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COURT OF APPEALS

STATE OF NEW YORK

PEOPLE,

Appellant,

-against-

No. 105

ROMAN BARET,

Respondent.

20 Eagle Street
Albany, New York 12207
May 1, 2014

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE VICTORIA A. GRAFFEO
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE ROBERT S. SMITH
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA

Appearances:

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Sharona Shapiro
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: Number 105, People v.
2 Baret.

3 Counselor, do you want any rebuttal time?

4 MS. SALZBERG: Two minutes, please, Your
5 Honor.

6 CHIEF JUDGE LIPPMAN: Two minutes, sure.
7 Go ahead.

8 MS. SALZBERG: Good afternoon, Your Honors.
9 My name is Clara Salzberg, on behalf of the People of
10 Bronx County.

11 In this case we have People v. Chaidez, a
12 United States Supreme Court decision, clearly
13 indicating that as a matter of federal precedent - -
14 -

15 CHIEF JUDGE LIPPMAN: Is that binding on
16 us?

17 MS. SALZBERG: With regards to federal
18 retroactivity of Padilla v. Kentucky, Your Honor,
19 yes, it is.

20 CHIEF JUDGE LIPPMAN: Well, we know - - -

21 MS. SALZBERG: However this - - -

22 CHIEF JUDGE LIPPMAN: - - - in regard to
23 federal ret - - - retroactivity.

24 MS. SALZBERG: That's correct. And with
25 regards to state retroactivity - - -

1 CHIEF JUDGE LIPPMAN: What about the
2 decision we have to make today; is it binding on us?

3 MS. SALZBERG: Sorry, Your Honor?

4 CHIEF JUDGE LIPPMAN: Chaidez, is it
5 binding on us?

6 MS. SALZBERG: With respect to state
7 retroactivity - - -

8 CHIEF JUDGE LIPPMAN: Yeah.

9 MS. SALZBERG: - - - it is not binding on
10 this court, Your Honor.

11 CHIEF JUDGE LIPPMAN: Okay. So what's the
12 test we should use in determining state
13 retroactivity?

14 MS. SALZBERG: The test is clearly laid out
15 in People v. Pepper, indicating that retroactive
16 application of a change - - -

17 CHIEF JUDGE LIPPMAN: What about Teague?

18 MS. SALZBERG: Teague is a federal case,
19 Your Honor.

20 CHIEF JUDGE LIPPMAN: It has no impact on
21 us?

22 MS. SALZBERG: Well, certainly it would
23 influence this court. However, the clear language
24 that the U.S. Supreme Court used in Chaidez was that
25 under the - - - under the principles enumerated in

1 Teague, it was not retroactive.

2 JUDGE SMITH: But under - - - under
3 Danforth, aren't we free to - - - to develop our own
4 Teague-like, or whatever it is, standard for applying
5 federal decisions?

6 MS. SALZBERG: That's correct, Your Honor.
7 You're - - - you're - - - the Court - - - the court,
8 under Danforth, could do that. And under this
9 court's jurisprudence, the standard that it would
10 apply would be the People v. Pepper standard.

11 JUDGE SMITH: You say - - - well, you say
12 there's nothing - - - Pepper - - - Pepper is really
13 the state standard, and it doesn't directly speak to
14 the question of what you do when there's a federal
15 decision that compel - - - that affects state
16 prosecutions. I mean, we've never really considered
17 a pure Danforth issue, have we, or have we?

18 MS. SALZBERG: No, Your Honor, you have
19 not. And it would, indeed, be unusual for a court to
20 find that a federal standard that was directly in
21 contradiction with its own standard, as enumerated in
22 Ford and in McDonald, is nonetheless retroactive as a
23 matter of state law.

24 JUDGE GRAFFEO: Why should we adopt the
25 federal precedent here? Is there some problem that

1 would result if we differed from - - -

2 MS. SALZBERG: Differed from the federal -

3 - -

4 JUDGE GRAFFEO: Yeah, if there were two
5 different retroactivity rules, does that cause some
6 kind of practical problem?

7 MS. SALZBERG: If this court found that
8 Padilla was retroactive, as a matter of state law, it
9 would cause enumerable problems on the state level.

10 CHIEF JUDGE LIPPMAN: Tell us what they
11 are.

12 MS. SALZBERG: Well, the reliance over the
13 past decades on - - - on the precedence of this
14 court, in Ford and in McDonald, that there need be no
15 warning of a defendant's immigrat - - - the
16 immigration consequences of a defendant's guilty plea
17 by his defense attorney prior to the guilty plea,
18 would - - - would, of course, be destroyed.

19 CHIEF JUDGE LIPPMAN: So it would open the
20 floodgates, is that what you're saying?

21 MS. SALZBERG: The floodgate would be an
22 additional issue, Your Honor, yes. The reality is
23 that this case would affect - - - if it were found to
24 be retroactively applied, would affect tens of
25 thousands of cases in this state alone, certainly

1 possibly alone in the City of New York. And it is
2 for those two rea - - -

3 JUDGE RIVERA: But apparently, for over a
4 decade, there's been incredible education of the
5 defense bar on this issue. Is it really that
6 dramatic a - - - really that severe a problem, if
7 there's really been that kind of training and
8 preparation of the defense bar?

9 MS. SALZBERG: The reality is that this is
10 an emerging issue, Your Honor, and that the defense
11 bar, along with the rest of us, have become more
12 educated over the past decades. Notably, in the case
13 that is before Your Honors here, this is a 1996
14 guilty plea.

15 JUDGE READ: It's a 440, right?

16 MS. SALZBERG: This is a 440, Your Honor,
17 stemming from a 1996 guilty plea. And the reality is
18 that I bel - - - I certainly believe the original
19 plea attorney in this case, when he told my adversary
20 that he simply doesn't remember whether he talked to
21 the defendant about immigration consequences or not.

22 JUDGE SMITH: So you're suggesting that
23 even if the bar is just as sophisticated as Judge
24 Rivera suggested, even if they've been doing a great
25 job for twenty years, how do you prove it?

1 MS. SALZBERG: Proof is one issue, Your
2 Honor. However, I would note that the amicus brief -
3 - - brief, that was filed on behalf of several
4 defender organizations in this case only specifies
5 very few training type programs that had happened
6 prior to this guilty plea in 1996, which illustrates
7 the problem. This immigration element of guilty
8 pleas is something that is emerging. As we all know
9 from the news, it has come out to the forefront in
10 the past few years - - -

11 JUDGE RIVERA: But - - -

12 MS. SALZBERG: - - - now more than ever.

13 JUDGE RIVERA: But certainly I think the
14 implication of that information and that scheduling
15 of these trainings and CLEs, and so forth, put the
16 defense bar on notice.

17 Now perhaps you have a very good point that
18 they may not have been skilled on what to do once
19 they were on notice, but they were on notice, and
20 they certainly could have sought other assistance.
21 I'm not - - - again, I'm just trying to get to this
22 issue of really how expansive is this problem. What
23 - - - how wide are the floodgates being opened?

24 MS. SALZBERG: Well, the reality is that
25 Ford was decided in 1995, so this court, a year

1 before this guilty plea - - -

2 JUDGE RIVERA: Um-hum.

3 MS. SALZBERG: - - - had told the defense
4 bar, and everybody else, that failure to advise a
5 defendant of the immigration consequences of a guilty
6 plea was not ineffective assistance of counsel. And
7 so, of course, you did have large organizations, such
8 as the Legal Aid Society - - -

9 JUDGE RIVERA: Um-hum.

10 MS. SALZBERG: - - - just beginning to talk
11 about these immigration issues. But it certainly - -
12 -

13 JUDGE RIVERA: So even given that training,
14 in this case, you're saying that a year would
15 certainly not be enough to say that, at least in the
16 State of New York, the understanding and what the
17 defense bar did, did not reach the level it may have
18 today.

19 MS. SALZBERG: No, Your Honor. I - - -
20 clearly, it's admirable that the defense bar was
21 beginning, at the point of this guilty plea, to
22 respond to this growing issue. However, the reality
23 is that it simply wasn't something that many defense
24 attorneys were making part of their practice to warn
25 about. And that was something that this court told

1 them that they didn't have to do, in Ford, and then
2 later on in McDonald. And so when Padilla came down,
3 it was a huge shift in how - - -

4 CHIEF JUDGE LIPPMAN: So - - -

5 MS. SALZBERG: - - - these guilty pleas
6 were - - -

7 CHIEF JUDGE LIPPMAN: So based on these
8 practical issues, you feel we should decide the case?

9 MS. SALZBERG: Well, Your Honor, under - -
10 -

11 CHIEF JUDGE LIPPMAN: In this - - -

12 MS. SALZBERG: - - - under the Pepper
13 factors - - - these are two of the three Pepper
14 factors, the reliance on the old standards as well as
15 the finality issue. I would also direct your
16 attention to the - - - to the first, which is - - -

17 CHIEF JUDGE LIPPMAN: Yes, isn't the first
18 the most important factor?

19 MS. SALZBERG: Arguably, Your Honor. And
20 in this - - - and in these cases, there is no dispute
21 here about the guilt or innocence of the people who
22 entered these guilty pleas, by and large. The
23 reality is that this defendant, and many Padilla
24 defendants, do not dispute their guilt.

25 So this is not something that goes to the

1 manifest justice of the proceeding. This is not
2 something that goes to the actual underlying elements
3 of the criminal justice system. This is talking
4 about an issue that has no bearing on those larger
5 questions, which is why we do urge this court, in
6 light of the overwhelming weight of those second two
7 factors on the effects of the administration of
8 justice - - -

9 CHIEF JUDGE LIPPMAN: So you acknowledge
10 the first is the most important factor, but you're
11 saying the first cuts the other way also, in your
12 view?

13 MS. SALZBERG: Well, the language - - -

14 CHIEF JUDGE LIPPMAN: Cuts your way.

15 MS. SALZBERG: - - - the language in Pepper
16 makes it very clear that there would be cases where
17 the simple purpose to be served by the new standard,
18 in the scheme of guilt or innocence, would overcome
19 the other barriers.

20 CHIEF JUDGE LIPPMAN: Is so important.

21 MS. SALZBERG: Absolutely. I would - - - I
22 would - - - I would say that's true. This is simply
23 not one of those cases, and so that's why - - -

24 CHIEF JUDGE LIPPMAN: And then combined
25 with the other factors, is your argument?

1 MS. SALZBERG: Yes - - -

2 CHIEF JUDGE LIPPMAN: Okay.

3 MS. SALZBERG: - - - combined - - - the
4 weakness of that first factor, combined with the
5 overwhelming effect that those other two factors
6 would have, means that this court should not apply
7 Padilla retroactively as a matter of state law.

8 CHIEF JUDGE LIPPMAN: Okay.

9 MS. SALZBERG: Thank you.

10 CHIEF JUDGE LIPPMAN: Thank you, counsel.

11 MR. RICHMAN: Good afternoon. My name is
12 Labe Richman, and I represent Roman Baret.

13 Obviously, this case affects many more people than
14 Roman Baret. It affects everybody from - - -

15 CHIEF JUDGE LIPPMAN: Counselor, if we
16 evaluate it on the basis of Pepper, tell us what your
17 view is.

18 MR. RICHMAN: If - - - if Pepper is used, I
19 would bring this court back to what Judge Lippman
20 said in Peque, "Notice of immigration consequences
21 is", as the court said, "a matter of fundamental
22 fairness that ought to animate our jurisprudence in
23 passing upon pleas, the means by which guilt is
24 established in the vast majority of cases".

25 And in the Supreme Court, in Missouri v.

1 Frye, they said "plea bargaining is not an adjunct to
2 the criminal justice system" - - -

3 JUDGE GRAFFEO: But when did - - -

4 MR. RICHMAN: - - - "it is the criminal" -
5 - -

6 JUDGE GRAFFEO: When did - - -

7 MR. RICHMAN: - - - "justice system".

8 JUDGE GRAFFEO: When did attorneys
9 understand that it was mandatory for them to
10 undertake this practice?

11 MR. RICHMAN: Well, the key really - - -

12 JUDGE GRAFFEO: Isn't that key to whether
13 it's a new rule or it's not a new rule?

14 MR. RICHMAN: Well, let's put it this way.
15 In Ford, in 1995, this court did not know about the
16 1996 amendments in AEDPA and IIRIRA, which took away
17 all discretion from the attorney general under
18 212(c).

19 JUDGE GRAFFEO: That's right. I mean, in
20 Ford - - -

21 MR. RICHMAN: And People - - -

22 JUDGE GRAFFEO: - - - in Ford, we said it's
23 not ineffective assistance.

24 MR. RICHMAN: Correct, but - - - but as you
25 saw from all of the attorney norms in Padilla that

1 were listed that go back - - - and in fact, even in
2 Chaidez they said it went back to 1968. The point is
3 that the turning point is April of '96. And that's
4 when - - - you know, in fact, in McDonald, when this
5 court, in dicta, said we're still going to stick with
6 Ford, this court did not deal with the 1996
7 amendments.

8 JUDGE READ: So who are New York attorneys
9 - - - defense attorneys supposed to believe? They're
10 supposed to believe what we say, aren't they?

11 MR. RICHMAN: They're supposed to believe
12 what's in their heart. They're supposed to believe
13 that the most impor - - - what Padilla said was that
14 the most important penalty, in many cases, is the
15 immigration consequences. And - - -

16 JUDGE SMITH: But - - -

17 MS. SALZBERG: - - - and - - - oh, I'm
18 sorry.

19 JUDGE SMITH: Go ahead.

20 MS. SALZBERG: You know, it would be
21 disgraceful for defense organizations to accept Ford
22 as their duty. Their - - - okay, so the court said
23 we're not going to touch these pleas, but the point
24 is, it's the most important thing.

25 JUDGE GRAFFEO: Okay. But they didn't know

1 - - -

2 MR. RICHMAN: This court, in - - -

3 JUDGE GRAFFEO: Did they know to document
4 it or to make a record of it so they'd be able to - -
5 -

6 MR. RICHMAN: Sure, people - - - legal aid

7 - - -

8 JUDGE GRAFFEO: - - - recall this later on?

9 MR. RICHMAN: - - - started to put - - -

10 JUDGE GRAFFEO: Really?

11 MR. RICHMAN: - - - different kinds of
12 forms together. There were all these CLEs. Of
13 course it took time.

14 JUDGE GRAFFEO: Why did it take until 2010
15 for Padilla to come out?

16 MR. RICHMAN: Well, in 2002, in Couto, the
17 court said - - - and this court cited Couto in
18 McDonald - - - the court said in Couto that, you know
19 something, the time is coming. We - - - the time has
20 now come, because of AEDPA and IIRIRA. We're going
21 to decide this case on inaccurate, but you know
22 something, the time is coming. You can see that in
23 Couto, and that's 2002. But - - -

24 JUDGE SMITH: But isn't - - - I guess - - -

25 MR. RICHMAN: But Manny Vargas - - - I'm

1 sorry, Judge.

2 JUDGE SMITH: Well, I guess I wanted - - -
3 I thought implicit in Judge Graffeo's question was,
4 even if a lot of lawyers were doing what they sh - -
5 - what you say they should be doing for a long time,
6 and all of them should be, isn't there going to be a
7 danger of a lot of false claims? Aren't there going
8 to be people who - - - people who say, oh, fifteen
9 years ago my lawyer didn't say a word about
10 immigration. They go to the - - - they go to the
11 lawyer; he's says I don't have the slightest
12 recollection of the case. How do you - - - how do
13 you stop this guy from getting a free pass, even
14 though he might have known perfectly well that he was
15 going to - - - subject to deportation?

16 MR. RICHMAN: Your Honor, most of the
17 people, the serious cases that went upstate in 1996 -
18 - - this is a weird case, because I wouldn't have
19 done this Padilla, but he moved to take back his
20 plea, at the time of the plea, on other grounds, and
21 it went up the system. And this court's already seen
22 this case, so this is a weird case.

23 Everybody else from '96 is long deported,
24 and they can't get in. If they did a long sentence,
25 they - - - they are gone. I mean, I can go through

1 my list of how this - - -

2 JUDGE SMITH: Actually, theor - - -

3 MR. RICHMAN: - - - is limited - - -

4 JUDGE SMITH: - - - theoretically, I mean,
5 maybe you say practically it's not going to happen,
6 but a guy could be sitting in Nicaragua and somebody
7 could say to him, hey, there's a case out of the New
8 York Court of Appeals to let you get your plea back
9 and go back to New York.

10 MR. RICHMAN: Well, that's not before the
11 court now, but I would note that they don't need a
12 conviction to keep you out of the country if they
13 believe you're a trafficker. If you pled guilty to
14 attempted sale, they can use the police report - - -

15 CHIEF JUDGE LIPPMAN: Counselor, go through
16 your list as to why it's - - -

17 MR. RICHMAN: Okay. I want to go through -
18 - -

19 CHIEF JUDGE LIPPMAN: - - - why it's
20 limited.

21 MR. RICHMAN: - - - the list - - -

22 CHIEF JUDGE LIPPMAN: Tell us why it's
23 limited.

24 MR. RICHMAN: - - - as to why it's not so
25 bad. First of all, it - - - it's - - - okay, so

1 Padilla happens in 2010. So the more serious cases
2 of people who are now going to come to you are going
3 to be cases where they've been - - - they've been in
4 jail for four or five years. They took a plea to a
5 lot of jail time to avoid even more jail time.

6 JUDGE PIGOTT: I don't understand that,
7 because it would seem to me if somebody got arrested
8 today and said, you know, I'm going to be a second
9 felony offender or I'm going to be a persistent
10 felon, you know, but one of the reasons is, is
11 because I took a plea back in - - - in 1997, but they
12 never advised me of my - - - of my rights, so move to
13 vacate that. And if that falls, then this is no
14 longer a second felony and we're in much better shape
15 to take a plea. Wouldn't that be a logical thing to
16 do?

17 MR. RICHMAN: Well, it would be a logical
18 thing to do - - -

19 JUDGE PIGOTT: So it's not just - - -

20 MR. RICHMAN: - - - but by the same token -
21 - -

22 JUDGE PIGOTT: - - - it's not just that,
23 you know, people in the last four or five years - - -

24 MR. RICHMAN: You're right. You're right.
25 But - - - but by the same token, they would have to -

1 - - maybe they would get a hearing, but they would
2 have to show that - - - that the - - - that the
3 immigration consequences made a difference.

4 JUDGE PIGOTT: Well, what you're now saying
5 - - -

6 MR. RICHMAN: So if they were - - - if - -
7 -

8 JUDGE PIGOTT: What you're now saying is
9 that it would be ineffective assistance of - - - of
10 counsel to now discourage that person from bringing a
11 440 to vacate his plea back then, because he's
12 getting bad advice, when obviously he's got to take
13 the shot because otherwise he's a second felony.

14 MR. RICHMAN: He should take a shot. He
15 should - - -

16 JUDGE PIGOTT: Right.

17 MR. RICHMAN: - - - try to get his plea - -
18 -

19 JUDGE PIGOTT: So - - -

20 MR. RICHMAN: - - - back on the - - -

21 JUDGE PIGOTT: So your suggestion that, you
22 know, gee, it's hard, and everything else, so maybe
23 you shouldn't do it, would be wrong; you've got to do
24 it.

25 MR. RICHMAN: Well, I'm just saying - - -

1 I'm just talking about people who are upstate now who
2 now want to come back and do it. And I'm trying to
3 explain that they're upstate now and - - - and I
4 thought the court would be worried that they would be
5 filing 440s to get their plea back - - -

6 JUDGE SMITH: Well, in - - -

7 MR. RICHMAN: - - - six or seven years
8 after the case - - -

9 JUDGE SMITH: But on Judge Pigott's second
10 felony offender, is your - - - your answer to me was
11 - - - I mean, is your answer most of those guys have
12 been deported already?

13 MR. RICHMAN: Well, if they did an upstate
14 sentence. He's - - - what Judge Pigott's talking
15 about is it could be somebody who got five years'
16 probation, and they pled to the wrong count, and had
17 their lawyer been competent and pled to Count II - -
18 -

19 JUDGE SMITH: But if - - -

20 MR. RICHMAN: - - - rather than

21 JUDGE SMITH: Okay. But if - - -

22 MR. RICHMAN: - - - Count III - - -

23 JUDGE SMITH: Okay. But if he - - -

24 MR. RICHMAN: He makes a valid point, and
25 I'm just trying to show - - -

1 JUDGE SMITH: I'm - - - I'm a little
2 confused. He pled to the wrong count; he pled to a
3 count that made him removable; how come he didn't get
4 removed?

5 MR. RICHMAN: Well, he just got a - - -
6 he's - - - maybe he filed a notice of appeal; maybe
7 he slipped through the cracks. But - - - but the
8 point is now he has a new case, under Judge Pigott's
9 analysis, and I'm trying to say he's going to have to
10 show that it would have made a difference back then.

11 And - - - and the way that these things are
12 limited is by the type of immigration consequence.
13 In other words, it's not all deport - - - first of
14 all, a lot of attorneys give the advice, okay? A lot
15 of judges have given the advice. But sometimes the
16 person's deportable with no remedy; it's an
17 aggravated felony or they just have - - - there's
18 nothing they can do. There's some people who plead
19 guilty, don't know the immigration consequences, but
20 it ends up it's not so bad.

21 So when they go to do their 440, they're
22 going to lose because they're going to have to say,
23 okay, what was the correct advice that you would have
24 given? Well, it would have been yes, you're
25 deportable, but you can get citizenship and you can

1 get cancellation of removal. And that person's going
2 to have a hard time, at a hearing, to show, oh, I
3 would have turned down an advantageous plea because
4 of the immigration consequences.

5 JUDGE SMITH: The hearing you're
6 describing, though, is - - - is going to - - - it
7 sounds to me like it raises very hard to handle
8 factual - - - counterfactual issues. You have to - -
9 - you have to put yourself back in 1998, or whenever
10 it was, and the judge has to figure out what would
11 have happened if this conversation with this lawyer,
12 who no longer remembers the case, had - - - had told
13 the guy so and so. Isn't that - - - isn't that going
14 to put a little strain on the system?

15 MR. RICHMAN: Well, some of the cases are -
16 - - you're right. I mean, to some degree, but it's
17 worth it because - - - you know, yeah, some of the
18 cases are going to do hearings. Some of them are
19 going to be disposed of without a hearing because
20 it's going to be clearer that the person would have
21 taken the plea anyway. You know, if you're doing - -
22 - if you took ten years, when you're facing fifty,
23 how is immigra - - - how are you going to show that
24 immigration would have made a difference in what - -
25 - in what you did? It's - - - but you're right. But

1 it's worth it, Judge, because as - - - as this court
2 said in Peque, it's the most important part, in many
3 cases, of the remedy - - - of the penalty that they
4 face. It's - - - as Judge Lipmann said, it's - - -

5 JUDGE GRAFFEO: So why is not worth it in
6 the federal system, but it's worth it in the state
7 system?

8 MR. RICHMAN: Well, first of all, the
9 federal system's totally different. They - - - they
10 have much - - - cases that are much, much more
11 serious; they have much more evidence. They have
12 almost no misdemeanors; they're all serious felonies.
13 This court has - - - most of the cases that - - -
14 that are really good Padillas are - - - are people
15 who pled guilty to 220.03, the - - - the misdemeanor
16 cocaine. That's a lifetime bar to a green card. You
17 get a conditional discharge in 2002, and - - - and
18 your lawyer says this is a conditional discharge;
19 it'll be no big deal; pay a fifty dollar fine.
20 That's a lifetime bar to a green card. He's been
21 here for fifteen years. Doesn't he have a right to a
22 do-over on that?

23 JUDGE SMITH: Your adversary makes a point.
24 You're not saying that there are - - - there are very
25 few of these guys who didn't in fact commit removable

1 offenses.

2 MR. RICHMAN: What? I'm sorry, Your Honor?

3 JUDGE SMITH: These - - - almost all of
4 these guys did in fact commit removable offenses,
5 didn't they? There are not too many who - - -

6 MR. RICHMAN: Well - - -

7 JUDGE SMITH: - - - who never sold the
8 cocaine they're pleading to.

9 MR. RICHMAN: I mean, it's hard - - - well,
10 sold is different. It's hard to know that. The
11 point is they have a right, under this court's
12 doctrine, to make a knowing and intelligent decision,
13 based on proper advice, know their options - - -

14 JUDGE SMITH: I guess what she - - - maybe
15 what your real disagreement with her is about what
16 the first Pepper factor means, which is, well, yeah,
17 justice/injustice. You're saying it's unjust if the
18 guy didn't make an enlightened plea. She's saying
19 her idea of injustice is - - - is punishing an
20 innocent man.

21 MR. RICHMAN: Yeah, well - - -

22 JUDGE SMITH: Is that really the
23 difference?

24 MR. RICHMAN: Well, in Favor, this court
25 said that that presence at a Sandoval hearing would

1 help the defendant decide whether he would take the
2 stand or not. This helps the defendant decide
3 whether he should go to trial or not. I mean, there
4 are a lot of innocent people who are waiting for
5 three years in the Bronx, as reported in The New York
6 Times, who had a fight with their neighbor, who are
7 innocent, who might just give up and not know, wait a
8 second, this happened within five years of entry.
9 You're now on - - -

10 JUDGE PIGOTT: It's possible - - - to go
11 back to your 220, though, in 2002, let's assume he
12 can vacate that plea, how's the trial going to shape
13 up twelve years later?

14 MR. RICHMAN: He's done his sentence, Your
15 Honor. It's worth it; I'm telling you. It's - - -

16 JUDGE PIGOTT: So how's the trial going to
17 shape up? I mean - - -

18 MR. RICHMAN: It's going to be hard. Maybe
19 he can plead to disorderly conduct - - -

20 JUDGE PIGOTT: It's going to get dismissed.

21 MR. RICHMAN: - - - or something.

22 JUDGE PIGOTT: It's going to get dismissed.

23 MR. RICHMAN: It very possibly will, but
24 that person - - - we have to balance.

25 JUDGE PIGOTT: That person - - -

1 MR. RICHMAN: That's what Pepper is about -
2 - -

3 JUDGE PIGOTT: That person - - -

4 MR. RICHMAN: - - - is balancing.

5 JUDGE PIGOTT: That person who committed
6 the crime, who - - - who took a plea to it, and then,
7 as you say, sometimes they abscond and do whatever
8 they're going to do. Now, ten years later, twelve
9 years later, we're going to say, well, you, Mr.
10 District Attorney, you've got to retry that one. And
11 what we're really saying is we're going to dismiss
12 this, because we know they're never going to be able
13 to retry that.

14 MR. RICHMAN: I think you're probably
15 right, but - - - but in balancing the factor, how
16 that person has been here for thirty years and has
17 lost everything and now can't get a green card for
18 the rest of their lives, and they weren't told what
19 this court has said is the most - - - and the Supreme
20 Court - - - the most important penalty that you can
21 have. That person you're talking about, Judge, has
22 finished their sentence. The penal - - - if they did
23 the treatment readiness program, or they did time in
24 jail, or they paid a fine, or whatever they did, they
25 finished that sentence and - - -

1 MR. RICHMAN: But that's not the point,
2 because you want to vacate the sentence; you want to
3 vacate the plea. You want it to be as if he never
4 possessed cocaine so that he can go get a green card.

5 MR. RICHMAN: That - - - that's true, but
6 it's after he's gone through the system and been
7 punished. That's what I'm trying to say.

8 JUDGE PIGOTT: Okay.

9 CHIEF JUDGE LIPPMAN: Okay.

10 MR. RICHMAN: And so therefore the
11 balancing weighs in favor of these very unbelievably
12 important rights that this court basically said that
13 it's a voluntary, intelligent choice among - - - you
14 know, it's just - - - read Peque, and the language is
15 so - - - is so amazing.

16 JUDGE PIGOTT: It's very strong, and it - -
17 - but it's recent. And you know, back, you know,
18 before 9/11, I mean, who knew what - - - what was
19 going to happen to our immigration system, you know,
20 over the last ten years - - -

21 MR. RICHMAN: But if you look - - -

22 JUDGE PIGOTT: - - - to say that the
23 counsel's ineff - - - to say that counsel's
24 ineffective, right?

25 MR. RICHMAN: But if you look at the amicus

1 brief, it would have been a disgrace to - - - to
2 leave it at that. I mean, we - - - the - - - the New
3 York bar was working on this as of 1996; that's when
4 Manny Vargas and IDP started the effort - - -

5 JUDGE RIVERA: But she argues the plea - -
6 -

7 MR. RICHMAN: - - - to educate people, and
8 they should know, whether they did it or not.

9 JUDGE RIVERA: You're - - - the People
10 argue that - - - this particular plea is in 1996, so
11 how does - - - how does that information help?

12 MR. RICHMAN: Well, the decision on
13 retroactivity - - - I mean, this court can decide - -
14 - if it wants to decide the case on - - - on attorney
15 standards, it can do that. But we're talking about
16 retroactivity until '96 until the present. So we're
17 really talking about a large period of time.

18 As to this particular defendant, his
19 attorney should have known about AEDPA and IIRIRA.
20 He had about six or seven months to know. There was
21 an alternative plea that he could have maybe tried to
22 discuss as to the last count. He should have known
23 about it.

24 Yes, it was early on, but we have to draw
25 the line somewhere, and it's perfect to draw the line

1 where the Appellate Division drew the line, and that
2 is at AEDPA and IIRIRA.

3 CHIEF JUDGE LIPPMAN: Okay, counselor.
4 Thanks, counselor.

5 Counselor, rebuttal?

6 MS. SALZBERG: Thank you, Your Honor.

7 CHIEF JUDGE LIPPMAN: What about
8 fundamental issues of justice, counsel, the - - - the
9 point that Judge Smith was making about the way you
10 two - - - the two of you frame the issue differently
11 - - -

12 MS. SALZBERG: I understand - - -

13 CHIEF JUDGE LIPPMAN: - - - of what goes to
14 the heart of our justice system?

15 MS. SALZBERG: Right. I understand Judge
16 Smith's point there, and I think that if we look at
17 this court's case law - - -

18 CHIEF JUDGE LIPPMAN: Why isn't his version
19 right as to what's justice, what's fundamental?

20 MS. SALZBERG: Well, Your Honor, I read
21 that more as guilt or innocence, as Your Honor knows.
22 And I think that that's the only logical way to read
23 it, if you look at the other two factors, which are
24 the administration of justice and the - - - and the
25 extent of the reliance on the other law, because

1 those are also questions of justice. They're
2 questions of justice in a larger sense, but I don't
3 want them to get lost in what my adversary is talking
4 about. The reality is that there is - - -

5 CHIEF JUDGE LIPPMAN: He's talking about
6 justice, at least in - - -

7 MS. SALZBERG: Right, right, and - - -

8 CHIEF JUDGE LIPPMAN: - - - in his - - -

9 MS. SALZBERG: - - - and it's - - -

10 CHIEF JUDGE LIPPMAN: - - - in his view
11 that's - - - yeah.

12 MS. SALZBERG: It's a large concept; we
13 could talk about it for years. But the reality is
14 that we have to balance what he's talking about with
15 the fact that there is no deadline in the State of
16 New York on CPL 440 motions.

17 CHIEF JUDGE LIPPMAN: So you're saying even
18 if he's right, two and three - - -

19 MS. SALZBERG: Two and three outweigh it.

20 CHIEF JUDGE LIPPMAN: - - - outweigh one?

21 MS. SALZBERG: Yes.

22 CHIEF JUDGE LIPPMAN: Even though one - - -

23 MS. SALZBERG: Even if - - -

24 CHIEF JUDGE LIPPMAN: - - - one is such a
25 critical factor by any standard?

1 MS. SALZBERG: It is critical.

2 CHIEF JUDGE LIPPMAN: Even in the different
3 ways - - -

4 MS. SALZBERG: Two and three are - - -

5 CHIEF JUDGE LIPPMAN: - - - you define it?

6 MS. SALZBERG: Right. Two and three are
7 critical too. I - - - I agree that it's a nebulous
8 concept, the concept of justice. However, the
9 reality is that if this court decides to apply
10 Padilla retroactively, in contradiction to what this
11 court had decided in Ford and later on in McDonald,
12 we're looking at tens of thousands of people who are
13 going to be challenging these pleas, many of which
14 will have to be recalling witnesses from decades-old
15 cases, police officers who may have retired. And we
16 need to take that in the one hand and balance it
17 against the fact that these people, many of them,
18 most of them, certainly this particular defendant,
19 don't dispute their guilt.

20 JUDGE RIVERA: Where does the number tens
21 of thousands come from?

22 MS. SALZBERG: That - - - that is a
23 ballpark figure, Your Honor.

24 JUDGE RIVERA: Based on?

25 MS. SALZBERG: Based on the experience that

1 my office has had handling Padilla motions.

2 JUDGE RIVERA: Handling the motions. Which
3 motions - - - I'm sorry - - - the 440s?

4 MS. SALZBERG: 440 motions, yes, Your
5 Honor; I'm sorry.

6 JUDGE RIVERA: Where people admit that they
7 are undocumented or suffered these particular adverse
8 immigration consequences because their attorney did
9 not inform them of those consequences? Is that what
10 you're talking about?

11 MS. SALZBERG: We - - - no, we don't admit
12 that as a blanket - - -

13 JUDGE RIVERA: Okay. So what - - -

14 MS. SALZBERG: - - - Your Honor.

15 JUDGE RIVERA: That's what I'm say - - -
16 I'm just trying to understand the num - - - I'm
17 trying to understand your argument.

18 MS. SALZBERG: I understand what you're
19 saying.

20 JUDGE RIVERA: Yeah, um-hum.

21 MS. SALZBERG: That - - - that's a ballpark
22 number that I think is reasonable, based on the
23 number of people in this state that this - - - this
24 case is likely to affect.

25 JUDGE SMITH: Well, this - - - as I - - -

1 and also I - - - so this doesn't affect - - -
2 immigrants who've never had documents it doesn't
3 affect at all. This affects only green card people,
4 right?

5 MS. SALZBERG: You're talking about
6 undocumented - - - I - - -

7 JUDGE SMITH: Yeah, if you're undocumented,
8 you're removable anyway; it doesn't matter what you
9 plead to, correct?

10 MS. SALZBERG: I understand what you're
11 saying. I believe that that is the case, Your Honor.
12 This particular defendant is - - - is - - - was - - -

13 CHIEF JUDGE LIPPMAN: You still hold by the
14 number you're talking about, based on that
15 distinction?

16 MS. SALZBERG: Yes, Your Honor. I - - - I
17 believe that tens of thousands is a ballpark accurate
18 estimate. However, it's true that I'm - - - I'm
19 essentially pulling that number out of, sort of, my
20 own - - -

21 JUDGE PIGOTT: But an undocument - - - it
22 would not - - - it would not prevent an undocumented
23 person from bringing a 440 saying because of this I
24 can never even apply. So I - - - I don't think
25 anybody would be shy about bringing a 440 based upon

1 the retroactivity of - - - of Padilla - - -

2 MS. SALZBERG: I mean, we are - - -

3 JUDGE PIGOTT: - - - documented or not.

4 MS. SALZBERG: - - - going far abreast of
5 this case, but I would - - - I would say that Padilla
6 specifically deals with a lawful permanent resident,
7 and this is also a lawful permanent resident. The
8 question of whether Padilla would also apply to
9 people who are not necessarily being deported but who
10 are not given other rights, for example, the right to
11 pursue citizenship because of a criminal conviction,
12 I think that that's overextending what Padilla says
13 on its language.

14 CHIEF JUDGE LIPPMAN: Okay, counselor.
15 Thanks. Thank you both.

16 MS. SALZBERG: Thank you.

17 CHIEF JUDGE LIPPMAN: Appreciate it.

18 (Court is adjourned)

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

I, Sharona Shapiro, certify that the foregoing transcript of proceedings in the court of Appeals of People v. Roman Baret, No. 105, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Sharona Shapiro

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