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COURT OF APPEALS

STATE OF NEW YORK

PEOPLE,

Appellant,

-against-

No. 193

NATANAEL SAGASTUMEAL VARENGA,

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

Appearances:

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Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: Okay, 193, People v.
2 Varenga.

3 Counsel.

4 MR. COSTELLO: Good afternoon. May I have
5 two minutes for rebuttal, Your Honor?

6 CHIEF JUDGE LIPPMAN: Two minutes. You
7 have it. Go ahead.

8 MR. COSTELLO: May it please the court, I
9 am Assistant District Attorney Thomas Costello for
10 appellant. Your Honors, it is our position that - -
11 -

12 CHIEF JUDGE LIPPMAN: Counsel, do they have
13 only the thirty days, or is there one year tacked
14 onto that?

15 MR. COSTELLO: The Appellate Division held,
16 we believe erroneously, that the - - -

17 CHIEF JUDGE LIPPMAN: Why is it erroneous
18 that they get the one year - - -

19 MR. COSTELLO: Well, for two - - - for two
20 main reasons. Number one - - -

21 CHIEF JUDGE LIPPMAN: Say again?

22 MR. COSTELLO: For two - - -

23 CHIEF JUDGE LIPPMAN: Yes, go ahead.

24 MR. COSTELLO: - - - main reasons under two
25 theories. Number one, such a claim as Padilla, which

1 is based on matters off the record, could never form
2 the basis for an appeal, so it doesn't make sense to
3 count the time within which to seek an appeal or to
4 file an appeal for the purpose of determining
5 finality as far as Padilla.

6 CHIEF JUDGE LIPPMAN: What's the logic of
7 that?

8 MR. COSTELLO: Well, the - - - the - - -
9 the - - - it's called the pipeline rule, basically,
10 which is - - -

11 JUDGE PIGOTT: What rule?

12 MR. COSTELLO: The pipeline rule which is -
13 - -

14 JUDGE PIGOTT: Oh, right. Okay.

15 MR. COSTELLO: - - - from Griffith. Which
16 is basically that when a new rule is pronounced by
17 the Supreme Court, if an appellate court has before
18 it a case that is affected by it but it's not
19 retroactive, but if the court - - -

20 CHIEF JUDGE LIPPMAN: Yeah, but when is it
21 final? That's the issue.

22 MR. COSTELLO: Then - - - then the court
23 can determine it out of interest of equity - - -

24 CHIEF JUDGE LIPPMAN: Yeah, yeah. So when
25 - - - when is the time of finality? That's the

1 question.

2 MR. COSTELLO: Well, that is an appellate
3 pipeline. We're talking here about a post-conviction
4 pipeline.

5 JUDGE FAHEY: So what you're saying is the
6 - - - we're not talking about final - - - finality on
7 direct appeal?

8 MR. COSTELLO: Exactly.

9 JUDGE FAHEY: Okay.

10 MR. COSTELLO: Exactly. The - - - we're
11 talking about - - -

12 JUDGE FAHEY: It's final.

13 MR. COSTELLO: - - - a finality for
14 purposes of Padilla - - -

15 CHIEF JUDGE LIPPMAN: Right, go ahead.

16 MR. COSTELLO: - - - on a 440.

17 CHIEF JUDGE LIPPMAN: Go ahead.

18 MR. COSTELLO: Because it can never form
19 the basis for a direct appeal.

20 CHIEF JUDGE LIPPMAN: Go ahead.

21 MR. COSTELLO: So what - - - what other
22 states have held, and I found this relatively
23 recently, was that they will adopt a post-conviction
24 finality pipeline, per se, for a case, say, that a
25 judge has before him or herself a Padilla claim

1 pending at the time of Padilla. That is basically
2 when a 440 equivalent judge in another state has been
3 able to - - - to contemplate a Padilla claim, after
4 that, the case is final.

5 JUDGE PIGOTT: I lost you.

6 JUDGE STEIN: You mean till sentencing; is
7 that what you're saying?

8 MR. COSTELLO: Well, I'm set - - - my - - -
9 my first claim is that for purposes of Padilla, a
10 conviction is final at sentencing. For other
11 purposes, you know, the - - - we're talking about
12 Padilla finality. Mr. Varenga could - - -

13 JUDGE STEIN: Well, we're talking about
14 Padilla today, but then are you saying that any claim
15 that relates to something that cannot be discerned
16 from the record and therefore is not subject to a
17 direct appeal - - -

18 MR. COSTELLO: Oh, right. That - - -
19 that's why I - - -

20 JUDGE STEIN: - - - falls within the same
21 rule?

22 MR. COSTELLO: - - - I think this is - - -
23 this could be an important case in the future for any
24 kind of future Supreme Court case that affects
25 ineffective assistance of counsel or anything else

1 off the record.

2 JUDGE STEIN: Um-hum.

3 JUDGE PIGOTT: Mr. Costello, I know in the
4 Fourth Department, because that's where I used to be,
5 if a notice of appeal is filed, it can be - - - it
6 can be pending there for ten years, fifteen years,
7 until and unless the People move to dismiss it,
8 because the defense is never going to move to dismiss
9 it, and for some reason, they never do. So all of
10 the people that have filed notices of appeal -- I
11 don't know if this is true in the Second Department,
12 but in the Fourth Department, that may have a Padilla
13 claim, if they filed a notice of appeal and just took
14 no action but the People took no action to dismiss
15 it, are sitting there. And I don't know that anybody
16 - - - that used to be a complaint I would - - - we
17 would hear from this court saying, you know, these
18 are not final, you know, and what are you going to
19 do. Now, in - - - in - - - in this situation, you
20 have no - - - no notice of appeal, right?

21 MR. COSTELLO: No notice of appeal and - -
22 -

23 JUDGE PIGOTT: And - - - and what you're -
24 - - and what you're saying is therefore, they're not
25 in the pipe - - - all the ones I just described would

1 be in the pipeline that you're talking about because
2 all of a sudden, if Padilla came down, they could say
3 oh, hey, we never thought about this but we can
4 appeal because it's pending and they're in the
5 pipeline and it would apply, right?

6 MR. COSTELLO: Well, I'm - - - they would
7 be in the appellate pipeline.

8 JUDGE PIGOTT: Right.

9 MR. COSTELLO: But what my position is that
10 as far as a Padilla claim, there - - - there is a
11 separate pipeline. There's a different pipeline for
12 post-conviction 440 motions, and that why are we - -
13 -

14 JUDGE PIGOTT: Okay.

15 MR. COSTELLO: - - - why are we
16 contemplating the year and thirty days for purposes
17 of assessing a Padilla claim? That - - - that is - -
18 -

19 JUDGE PIGOTT: On Padilla - - - on Padilla,
20 you're saying a 440 would be necessary?

21 MR. COSTELLO: Well, I - - - I - - - you
22 know, that is, I think, that the law - - - and Judge
23 Lippman himself, I think, stated that in - - - in his
24 dissent in Baret, which is these - - - these claims
25 can only be brought by a 440.

1 JUDGE PIGOTT: Um-hum.

2 MR. COSTELLO: The - - - there is one
3 exception; that a defendant can move to withdraw his
4 plea or her - - - her plea, but that has to be made
5 and determined before sentence.

6 JUDGE PIGOTT: Well, what's your argument
7 here? I mean what - - - what should they have done
8 then, brought a 460.30 motion in order to qualify for
9 the year-and-thirty and - - -

10 MR. COSTELLO: Well, no - - -

11 JUDGE PIGOTT: Almost done. And then - - -
12 and then once that's granted, assuming it's granted,
13 now you do have the year-and-thirty, and then you can
14 do whatever you want in your view, a 440 or whatever.

15 MR. COSTELLO: My position is 460.30
16 doesn't apply to these claims because they're not
17 part of the record. They're not record based so that
18 they can't be - - - ever be the - - - the subject of
19 an appeal.

20 JUDGE FAHEY: It's always a collateral
21 issue, is what you're saying?

22 MR. COSTELLO: It's always a collateral
23 issue except in that - - -

24 JUDGE FAHEY: And Padilla can't apply
25 retroactively because of Chaidez and Baret. The - -

1 - it can't be applied collaterally - - - a collateral
2 claim.

3 MR. COSTELLO: That - - - that is our
4 claim. Now, I will acknowledge that there are courts
5 that have said - - - this is the other prong of my
6 argument - - - that a conviction is final thirty days
7 after sentence. I - - - I don't - - - and I'm not
8 sure what that statute they're - - - they're looking
9 at for that, but it is apparent from the - - - the
10 lower court cases from the Bronx that I cited.

11 JUDGE FAHEY: But you want to say it's
12 final with the date of sentence, which would be
13 something that we haven't done before.

14 MR. COSTELLO: Well, I think that is the
15 most reasonable view - - -

16 JUDGE FAHEY: Let's assume that we don't
17 agree with that. All right, so that's - - -

18 MR. COSTELLO: Then - - - then you go - - -

19 JUDGE FAHEY: Yeah.

20 MR. COSTELLO: - - - hopefully to my second
21 prong.

22 JUDGE RIVERA: Well, what - - - how does he
23 know - - - how does he know about the claim, this
24 particular defendant, on the day of sentence? When
25 is Padilla - - - Padilla rendered?

1 MR. COSTELLO: Well - - -

2 JUDGE RIVERA: Is it rendered before the
3 sentence, day of sentence - - -

4 MR. COSTELLO: Well - - -

5 JUDGE RIVERA: - - - thirty days after the
6 sentence?

7 MR. COSTELLO: Well, I mean that's - - -
8 that's the whole - - - that's the whole issue is that
9 - - -

10 JUDGE RIVERA: That's the conundrum, right.
11 So I - - -

12 MR. COSTELLO: As a - - -

13 JUDGE RIVERA: - - - and I'm trying to
14 figure out how your rule works for someone like this.

15 MR. COSTELLO: Well, when - - - the rule, I
16 guess, would be that on the day that Padilla was
17 decided - - -

18 JUDGE RIVERA: Um-hum.

19 MR. COSTELLO: - - - if the case is still
20 pending - - - obviously the attorney should have - -
21 - post-Padilla, attorneys have to advise their
22 clients. Pre-Padilla, it's not retroactive. We're
23 talking about - - -

24 JUDGE RIVERA: You're saying he's got
25 thirty days from when Padilla's rendered? Is that -

1 - -

2 MR. COSTELLO: Well, yes, essentially, that
3 would be thirty days after Padilla or - - - yeah,
4 that - - - that - - - and that I think - - -

5 JUDGE RIVERA: The - - - and if the
6 attorney fails to do that, does he get a year and
7 thirty days after that - - -

8 MR. COSTELLO: No.

9 JUDGE RIVERA: - - - to argue his attorney
10 failed to file that notice of appeal?

11 MR. COSTELLO: No, Your Honor. It - - -
12 it's - - - the Padilla claim - - -

13 JUDGE RIVERA: Um-hum.

14 MR. COSTELLO: - - - has to have been
15 raised before Padilla - - - at the time of sentencing
16 or before.

17 JUDGE PIGOTT: At the time of the - - -

18 JUDGE RIVERA: There is no Padilla claim at
19 the time of sentencing in his case.

20 MR. COSTELLO: In Mr. Varenga's case?

21 JUDGE RIVERA: Correct. Padilla's decided
22 after that; isn't it?

23 MR. COSTELLO: Right, it's decided after.

24 JUDGE RIVERA: Right, so at - - - at
25 sentencing, he - - - he has no clue.

1 MR. COSTELLO: Right, so that's - - - that
2 is basically our position is that why are we allowing
3 a defendant, when Padilla is not the - - - is not the
4 requirement, why are we saying that a - - - an
5 attorney has to have advised - - - and that was - - -
6 that was - - -

7 JUDGE RIVERA: But I'm trying - - - I'm - -
8 - I'm trying to understand your rule. Your rule is
9 then thirty days from when Padilla is rendered,
10 because now he has some claim; that's your argument?

11 MR. COSTELLO: The argu - - - well, the
12 argument is either; for purposes of Padilla finality
13 - - -

14 JUDGE RIVERA: Um-hum.

15 MR. COSTELLO: - - - a case is final at
16 sentencing.

17 JUDGE RIVERA: If - - - if Padilla had
18 already been decided; is that what you're trying to
19 say?

20 MR. COSTELLO: Right, because we're
21 counting from the date of Padilla. Or based on the
22 other cases that I've - - -

23 JUDGE RIVERA: Could be the same day,
24 otherwise you're trying to apply it retroactive, but
25 go ahead, okay.

1 MR. COSTELLO: Well, I'm saying it
2 shouldn't be retroactive, that it should be applied
3 at - - - at sentenc - - - as - - - as the date of - -
4 -

5 JUDGE RIVERA: I understand. That's why I
6 was saying the sentencing date doesn't necessarily
7 make sense, but okay. Let's try it from the thirty
8 days from Padilla. So my question is then why isn't
9 - - - why doesn't he get the benefit of the year and
10 thirty days after that?

11 MR. COSTELLO: Well, I'm saying - - - well,
12 because it's a discretionary - - -

13 JUDGE RIVERA: Okay, now we got to it.

14 MR. COSTELLO: - - - it's a discretionary
15 motion, first of all.

16 JUDGE FAHEY: Well, what you're - - -
17 aren't you saying the thirty days he's entitled to by
18 statute, 460.10, right? Let's assume that. However,
19 the year is discretionary. It's not a "would get" or
20 a "must get" or is "entitled to", but it's a "can
21 get". Now, there are some departments like the First
22 Department, which - - - which I understand gives - -
23 - grants all of these, gives everybody a year, but
24 everybody else does not do that. That isn't really
25 the - - - the policy across the state, and that

1 discretionary determination is to be made on an
2 individual basis. And here, of course, it's
3 important because we would be making a rule for the
4 whole state. We would - - - we would be taking away
5 that discretion.

6 MR. COSTELLO: Right.

7 JUDGE FAHEY: Yeah.

8 MR. COSTELLO: And also - - -

9 JUDGE FAHEY: Because it falls after the
10 thirty days but before the one year is up after the
11 thirty days.

12 MR. COSTELLO: Yes, and going back to the
13 last case, there's also - - -

14 JUDGE RIVERA: But to hold otherwise means
15 that similarly situated defendants might end up with
16 a different outcome just because of the departments
17 they're in, right? Because it is - - -

18 MR. COSTELLO: Well - - -

19 JUDGE RIVERA: - - - discretionary.

20 MR. COSTELLO: Well, right now, as far as
21 I'm concerned, People v. Bent, which is the case that
22 we relied on where a defendant was sentenced after
23 our defendant, Padilla was not retroactive. So the
24 Third Department - - - it - - -

25 JUDGE STEIN: Well, was it raised in that

1 case? Can we - - - can we tell from - - - from - - -
2 from the case if - - - if the issue was ever even
3 raised?

4 MR. COSTELLO: I don't know if the - - -
5 the issue was raised and briefed and - - - and
6 formally argued, but, I mean, in - - - in doing a - -
7 - in doing the analysis for final - - - finality - -
8 -

9 JUDGE STEIN: The issue of whether that
10 case was final, that was raised in - - - in Bent?

11 MR. COSTELLO: Well, the court held that
12 the - - - that the sentence was final, so, I mean,
13 other - - - other - - - if - - - if you don't look at
14 the sentencing date, you don't - - - you don't look
15 at - - - you don't reach the finality conclusion, so
16 I think - - - I think there was some kind of thought
17 process there as far as finality.

18 CHIEF JUDGE LIPPMAN: Okay, counsel.
19 You'll have your rebuttal.

20 MR. COSTELLO: Thank you.

21 CHIEF JUDGE LIPPMAN: Let's hear from your
22 adversary.

23 Counsel, what's - - -

24 MR. SOLAGES: Good afternoon.

25 CHIEF JUDGE LIPPMAN: - - - what's fair

1 here? What - - - what's fair - - -

2 MR. SOLAGES: What's fair?

3 CHIEF JUDGE LIPPMAN: - - - for the
4 defendant? Yeah.

5 MR. SOLAGES: What would be fair?

6 CHIEF JUDGE LIPPMAN: From a policy
7 perspective. Go ahead.

8 MR. SOLAGES: From a policy perspective it
9 would be fair to issue a rule that a conviction
10 becomes final one year and thirty days after
11 sentencing.

12 CHIEF JUDGE LIPPMAN: Why?

13 MR. SOLAGES: Because of CPL 460.30, the
14 legislature has created a statute, and we should
15 honor that statute. We should honor that statutory
16 scheme. The scheme that the prosecution is proposing
17 is not a scheme that the legislature has adopted.

18 JUDGE STEIN: Coun - - - counselor, what if
19 - - - what if that - - - that appeal is allowed and -
20 - - and - - - and goes forward and - - - then don't
21 our rules then also permit a discretionary appeal?
22 So - - - so then do we extend the time to - - - to
23 that period of time?

24 MR. SOLAGES: No, we would extend the time
25 per - - - I'm specifically referring to the time

1 period within CPL 460.30. You - - - you know - - -

2 JUDGE RIVERA: I think Judge Stein's asking
3 since there's a discretionary appeal to the Court of
4 Appeal - - - or let's just say we're talking about
5 the discretionary appeal to the Court of Appeals, why
6 - - - why aren't you also advocating for the addition
7 of that time? Or - - - or does that only count if
8 indeed the 460.30 appeal is actually granted?

9 MR. SOLAGES: It applies - - - keep in mind
10 the Supreme Court in Teague stated that criminal
11 convictions do not become final until the
12 discretionary time period has expired. Under Teague,
13 discretionary time period - - -

14 JUDGE RIVERA: You mean for the appeal as
15 of right?

16 MR. SOLAGES: The - - - for the
17 discretionary appeal. So in essence, under - - - the
18 - - - with the discretionary appea - - - when
19 calculating discretionary time periods to appeal,
20 Teague states that you have to include that time
21 period to determine when a criminal conviction
22 becomes final.

23 JUDGE STEIN: Well, let - - - let me ask
24 you another question. We've been talking about
25 Syville. Okay, so Syville now has some exceptions

1 already that say even the one-year-and-thirty-day
2 period isn't - - - you know, may not be final because
3 you - - - there may be an exception to that. So then
4 again, aren't - - - aren't we extending - - -
5 extending it indefinitely under those circumstances?

6 MR. SOLAGES: No, no. We're - - - we're
7 not - - - we're not extending it indefinitely. I
8 mean, the statute on its face grants one year and
9 thirty days if the defendant meets the conditions
10 whether or not an appeal is filed. In - - - in this
11 particular situation, my client met the - - - met the
12 statutory requirements in 460.30. He had a counsel
13 who did not properly advise him of the negative
14 consequences of his plea. He had defective counsel.
15 He wasn't aware. He took - - - he took a plea
16 without the proper advice.

17 JUDGE PIGOTT: Mr. Solages - - - [So-
18 ladj']. Am I pronouncing your name correctly?

19 MR. SOLAGES: Yes, Your Honor.

20 JUDGE PIGOTT: Shouldn't you have - - -
21 shouldn't you be required to show that you're
22 entitled to 460.30 relief before you invoke that time
23 period? Now, you're saying that he does.

24 MR. SOLAGES: Yes.

25 JUDGE PIGOTT: But - - - but no court has

1 found that, correct? There's been no finding that -
2 - - that he's entitled to a right to appeal.

3 MR. SOLAGES: Well, my understanding of the
4 law is that if you make a showing under 460.30 - - -
5 under one of the conditions, if you make a showing,
6 the court must grant that application.

7 JUDGE PIGOTT: Well, as we just disc - - -
8 you're - - - you're alluding to what we heard just a
9 minute ago. If we were - - - if we were to affirm
10 those in which they were denied, you - - - then they
11 didn't qualify for 460.30. They could not make the
12 allegation that you're making, correct?

13 MR. SOLAGES: Perhaps. Perhaps. You know,
14 what - - - what's your specific - - - what's your
15 specific - - -

16 JUDGE PIGOTT: No, I'm thin - - - I'm - - -
17 I'm suggesting that shouldn't your client be required
18 to show that he would qualify under 460.30 before he
19 can take advantage of - - - of that pipeline, as - -
20 - as Mr. Costello calls it.

21 MR. SOLAGES: Well - - - well, for - - -
22 for one, he - - - when we made the 440 motion - - -

23 JUDGE PIGOTT: Yeah, in - - - in other
24 words, if - - - if he's successful on a 460.30, using
25 Mr. Costello's pipeline, he then has opened the

1 pipeline; he's now in it, he's got a right to appeal
2 and he can - - - and he's got thirty days usually
3 from the date of the 460.30 to file a notice of
4 appeal, and presumably he would do so, and now he's
5 in the pipeline for Padilla purposes and all others.
6 If he did not qualify, then he would not be in the
7 pipeline and he would not qualify for the - - - for
8 the Padilla relation back for being in the pipeline.

9 MR. SOLAGES: Well, I - - - I believe that
10 the prosecution's argument is completely flawed
11 because they're basing finality on the failure to
12 file a notice of appeal, and that's not what the
13 statute specifically says. And in - - - in their
14 argument, they made reference to Bent, and if you
15 look at the four corners of the Bent analysis, it
16 never - - - the four corners of that decision, it
17 never raised this specific thorough analysis on
18 460.30. So I think that relying on Bent is not a - -
19 - not an appropriate case to rely on.

20 JUDGE FAHEY: You know what I'm wondering
21 is - - - it's kind of complicated, but how would this
22 affect other areas? Let - - - let's say we allowed
23 this but let's say we get a writ for error coram
24 nobis and - - - and unlike a 460.30, an error coram
25 nobis and - - - and through there, you want to say I

1 want to file a late notice of appeal, and - - - but
2 that has no time limit and you can do it at any time,
3 and all it would take - - - there would be no
4 finality if a defendant could have sought the - - -
5 the right to file a late notice of appeal. If you do
6 it through a writ through error coram nobis, there
7 would never be any finality ever on - - - on appeals.

8 And I don't know if it's really fair to ask
9 you to comment on it, because it - - - it seems
10 convoluted, but I've only been here a short time and
11 the convoluted argument always shows up here, so
12 doesn't take long. So that being the case, though,
13 I'm concerned about the policy implications of saying
14 "could" is - - - is the same as - - - as "must", and
15 that's, it seems, logically where we're at.

16 MR. SOLAGES: Understood, yeah. You know,
17 the - - - obviously the coram nobis issue didn't
18 apply to this case - - -

19 JUDGE FAHEY: No, it doesn't apply to you
20 here. You had a 440. It's a little bit - - - yeah.

21 MR. SOLAGES: We have a statute on point.
22 Yes, but what I'm asking this court is to impose - -
23 - the bright-line rule that I'm seeking is consistent
24 with this court's tradition of protecting the rights
25 of criminal defendants and ensuring that their

1 criminal convictions, with all the consequences that
2 come with a criminal conviction - - -

3 JUDGE PIGOTT: Judge Fahey raised a minute
4 ago that the First Department does this routinely.

5 MR. SOLAGES: Yes.

6 JUDGE PIGOTT: You're in Third. Have you
7 done any research as to what the effect has been in
8 the First Department as opposed to the other three?

9 MR. SOLAGES: Well, I know in - - - in the
10 amicus, we - - - we addressed that issue that once a
11 460.30 application is made, they grant it, usu - - -
12 usually a hundred percent - - - you know, a hundred
13 percent of the time. As far as the research as to
14 what happens thereafter - - -

15 JUDGE PIGOTT: Um-hum.

16 MR. SOLAGES: - - - we - - - no.

17 JUDGE PIGOTT: Okay.

18 JUDGE FAHEY: And of course, granting it
19 doesn't make it - - - it's - - - it's still the act
20 that they have to make it. It's still - - - it
21 extends the finality is what you're saying. I'm not
22 even sure it does that, but okay.

23 MR. SOLAGES: Understood.

24 JUDGE RIVERA: The - - -

25 JUDGE PIGOTT: But it's one thing - - -

1 it's one thing to - - - to - - - to extend the right
2 to appeal so he can go file a piece of paper and then
3 bring up his record and argument in front of an
4 Appellate Division. It's another thing - - - you
5 want to say that you want to vacate the plea, and I
6 think in Corso, I forget who wrote that, but they
7 were saying this is not 440, this is 460.30, and it's
8 not vacating a plea, it's just giving somebody a
9 right to appeal, and they made a fine distinction
10 there, I thought, that we're - - - that we have
11 followed since.

12 MR. SOLAGES: Understood. You know, the
13 prosecution's argument and the way - - - the
14 prosecution is completely disregarding 460.30 in
15 their - - - their arguments. If the prosecution
16 wants to repeal 460.30, then they should seek - - -
17 their - - - their rem - - -

18 JUDGE PIGOTT: I saw that in your brief.

19 MR. SOLAGES: - - - yes, their remedy is
20 not with the courts.

21 JUDGE PIGOTT: But they're not, 460.30
22 applies to appeals. I think this is - - - you know,
23 so if you want to appeal, bring a 460.30. If you can
24 show the two elements required in 460.30, come on up.
25 If you can't, you can't, you - - - you know, you're -

1 - - you're foreclosed.

2 This isn't - - - this is kind of an
3 addendum to that saying well, maybe we could, maybe
4 we couldn't, but not under - - - but all of a sudden,
5 the - - - the year and thirty that 460.30 creates
6 applies to 440s in - - - in terms of a Padilla-type
7 thing or any other new law that - - - that may come
8 down the pike, right?

9 MR. SOLAGES: Understood. Well, I'm going
10 to respectfully request that this court uphold and
11 adopt the Second Department's holding.

12 JUDGE PIGOTT: Okay.

13 JUDGE RIVERA: Before you sit down, so I
14 just want a little clarity here. So when does the
15 clock start ticking for when he has to file his
16 notice of appeal under your rule?

17 MR. SOLAGES: Under - - - under the rule
18 that we're advocating for, a notice of appeal doesn't
19 necessarily have to be filed. The rule that we're
20 arguing is that a criminal conviction becomes final
21 one year and thirty days after sentencing,
22 irrespective of whether a notice of appeal is filed.

23 JUDGE RIVERA: Okay.

24 MR. COSTELLO: Bright-line rule.

25 CHIEF JUDGE LIPPMAN: Okay.

1 JUDGE RIVERA: Okay. I'm sorry. Let me
2 just follow up with it.

3 CHIEF JUDGE LIPPMAN: Go ahead.

4 JUDGE RIVERA: So - - - but - - - but in
5 this particular case, the - - - the challenge that
6 he's asserting, he has no knowledge of that - - -

7 MR. SOLAGES: Yes.

8 JUDGE RIVERA: - - - until March 31st,
9 2010?

10 MR. SOLAGES: Yes, on - - - on March - - -
11 it's on March 31st, 2010, that's the date that
12 Padilla was decided.

13 JUDGE RIVERA: Padilla was rendered,
14 correct?

15 MR. SOLAGES: Yes. On that particular
16 date, pursuant to his 460.30 rights, they - - - he -
17 - - he still had time. His 460.30 time had not
18 expired; therefore his criminal conviction was not
19 final on that day and therefore he should receive the
20 benefit of the new - - -

21 JUDGE RIVERA: But why doesn't the clock
22 start ticking on that day, when he knows he's got a
23 basis for appeal?

24 MR. SOLAGES: My client didn't know on that
25 particular day.

1 JUDGE RIVERA: I understand. You're - - -
2 I'm just trying to follow up a little bit on one of
3 your adversary's suggestion here that the attorney
4 should know at that point, and so the thirty days
5 should apply at that point.

6 MR. SOLAGES: But it's our argument that
7 the attorney was ineffective in this particular case.

8 JUDGE PIGOTT: How - - - how much time did
9 he have to file this - - - this 440? I - - - I know
10 he filed it on April 13th?

11 MR. SOLAGES: In April of 2011.

12 JUDGE PIGOTT: Right, that's when he filed
13 it, right?

14 MR. SOLAGES: Yes, that's when the 440 was
15 filed.

16 JUDGE PIGOTT: What was the last date that
17 he could have filed it?

18 MR. SOLAGES: The last date that he could
19 have filed the 440?

20 JUDGE PIGOTT: Yeah.

21 MR. SOLAGES: It - - - it's a - - - it - -
22 - it's a 440 motion.

23 JUDGE PIGOTT: Yeah, but you need the
24 Padilla. You need the Padilla thing, so - - - and -
25 - - and that's why you need the 460.30. So it would

1 have been a year and thirty days post - - -

2 MR. SOLAGES: It's - - -

3 JUDGE PIGOTT: - - - Padilla.

4 MR. COSTELLO: I believe the Appellate
5 Division said that my client, Mr. Varenga's,
6 conviction became final on June 14, 2010,
7 approximately ten weeks after Padilla was decided.

8 JUDGE PIGOTT: And he just made it, right?

9 MR. SOLAGES: Yes.

10 CHIEF JUDGE LIPPMAN: Okay.

11 MR. SOLAGES: Thank you.

12 CHIEF JUDGE LIPPMAN: Thanks, counsel.

13 Counsel, rebuttal.

14 MR. COSTELLO: Yes, and I - - - I guess I
15 misapprehended Judge Rivera's question. My point is
16 this. Assume Mr. Varenga had filed a timely notice
17 of appeal. Assume he had gone through his appeal and
18 raised meritorious claims and the conviction was
19 affirmed; that had - - - that would have nothing to
20 do with his Padilla claim. And so the time frames
21 for determining when to file the notice of appeal and
22 when to file a late notice of appeal shouldn't apply
23 to 440 claims. That is our - - - our main
24 contention.

25 CHIEF JUDGE LIPPMAN: Okay. Thanks,

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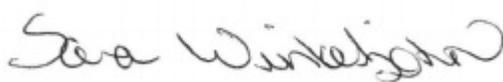
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C E R T I F I C A T I O N

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Natanael Sagastumeal Varenga, No. 193 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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