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COURT OF APPEALS

STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

No. 60

ANDRE HARRISON,

Appellant.

PEOPLE,

Respondent,

-against-

No. 61

MARINO SERRANO,

Appellant.

20 Eagle Street
Albany, New York 12207
March 29, 2016

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA

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1 CHIEF JUDGE DIFIORE: Numbers 60 and 61 on the
2 calendar. 60, People v. Andre Harrison. 61, People v.
3 Marino Serrano.

4 MS. NAPOLI: I'd like to reserve two
5 minutes for rebuttal, please.

6 CHIEF JUDGE DIFIORE: You may.

7 MS. NAPOLI: Good afternoon, Your Honors.
8 Lisa Napoli of the Appellate Advocates for the
9 appellant, Andre Harrison.

10 The Appellate Division has broad authority to
11 dismiss an appeal, but it's not unfettered. And this
12 court has stated in Ventura that where a defendant has - -
13 - is involuntarily absent - - - and in that case,
14 involuntarily deported - - - the Appellate Division
15 doesn't have the discretion to - - - the Appellate
16 Division's discretion doesn't extend to dismissing the
17 appeal; that is his first tier appellate review. The same
18 is true for Mr. Harrison.

19 JUDGE GARCIA: But why is that, if it's not
20 his first tier appellate review?

21 MS. NAPOLI: It is his first tier appellate
22 review. He is - - - it's a 440 motion.

23 JUDGE GARCIA: Right.

24 MS. NAPOLI: What happened in the motion
25 court is not review.

1 JUDGE STEIN: But you don't disagree that
2 the Appellate Division could deny permission to
3 appeal from that 440 motion in the first place?

4 MS. NAPOLI: That's right. The ones that -
5 - -

6 JUDGE STEIN: Okay. So if they can do
7 that, why can't they dismiss? Because, you know, if
8 you look at Ventura as a distinction between a
9 discretionary appeal and a mandatory appeal, this is
10 not a mandatory - - -

11 MS. NAPOLI: Well, initially, I would like
12 to say that Ventura doesn't dis - - - doesn't
13 distinguish between mandatory and permissive appeals.
14 Ventura distinguishes - - - the distinguishing
15 feature in Ventura is whether the defendant had had
16 first tier appellate review.

17 The - - - yes, the Appellate Division could not
18 grant permission to appeal. But in this case, they did.
19 The judge - - -

20 JUDGE PIGOTT: What's that - - - what's the
21 rule we ought to have here? Because it seems like
22 there is all these permutations - - - you are raising
23 a cogent argument with respect to the fact that if he
24 had waived his right to appeal in the first instance,
25 now he wants to - - - a 440 that can be granted or

1 not. But if he's - - - if he is deported as a result
2 of the conviction underneath, does that make a
3 difference as opposed to whether or not some other
4 circumstance led to his - - - to his being excluded?

5 MS. NAPOLI: I don't think that it does,
6 but in this particular case, the conviction at issue
7 - - - it was the basis for Mr. Harrison's removal.

8 The rule is really very simple. Once you have
9 an appeal pending, it doesn't matter how you got there,
10 whether by permission, or as of right; once it's there and
11 it's pending, it should be resolved.

12 JUDGE PIGOTT: In your - - -

13 JUDGE ABDUS-SALAAM: Was - - -

14 JUDGE PIGOTT: I'm sorry, go ahead.

15 JUDGE ABDUS-SALAAM: It's okay.

16 JUDGE PIGOTT: I was going to say, so in
17 your view, 440s can happen at any time.

18 MS. NAPOLI: That's right.

19 JUDGE PIGOTT: So let's pick it - - - five
20 years later, someone decides that they want to bring
21 a 440. They have an absolute right to bring it, and
22 the fact that they are excluded from the country and
23 may not respond, you know, were a 440 be granted and
24 another hearing, and that person is not there for
25 this hearing that's going to happen, that should have

1 no impact on whether or not he has that right to file
2 or she has the right to file the 440.

3 MS. NAPOLI: No. The 440 - - - the
4 person's presence in the country and the maintaining
5 of a 440 motion, that's going to impact how it's
6 litigated. Right. Now, you could have a 440
7 resolved on the papers; it could even be resolved on
8 the papers in favor of the movant, right. So you
9 wouldn't necessarily have to be physically present to
10 maintain your litigation. But, you could - - -

11 JUDGE PIGOTT: Well, I think of one where
12 you are out of the country, you bring a 440. You're
13 out of the country for some other reason - - - a very
14 valid reason that says you can't come back - - -

15 MS. NAPOLI: Uh-huh.

16 JUDGE PIGOTT: And yet, we're going to tell
17 our courts, you're going to have to hear this, or at
18 least consider, in your case, a 440, regardless of
19 the fact that there is no way on God's green earth
20 that this thing is ever going anywhere.

21 MS. NAPOLI: Well, what - - - you're asking
22 questions about the motion court.

23 JUDGE PIGOTT: I'm looking for a rule.

24 MS. NAPOLI: And I - - - yeah, and I think
25 that with the motion court it's a little different.

1 We're talking about the appeal, the appeal itself.
2 Now, you don't need to be present - - - the defendant
3 never needs to appear - - - can maintain an appeal
4 through legal representation. So there's no problem
5 that being the mandate of the Appellate Court.

6 JUDGE ABDUS-SALAAM: Counsel, my question
7 goes to 440s in general.

8 MS. NAPOLI: Uh-huh.

9 JUDGE ABDUS-SALAAM: This one happens to be
10 - - - involve a Padilla issue, but - - -

11 MS. NAPOLI: Uh-huh.

12 JUDGE ABDUS-SALAAM: - - - are you saying
13 that every 440 that should be appealed, or defendant
14 would like to appeal, now the Appellate Court has to
15 allow that appeal; it has no discretion to deny the
16 appeal?

17 MS. NAPOLI: We were talking about where
18 permission has been - - - appeal had been granted.
19 We're not talking that now the permissive - - - I
20 mean, you have to ask for permission to appeal a 440
21 motion. That's not going to change; there is nothing
22 before this court that is going to change that.

23 JUDGE STEIN: But would your rule apply
24 regardless of the underlying grounds for the 440
25 motion? I think that's the question.

1 MS. NAPOLI: I - - - but this particular
2 case involves ineffective assistance of counsel. And
3 those - - -

4 JUDGE STEIN: Well, let's say it's
5 ineffective assistance but it's not based on Padilla.

6 MS. NAPOLI: Right. Any ineffective
7 assistance of counsel, whether it has to do with
8 immig - - - the provision of immigration advice or
9 not. Because Mr. Harrison's motion, if it had been
10 counseled, I can assure you would include claims that
11 were beyond the - - - just the misadvice proffered by
12 counsel.

13 JUDGE PIGOTT: But if it's a 440 - - - if
14 it's a - - -

15 MS. NAPOLI: So a 440 ineffectiveness - - -
16 ineffectiveness claim, that's what's at issue here.
17 I don't feel that I can really speak to the whole
18 universe of 440 claims. But ineffectiveness claims
19 are distinct.

20 JUDGE PIGOTT: But if it's a 440 - - -

21 MS. NAPOLI: Uh-huh.

22 JUDGE PIGOTT: - - - and they want to deny
23 it - - -

24 MS. NAPOLI: That's right.

25 JUDGE PIGOTT: - - - and the person is

1 outside the country - - -

2 MS. NAPOLI: Deny the motion itself.

3 JUDGE PIGOTT: Right.

4 MS. NAPOLI: Uh-huh.

5 JUDGE PIGOTT: Do they have to say, we are
6 denying it, not because he's outside or she is
7 outside the country, we're denying it on the merits?
8 And failure to do that, there's always the argument
9 on appeal, they denied it because he or she is
10 outside the country.

11 MS. NAPOLI: They - - - my - - - this 440
12 motion was denied - - - was decided on the merits.

13 JUDGE PIGOTT: I'm still looking for my - -
14 -

15 MS. NAPOLI: Okay. I'm just - - - it's
16 just that the question is very far afield from what
17 happened in this case and what was litigated. So I'm
18 not really - - -

19 JUDGE GARCIA: But then, would the rule be,
20 if they decided and then they learned he's deported,
21 they don't have the discretion to dismiss it? Is
22 that the rule you're looking for?

23 MS. NAPOLI: We're talking about in the
24 Appellate Court.

25 JUDGE GARCIA: Right.

1 MS. NAPOLI: In the Appellate Division,
2 once permission has been granted to appeal - - -

3 JUDGE GARCIA: Right.

4 MS. NAPOLI: - - - that appeal is just
5 like an appeal as of right, and it cannot be
6 dismissed, because - - -

7 JUDGE GARCIA: But that's not what the
8 statute says.

9 MS. NAPOLI: That's right. The statute
10 doesn't say that, the statute - - - well, the statute
11 only says that a 440 is by permission.

12 JUDGE GARCIA: Right.

13 MS. NAPOLI: Right. That's all the statute
14 says. So you're not - - - you're not being asked to
15 contradict the statute.

16 JUDGE GARCIA: The statute also says that
17 the Appellate Division has very broad discretion to
18 dismiss appeals.

19 MS. NAPOLI: That's right. And - - - but -
20 - -

21 JUDGE GARCIA: So how do you read those two
22 things to come up with the rule you're asking for?

23 MS. NAPOLI: Because - - - because Ventura
24 talks about the distinguishing feature being first
25 tier appellate review, which Mr. - - -

1 JUDGE RIVERA: What are actually the
2 categories for dismissal?

3 MS. NAPOLI: Excuse me.

4 JUDGE RIVERA: It is a broad authority, but
5 what are the categories for dismissal under the
6 statute?

7 MS. NAPOLI: There - - - there is - - -
8 there is a number of them. I mean, none of them are
9 at issue here.

10 JUDGE RIVERA: So - - - that's my point.
11 What - - - which one of those categories applies to
12 this case?

13 MS. NAPOLI: Well - - -

14 JUDGE GARCIA: If any - - -

15 MS. NAPOLI: - - - I think the closest one
16 is moot - - -

17 JUDGE RIVERA: What's your argument?

18 MS. NAPOLI: - - - is mootness.

19 JUDGE RIVERA: Okay. What - - -

20 MS. NAPOLI: But that's not - - -

21 JUDGE RIVERA: What's the argument for
22 mootness?

23 MS. NAPOLI: I mean - - - it - - - but, the
24 - - - it's not moot because he's out of the country.
25 Or because he's not here. I think that - - -

1 JUDGE RIVERA: So, that's what I'm trying
2 to understand your argument. I underst - - - first,
3 I understood your argument was all about Ventura, but
4 it seems to me you're also arguing that there is no
5 statutory basis for the AD to refuse to hear this
6 appeal.

7 MS. NAPOLI: No - - -

8 JUDGE RIVERA: Am I misunderstanding your
9 argument?

10 MS. NAPOLI: Yeah, I - - -

11 JUDGE RIVERA: Okay.

12 MS. NAPOLI: I think the argument is very
13 simple.

14 JUDGE RIVERA: Uh-huh.

15 MS. NAPOLI: That when you have an appeal
16 in the Appellate Division, regardless of whether you
17 got there as of right or by permission - - -

18 JUDGE RIVERA: Uh-huh.

19 MS. NAPOLI: - - - that it cannot be
20 dismissed because you have been involuntarily
21 deported.

22 JUDGE PIGOTT: That's - - - that's - - -

23 CHIEF JUDGE DIFIORE: Counsel, I have a
24 question, a little different tact on the 440 in terms
25 of timing.

1 MS. NAPOLI: Uh-huh.

2 CHIEF JUDGE DIFIORE: So there was a
3 significant delay between the time the defendant had
4 been detained by ICE, and the time he filed the 440.

5 MS. NAPOLI: That's right.

6 CHIEF JUDGE DIFIORE: Is that a factor that
7 should be taken into consideration by the Appellate
8 Division in its determination?

9 MS. NAPOLI: I think that that is something
10 that would be very difficult for the Appellate
11 Division to take into consideration because of - - -
12 the nature of the Appellate Division is not a forum
13 on where you could develop facts. So I - - -

14 CHIEF JUDGE DIFIORE: This was two years,
15 right?

16 MS. NAPOLI: Yes. But also - - - of course
17 it took him two years; I mean, ICE detention is
18 chaotic, you're moved all around, you don't - - -
19 you're cut off from friends, family, the access to
20 the law library. I mean, it's really not surprising
21 that it would take a couple of years for him to - - -
22 to put forth the papers that he did.

23 CHIEF JUDGE DIFIORE: Thank you. Thank
24 you, counsel.

25 MS. WASSEL: Good afternoon. Assistant

1 District Attorney Deborah Wassel, on behalf of the
2 office of Richard A. Brown.

3 The court should decline to extend the ban in
4 Ventura to collateral appeals because the situation and
5 the circumstances present in Ventura are simply not
6 present here. In Ventura, we were dealing with defendants
7 who were on appeal in their first appeal as of right.
8 Whereas here, this is a collateral permissive appeal - - -

9 JUDGE RIVERA: What - - - what - - - I'm
10 sorry, what's the - - - what's the authority for
11 refusing to hear the appeal once granted?

12 MS. WASSEL: Well, they are - - - they are
13 treated differently under the statute, Your Honor.
14 And in fact, the CPL is very clear that permissive
15 appeals are - - - are different than direct appeals
16 as of right.

17 And one of the main factors in Ventura that this
18 court decided was that it was - - - it was their absolute
19 right to an appeal, to a first appeal as of right. And
20 that's simply not the case when you're dealing with
21 collateral appeal that's by permission only.

22 JUDGE RIVERA: But once permission is
23 granted, what would be the basis now not to actually
24 reach the merits of the appeal?

25 MS. WASSEL: Well, there a number of

1 factors that the court can consider in deciding to
2 dismiss the claim. First and foremost, in a
3 situation where you have a collateral appeal, the
4 defendant is not available to obey the mandate of the
5 court in the event of - - -

6 JUDGE RIVERA: Where is that set out - - -
7 what statute says that? Where is that authority - -
8 - where is the source of that being the basis for not
9 hearing the appeal?

10 MS. WASSEL: Well, this court in Diaz
11 decided that when the defendant is not available to
12 obey the mandate of the court, that's a - - - that's
13 a ground to dismiss the appeal.

14 CHIEF JUDGE DIFIORE: Can the defendant
15 ever be present if he is outside the country?

16 MS. WASSEL: I'm sorry.

17 CHIEF JUDGE DIFIORE: Can the defendant
18 ever be present, for purposes of the proceedings, if
19 he's outside the country?

20 MS. WASSEL: Not for the purposes of
21 testifying at a hearing or for the ultimate issue,
22 which is if this case were to get that far, is a
23 trial. We can't try a defendant who is simply not
24 there, and a defendant, of course if he's convicted,
25 can't serve his sentence if he is not in the country.

1 So that's the - - -

2 JUDGE RIVERA: Can we go back - - - I'm
3 sorry, finish - - - I'm sorry, I thought you finished
4 your - - -

5 MS. WASSEL: That's the ultimate question,
6 Your Honor. It's whether or not he can be sentenced
7 and serve his sentence if he is convicted at trial.

8 JUDGE RIVERA: Can I go back now to Diaz -
9 - - Diaz is not about the Appellate Department, is
10 that correct - - -

11 MS. WASSEL: That's correct. But this - -
12 -

13 JUDGE RIVERA: - - - about this Court's
14 authority, number one. Number two, Ventura, though,
15 made very clear that simply involuntary deportation
16 does not permit the Appellate Division to exercise
17 its broad authority to dismiss the appeal, correct?

18 MS. WASSEL: Yes. If I may just - - -

19 JUDGE RIVERA: Okay. So - - - but - - -
20 but that - - - let me just finish. That discussion
21 about being unable to comply with the mandate was a
22 policy question; was it not? Not based on the
23 statute, not based on the authority of the Appellate
24 Department, under the statute. That was a different
25 argument addressed later in the opinion in Ventura;

1 is that not correct?

2 MS. WASSEL: Well, the mandate of the court
3 goes to the court's jurisdiction over a per - - -
4 over a defendant and the ability to compel that
5 defendant to obey the mandate of the court. So it is
6 - - - it is a jurisdictional question.

7 JUDGE RIVERA: So, you're saying that fits
8 under the lack of jurisdiction part of the statute?

9 MS. WASSEL: Yes.

10 JUDGE RIVERA: Because then, I don't - - -
11 then, I'm a little confused as to why Ventura did not
12 address the question that way when it made very clear
13 that that question about complying that the mandate
14 was a public policy issue related to those who
15 abscond. And the statutory authority was discussed
16 later in the opinion.

17 MS. WASSEL: Well, there are - - - there
18 are couple of different things happening here.

19 JUDGE RIVERA: I mean, does he - - - does
20 he need to appear - - - could he waive appearance for
21 purposes of this appeal?

22 MS. WASSEL: For the purposes of a 440
23 hearing, yes. The defendant - - -

24 JUDGE RIVERA: So isn't that the
25 jurisdiction the statute is referring to? The

1 jurisdiction you are referring to is the criminal
2 court's jurisdiction?

3 MS. WASSEL: However, if the defendant won
4 at a 440 hearing, the next step is that he is in a
5 pre-reading - - - pre-pleading status, and the case
6 would eventually go to a trial. And the court, in
7 that instance, doesn't have the ability to compel
8 that defendant's attendance.

9 JUDGE RIVERA: I suppose there are some
10 different questions about that, but isn't that then -
11 - - and help me on this, isn't that then the
12 Appellate Department rendering a decision about
13 whether or not to hear their appeal based on the
14 merits of the appeal?

15 MS. WASSEL: The merits of the - - -

16 JUDGE RIVERA: And is that a ground under
17 the statute?

18 MS. WASSEL: The merits of the appeal are
19 one of the things that the court can consider in
20 deciding whether or not to dismiss - - -

21 JUDGE RIVERA: Where - - - where does that
22 say that in the statute?

23 MS. WASSEL: This court in Traveras said
24 that the court can consider the merits in whether or
25 not to dismiss the appeal. And what we're asking

1 for, essentially, is a factor-based analysis; that
2 it's not any one of these things that creates this
3 blanket ban on dismissals, but rather that the court
4 should be considering many different factors. For
5 example, whether or not he would be available to obey
6 this mandate. If there are other proceedings - - -

7 JUDGE PIGOTT: Well, in this particular
8 case, you know, he lost his 440 at the trial level
9 and he's coming up - - - the only thing that can
10 happen is good for him. In other words, if - - - if
11 it gets affirmed, then he - - - you know, he is where
12 he is. If it's reversed, he may get it - - - he may
13 get it - - - you know, be able to vacate his plea, et
14 cetera. So he is not moving to dismiss it, that's
15 for sure.

16 And while I'm looking for a rule, it seems
17 to me if he is excluded from the country because of
18 the underlying charge that's at issue here, wouldn't
19 it be unfair to say, well, we're not going to hear
20 that anymore because you're out of the country, when
21 that's the reason he's out. If on the other hand,
22 he's out because he overstayed his visa, or some
23 other - - - then that's self-inflicted and maybe you
24 didn't want to hear it.

25 The third one, of course, is on the merits.

1 And this one, as I understand it, the - - -
2 everything was in front of the court. It could have
3 simply made a decision on the merits. You made a
4 motion to say, well, he's outside of the country so
5 don't do that. And all that did was hurt him.
6 Because he's either going to get a new trial, or at
7 least get a chance to vacate his plea, or he is going
8 to be where he is. And I'm just missing why we
9 should be doing that and what the rule ought to be.

10 MS. WASSEL: Well, the rule should be to
11 allow the Appellate Division to retain discretion and
12 to look at the facts of each individual case and come
13 to a determination in that particular case.

14 JUDGE PIGOTT: Well, I understand that.
15 But what I'm saying is, if they say, because he is
16 not here, we're not hearing the case. We don't care
17 how much merit it is, if his lawyer was disbarred, if
18 his lawyer didn't pay attention, if he was sentenced
19 improperly; we don't care because he is not in the
20 country. And I think, as a justice system, we don't
21 want to do that. I think we want to say, well, he's
22 not here because he chose to not be here for other
23 reasons. But - - - and that could be the basis of
24 the dismissal.

25 I'm just wondering if we can say, simply

1 because he is not here, we don't care why, we're
2 going to dismiss it. And it seems to me that it
3 would either be - - - you know, that we got to state
4 that somehow. But that sounds like a tough rule.

5 MS. WASSEL: The fact that the defendant
6 has been deported is one of the factors that the
7 court should consider. It's not dispositive,
8 however, it is something that they can consider in
9 deciding these motions to dismiss.

10 JUDGE PIGOTT: But you made - - - your
11 argument was simply that, right? That he wasn't
12 there, and therefore it ought to be dismissed.

13 MS. WASSEL: That was the basis for our
14 motion. However, the court can decide and consider
15 the merits of the case in deciding whether or not to
16 dismiss.

17 JUDGE PIGOTT: That was not your motion.
18 You didn't say, by the way, take a look at the merits
19 and it ought to be dismissed for that reason; you
20 said, don't look at the merits, dismiss it because he
21 is not here. And I'm wondering if that's fair.

22 MS. WASSEL: Well, the merits of the case
23 had already been argued. It was fully submitted - -

24 -

25 JUDGE PIGOTT: Right.

1 MS. WASSEL: - - - and briefed before the
2 court. So the court did have a full opportunity to
3 discuss the merits of the case. And - - -

4 JUDGE PIGOTT: But it didn't.

5 MS. WASSEL: Well, it had to decide the
6 question that was before it. And the question that
7 was before it first was whether - - -

8 JUDGE PIGOTT: Are you missing my point?
9 What I'm saying is, let's assume for a minute they
10 are all set to decide, this is terrible. Disbarred
11 lawyer, not paying attention; this guy, you know, did
12 not get a fair treat - - - fair treatment in our
13 justice system. And then you bring a motion saying,
14 well, you can't decide that; you cannot decide the
15 merits because he is not here, and they agreed.
16 Isn't that where we are right now?

17 MS. WASSEL: Well - - - but that is exactly
18 what's inherent in the court's discretion is that
19 they don't have to grant our motion to dismiss. And
20 of course, we don't expect to win all of these
21 motions to dismiss.

22 JUDGE PIGOTT: And that was where I was
23 getting back to my rule. If they say, we're
24 dismissing it because he is not in the country,
25 shouldn't they say that, and then that ought to be -

1 - - I mean, it ought to be, if it's his fault, fine.
2 If it's not as fault, that's a different issue. Or
3 they could say, we're dismissing it on the merits,
4 and then you guys wouldn't be here. I'm just
5 wondering what the rule ought to be.

6 MS. WASSEL: Well, we're not talking about
7 anything like a fugitive-disentitlement doctrine;
8 that's already been decided. And that doesn't apply
9 to this case because he was involuntarily deported.
10 But I just want to go to your point about fairness.

11 The defendant in this case already did
12 receive a merits review of his claim. He received it
13 in the trial court, which perhaps is not the venue
14 that he wanted to be in, but he did receive a merits-
15 based review. And so - - -

16 JUDGE PIGOTT: Well, isn't that begging the
17 question - - - I mean, isn't the whole point of the
18 440 is that there were - - - there were things that
19 happened not on the record that should be brought to
20 the attention of the court? And then - - - and he
21 did that. He lost, and now he wants to come up.

22 MS. WASSEL: Exactly. However, he doesn't
23 have a statutory right to that appeal. And so that's
24 why these cases should be treated differently. And
25 that's why we're asking the court not the extend this

1 ban in Ventura.

2 JUDGE RIVERA: But even once it's actually
3 granted? I understand your point about he has no
4 right to an appeal, in that sense, right. But once
5 it's actually granted, there's been a determination
6 by at least one justice that it should be heard. Why
7 - - - why should that analysis apply once it's
8 granted?

9 MS. WASSEL: Well, because - - - because
10 the appeal is permissive, because he doesn't have a
11 statutory right, and because this court's decision in
12 Ventura was premise to - - -

13 JUDGE RIVERA: What's his expectation once
14 the appeal is granted?

15 MS. WASSEL: Well, his expect - - -

16 JUDGE RIVERA: His right to appeal is
17 granted. Isn't the expectation he'll be heard?

18 MS. WASSEL: Of course. But there are - -
19 - there are always grounds to dismiss - - - or there
20 may be grounds to dismiss a case for any number of
21 reasons that may not - - - may not even have come up
22 in this case.

23 JUDGE FAHEY: Back to the fairness problem,
24 though, is - - - when - - - when the individual
25 Justice granted the right to appeal - - - the

1 permissive appeal - - - before it was dismissed by
2 the full Second Department, it was the same
3 situation. He was still - - - he had still been
4 involuntarily deported, and that judge then granted
5 that appeal, so - - - which - - - which presumes a
6 determination on the merits.

7 But in normal cases, where the Appellate
8 Divisions are dismissing because there hasn't been -
9 - - or because the question is moot, that's something
10 that's done by the whole court, not on a collateral
11 appeal where permission has already been granted to
12 appeal, which is the way I understand Judge Rivera's
13 point, is - - - you don't have a right to a
14 permissive appeal; we all agree with that. The
15 question is, once you've been given that right to the
16 permissive appeal, can it be taken away by an
17 argument that was available prior to the
18 determination of the permissive appeal. You see what
19 I'm saying?

20 JUDGE STEIN: Well, he was - - - he wasn't
21 deported when he - - - when they accepted the appeal
22 here, I don't think. Was he?

23 MS. WASSEL: That's - - - that's correct,
24 Your Honor. He - - - leave was granted, and while
25 the appeal was pending - - -

1 JUDGE FAHEY: Oh, I see. Okay.

2 MS. WASSEL: - - - the defendant was
3 deported.

4 JUDGE FAHEY: Thank you.

5 JUDGE STEIN: And could - - - could we - -
6 - if it came up to us for review as it has now, could
7 we say that it was an abuse of discretion if the
8 court only considered his absence?

9 MS. WASSEL: No. It should be - - - it
10 should be a factor-based analysis. That's one of the
11 factors. And if that was - - -

12 JUDGE STEIN: But if that's the only
13 factor, could - - - and there are other factors that
14 would lean the other way that says, you know, under
15 the circumstances here, it's fair for this person's
16 appeal to be heard to conclusion, then we could find
17 that it's an abuse of discretion?

18 MS. WASSEL: Well, if a court were to find
19 that to be the most important factor, that's not
20 necessarily an abuse of discretion, simply because
21 they found that to be the most persuasive.

22 CHIEF JUDGE DIFIORE: Thank you.

23 MS. WASSEL: Thank you.

24 CHIEF JUDGE DIFIORE: If Mr. Harrison where
25 to find himself in a posture where his case was back

1 in the trial court - - - the case is called and he
2 doesn't appear - - -

3 MS. NAPOLI: Uh-huh.

4 CHIEF JUDGE DIFIORE: What's next step?
5 What does the trial judge do?

6 MS. NAPOLI: Well, the whole question of
7 whether - - - as a general matter, can - - - there is
8 two questions if the appeal proceeds to resolution
9 and it's decided in favor of the appellant. There's
10 two questions. One is, does he have to appear to
11 maintain the - - - the further proceedings; does he
12 have to appear? And the other question is, can he.

13 And as a general matter, the answer to
14 both of these questions is, yes. He does not have to
15 appear. And yes, he can be brought back into the
16 country.

17 Mr. Harrison specifically - - - I mean, a
18 440 motion could be - - - a litigant charges - - -
19 charged the course of his proceedings, right. So if
20 there was a hearing - - - right, if a hearing was
21 ordered, Mr. Harrison could choose not to testify.
22 If we couldn't arrange for him to testify by video
23 conference or via Skype, right, he could put in an -
24 - -

25 CHIEF JUDGE DIFIORE: Is there authority

1 for that?

2 MS. NAPOLI: He could put in an affidavit.
3 That's how - - - I mean, they chart - - - the People
4 decide how to present their case, the defense can
5 decide how to present its case. But it would of
6 course be counted against Mr. Harrison if all he puts
7 in is an affidavit and he's not - - - you know,
8 doesn't give testimony. But then the defense would
9 be saying, okay, you know, we're putting on a case,
10 it's not the best case, but - - - you know, but
11 that's what we're limited by.

12 Do you understand what I mean? I think
13 maybe it's - - - got convoluted. But it's - - - it's
14 that he - - - if - - - he could testify via
15 videoconference, via Skype; that happens all the
16 time. If he couldn't - - - if that absolutely
17 couldn't happen, he could put in his side via
18 affidavit, we could get testimony from family
19 members, and that would be the case we presented.

20 And if the court wanted to say, listen, you
21 know, I didn't hear from Mr. Harrison and so I'm not
22 going to find for him, then that's the risk, to a
23 certain extent, that the defense would be assuming.

24 JUDGE PIGOTT: You take that a step
25 further. Let's assume the Appellate Division reviews

1 and says, yes, this was a bad plea - - -

2 MS. NAPOLI: Uh-huh.

3 JUDGE PIGOTT: - - - so we're sending it
4 back for further proceedings.

5 MS. NAPOLI: Uh-huh.

6 JUDGE PIGOTT: He doesn't show.

7 MS. NAPOLI: Well, there's a lot of things
8 that could happen once the case is sent back. That's
9 why there's so much speculation here and why you
10 can't dismiss an appeal when somebody is
11 involuntarily deported just because - - -

12 JUDGE PIGOTT: He doesn't show, and so the
13 People put on their case.

14 MS. NAPOLI: Well, the - - - if the case
15 was sent back for further proceedings, the first
16 thing we would do would we would be - - - is to reach
17 out to the People and see if we can renegotiate a
18 deal.

19 JUDGE PIGOTT: And they'll say, no, we're
20 trying this case.

21 MS. NAPOLI: Then we would - - -

22 JUDGE PIGOTT: And he doesn't show.

23 MS. NAPOLI: Well, then - - - then I think
24 in that case, you know, without - - - then he - - -

25 JUDGE PIGOTT: Where do we serve the

1 warrant?

2 CHIEF JUDGE DIFIORE: Is that what
3 happened?

4 MS. NAPOLI: Somebody could be - - - well,
5 if they insist on going to trial, then he is tried in
6 absentia.

7 JUDGE PIGOTT: Yeah, and he gets convicted.

8 MS. NAPOLI: Right? I mean, well - - -

9 JUDGE PIGOTT: Then the next 440, I
10 suppose.

11 MS. NAPOLI: But then he's tried in
12 absentia. I mean, people are tried in absentia all
13 the time.

14 JUDGE PIGOTT: Right.

15 MS. NAPOLI: So I mean - - - so yes, things
16 can proceed, if they insist, without him. This is a
17 question of fairness, a very basic question of
18 fairness.

19 CHIEF JUDGE DIFIORE: Thank you, counsel.

20 MS. NAPOLI: But - - - I just want to point
21 out, because we - - - this - - - this - - - there is
22 one particular thing that was lost in our discussion
23 is that if the appeal is not allowed to be resolved -
24 - - look at what happened in this case. The People
25 took six months to file their brief and then it was a

1 year before it was calendared for oral argument.
2 They didn't do this on purpose, or for gamesmanship,
3 but in that interim, Mr. Harrison was deported. If
4 the case had proceeded more quickly, it could've been
5 resolved before - - - and he would've had his day in
6 court.

7 CHIEF JUDGE DIFIORE: What was the
8 intervening time it took him to file his - - -

9 MS. NAPOLI: He - - - we were assigned,
10 five months later we filed our brief. Six months
11 later the People filed theirs. Two months after they
12 filed their brief, he was deported.

13 From the time that they filed - - - from
14 the time they filed their papers, we filed our reply
15 brief, it was a full year before oral argument was
16 scheduled. My point is that somebody could lose
17 their day in court, that crucial first-tier appellate
18 review, because of forces outside of their control.

19 CHIEF JUDGE DIFIORE: Thank you, counsel.

20 MS. NAPOLI: Thank you.

21 CHIEF JUDGE DIFIORE: Number 61, People v.
22 Marino Serrano.

23 MS. DONNER: May it please the court, my
24 name is Amy Donner and I represent appellant Marino
25 Serrano. And I would like to request two minutes for

1 rebuttal, Your Honor.

2 CHIEF JUDGE DIFIORE: Certainly.

3 MS. DONNER: Thank you.

4 CHIEF JUDGE DIFIORE: You're welcome.

5 MS. DONNER: Okay. This court held in
6 Ventura that a convicted criminal defendant has an
7 absolute fundamental right to an intermediate court's
8 broad review of his direct appeal. And that's what
9 Mr. Serrano was denied. That comes from the unique
10 role of the - - - well, that comes from a few things.
11 But it comes from the - - - certainly from CPL 450.10
12 - - - this is all in Ventura - - - and the common law
13 - - - which codifies the common-law right to appeal
14 from Montgomery.

15 JUDGE GARCIA: Counsel, I'm sorry.

16 MS. DONNER: Yes.

17 JUDGE GARCIA: Just to go back to something
18 Judge Pigott was asking in the last case, I believe.
19 So this goes back - - - it's vacated, it goes back,
20 what happens?

21 MS. DONNER: Okay. Well - - - so if we're
22 - - - okay. So we're saying that if it's remanded to
23 the trial court - - - which is, you know, the rule
24 that we would - - - part of the rule that we would be
25 saying.

1 JUDGE GARCIA: You have a live charge,
2 right?

3 MS. DONNER: We have a - - - okay. What we
4 - - - a lot of things could happen. It could be put
5 off calendar until such time as a defendant does or
6 doesn't return to the jurisdiction. So it's not - -
7 -

8 CHIEF JUDGE DIFIORE: Is a warrant - - - is
9 a warrant issued?

10 MS. DONNER: I don't - - - I don't know.
11 Honestly, I mean, it would be off - - - I mean, it
12 would sort of - - - be sort of like a warrant
13 situation, like a bench warrant situation, basically.
14 But it certainly could be dealt with off calendar.
15 It's not going to keep getting called and clogging
16 things up. Defin - - -

17 JUDGE STEIN: So it could be twenty years
18 before it would come back on for trial.

19 MS. DONNER: Theoretically, yes.

20 But the defendant can also waive his right to be
21 present. And here, when you have a case where we are in
22 touch with appellant, we have every reason to think that
23 he would waive his right to be present, and a lot of stuff
24 could happen. Even - - - a person - - -

25 JUDGE PIGOTT: Everybody - - - I - - - I

1 get that, and I understand what you're saying. But
2 your - - - your client was deported for some other
3 reason. The DWI had nothing to do it, as I
4 understand the record. So he - - - he had overstayed
5 his visa or whatever, and he's going back no matter
6 what. Now, why should the justice system - - - as
7 your counsel points out, which is slow in the first
8 place, but why should we say, oh, okay, this is what
9 happened so we'll go off calendar, we'll give this
10 break, we'll make the courts do this, we'll let the
11 People do something else, when in fact he left, you
12 know, voluntarily, in what - - - wait a minute - - -
13 in one sense, that he is the one that chose to
14 overstay, and he's the one that, had he followed
15 proper Federal procedures with respect to his
16 immigration status, would have been there, would have
17 finished his DWI and everything else.

18 There are a lot of people that are here on
19 visas that follow the rules, and they don't overstay.
20 He gets thrown out because he overstayed, not because
21 of the DWI. Now why do we have - - - owe him
22 anything other than the fact that he got convicted
23 and there he is?

24 MS. DONNER: Okay. A few replies, Your
25 Honor. I hope I can remember all of these. Okay.

1 The first - - - okay. Well, first of all, in
2 Ventura, the conviction was not the basis for Mr.
3 Ventura's dep - - - deportation.

4 JUDGE PIGOTT: Right.

5 MS. DONNER: And we know that from the
6 defending opinion that Your Honor joined, and that it
7 was - - - and it wasn't contradicted by the majority
8 and the briefs. And it - - - it's unclear whether it
9 was a basis for Mr. Gardner's, but anyway, for Mr.
10 Ventura, it's for sure. Okay. Then - - - and now
11 I'm going to start to forget the rest of my - - - let
12 me think, Your Honor.

13 JUDGE PIGOTT: Well, the big thing is, it
14 seems to me if - - -

15 MS. DONNER: Oh, yeah, I get it.

16 JUDGE PIGOTT: - - - if the defendant is
17 responsible for his own - - - go ahead, you know.

18 MS. DONNER: Sorry. Thank you, I still
19 have that thought. Okay - - - thank you - - - that
20 basically there are a few things. First of all,
21 there is an absolute - - - you can be inadmissible on
22 health grounds for alcoholism. So actually, that DWI
23 could be - - - could definitely - - - could be a bar
24 to readmission - - - to legal readmission.

25 Now, my client has an American citizen

1 child who is going to the - - - teenager who is going
2 to be over twenty-one, who could petition for him.
3 But most all immig - - - almost all immigration
4 decisions are discretionary. And this can severely
5 complicate legal reentry because DWI is a significant
6 negative factor. And if all these decisions - - -
7 immigration decisions are discretionary, then why are
8 they going to say, sure, drunk-driving conviction - -
9 - I mean, that's not something - - - so it really
10 does - - -

11 JUDGE PIGOTT: I'm - - - I'm just looking
12 for something that - - -

13 MS. DONNER: Okay.

14 JUDGE PIGOTT: - - - let's assume you got
15 an American - - -

16 MS. DONNER: Okay.

17 JUDGE PIGOTT: - - - who is in a similar
18 situation, who goes to Canada. He says, I'm not
19 coming back because, you know, if I do, you know, I'm
20 now on a felony DWI situation. So handle my appeal
21 for me. If I win, I will be back; if I don't, I
22 won't.

23 And it seems to me that if it's a voluntary
24 leaving the country - - - and I know yours is quasi
25 voluntary, but if it's not as result of this

1 particular conviction, why should anyone get any
2 other break then if - - - then what anybody else
3 would get?

4 MS. DONNER: Okay. I'm not sure if I'm a
5 hundred percent understanding all of - - - but first
6 of all, I mean, this was - - - okay. This was a
7 misdemeanor DWI, and he did do his full thirty days
8 in jail. But this is - - - okay. So that's one
9 reason.

10 Basically, because Ventura said that there
11 is a crim - - - that there is an absolute fundamental
12 right to - - - this is your - - - going to be your
13 only appeal. And if we are going to use this to
14 severely complicate his ability to come back in, if
15 not be an absolute bar, then it seems like he should
16 have a right to his appeal.

17 JUDGE RIVERA: Well, it's not voluntary - -
18 - in Ventura - - -

19 MS. DONNER: Oh, yes.

20 JUDGE RIVERA: - - - right, the point is
21 the involuntary deportation is not the equivalent to
22 someone absconding from the jurisdiction - - -

23 MS. DONNER: Abs - - -

24 JUDGE RIVERA: - - - and that's the
25 difference, right? That that - - - that's not

1 voluntary in that sense, although as Judge Pigott
2 correctly points out, there is conduct that your
3 client has taken that is the basis for the
4 deportation.

5 But in Ventura, the point was that
6 involuntary deportation, in the sense that obviously
7 the defendants are not seeking to leave the U.S.,
8 right, but even when they are, there is a case that
9 still adds some appeal - - - that that is not the
10 equivalent of someone who is trying to undermine the
11 criminal process like absconding.

12 MS. DONNER: Abso - - - absolutely, Your
13 Honor. Right. And that's in Dwayne (ph.), which
14 it's not - - - that's why it's definitely
15 involuntary. It's not a situation, let's say, like
16 Del Rio, where the defendant initiates deportation;
17 he gets a benefit for it.

18 JUDGE PIGOTT: Any involuntary should - - -
19 we should not consider at all?

20 MS. DONNER: Well, that's what Ventura - -
21 - I mean, that's what Ventura says, that if you're
22 involuntarily deported - - - if you - - - that every
23 defendant - - - the one - - - that every defendant -
24 - - if you're going to have a violation of due
25 process, which is - - - and - - - which is what was

1 held by the Appellate Term here, then you have to - -
2 - then at that point, you have a right to an - - -
3 before you can start doing anything with this, there
4 has to be this review from the - - -

5 JUDGE RIVERA: Is your - - - is your point
6 then that Ventura has really - - - already decided
7 this issue?

8 MS. DONNER: Yes.

9 JUDGE RIVERA: If you read the majority in
10 dissent together, is not an open question to be
11 decided in - - - with respect to your client's case.

12 MS. DONNER: Yes, Your Honor. Absolutely,
13 because it is his direct - - - it is his direct
14 appeal as of right.

15 JUDGE GARCIA: To go back to the causes of
16 deportation. So, you know, where you have a
17 defendant, let's say, who has a permanent legal
18 resident status but the crime is such that that's
19 unraveled and they're deported, you reverse the
20 conviction, you really reverse the basis for the
21 deportation.

22 In this case, he is deported as a visa
23 overstay, which is a legitimate basis for
24 deportation, no matter what happens here. So if he
25 ever comes back in the country after being deported,

1 it's a separate Federal crime to reenter after
2 deportation. So there is no distinction in your
3 mind, given the basis of the deportation, what
4 happens if this goes back? He can never reenter
5 because of the legitimate deportation; he has to get
6 the permission of the Attorney General, I believe, to
7 come back into the country.

8 MS. DONNER: But there are all these
9 remedies that are open to him if he - - - if he
10 didn't - - - the point is if you're going to have all
11 these ramifications against him, then he should at
12 least have the first direct review to make sure - - -
13 and it wasn't fair, according to the Appellate Term
14 below. And that's been decided in this case. And so
15 - - - and under Carracedo, that can't be - - - that's
16 it. And - - - I'm sorry - - - I think I'm - - -
17 could I just get a repetition of what your question
18 to me was?

19 JUDGE GARCIA: No. I think you addressed
20 it. It wasn't the involuntary nature of the
21 deportation and the repercussions from that in terms
22 of what happened when he goes back to - - - if this
23 were to go back to the trial court and be vacated.
24 But I think you addressed it, thank you.

25 CHIEF JUDGE DIFIORE: Thank you, Ms.

1 Donner.

2 MS. DONNER: Thank you.

3 CHIEF JUDGE DIFIORE: Counsel.

4 MS. SLEVIN: May it please the court.

5 Joyce Slevin for respondent, the District Attorney's
6 office of King County.

7 JUDGE STEIN: Counselor, am I correct at
8 the way that you are attempting to distinguish
9 Ventura is based on the - - - what would be necessary
10 if the appeal was in fact decided in favor of the
11 defendant?

12 MS. SLEVIN: The reason why this is
13 different from Ventura is that there is a way that
14 this appeal may be resolved that will go - - - will
15 go and need the defendant's presence.

16 JUDGE STEIN: Well, if we hinge the - - -
17 the right to not have an appeal dismissed on that
18 distinction, then wouldn't every defendant then just
19 - - - when they file their direct appeal, claim that
20 - - - you know, that the indictment was invalid, or
21 that there was insufficient legal evidence to support
22 the conviction, or something that would, if granted,
23 result in dismissal of the charges completely?
24 Wouldn't they just do that?

25 MS. SLEVIN: Well, there shouldn't be a

1 rule that in - - - that in every case where there is
2 further proceedings, the appeal had - - - must be
3 dismissed or must not be dismissed. What the People
4 are arguing for here is that the Appellate Court
5 still re - - - the intermediate Appellate Court still
6 retain its discret - - - its discretion to decide
7 whether to dismiss the appeal or not to dismiss the
8 appeal.

9 In Ventura, it was held that - - - and the
10 facts of Ventura are very different from here in a
11 very, very significant way. In Ventura, there were
12 two possibilities. The appeal could have been - - -
13 the case could've been affirmed or the case could
14 have been dismissed.

15 JUDGE STEIN: But that's my point; wouldn't
16 every defendant then raise an issue such as that,
17 that would inevitably lead to affirm or dismiss, in
18 order to make sure that the Appellate Division
19 wouldn't have the discretion to dismiss their appeal?

20 MS. SLEVIN: So I think what you're saying
21 is that in every brief, then a defendant would - - -
22 whatever his claims are or her claims are, let me
23 raise the claim of legal sufficiency or double jeopar
24 - - - or whatever - - - and then, boom, the appeal is
25 dismissed.

1 JUDGE STEIN: Well, no. Then - - -

2 MS. SLEVIN: I mean, I'm sorry, the
3 opposite.

4 JUDGE STEIN: - - - then we would be
5 saying that the Appellate Division couldn't dismiss
6 it. But if they didn't raise those issues, then the
7 Appellate Division could dismiss it. That's, as I
8 understand, your - - - your argument.

9 MS. SLEVIN: Well, I'm not saying that - - -
10 - that - - - there is certainly a problem, but - - -
11 in the Ventura context, but if we are staying within
12 Ventura, then Ventura, as we read it, is that if the
13 defendant's appearance is not necessary for further
14 proceedings, then the defendant has the right to an
15 appeal.

16 JUDGE ABDUS-SALAAM: Was that - - - was
17 that language essential to the holding of Ventura,
18 that due process requires that there be at least one
19 intermediate appellate review?

20 MS. SLEVIN: You know, the language of an
21 opinion must be confined to the facts before the
22 court. A very important consideration when this
23 court was deciding Ventura - - - and the People were
24 asked repeatedly, what's the interest of the People?
25 What's the interest of the People? And the interest

1 of the People is profoundly different than in
2 Ventura. And what we have here is if the defendant's
3 presence is necessary, we have a different competing
4 interest.

5 JUDGE PIGOTT: In other words, in this
6 case, if there is reversal on an O'Rama issue, he
7 gets a trial. You got to show up for the trial.

8 MS. SLEVIN: Yes.

9 JUDGE PIGOTT: And if he's not going to
10 show up for the trial, what's the point of the
11 argument - - - of the appeal, et cetera?

12 MS. SLEVIN: Right. though - - - yes, and
13 - - - well, the thing - - - my main point is that
14 there's still discretion left in the ap - - -
15 intermediate Appellate Courts. Ventura cut off that
16 discretion only to the extent of the facts of that
17 case, which is that if the defendant is not there - -
18 - necessary for further proceedings. But if the
19 defendant's presence is necessary for further
20 proceedings, then you have two countervailing
21 interests, the interest of the defendant in having
22 his appeal, and the interest of the People of being
23 able to prosecute him. And if you have two
24 countervailing factors, then the thing to do is leave
25 the discretion in the intermediate Appellate Court's

1 discretion.

2 JUDGE RIVERA: And this case isn't - - -
3 isn't really the only reason you're getting to this
4 point about this particular exercise of discretion.
5 It's because the court has decided he has got a
6 meritorious claim, and they're not going to exercise
7 interest of justice; instead, they think there is
8 some value in actually prosecuting him because of the
9 seriousness of the crime. So isn't that a
10 determination on the merits?

11 MS. SLEVIN: Well, in this particular case,
12 that's what the Appellate Term did. Because in this
13 particular case, unlike Ventura, where there were two
14 possibilities - - - the two possibilities were
15 affirmance or dismissal - - - here there was a third
16 possibility. And the third possibility was that we
17 would need the defendant's presence for future
18 proceedings.

19 So what the Appellate Court did, within its
20 discretion - - - it could've done this any number of
21 ways, but what this court decided to do, by Appellate
22 Term, they decided does the underlying claim have
23 merit? Yes, it does. Let's go further. Do we need
24 his presence, which really was why they're looking at
25 Ventura, are we within Ventura or not within Ventura?

1 They're saying, well, this is enough penological
2 purpose that we're going to remit it for a trial.

3 JUDGE RIVERA: Well, considering the
4 fairness considerations in Ventura - - -

5 MS. SLEVIN: Uh-huh.

6 JUDGE RIVERA: - - - isn't that counter to
7 Ventura? Because if the point of why the Appellate
8 Term here chooses to dismiss is because there is a
9 meritorious claim, there is a constant - - - it's a
10 violation of his constitutional rights.

11 MS. SLEVIN: Well, as far as the - - - the
12 issue of whether his underlying claim was
13 meritorious, we're not so sure that that's correct
14 right now because this case raised a Tyrell issue.

15 JUDGE RIVERA: Uh-huh.

16 MS. SLEVIN: And subsequent to the court's
17 dismissal in this case, we heard Conceicao, and
18 Conceicao clarified Tyrell. And to that extent, I
19 don't know that his claim would be viable right now
20 because the court in this case seemed to be under the
21 impression that the preservation requirement didn't
22 apply to a Tyrell claim, now we know that there is a
23 preservation requirement in Tyrell. And even looking
24 at the merits, the Appellate Term here seemed to say
25 - - - seemed to think that the mere fact alone that

1 the court did not advise the defendant of certain
2 Boykin rights, that in and of itself made it
3 involuntary; now we know from Conceicao that it's a
4 more well-rounded use. So I think if this court were
5 to look at it - - - the Appellate Term were to look
6 at it now, they'd have to first reach it in the
7 interest of justice jurisdiction, and then they would
8 have to look at it as a whole. So I don't even know
9 that they would get to the same - - -

10 JUDGE RIVERA: Then in your - - - in the
11 way you're analyzing it, then he's being denied his
12 appellate right when he is really not going to
13 undermine the concern of that court. Which is, he
14 won't be able to comply with the mandate of the
15 court. Because your argument is, there is no merit
16 to the claim.

17 MS. SLEVIN: Well, if there's no merit to
18 the claim, then the court can affirm the conviction.
19 I mean, there's three things that can happen. If the
20 court is going to affirm the conviction, we don't
21 need his presence. If the court is going to dismiss,
22 we don't have his presence. If it's this situation,
23 and it's in the court's discretion to determine this
24 first threshold question - - - the first threshold
25 question is, is his presence required for further

1 proceedings.

2 JUDGE GARCIA: Counsel - - -

3 MS. SLEVIN: And then after the court looks

4 - - -

5 JUDGE GARCIA: - - - can we - - - sorry to

6 interrupt you but going back - - - going on that

7 point in something that Chief Judge raised earlier.

8 So let's say this does go back and you have

9 an outstanding charge, no defendant; what would your

10 office do? Would you get a warrant?

11 MS. SLEVIN: Well, the - - - the court

12 sitting in the criminal part would issue a bench

13 warrant for his arrest. With the defendant being

14 outside of the country, I don't know that we can

15 execute that warrant there.

16 JUDGE GARCIA: You would put it in the

17 system though, right?

18 MS. SLEVIN: We would put it in the system.

19 You know, I guess, if for some reason he's unlawfully

20 here in the United States and ends up in prison

21 again, we would find him. But the - - - I mean, the

22 point there is that - - - then we have an open case.

23 JUDGE GARCIA: Uh-huh.

24 MS. SLEVIN: And when you have an open

25 case, it's just going to languish, and people's

1 memories are going to fade. This really is putting
2 the People in the untenable position, which is where
3 you come again to this balancing question. This is
4 the People's interest.

5 JUDGE GARCIA: I guess the thi - - - the
6 way I was looking at it is, he is deported on - - -
7 for a visa overstay. There's very limited ways he
8 can get back into the country lawfully. Now he seeks
9 to come back in the country lawfully; not only has he
10 been deported already, but he has an outstanding
11 warrant. I'm not sure what authority would grant him
12 the right to come back.

13 MS. SLEVIN: I see.

14 JUDGE GARCIA: So if he came back
15 illegally, it would be an illegal reentry right after
16 deportation. So I'm not sure what the harm would be.
17 He served the sentence, he's never coming back, you
18 have an outstanding warrant in the system that'll
19 hit, you know, on the borders as well. If he gets
20 picked up, he's committing another Federal violation.
21 So what is the harm?

22 MS. SLEVIN: So you're saying, he could
23 never come back, so why not just hear the appeal?

24 I mean, I don't - - - I don't think that
25 totally answers the question, is he going to come

1 back, is he not going to come back. I think, can we
2 know? We could never definitely know. So if it's in
3 - - - it would be in the court's discretion. I mean,
4 if there is the possibility that we can't - - - that
5 he would never come back, then there is a possibility
6 that he can come back. I'm just saying, it's always
7 goes back to the - - -

8 JUDGE ABDUS-SALAAM: But couldn't we assume
9 that he would never be able to get back - - - I mean,
10 could - - - for the purpose of the appeal, couldn't
11 it be assumed that he would not come back?

12 MS. SLEVIN: That he would not come back
13 for the purpose of the appeal - - -

14 JUDGE ABDUS-SALAAM: Yes.

15 MS. SLEVIN: Yes. And then we cannot - - -
16 the appeal should be dismissed because the - - -
17 because if he is not here for us to retry him, then -
18 - - you know, you never - - - the People never - - -
19 always have the interest in the ability to retry him.

20 JUDGE PIGOTT: Yeah, but the - - -

21 JUDGE RIVERA: But - - - but wasn't this -
22 - -

23 JUDGE PIGOTT: If it gets - - -

24 JUDGE RIVERA: I'm sorry. I'm sorry.

25 JUDGE PIGOTT: It's okay. If it gets

1 reversed, it's because the People erred, or the court
2 erred. And why don't - - - why don't we at least
3 make that statement, whether the person comes back or
4 not?

5 MS. SLEVIN: Excuse me.

6 JUDGE PIGOTT: In other words, if you - - -
7 you were right. I said - - - I said O'Rama, and you
8 - - - it was Boykin rights. He was not advised of
9 his Boykin rights. That's the court's mistake.
10 Right. Why should we let that stand simply because
11 the person is outside the country? At the minimum,
12 we can correct it, and if he comes or goes, at least
13 we've corrected the error.

14 MS. SLEVIN: But if you - - - if you have
15 corrected the error, then it doesn't - - - it comes
16 back down for a trial.

17 JUDGE PIGOTT: Yeah.

18 MS. SLEVIN: And - - -

19 JUDGE PIGOTT: If he's not there, he's not
20 there. My point is, you're saying, we made a mistake
21 but he is out of the country; our mistake stands.
22 And my suggestion is, why don't we fix the mistake
23 and if he comes back, fine; if he doesn't, fine.

24 MS. SLEVIN: For the simple reason as that
25 there is a countervailing interest here.

1 JUDGE PIGOTT: Right. That's - - - I know
2 that's your argument.

3 MS. SLEVIN: Yeah.

4 JUDGE PIGOTT: I mean, I don't necessarily
5 disagree. If you convict him again, it's going to be
6 hard to find him.

7 MS. SLEVIN: Well, the thing is - - -

8 JUDGE RIVERA: But aren't you stuck with
9 that anyway? Because the Appellate Term said,
10 dismiss the appeal without prejudice to reinstate.
11 So if he does come back, he can reinstate the appeal.

12 MS. SLEVIN: And if he comes back - - -

13 JUDGE RIVERA: I'm saying, that concern
14 that you're talking about is not addressed by what
15 you've got from the Appellate Term.

16 MS. SLEVIN: I don't understand the
17 question.

18 JUDGE RIVERA: Well, the Appellate Term is
19 allowing him to reinstate the appeal if he comes back
20 anyways. So that - - - I'm a little hard pressed to
21 understand how you are extinguishing the concern you
22 have, when you have an Appellate Term decision that
23 says he's not here now, but if he does come back, he
24 gets to reinstate his appeal and we will hear it at
25 that time.

1 MS. SLEVIN: I think that's perfectly fair.
2 The whole basis if - - - is the defendant here, or is
3 he not here. Because the - - - if the Appellate Term
4 or the Appellate Division reversing the decision is
5 really two parts to that order. The Appellate Term
6 reverses it, and they either dismiss, or they send it
7 back for further proceedings. We can't have it that
8 the defendant who is not here can have the first part
9 of the order.

10 JUDGE RIVERA: Well, with the Chief Judge's
11 permission, if I can ask a question past - - - past
12 your red light.

13 CHIEF JUDGE DIFIORE: Please.

14 JUDGE RIVERA: Thank you so much.

15 As I understand the amici, they suggest that
16 it's hard now to tell whether or not he has a way to get
17 back that would not be in violation of the immigration
18 laws, number one, for purposes of a prosecution, right?
19 But he's not going to be able to do that if we follow your
20 analysis, because he is not going to have a ground because
21 there is no prosecution, right?

22 So their argument is, you've got to let him
23 proceed with his appeal, if indeed he doesn't need to be
24 present for the appeal. But if indeed there is a re-
25 prosecution that might indeed, under the immigration laws,

1 provide some lawful basis for him to return, and it should
2 not be that state judges are trying to determine for
3 themselves a very difficult and complex federal area of
4 law - - -

5 MS. SLEVIN: But the appellant - - -

6 JUDGE RIVERA: - - - with respect to
7 whether or not he can return.

8 MS. SLEVIN: But the Appellate - - - the
9 Appellate Courts can never know for certain what the
10 immigration courts will do. But if you're - - - if
11 you're asking about the complexity of immigration law
12 and state law, you know, it actually right now is the
13 state of litigation in criminal cases that the
14 defense are going very deep into immigration facts
15 about a person's - - - whether they're a permanent
16 resident, whether they can get some kind of relief,
17 whether - - - when they want guilty pleas, they are
18 asking us - - - they are already going into very
19 specific immigration law.

20 JUDGE RIVERA: Uh-huh.

21 MS. SLEVIN: And the People, on the other
22 hand, then have to learn this very specific
23 immigration law. So that really already is the state
24 of the law. I think that it is unavoidable to look
25 at this intersection of immigration law and criminal

1 law, and then you can't, at one point raise all of
2 these specific immigration issues, and then on the
3 other hand and say, but don't look at those
4 immigration issues if you're trying to decide my
5 appeal.

6 JUDGE RIVERA: I get that, but that's on
7 the - - - on the end where you're deciding whether
8 or not to plea, or how to deal with a plea, and so
9 forth. This is someone where you would have to now
10 explore his whole immigration status, and lots of
11 this you're not going to be able to determine.

12 That is, as you say, discretionary and a
13 complex area, and a state court is not going to be
14 able to determine this in advance, which is different
15 from, I can look at your status and there are some
16 things that I know from the immigration context; your
17 attorney should, based on - - - but the - - - should
18 be well informed as to how to advise you about these
19 issues. Strikes me if those are different situations
20 but, your red light is on.

21 MS. SLEVIN: But - - - what - - - if I may
22 just go to that.

23 CHIEF JUDGE DIFIORE: You may. One minute.

24 MS. SLEVIN: As I said, the court won't
25 necessarily - - - would not be able to make a final

1 determination. But what the defendant has to at
2 least do is make some sort of showing. Because in
3 this case, the People show that it wasn't the
4 underlying base of the conviction; he made absolutely
5 no showing. So in light of a case like this, where
6 the court handled it well, in its discretion, the
7 only rule the People are seeking right now is just to
8 keep the discretion within the intermediate Appellate
9 Courts.

10 CHIEF JUDGE DIFIORE: Thank you.

11 Ms. Donner.

12 MS. DONNER: Thank you. I wish I had
13 requested more time for rebuttal because I've got so
14 much I want to rebut.

15 Okay. First on the Tyrell. This court should
16 not revisit - - - I mean the Tyrell holding, which sounded
17 like the prosecutor might want to. Because one, the
18 People didn't attempt to raise the merits of Tyrell in
19 this court by seeking to file a supplemental brief after
20 Conceicao came out. They didn't make a motion to reargue
21 in the Appellate Term after Conceicao came out, and they
22 did it in some other cases, just not this one.

23 Two, the People could not raise it because,
24 under this court's long established jurisprudence, and
25 specifically People v. Carracedo, 89 N.Y. 2d 1059. In

1 Carracedo, this court does not have the power to review an
2 issue that was decided adversely to respondent.

3 And they held there was a Tyrell - - - the
4 Appellate Term heard there was a Tyrell - - - a Boykin
5 violation below. And all that came up - - - all the - - -
6 the leave was granted on whether or not the appeal could
7 be dismissed. That's what's properly before the court.

8 And - - - and it's - - - I mean, that was the
9 same situation, basically, as in Carracedo, where they
10 held there was a Sixth Amendment violation, the Appellate
11 Division, but the remedy should be a suppression hearing,
12 not a new trial. So the - - - that's what goes up, should
13 it be a remedy or a new trial. The defendant appeals, the
14 People say, no, no Sixth Amendment violation; not entitled
15 to any remedy. And this court held it was unable to
16 review whether or not the Appellate Division was correct
17 that the Sixth Amendment violation had occurred.

18 Okay. So - - - and then - - - in any event, I
19 mean, this is different than a lot of the cases where this
20 court held there was no Tyrell violation, post-Conceicao,
21 because there wasn't a waiver of former allocution.

22 JUDGE PIGOTT: Could you give a thought to
23 - - - Judge Garcia - - -

24 MS. DONNER: Yes.

25 JUDGE PIGOTT: - - - raised a point that

1 it hadn't occurred to me, that if you overstay a
2 visa, that apparently you can't come back.

3 MS. DONNER: Okay. But there is a - - -

4 JUDGE PIGOTT: Are you spinning your wheels
5 here, then?

6 MS. DONNER: Okay. I guess I'm a little
7 bit confused as to - - - I'm sorry - - - what I am
8 being asked.

9 JUDGE PIGOTT: Well, let's assume for a
10 minute that under no circumstances can the defendant
11 return.

12 MS. DONNER: Uh-huh.

13 JUDGE PIGOTT: What's the point? What's
14 the point of - - -

15 MS. DONNER: Well, why - - - but okay. On
16 the other hand, what's the point - - - we don't know
17 that for sure that he could never return, because if
18 he were to come back in, that would then be re-
19 litigated, and he would have all sorts of rights
20 concerning that. So - - - I mean - - - so - - - I
21 mean, people do return all the time, unfortunately.
22 So - - - or however you view it. What I mean - - -
23 it's unfortunate.

24 JUDGE PIGOTT: We're going to build a wall.

25 MS. DONNER: It's un - - - so the point is,

1 is that - - - and it's going to have all this eff - -
2 - all this effect on him. So I guess I'm a little
3 unclear about that.

4 JUDGE PIGOTT: That's all right.

5 MS. DONNER: Okay. Other things that I
6 wanted to get - - -

7 CHIEF JUDGE DIFIORE: This is your final
8 point, counsel.

9 MS. DONNER: Okay. Sorry. I think had - -
10 - might of had two final points.

11 JUDGE PIGOTT: Pick one.

12 MS. DONNER: Okay, let me see.

13 Sorry. Okay. Well, certainly Ventura is not
14 limited to cases where no further proceedings - - - that
15 line - - - the whole - - - the whole rationale of Ventura
16 is - - - and by the way - - - that the rule that we would
17 want would be that if the defendant is involuntarily
18 deported, the intermediate court cannot dismiss it, then
19 the Intermediate Court has - - - can - - - after - - -
20 they can't dismiss it for that. If further proceed - - -
21 they have to order the further proceedings.

22 If further proceedings are required, the trial
23 court then can balance different things, whether the
24 defendant is willing to waive his appearance, whether it
25 could be off calendar, whether you have touch with the

1 defendant. You know, all - - - video conferencing, Skype,
2 all this technology stuff. Okay. So - - - okay. So - -
3 - I'm sorry.

4 But that line was concerning - - - was at the
5 very end of Ventura. That was only in response to the
6 People's saying, oh, further proc - - - you know, further
7 proceedings is going to be so difficult. So the court was
8 like, don't worry - - - here - - - look - - - you know,
9 you don't even have to worry about that. But that was not
10 the basis. The basis was the right to an intermediate
11 Appellate Court's review - - - to one - - - to one review.

12 I'm sorry, I have more points. I - - - if just
13 - - - actually - - - this actually wouldn't even be a
14 burdensome case from the People; you have a police
15 witness. Judge Read, by the way, in her dissent, did talk
16 about - - - she would have liked the People's rule saying
17 that only where there is no further proceedings can we - -
18 - only in those cases do you have to, you know - - - does
19 the defendant have a right to an intermediate Appellate
20 Court review. But - - - but that was a dissenting opinion
21 there. As we said, by the way, in Ventura, it was not the
22 basis. And I am sorry.

23 JUDGE FAHEY: So you're saying that the
24 Appellate Division in essence adopted the dissent's
25 interpretation of how to apply the rule?

1 MS. DONNER: I'm sorry, Your Honor, did it

2 - - -

3 JUDGE FAHEY: Yeah, what - - - are you
4 saying that the Judge Read's dissent - - - that the
5 Appellate Division, in the way that they proceeded,
6 was in essence saying they were adopting what she
7 suggested?

8 MS. DONNER: Possibly. I mean, they said
9 that they didn't want to give - - - the didn't want
10 to give Burwell relief. They said, if further
11 proceedings would be required - - - perhaps they
12 were.

13 JUDGE FAHEY: Yeah, okay.

14 CHIEF JUDGE DIFIORE: Thank you, counsel.

15 JUDGE FAHEY: Thank you.

16 MS. DONNER: Thank you. Thank you.

17 (Court is adjourned)

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

I, Meir Sabbah, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Andre Harrison, No. 60, and People v. Marino Serrano, No. 61 were prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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