF JUDGE LIPPMAN: So he's checked that
6 he's signed the waiver, and that - - - and he - - -
7 he's checked that he is - - - that he's waived and he
8 signed the waiver in that case, right?

9 MS. NICHINSKY: He's - - -

10 CHIEF JUDGE LIPPMAN: And what about
11 consultation?

12 MS. NICHINSKY: No consultation. And in
13 fact - - -

14 JUDGE STEIN: Didn't the waive - - - didn't
15 the written waiver said - - - say that he had
16 consulted with his attorney?

17 MS. NICHINSKY: The written - - - the
18 written waiver said he had discussed it with his
19 attorney. He said he had discussed it with attorney
20 also verbally, but the attorney was standing there,
21 and let the court misinform him when the court said,
22 well, you really don't have any issues to raise, and
23 the court said, you - - - you know, if you're - - -
24 you only have immigration consequences if you're in
25 the country not legally.

1 So I would say - - - I don't know what kind
2 of discussion that was, but under Flores-Ortega - - -
3 because particularly - - - I think this is really
4 critical - - - the issue that arose in this case
5 arose during the plea itself. And it's when the
6 court misinformed the defendant about the immigration
7 consequences.

8 JUDGE PIGOTT: Could he move to vacate the
9 plea, then?

10 MS. NICHINSKY: Did he move to vacate - - -
11 no, he didn't know that it was misinformation, Your
12 Honor. He - - - nobody told him.

13 JUDGE PIGOTT: But I mean, well, is there -
14 - - is there any time limit in which to move to
15 vacate the plea? In other words, if he's - - - if he
16 at some point said, whoa, you know - - -

17 MS. NICHINSKY: Well, he could have moved
18 to vacate the plea, if his attorney had consulted
19 with him. If his attorney had spoke up, but - - -

20 JUDGE PIGOTT: Could he now?

21 MS. NICHINSKY: - - - but nobody did.

22 JUDGE PIGOTT: Is there a time limit on
23 440s, I mean, a motion to vacate the plea?

24 MS. NICHINSKY: I don't believe so.

25 JUDGE PIGOTT: So he can do it today?

1 MS. NICHINSKY: Under 440?

2 JUDGE PIGOTT: Yeah.

3 MS. NICHINSKY: Well, his 440 has been
4 denied.

5 JUDGE PIGOTT: That's my point. So that's
6 not an issue. And - - - and what you're asking for
7 is the right to appeal. That's all, and not - - -

8 MS. NICHINSKY: That's all.

9 JUDGE PIGOTT: - - - not to have anything
10 reversed or anything else. You just want to be able
11 to file an appeal, and the grounds for that appeal
12 will be, what? The same thing that you brought the
13 440 on that was denied?

14 MS. NICHINSKY: Well, the 440 found that -
15 - - said that - - - the coram showed he had
16 ineffective assistance, but the coram didn't really
17 find anything. The coram was just - - -

18 JUDGE FAHEY: Well, there - - - there
19 wasn't any opinion on it. There error coram was - -
20 -

21 MS. NICHINSKY: The coram was just denied.

22 JUDGE FAHEY: But here - - - let's take a
23 step back. The - - - the issue really before us
24 today isn't the validity of the defendant claims,
25 it's really a question of whether or not the Syville

1 rules apply, because it seemed to me in Syville, in -
2 - - in that case, in - - - trial counsel there,
3 essentially, admitted ineffective assistance of
4 counsel by an affidavit. You don't meet the standard
5 of Syville in either case here.

6 Excuse me, you - - - from my review of the
7 record is I don't see anything that said that - - -
8 where we got an affidavit from any attorney saying,
9 as you did in Syville, that - - - that yes, I didn't
10 tell counsel about this. What you only have is an
11 affidavit from the person directly involved, the
12 defendants in this case.

13 MS. NICHINSKY: Your Honor, my response - -
14 -

15 JUDGE FAHEY: Is that fair? Yeah.

16 MS. NICHINSKY: My response to that is that
17 that was the particular situation in Syville, but
18 Syville, and in particular also Roe v. Flores-Ortega,
19 stand for the proposition that - - -

20 JUDGE FAHEY: Okay, let's stay with the New
21 - - - New York cases - - -

22 MS. NICHINSKY: - - - you cannot lose a
23 Constitutional right - - -

24 JUDGE FAHEY: Go ahead; finish your point.

25 MS. NICHINSKY: You can't lose your

1 Constitutional right to appeal because of ineffective
2 assistance of counsel. And under Syville, there has
3 to be a remedy. And it - - - the - - - I would argue
4 the situation in Syville is - - - is a - - - the - -
5 - in Syville, the defendants knew they had the right
6 to appeal. They were savvy enough to say, let me
7 file a notice for me. We have here - - -

8 JUDGE STEIN: But let - - - let's assume -
9 - - let's assume Syville applies, does there - - -
10 does - - - does the defendant have to - - - what kind
11 of showing does the defendant have to make? Is it
12 enough just to - - - to say with no support that I
13 wasn't informed, or does the - - -

14 MS. NICHINSKY: No, Your Honor.

15 JUDGE STEIN: - - - does the defendant, for
16 example, have to then seek to assert his appellate
17 rights with due diligence after he learns of his
18 rights? And - - - and if that's the case, do we have
19 anything in this record at all that tells us whether
20 he did that?

21 MS. NICHINSKY: Well, Your Honor, Syville
22 and Andrews set out certain - - - certain criteria,
23 and the Bachert case, which also talked about the
24 coram nobis and gave - - - said this court has the
25 right to set that out, you could set out something

1 similar to 440.30 where - - - and I think we did hear
2 - - - they made credible allegations, both
3 defendants, that they were not told or misled, that
4 they would have appealed, that they didn't file under
5 460.30 because they didn't know, and they are in more
6 of need of counsel than the defendants in Syville.

7 JUDGE PIGOTT: Well, 46 - - -

8 MS. NICHINSKY: The defendants in Syville
9 knew they had a right to appeal. Here they didn't
10 because they didn't have counsel. They were first
11 offenders; they were immigrants.

12 JUDGE STEIN: Didn't we say that Syville
13 was going to be a rare case?

14 MS. NICHINSKY: Well, it will be relatively
15 rare here. Normally - - -

16 JUDGE STEIN: But how - - - how could that
17 be, if any - - - any defendant where it's not
18 explicitly shown on the record that they - - - that
19 they were - - - you know, exactly what they were told
20 about the right to appeal or, you know, there's
21 something in a file or - - - or whatever, all they
22 have to do is make this allegation at any time. Is
23 that - - - is that the rule that - - -

24 MS. NICHINSKY: Well, Your Honor, it's not
25 just making an allegation. So for example, here, Mr.

1 Llibre, normally judges say something on the record
2 about the right to appeal. Very often the clerk will
3 hand a notice about the right to appeal. In Mr.
4 Llibre's case, they actually crossed it off on the
5 worksheet.

6 JUDGE STEIN: But the record - - - but we
7 have a record in Llibre that shows that he signed
8 this very comprehensive waiver of the right to
9 appeal.

10 MS. NICHINSKY: But the wai - - -

11 JUDGE STEIN: Whether it's valid or not is
12 another question. But - - - but it - - -

13 MS. NICHINSKY: No, but - - -

14 JUDGE STEIN: - - - certainly indicates
15 that he knew something about his right to appeal.

16 MS. NICHINSKY: But that's critical, Your
17 Honor. He didn't make a knowing waiver. He thought
18 - - -

19 JUDGE PIGOTT: I don't understand - - -

20 JUDGE STEIN: But we're not talking about
21 waiver. We're talking about whether he knew about
22 his right, not whether he waived it.

23 MS. NICHINSKY: But he didn't know about
24 his right to appeal. He was never told you have
25 thirty days to file a - - - a notice to appeal. He

1 was never given that sheet that most judges give that
2 tell you about the right to appeal and how you can go
3 about the right to appeal.

4 JUDGE FAHEY: But the prob - - - the
5 problem is here - - - it seems that you want us to -
6 - - to say 460.30 doesn't apply. Syville was
7 supposed to be a rare circumstance and it was so rare
8 because there counsel said, yes, I didn't tell him.
9 Here, counsel is not saying yes, I didn't tell him.
10 And so, we - - - we have to - - - so then we're only
11 relying on the person who directly benefits from our
12 decision, and if there's no objective proof or proof
13 that contravenes or shows definitively ineffective
14 assistance of counsel, in a case that you argue that
15 the defendant was wholly unaware.

16 MS. NICHINSKY: Yes, but - - -

17 JUDGE FAHEY: I think it's - - - that's the
18 standard that you're asking us to - - - to adopt
19 here.

20 MS. NICHINSKY: Yes.

21 JUDGE FAHEY: And what I'm wondering is if
22 we do that, does that shift the burden from you - - -
23 from - - - not from you, but from the - - - from the
24 defendant to the People on a writ of error?

25 MS. NICHINSKY: Well, Your Honor, you can't

1 - - - when you've been denied your Constitutional
2 right to counsel, you can't say you can only have it
3 when the DA is going to admit that he's been
4 ineffective - - -

5 JUDGE PIGOTT: Yeah, but wait a minute.

6 JUDGE FAHEY: No, no, that's not what I'm
7 saying at all.

8 JUDGE PIGOTT: Excuse me.

9 JUDGE FAHEY: That's - - - that's a
10 mischaracterization.

11 MS. NICHINSKY: - - - because that standard
12 is too high.

13 JUDGE PIGOTT: Wait, let me - - - I mean,
14 you - - -

15 JUDGE FAHEY: In fairness - - -

16 JUDGE PIGOTT: It was six years for - - -

17 MS. NICHINSKY: Yes, Your Honor.

18 JUDGE PIGOTT: And - - - and - - - and a
19 written waiver. And you're saying, oh, well, look at
20 - - - you know, everybody, you know, just violated
21 this man's - - -

22 MS. NICHINSKY: But - - -

23 JUDGE PIGOTT: - - - Constitutional rights
24 right and left and this is an outrage. And this is
25 why we have to go beyond the thirty, go beyond the -

1 - - the 460.30, and do a writ of error coram nobis,
2 which we've done twice.

3 MS. NICHINSKY: Well, Your Honor, the
4 reason that it was so long is he wasn't told that he
5 had the right to appeal. He has to prove that he
6 wasn't told that he had the right to appeal.

7 CHIEF JUDGE LIPPMAN: Okay.

8 JUDGE FAHEY: We don't know that.

9 MS. NICHINSKY: He has to prove that he
10 would have appealed.

11 JUDGE FAHEY: I - - - I just want to go
12 back to the point on - - -

13 MS. NICHINSKY: Under Flores-Ortega - - -

14 JUDGE FAHEY: I just want to go back to - -
15 -

16 MS. NICHINSKY: - - - that's what he has to
17 show as well, that he had issues that he could have
18 appealed, that a rational defendant would have wanted
19 to appeal. He made all those showings in this case.
20 And under those circumstances where he proves he had
21 ineffective assistance of counsel - - -

22 CHIEF JUDGE LIPPMAN: Okay, Judge Fahey,
23 last question, go ahead.

24 JUDGE FAHEY: Just - - - just the last
25 point, it's - - - really, what I'm trying to get at.

1 I'm trying - - - I'm trying to - - - I see - - - the
2 problem I have with it is - - - I can see the
3 equities of it. The problem I have is - - - is with
4 the burden of proof and whose responsibility is it to
5 prove it here. And it seems that the argument that
6 you're presenting us with is that the burden is being
7 shifted from the - - - the person making the
8 application to the People; that's really what I want
9 you to address.

10 MS. NICHINSKY: Well, I would say no more
11 so, Your Honor, than we have under CPL 440. And
12 looking at CPL 440.30 - - -

13 JUDGE FAHEY: Um-hum.

14 MS. NICHINSKY: - - - when you look at the
15 criteria there for - - - you know, when you can
16 successfully bring a motion or when a court may deny
17 a motion. A court may deny a motion if it's based
18 only upon the defendant's claims and there is no
19 evidence to support it and there's no reasonable
20 possibility to believe it, you can deny it. And you
21 can deny a coram nobis under those circumstances as
22 well. It is a high standard. It should be an
23 unusual - - -

24 CHIEF JUDGE LIPPMAN: Okay. Okay.

25 MS. NICHINSKY: - - - but you shouldn't

1 deny - - -

2 CHIEF JUDGE LIPPMAN: Okay.

3 MS. NICHINSKY: - - - the Constitutional
4 right - - -

5 CHIEF JUDGE LIPPMAN: You'll - - - you'll
6 have your - - -

7 MS. NICHINSKY: - - - just for that reason.

8 CHIEF JUDGE LIPPMAN: You'll have your
9 rebuttal. Thanks, counsel.

10 JUDGE FAHEY: Thank you.

11 MS. NICHINSKY: Thank you.

12 MR. JOHNSON: Good afternoon, David Johnson
13 for the People. Your Honor - - -

14 CHIEF JUDGE LIPPMAN: On Rosario, right?

15 MR. JOHNSON: On Rosario, yes, Your Honor.

16 CHIEF JUDGE LIPPMAN: So - - - so what
17 happened in Rosario? The - - - the - - - the first
18 attorney really didn't - - - could not say that she
19 actually warned him or told him. The first
20 allocution didn't come off. Is - - - is it so
21 evident he's had all his rights here? That this was
22 knowing?

23 MR. JOHNSON: I think so, yes, Your Honor,
24 because if you - - -

25 CHIEF JUDGE LIPPMAN: Why?

1 MR. JOHNSON: If we - - - if we look at the
2 first plea proceeding, the court made it very clear
3 that this plea could result in his exclusion from the
4 United States. Counsel indicated that his client
5 understood - - - or her client understood that. And
6 there's - - -

7 CHIEF JUDGE LIPPMAN: And he said, I - - -
8 really, that's going to be a problem? Gee, you know,
9 that's a problem, and the judge said, okay, we're not
10 doing it. What happened in the second one that - - -
11 that changed that we can be assured that he knew what
12 was going on, the defendant?

13 MR. JOHNSON: Well, in the second plea
14 proceeding, it - - - it was a fairly abbreviated
15 procedure. But I think that's why we have to - - -

16 CHIEF JUDGE LIPPMAN: Who spoke, only the -
17 - - only the lawyer for the defendant, right?

18 MR. JOHNSON: Yes, Your Honor.

19 CHIEF JUDGE LIPPMAN: And the lawyer said
20 he waives?

21 MR. JOHNSON: Yes, the - - - the lawyer
22 said that he waives formal allocution, prosecution by
23 information and the right to appeal.

24 CHIEF JUDGE LIPPMAN: So do we have
25 anything else?

1 MR. JOHNSON: Not from that particular
2 date, but again, going back to the first date,
3 because these only took place a few weeks apart. On
4 the first day, the court did speak with the defendant
5 - - -

6 CHIEF JUDGE LIPPMAN: Yeah, but that cuts
7 both ways. On the first case, the judge says I'm not
8 taking this, you know, without him knowing what's
9 going on.

10 MR. JOHNSON: But before - - - before that
11 took place, the court did speak directly with the
12 defendant through the interpreter and - - - and the
13 court explained, if you pleads guilty, you give up -
14 - - give up your right to a trial, to - - - to have
15 the People prove their burden - - -

16 CHIEF JUDGE LIPPMAN: Now in between, your
17 surmise or your - - - your contention is that in
18 between, the lawyer explained it to him again, or
19 whatever, and he said, okay, I'll waive, and - - -
20 and that's enough that when the - - - the attorney
21 was asked, he said, yeah, he waives. That's it, good
22 enough?

23 MR. JOHNSON: Yes, because again, at - - -
24 at the first time, not to belabor the point, but - -
25 -

1 CHIEF JUDGE LIPPMAN: Go ahead.

2 MR. JOHNSON: - - - but when the court
3 said, okay, I'm not going take his plea, the
4 defendant - - - the defendant interjected and said,
5 no, no, I - - - I want to forward. The record is
6 very clear that this defendant just wanted to - - -
7 to move on with his life. He wanted to accept the
8 plea, because again, as - - - as counsel noted at the
9 first plea proceeding that - - -

10 CHIEF JUDGE LIPPMAN: Well, you would - - -
11 you would - - - you would expect that he would not
12 want to be deported as a result of the plea, right?

13 MR. JOHNSON: Well, he also didn't want to
14 go to jail for up - - - up to a year. He was charged
15 with three misdemeanors - - - three Class A
16 misdemeanors - - - so he could have gone to jail for
17 a year and still have been subject to deportation. I
18 - - - I think it's very clear that this defendant
19 just wanted to - - - to take the minimal incar - - -
20 incarceration.

21 CHIEF JUDGE LIPPMAN: And be deported and
22 go?

23 MR. JOHNSON: Excuse me, Your Honor?

24 CHIEF JUDGE LIPPMAN: And be deported?

25 MR. JOHNSON: Well, that's - - -

1 CHIEF JUDGE LIPPMAN: Because if he knew
2 what's going on, he knows he's probably going to be
3 deported, right?

4 MR. JOHNSON: Well, maybe not. It's - - -
5 we're now five years on and this defendant is still
6 in this country. And he - - -

7 JUDGE FAHEY: You know what I'm wondering
8 though, why - - - why limit coram nobis relief only
9 to situations where a defendant has affirmatively
10 requested it, as in Syville where there's been an
11 affirmative affidavit? I mean, why - - - what policy
12 reason would be for us to limit it in this case, if
13 it seems to be a clear inequity?

14 MR. JOHNSON: Well, Your Honor, I wouldn't
15 say that, because as our brief makes clear, we are
16 fine with - - - with an exception in circumstances
17 such as like this, as a general proposition, but as I
18 think all of Your Honors made quite clear, there has
19 to be credible allegations from the defendant, which
20 I don't think we have here, because otherwise, we're
21 talking about unleashing the floodgates. As I think
22 my - - - my colleague from Manhattan noted in her
23 brief - - -

24 JUDGE RIVERA: Well, what - - - what would
25 make - - - what would have been credible allegations?

1 MR. JOHNSON: Well, first, it would have
2 been helpful if we had an affidavit from the
3 attorney. While, I - - - I know that the defendant
4 spoke with Legal Aid, and they - - - they declined to
5 provide such an affidavit - - -

6 JUDGE PIGOTT: Well, wait a minute. I
7 don't think the defendant spoke to Legal Aid. I
8 noticed that and I think it was an attorney who spoke
9 to Legal Aid who said, you know, we're not turning it
10 over. Because I always thought if that were me, I'd
11 say, well, then the defendant clearly can go get her
12 own file or his own file in this case. And so if he
13 had asked, he'd - - - obviously they'd have to give
14 him his file, and they'd have to - - - you know, I
15 assume if he wanted an affidavit, get one, and that
16 wasn't done in this case.

17 MR. JOHNSON: Well, I - - - I can't speak
18 to what could have happened if - - - if the defendant
19 had asked for the affidavit. I do believe it was
20 defense counsel, but again, Legal Aid didn't provide
21 an affidavit. The - - - the attorney said it was - -
22 - it was her general policy to - - - to advise as to
23 the right to appeal.

24 JUDGE PIGOTT: No, I'm giving you a
25 softball. I'm agreeing with you. I'm saying I - - -

1 I got the point that - - -

2 MR. JOHNSON: Right.

3 JUDGE PIGOTT: - - - that, if you know,
4 somebody calls up and says I want to see a file,
5 they're not going to show it. But if the defendant
6 calls up and says I'm the person you represented, I
7 want to see my file, because I'm trying to get a
8 460.30 or a writ, I would think they would be
9 compelled to, and if they didn't, I would think a
10 subpoena would work.

11 MR. JOHNSON: I would think so, Your Honor.

12 CHIEF JUDGE LIPPMAN: Is it - - - does it -
13 - -

14 JUDGE RIVERA: But - - - but the point - -
15 -

16 CHIEF JUDGE LIPPMAN: Go ahead, counsel.

17 JUDGE RIVERA: The point is - - - I thought
18 your point was that it's not the attorney who
19 indicates what she did or didn't do. It's the
20 supervisor saying it - - - it - - - I am informed by
21 her that this is her usual practice. And you're
22 saying that's the problem?

23 MR. JOHNSON: I'm saying that's one of
24 them.

25 JUDGE RIVERA: That that's a credible

1 allegation on his part, relying on that statement?

2 MR. JOHNSON: Well, I'm saying that's one
3 of the problems. One of the - - - one of the other
4 problems is that the defendant's affidavit said that
5 he wanted to contest this case and go to trial and as
6 I - - - as I said earlier, I think the record is
7 quite clear that that's not the case. And if we're
8 going to analogize to 440.10 and 440.30, I think that
9 an unsubstantiated allegation has to have some
10 contextual support.

11 CHIEF JUDGE LIPPMAN: Counsel, is this a
12 stronger case or a weaker case than Andrews?

13 MR. JOHNSON: I would say it's - - - it's
14 on all fours with Andrews in terms of - - - of the
15 credible allegations that are brought and - - - and
16 that's why the defendant's allegations here weren't
17 sufficient. And so I would - - - I see that my time
18 is up. I would just ask that this court affirm the -
19 - -

20 CHIEF JUDGE LIPPMAN: Okay, counsel.

21 MR. JOHNSON: - - - this court's order.
22 Thank you.

23 MS. NICHINSKY: Excuse me, Your Honor.
24 Should I respond to that one minute and then to other
25 - - -

1 CHIEF JUDGE LIPPMAN: I think you could
2 just answer them both, unless you - - - you want to.
3 I mean, I - - - I think it's hard. Do - - - you - -
4 - have many minutes did you - - - did you keep?

5 MS. NICHINSKY: Two.

6 CHIEF JUDGE LIPPMAN: Two? You want to do
7 one and one, or do you want to just do two at the
8 end?

9 MS. NICHINSKY: Can I - - - would you mind
10 if I could - - -

11 CHIEF JUDGE LIPPMAN: Go ahead.

12 MS. NICHINSKY: Thank you. Just factually,
13 we did - - - we got the trial file in this case. And
14 there was no indication that there was a - - - any
15 discussion about the right to appeal in the file.

16 The - - - what I was talking about - - -

17 JUDGE PIGOTT: Weren't they - - - wasn't
18 that statements that made - - -

19 MS. NICHINSKY: - - - with the phone call
20 was the - - -

21 JUDGE PIGOTT: Hold on a minute. Maybe I -
22 - - maybe I misread the record, but I thought someone
23 had tried to contact, as - - - as counsel was saying,
24 and they weren't going to cooperate. They said,
25 we're not - - - you know - - -

1 MS. NICHINSKY: Correct.

2 JUDGE PIGOTT: Right?

3 MS. NICHINSKY: When I got the trial file,
4 and then I - - -

5 JUDGE PIGOTT: Is it in - - - is it in the
6 record?

7 MS. NICHINSKY: - - - and then I called the
8 lawyer - - -

9 JUDGE PIGOTT: Is it in the record?

10 MS. NICHINSKY: Yes.

11 JUDGE PIGOTT: The trial file?

12 MS. NICHINSKY: No.

13 JUDGE PIGOTT: Oh.

14 MS. NICHINSKY: But my - - - my allegations
15 about what - - - that - - - that there was nothing in
16 the trial file are - - - are in the record. There
17 was nothing there referring to this.

18 Then I called her and she wouldn't speak to
19 me about the case. She had Legal Aid counsel call me
20 back.

21 JUDGE PIGOTT: Well, that's what I mean.
22 Didn't - - - couldn't the - - -

23 MS. NICHINSKY: And say it was her
24 practice.

25 JUDGE PIGOTT: Couldn't the defendant

1 contact his former lawyer and say, you - - - you've
2 got to talk to my present lawyer, because I'm trying
3 to get something done here?

4 MS. NICHINSKY: She would not have done
5 that, Your Honor. It's the policy - - -

6 JUDGE PIGOTT: Who would not have done
7 what?

8 MS. NICHINSKY: It's the policy of the
9 Legal Aid Society to not speak to us about potential
10 ineffective assistance of counsel - - -

11 JUDGE PIGOTT: No, no, no.

12 MS. NICHINSKY: - - - cases.

13 JUDGE PIGOTT: I'm talking about the
14 defendant. I mean, if I'm the defendant, and I go
15 and say, you were my former lawyer, I'm about to be
16 executed. I got to have you talk to my new lawyer so
17 they don't throw the switch on me by midnight
18 tonight. I would think they would talk. I would
19 think they would talk under any circumstance where a
20 defendant comes and says, you - - - you represented
21 me and I need your help now on this - - - this post-
22 conviction - - -

23 MS. NICHINSKY: Your Honor - - -

24 JUDGE PIGOTT: - - - motion.

25 MS. NICHINSKY: - - - that is not the

1 policy of the Legal Aid Society.

2 JUDGE PIGOTT: That is not what?

3 MS. NICHINSKY: Not the policy of the Legal
4 Aid Society.

5 JUDGE PIGOTT: They will - - - they will
6 ignore their own client?

7 MS. NICHINSKY: In an ineffective
8 assistance of counsel case, they will not speak to
9 you. If you subpoena them, they will come to a
10 hearing, but they will not talk to you. This - - -

11 CHIEF JUDGE LIPPMAN: Okay, counsel.

12 MS. NICHINSKY: I just also - - -

13 CHIEF JUDGE LIPPMAN: Counsel, okay, you'll
14 have your one minute on the other case.

15 MS. NICHINSKY: Okay. Okay.

16 CHIEF JUDGE LIPPMAN: Counsel? Llibre, go
17 ahead.

18 MS. KORENSTEIN: Good afternoon. Hope
19 Korenstein for respondent, People of the State of New
20 York, on People v. Llibre. In this case, the record
21 is - - - is pretty clear that defendant knew his
22 appellate rights. He knowingly, intelligently, and
23 voluntarily waived those rights. And he did so for a
24 really good reason. He got a really, really
25 beneficial plea deal and a plea deal that reflected

1 in all ways a very immigration-conscious strategy.

2 And the reason that he didn't appeal his
3 conviction is for the simple reason that he had no
4 incentive to do so.

5 JUDGE STEIN: So are you arguing that - - -
6 that the Syville exception to 460.30 would never
7 apply in a situation such as this, where - - - where
8 a defendant claims that he was not informed of his
9 appellate rights?

10 MS. KORENSTEIN: Well, I think - - -

11 JUDGE STEIN: Or you are just saying that
12 it doesn't apply in this case?

13 MS. KORENSTEIN: It - - - it doesn't apply
14 here because - - -

15 JUDGE STEIN: Okay. Because - - -

16 MS. KORENSTEIN: - - - defendant's claims
17 that he was not informed of his appellate rights are
18 belied by the record.

19 JUDGE STEIN: Okay.

20 MS. KORENSTEIN: Because - - -

21 JUDGE RIVERA: Is that his waiver?

22 MS. KORENSTEIN: Yeah. The waiver - - -

23 JUDGE RIVERA: Is that the written waiver?

24 MS. KORENSTEIN: The oral colloquy as well
25 as the written waiver. In the oral colloquy - - -

1 JUDGE RIVERA: Is - - - is this typical for
2 these kinds of written waivers to have an attorney's
3 signature on it?

4 MS. KORENSTEIN: It is not atypical. I've
5 seen many where the attorney does sign. I've seen
6 many where the attorney and defendant sign in open
7 court together. And I - - - you know, I can't speak
8 to what's typical. In my experience, it's not
9 uncommon.

10 And the oral colloquy is also not uncommon.
11 The - - - the prosecutor noted that for the record,
12 defendant is filling out the waiver of appeal. The
13 court said, "Have you specifically discussed that
14 with" Mr. Berman, his attorney. Defendant said
15 "Yes." The court said "You are agreeing to do that?"
16 The defendant said "Yes." The court said "We haven't
17 done pre-tri" - - - excuse me - - - "pre-trial
18 hearings so you are not waiving much. But, you are
19 waiving your right to appeal. Do you understand?"
20 Defendant says "Yes."

21 And defense counsel then notes that
22 defendant was executing the written waiver of appeal.
23 And the written waiver of appeal also says, "I hereby
24 waive my right to appeal from this judgment of
25 conviction." You know, the waiver doesn't apply to

1 four following issues, including voluntariness of
2 this waiver. "However, I understand and agree that I
3 hereby give up all other appellate claims." Executed
4 and signed voluntarily and knowingly "after being
5 advised by the court and after consulting with my
6 attorney. I have had a full opportunity to discuss
7 these matters with my attorney and any questions I
8 may have had have been answered to my satisfaction.
9 I have agreed to give up my appellate rights because
10 I am receiving a favorable plea and sentence
11 agreement."

12 JUDGE RIVERA: So your position, if he then
13 signs an affidavit saying that my attorney did not
14 give me my appellate rights, that would be an
15 insufficient record, correct?

16 MS. KORENSTEIN: Yes, I think it would be
17 insufficient.

18 JUDGE RIVERA: Okay, if his attorney says,
19 I didn't give him his - - - I did not inform him
20 about his right to appeal, would that be a sufficient
21 record? Is that what's wrong with this case?

22 MS. KORENSTEIN: I think what's wrong - - -
23 I think - - -

24 JUDGE RIVERA: If his own attorney - - -
25 that's why I asked you about the signature on that

1 waiver.

2 MS. KORENSTEIN: I think what's wrong with
3 the case is that there is no support for defendant's
4 allegations whatsoever. His attorney wasn't actually
5 asked about appellate rights, and so his attorney
6 didn't have - - - have an opportunity to state what
7 his practices are, what notations may or may not have
8 been on the file. The other problem is that five or
9 six years passed and so one can hardly blame the
10 attorney for not recalling a case that occurred five
11 or six years ago. I mean, it's - - -

12 JUDGE RIVERA: Although, he might have that
13 copy of the waiver with his signature on it.

14 MS. KORENSTEIN: He did have the copy of
15 the waiver with his signature in his file, correct,
16 Judge.

17 JUDGE RIVERA: It might refresh his
18 recollection, but I - - - let's go with my
19 hypothetical. If an attorney - - - same facts, but
20 the attorney actually does sign an affidavit saying,
21 I - - - I know what the record shows, but I
22 absolutely recall not informing him of his rights to
23 an appeal.

24 MS. KORENSTEIN: It's - - - it's difficult
25 to say, because the attorney signed - - -

1 JUDGE RIVERA: Would he be at least
2 entitled to a hearing?

3 MS. KORENSTEIN: I - - - I think it isn't
4 out of the question that he might be entitled to a
5 hearing, but it's hard to understand how an attorney
6 would do such a thing, because as an officer of the
7 court, he signed this document in open court, saying,
8 you know - - - cosigning that his client was informed
9 of all of the rights having to do with the waiver.

10 JUDGE PIGOTT: No, I think Judge - - -
11 Judge Rivera is talking about a different case, a
12 hypothetical case, where you don't have that.

13 MS. KORENSTEIN: But where the waiver is
14 signed?

15 JUDGE RIVERA: Um-hum.

16 MS. KORENSTEIN: Is that - - - is that your
17 hypo - - -

18 JUDGE RIVERA: The paper is signed, yes.

19 MS. KORENSTEIN: So - - - so then there's
20 sort of this contradiction and maybe that would
21 actually invite a hearing, because on the one hand,
22 as an officer of the court, he signed a waiver saying
23 one thing, and on the other hand, he signing an
24 affirmation saying another thing, so - - -

25 JUDGE FAHEY: You know, I - - - I think

1 that all four Appellate Divisions have a rule now
2 that require an attorney to inform a defendant of
3 their right to appeal.

4 MS. KORENSTEIN: Yes, that's - - -

5 JUDGE FAHEY: Why - - - why wouldn't we
6 just make that the standard and say, from now on,
7 it's got to be on the record. You got to inform them
8 of their right to appeal. Boom, period. That should
9 be the rule. And if it's not on the record, then - -
10 - then you have a right to appeal.

11 MS. KORENSTEIN: Well, I think if you look
12 at Flores-Ortega, they - - - the Supreme Court, at
13 least, talks about times when it isn't rational for a
14 defendant to want to go forth with an appeal, and
15 there's no reasonable demonstration that he wishes to
16 appeal, and under those circumstances, the attorney
17 wouldn't be obliged - - -

18 JUDGE FAHEY: I was kind of thinking
19 differently. I was thinking sometimes - - - you're
20 right about that, but - - - but there - - - there's
21 also, of course, the court could inform somebody of a
22 right to appeal so it - - - it wouldn't have to be an
23 absolute that an attorney would have to do it. So a
24 per se rule might not apply, but - - - but the face
25 of the record may have to show that the defendant was

1 informed in some form, whether an attorney or - - -
2 as the Department can say or the court itself.

3 MS. KORENSTEIN: Well, I think the face of
4 our record actually does show that he was informed.

5 JUDGE FAHEY: It's - - - it's pretty good
6 on Llibre, but it's - - - it's not quite the same in
7 Rosario, so - - - okay.

8 CHIEF JUDGE LIPPMAN: Okay, counsel,
9 thanks.

10 MS. KORENSTEIN: Thank you very much.

11 CHIEF JUDGE LIPPMAN: Counsel, rebuttal?

12 MS. NICHINSKY: Your Honor, even if you
13 have a waiver of the right to appeal, the waiver does
14 not waive everything. It doesn't waive an
15 involuntary plea, which is what we had in these
16 cases.

17 JUDGE PIGOTT: Then you should be moving to
18 vacate the plea. That's why I asked you before - - -

19 MS. NICHINSKY: Well - - -

20 JUDGE PIGOTT: I mean, a 440 would take
21 care of the plea. All you're asking for now is the
22 right to appeal on the record that is be - - - you
23 know, that will ultimately - - -

24 MS. NICHINSKY: Your Honor - - -

25 JUDGE PIGOTT: - - - be for an Appellate

1 Division. So you're saying, just let me file a
2 notice of appeal.

3 And what we've done, from Montgomery to
4 460.30 is say, fine, you got a year and thirty days
5 to do that. So that after - - - you know, once you
6 take the plea, you expect your appeal's going to be
7 filed within thirty. If it's not, you call somebody
8 and say, what's going on with my appeal? If they
9 don't do it within thirty days, we say, well, at
10 least do it within a year. That's not a - - - not a
11 burden on somebody if you've got that much interest
12 in your appeal; call somebody and do something.

13 Now if you don't do that, we have found two
14 exceptions that say, even if you don't do that, you
15 know, you can - - - you can a file a writ of error
16 coram nobis, and - - - and tell us why you didn't do
17 it in thirty, you didn't do it in a year and thirty,
18 and the reasons, we've said, I think, in Syville as
19 an exception, is it's got to be pretty reasonable. I
20 mean, the - - - the cases that we look at are pretty
21 egregious. It's not, you know, well, it's six years
22 later, even though I waived, you know - - - I'm now
23 going to get deported and so I want to go back to
24 square one.

25 MS. NICHINSKY: Okay, but Your Honor, if I

1 could respond to that. When you - - - when you have
2 the waiver of the right to appeal, and you're told
3 that you're waiving something, and then the plea
4 happens, and the court - - -

5 JUDGE PIGOTT: What happens?

6 MS. NICHINSKY: - - - misinforms you about
7 the con - - - the - - - improperly informs you about
8 immigration consequences. The lawyer is supposed to
9 consult with you then under Flores-Ortega, so - - -

10 JUDGE PIGOTT: Don't you then move to
11 vacate your plea? That's my point. I - - - I don't
12 understand why you simply - - -

13 MS. NICHINSKY: But he - - -

14 JUDGE PIGOTT: Let me finish. I don't
15 understand why you want to appeal something where the
16 Appellate Division may simply say, we're affirming,
17 it's clear on the record. And you want to say, well,
18 no, it's what - - - it's what happened off the
19 record. Ignore the record. They say, well, then
20 bring a 440, and you're back in this vortex of - - -
21 of what you want to say the lawyer did or did not do.

22 MS. NICHINSKY: Well, Your Honor, he lost
23 his right to appeal due to ineffective assistance of
24 counsel.

25 JUDGE PIGOTT: All right, okay.

1 MS. NICHINSKY: And that's the basis on
2 which coram nobis relief can be available. And these
3 were - - -

4 JUDGE RIVERA: Did you file the 440?

5 MS. NICHINSKY: - - - meritorious issues.

6 JUDGE RIVERA: Did you file the 440?

7 MS. NICHINSKY: Yes, he did, Your Honor.

8 JUDGE RIVERA: He did file, and that was
9 denied.

10 MS. NICHINSKY: And that was denied. So -
11 - -

12 JUDGE RIVERA: I know you've appealed that.

13 MS. NICHINSKY: So the 440 is denied, and
14 if the coram nobis is denied, I have a client who
15 never had his lawyer tell him he had an issue that is
16 meritorious, that this court has reversed on in the
17 past, and he had - - - he suffered from ineffective
18 assistance of counsel, and if he loses on the 440,
19 and he loses on the coram nobis, he is denied any
20 relief.

21 CHIEF JUDGE LIPPMAN: Okay, counsel.

22 MS. NICHINSKY: *Evitts v. Lucey* said you
23 cannot be denied your right to appeal because you
24 were denied your right to effective assistance of
25 counsel.

1 CHIEF JUDGE LIPPMAN: Okay, counsel.

2 JUDGE RIVERA: Counselor, can I - - - can I
3 just ask the same - - -

4 CHIEF JUDGE LIPPMAN: Judge Rivera, last
5 question. Go ahead.

6 JUDGE RIVERA: Yes, the same question I
7 asked before. Is this common, unusual, infrequent to
8 have an attorney also sign the defendant's waiver in
9 your experience?

10 MS. NICHINSKY: I think they sign them - -
11 -

12 JUDGE RIVERA: They both sign them.

13 MS. NICHINSKY: - - - often, as far as - -
14 -

15 JUDGE RIVERA: Together.

16 MS. NICHINSKY: - - - in my experience.
17 Yes - - -

18 CHIEF JUDGE LIPPMAN: Okay, counsel,
19 thanks. Thank you all.

20 MS. NICHINSKY: - - - but it was not
21 meaningful here.

22 JUDGE RIVERA: Thank you.

23 (Court is adjourned)

24

25

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

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

I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Luciano Rosario, No. 191, and of People v. Marcos Llibre, No. 192, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



Signature: _____

Agency Name: eScribers

Address of Agency: 700 West 192nd Street
Suite # 607
New York, NY 10040

Date: November 23, 2015