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COURT OF APPEALS

STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

No. 110

KAREEM WASHINGTON,

Appellant.

PEOPLE,

Respondent,

-against-

No. 111

CLEVELAND LOVETT,

Appellant.

20 Eagle Street
Albany, New York 12207
June 3rd, 2015

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE SUSAN PHILLIPS READ
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

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Sara Winkeljohn
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: Let's go to 110 and
2 111.

3 Counselor, you're on. Would you like any
4 rebuttal time?

5 MS. LIZARRAGA: Yes, if I could have three
6 minutes.

7 CHIEF JUDGE LIPPMAN: Three minutes. Go
8 ahead. This is Washington, right?

9 MS. LIZARRAGA: Yes, sir.

10 CHIEF JUDGE LIPPMAN: Go ahead.

11 MS. LIZARRAGA: Your Honor, I'm Kami
12 Lizarraga from Weil Gotshal, and I represent Kareem
13 Washington, the appellant, in association with the
14 Office of the Appellate Defender. In this case - - -

15 CHIEF JUDGE LIPPMAN: What - - - what was -
16 - - what was done wrong in your case in - - - in
17 terms of the - - - this whole idea of what the
18 defense counsel did vis-a-vis the defendant. What -
19 - - what undercut the defendant in the - - - in the
20 counsel explaining what happened? He's not saying
21 deny the - - - the motion, saying this is what
22 happened. What's wrong with that and how does that
23 play into our case law in this - - - this area?

24 MS. LIZARRAGA: Your Honor, counsel in this
25 case said several things that were adverse to his

1 client's factual allegations of ineffective
2 assistance.

3 CHIEF JUDGE LIPPMAN: Well, is he allowed
4 to explain what happened from his point of view at
5 all?

6 JUDGE READ: I mean, he was responding to
7 the judge's questions, too, wasn't he?

8 MS. LIZARRAGA: Your Honor, yes. The court
9 in this case did ask counsel if he wanted to address
10 the remarks, but Mr. Washington set forth on the
11 record in this case that in two-and-a-half years of
12 representation leading up to a felony trial with
13 potentially a life sentence, a twenty-year-to-life
14 sentence mandatory minimum, his lawyer did not meet
15 with him, only spoke to him once, did not consult
16 with him about strategy, and did not reply to his
17 responses to discuss strategy.

18 CHIEF JUDGE LIPPMAN: Right. But the judge
19 - - - but the judge listened to all of that.

20 MS. LIZARRAGA: Yes.

21 CHIEF JUDGE LIPPMAN: Listened to the
22 counsel say, at least from his perspective, what had
23 happened, looked at his own observations, and then
24 made a decision. What's wrong with that?

25 MS. LIZARRAGA: What's wrong with that,

1 Your Honor, is that counsel stated adverse positions,
2 including saying there are incorrect things in this
3 motion, I am sure I did discuss strategy with Mr.
4 Washington, I did give him discovery, and - - -

5 CHIEF JUDGE LIPPMAN: What should - - -
6 what should the counsel do, just say nothing?

7 MS. LIZARRAGA: What counsel should do is -
8 - - under Mitchell, counsel can often explain his
9 performance unless it amounts to an adverse factual
10 or legal position contradicting his client's claim -
11 - -

12 CHIEF JUDGE LIPPMAN: Is that our law or a
13 fed - - -

14 MS. LIZARRAGA: - - - of ineffective
15 assistance.

16 CHIEF JUDGE LIPPMAN: - - - federal law in
17 terms of what's an adverse position? Is it adverse
18 in differing on a material fact?

19 MS. LIZARRAGA: Your Honor, the standard is
20 - - -

21 CHIEF JUDGE LIPPMAN: In New - - - New York
22 and the standards in the feds, isn't there a
23 difference?

24 MS. LIZARRAGA: I'm not - - -

25 CHIEF JUDGE LIPPMAN: In the federal

1 standard versus ours in terms of a - - - a
2 disagreement as to a material fact, is it an actual
3 conflict in New York to disagree on a particular?

4 MS. LIZARRAGA: Yes, Your Honor. In New
5 York under - - - under the court's precedents in
6 Lewis, in Vasquez, in Berroa - - -

7 JUDGE PIGOTT: Well, let's - - - let's get
8 to this. If the - - - if the defendant says he never
9 met with me in two-and-a-half years and the - - - and
10 the lawyer says I got my time slips, I met with him
11 every three weeks, can he - - - can he bring that in?
12 That's adverse to his client.

13 MS. LIZARRAGA: That is adverse to his
14 client, yes, Your Honor. And a court, when faced
15 with one of these motions - - -

16 JUDGE PIGOTT: Can he - - -

17 MS. LIZARRAGA: - - - that makes an
18 allegation of ineffective assistance, it should
19 question the defendant in detail.

20 JUDGE PIGOTT: Can he say that? Can the -
21 - - can a - - - can the defense lawyer say, here are
22 my time slips, I - - - I actually did go see him?

23 MS. LIZARRAGA: No. He cannot say that,
24 because that is an adverse position to the client.

25 JUDGE PIGOTT: So you're saying that the

1 def - - - that - - -

2 MS. LIZARRAGA: It's adverse to - - -

3 JUDGE PIGOTT: You're saying the defendant
4 can lie and the lawyer has no right to - - - to - - -
5 to contradict him?

6 MS. LIZARRAGA: I'm not saying that the
7 defendant can lie. I'm saying if the court is put in
8 this - - -

9 JUDGE PIGOTT: If the defendant lies, can
10 the - - - can the defense lawyer correct the - - -
11 the record to say yes, indeed, I did visit him every
12 three weeks?

13 MS. LIZARRAGA: If the court is going - - -
14 if - - - I'm sorry. If counsel is going to correct
15 the record - - -

16 JUDGE PIGOTT: That's going to be a yes?

17 MS. LIZARRAGA: - - - by contradicting his
18 counsel's (sic) factual allegations, then he is
19 putting himself in a position - - -

20 JUDGE PIGOTT: I understand all that.

21 MS. LIZARRAGA: - - - of an adversary in
22 court.

23 JUDGE PIGOTT: Can - - - can he - - - can
24 he - - - can he - - -

25 MS. LIZARRAGA: He can do it - - -

1 JUDGE PIGOTT: Can he say he's lying? I
2 was - - - here are my records. I - - - I - - - I met
3 with him every three weeks. Yes or no?

4 MS. LIZARRAGA: No. He cannot without
5 contradicting his client.

6 JUDGE STEIN: There - - - there's a little
7 complication on the record here, though, isn't there
8 because there was this time period between the motion
9 was actually submitted and when - - - and when the
10 court actually received it. So - - -

11 MS. LIZARRAGA: Yes, Your Honor.

12 CHIEF JUDGE LIPPMAN: - - - it was
13 submitted several weeks before trial, and the court
14 didn't address it until after the trial.

15 MS. LIZARRAGA: Yes, Your Honor.

16 JUDGE STEIN: And - - - and you know, I - -
17 - can - - - can the record be read so that it
18 actually isn't contradictory so that the defendant
19 was saying, up until I submitted this motion, none of
20 these things had occurred. And then the - - - the
21 lawyer came back and said - - - I mean, he didn't
22 specifically said - - - say this but - - - but I
23 think that there's a reading of the record that would
24 support that he said, well, after that - - - the
25 motion was submitted, I did do all of these things

1 and - - - and - - - and the - - - and the defendant
2 didn't complain about anything that happened at
3 trial. So - - -

4 MS. LIZARRAGA: Well, - - -

5 JUDGE STEIN: - - - is that - - - so could
6 it be read as that there really wasn't a conflict
7 here?

8 MS. LIZARRAGA: Your Honor, the record in
9 this case cannot be read that way. It is true that
10 there were developments after the motion was filed
11 due to this glitch, this court error - - -

12 JUDGE STEIN: So could - - -

13 MS. LIZARRAGA: - - - where the judge did
14 not receive it.

15 JUDGE STEIN: - - - couldn't the judge have
16 then looked at that and said well, you know, okay,
17 maybe - - - maybe the attorney didn't do these things
18 up until that point, but he - - - he eventually did.
19 He - - - he - - - he gave effective representation at
20 trial and - - - you know, and - - - and - - - and
21 there's no issue here?

22 MS. LIZARRAGA: Well, there are a few
23 issues tangled up in there, Your Honor, and I want to
24 address them. The first one is that there - - - it
25 is true that there were some developments subsequent

1 to the filing of the motion and Mr. Washington
2 addressed those. However, the court pressed him on
3 whether before trial, including after the filing of
4 the motion, in that whole pre-trial period, if
5 counsel had consulted with him and discussed strategy
6 in a meaningful way and given him discovery, and Mr.
7 Washington confirmed that before he was in court,
8 counsel had not done so. Counsel then got up and
9 said, in response to the court's questions, I'm sure
10 I did discuss strategy with - - - with him. I'm sure
11 I did give him all the discovery that I had. And the
12 court, in making its decision did not find those
13 accounts consistent. It found them inconsistent. It
14 said - - -

15 JUDGE STEIN: The court also said that it
16 observed that the defendant had discovery present
17 with - - - with him, the documents that he was
18 complaining that he didn't get.

19 MS. LIZARRAGA: You are correct, Your
20 Honor, that at the beg - - - you know, that the court
21 did say I observed you coming in with discovery, but
22 after he heard Mr. Washington's account, he felt it
23 necessary to go to counsel and get counsel's version
24 of - - - of events. And in making it - - -

25 CHIEF JUDGE LIPPMAN: Yeah. But counsel,

1 what's - - - what's bothering me is what Judge Pigott
2 was talking about before. Even if you don't say in
3 such bold terms that the defendant lied, you mean the
4 counselor is not able to say, put it - - - let's say
5 he put it in a bow in the sweetest, most wonderful
6 way that, gee, I met with him last week and then I
7 met with him two days later and we spent an hour-and-
8 a-half. Counsel can't say that if that's, in the
9 counsel's mind, the truth?

10 MS. LIZARRAGA: He cannot say that unless
11 the court appoints new counsel.

12 CHIEF JUDGE LIPPMAN: So what can he say?

13 JUDGE PIGOTT: So aren't you - - - aren't
14 you putting an ethical dilemma in front of - - - in
15 front of a lawyer to say my client is lying to this
16 judge, he's flat out lying? But - - - but counsel
17 tells me I can't correct that, and - - - and so I
18 have to let this lie to a - - - to a member of the
19 judiciary be on the record, and - - - and I'm going
20 to - - - and I'm either going to stand mute or I'm
21 not going to bring in the proof that I have right
22 here because counsel says I can't do that.

23 MS. LIZARRAGA: No, Your Honor. What I'm
24 saying is that the court should approach these
25 situations in a situa - - - similar to as it did, for

1 example, in Berroa. Berroa is an example where the
2 defendant had offered testimony that it seemed to his
3 own attorney was a lie. Leading up to the trial,
4 there was no indication that the witnesses had alibi
5 testimony for the defendant - - -

6 CHIEF JUDGE LIPPMAN: Yeah, but that - - -

7 MS. LIZARRAGA: - - - and then they got up
8 and gave alibi testimony.

9 CHIEF JUDGE LIPPMAN: But that was a
10 different situation. The counsel could be a witness
11 on that issue in relation to the alibi. That's not
12 what we have here.

13 MS. LIZARRAGA: Well, Your Honor, I think
14 the principles announced in that case are closely
15 analogous. There, there was a situation where a
16 defendant could be perjuring in front of the court
17 and defense counsel had information - - -

18 JUDGE RIVERA: But - - - so clarify the
19 process you're recommending, if I - - - if I'm
20 understanding you. You say at that - - - the point
21 when counsel realizes that they are conflicted, that
22 is to see he'll have to look the judge in the eye and
23 - - - and if they're not saying it's a lie, they're
24 going to say no, I did this, this, this, and this or
25 in this particular case when they're asked, would you

1 have adopted this motion, and he says, no - - - which
2 is basically saying I can't support any of the
3 allegations in the motion, at - - - at that point,
4 he's got to - - - or he or she - - - what does the
5 attorney have to do if you're saying they cannot
6 respond to these questions or they can't, on their
7 own, volunteer this information?

8 MS. LIZARRAGA: I - - - Your Honor, I think
9 that one of the things to keep in mind is the reason
10 that we were stuck in this situation in this case is
11 that this was a pre-trial motion, whereas you pointed
12 out - - -

13 JUDGE ABDUS-SALAAM: Counsel, but we're - -
14 - we're asking - - -

15 MS. LIZARRAGA: - - - they were complaining
16 about pre - - -

17 JUDGE ABDUS-SALAAM: I'm sorry, counsel.
18 We're asking these questions because this isn't just
19 this case. There are a number of cases, there are a
20 number of trials going on as we speak, in criminal
21 courts, where counsel will have these allegations,
22 will have to face these allegations, and the courts
23 will have to do something about them. So are you
24 saying that every time a defendant makes an
25 allegation against - - - or that suggests that his

1 lawyer didn't do something or her lawyer didn't do
2 something, that the lawyer, as an officer of the
3 court, has to stand moot - - - mute or say to the
4 judge, judge, I think it's time for you to appoint
5 another counsel, and that the court should have
6 counsel essentially standing at the ready? Because
7 that's what we would need, to have counsel at the
8 ready for every time a defendant made such an
9 allegation against his counsel or her counsel.

10 MS. LIZARRAGA: No. I'm not saying that,
11 and you're right, Your Honor, this does go to cases
12 all over the court. When a court is confronted with
13 this motion pre-trial, first of all, most of these
14 pre-trial motions will actually be received pre-
15 trial, when the court has an opportunity to address
16 the alleged deficiencies before they can ever
17 prejudice the actual trial. The court can look at
18 the allegations and say, okay, yeah, it says
19 ineffectiveness, doesn't it - - - but does it - - -
20 is it really just a trafe - - - strategic
21 disagreement? In that case there's no real
22 ineffectiveness claim. There are serious claims.

23 JUDGE RIVERA: Yeah. But you're assuming
24 that - - - that - - - you're assuming the judge says,
25 yes, okay, those things happened, when - - - when the

1 point that you're being asked about is, if defense
2 counsel knows for a fact, because they know what they
3 have or have not done, that it's not an accurate
4 representation, I'm - - - please answer my question.
5 What is the process your recommendation, which is - -
6 - you're recommending, which is the same question
7 Judge Abdus-Salaam is asking.

8 MS. LIZARRAGA: My - - - my - - - the
9 process I am recommending - - - recommending is that if
10 the defendant makes a - - - makes a claim of
11 ineffectiveness that the court takes seriously, the -
12 - - and the counsel knows it is a lie.

13 JUDGE RIVERA: Um-hum.

14 MS. LIZARRAGA: And that in order to give
15 his account, he needs to get up and give a contrary
16 factual version of events - - -

17 JUDGE RIVERA: Yes.

18 MS. LIZARRAGA: - - - he needs to say
19 court, please appoint a new lawyer to resolve this
20 issue.

21 JUDGE READ: So that's what should have
22 happened here? That's what the - - - that's what the
23 lawyer should have done here?

24 MS. LIZARRAGA: Yes.

25 JUDGE READ: Rather than answering the

1 question, she - - - he should have said it's a
2 conflict situation, you've got to appoint somebody
3 else?

4 MS. LIZARRAGA: Yes, Your Honor.

5 CHIEF JUDGE LIPPMAN: Okay, counsel.
6 You'll have rebuttal. Let's hear from your
7 adversary.

8 MR. EIDA: Good afternoon. May it please
9 the court, Marc Eida for the respondent.

10 JUDGE READ: Is that practical, by the way,
11 what your - - - what your adversary suggested?

12 MR. EIDA: Not at all. If - - -

13 JUDGE READ: Why not?

14 MR. EIDA: - - - if we were to implement
15 that, that would - - - the judicial system would come
16 to a grinding halt.

17 CHIEF JUDGE LIPPMAN: So what's the rule?
18 What's the rule in your mind?

19 MR. EIDA: The rule is that an attorney,
20 under these circumstances, when these commonplace
21 allegations of ineffective assistance of coun - - -
22 counsel that are frequently made immediately before
23 trial are made, defense counsel should be made or - -
24 - or allowed to give a brief defense or outline a
25 correct - - -

1 CHIEF JUDGE LIPPMAN: Defense - - - the
2 defense counsel can't say, Judge, deny the motion,
3 right? That you can't do.

4 MR. EIDA: No. And I don't think that's
5 necessary under these circumstances.

6 JUDGE STEIN: Where do we draw the line?

7 MR. EIDA: Where do you draw the line? The
8 line is - - - well, with respect to what, when
9 they're taking a position - - -

10 JUDGE STEIN: How - - - how far - - -

11 MS. LIZARRAGA: - - - on the motion?

12 JUDGE STEIN: - - - is too far? Yeah.

13 MR. EIDA: Well, - - -

14 JUDGE STEIN: I mean, if they're
15 contradicting what the defendant is saying, you're
16 saying that's not enough. What - - -

17 MR. EIDA: Well, first of all, as a factual
18 matter in this case, there's - - - there is - - - our
19 position is there is no contradictions whatsoever,
20 specifically because of the sequence of events in
21 this case.

22 JUDGE STEIN: But assuming that there were.

23 MR. EIDA: Assuming that there were, I
24 think when there are allegations of a failure to disc
25 - - - turn over discovery or fairly - - - failure to

1 meet with a client, those are - - - those are things
2 that a defense counsel can contradict their - - -
3 their - - -

4 JUDGE STEIN: What - - - what can't they
5 contradict?

6 MR. EIDA: Well, for example in the case
7 that my adversary cites, Berroa, in that case the
8 defense counsel testified against their client,
9 effectively eviscerating their case.

10 JUDGE RIVERA: Did he go - - - did counsel
11 go over the line here when asked, would you have
12 adopted the motion?

13 MR. EIDA: Not at all. And that's - - -
14 and - - - and I don't even think my adversary thinks
15 that's inappropriate. A defense counsel has no
16 obligation to adopt his client's motion.

17 JUDGE RIVERA: But it's not reflecting the
18 counsel's position on whether or not there are
19 inaccuracies in the motion or the motion is without
20 merit?

21 MR. EIDA: No. I don't think it can be
22 read that way. I think - - - I - - - I can't re - -
23 - recall a case offhand, but - - - but it - - - but
24 it's perfectly appropriate for an attorney to do
25 that. And - - -

1 JUDGE STEIN: Is there a different standard
2 post-trial?

3 MR. EIDA: With respect to what type of
4 motion, with the reassignment motion, a 330 motion, a
5 plea withdrawal motion?

6 JUDGE STEIN: Yeah. A - - - a - - - a
7 withdrawal motion or - - - or a - - - a motion to set
8 aside the verdict.

9 MR. EIDA: I can't imagine why. I mean,
10 particularly - - - it really is a - - - a question of
11 the types of allegations that are being made and - -
12 - and I guess in the sense that after a trial's been
13 had, the allegations are going to have a different
14 substance.

15 CHIEF JUDGE LIPPMAN: There are some
16 circumstances where it would appropriate, right, for
17 the counsel to say, Judge, you know, I think you
18 should appoint a new attorney, right? Sometimes the
19 - - - the - - - the lack of trust, the nature of the
20 particular allegation would be such that it would be
21 appropriate for counsel to say, get me out of here?

22 MR. EIDA: Certainly, but - - - but that
23 was not the case here.

24 CHIEF JUDGE LIPPMAN: I - - - I understand,
25 but you - - - you acknowledge that there are times

1 when what your adversary is saying is a good thing
2 for counsel to do.

3 MR. EIDA: Right. But ninety-eight percent
4 of the time, these - - - these types of allegations
5 are found in a pro se, pro forma boilerplate motion
6 that's found in they - - -

7 CHIEF JUDGE LIPPMAN: Yeah, yeah. But
8 that's making a - - - a judgment beforehand that
9 usually it's false. Let's assume that sometimes it's
10 false, sometimes it's accurate. We're trying to make
11 a rule that would apply in all the different
12 situations of this kind where the defendant
13 challenges his counsel in terms of the representation
14 and the quality of the representation and what
15 they're doing. So across the board, the rule is
16 generally, counsel can answer the particulars in
17 terms of what he or she did or didn't do?

18 MR. EIDA: Yes.

19 CHIEF JUDGE LIPPMAN: But what can't they
20 do? They can't say deny the motion, they can't say
21 my - - -

22 MR. EIDA: Can't - - -

23 CHIEF JUDGE LIPPMAN: - - - counselor - - -
24 my - - - my client's a liar, or can they?

25 MR. EIDA: I think it would not be

1 advisable to say that my client's a liar or that this
2 motion should be denied, but they can make factual
3 assertions about their representation.

4 CHIEF JUDGE LIPPMAN: So they should
5 explain what happened.

6 MR. EIDA: Yes.

7 CHIEF JUDGE LIPPMAN: And in New - - - in
8 New York, if you have a - - - a difference over
9 material conflict, a material fact, is that an actual
10 conflict and - - - and then there's a real problem,
11 or it's a fact, but if the defendant has it wrong,
12 you can just see, gee, Judge, this is what happened?
13 You can explain what happened?

14 MR. EIDA: Well, what do you mean by
15 material fact in this case? For example, if - - - if
16 the defendant says, I - - - I didn't get my discovery
17 - - -

18 CHIEF JUDGE LIPPMAN: Yeah. That - - -

19 MR. EIDA: - - - that - - - that is a
20 perfect - - - I don't think that that's a material
21 fact. This is a perfect opportunity for the court to
22 resolve a situation like that without any undue
23 delay. With - - - you know, defense counsel's
24 proposition is that - - -

25 CHIEF JUDGE LIPPMAN: Well, the defendant

1 is saying I didn't get - - - the defendant's saying I
2 didn't get it, counsel is saying, oh, yeah, he got
3 it. Isn't that a disagreement over a fact that - - -
4 that works to the disadvantage of the defendant
5 himself?

6 MR. EIDA: It - - - it certainly doesn't
7 affect his guilt or innocence. You know, he's not
8 going to be found guilty or found innocent as - - -
9 as a result of the fact that he - - -

10 CHIEF JUDGE LIPPMAN: Okay. So your rule
11 is, if the client - - - the counsel just tells the
12 truth in an appropriate manner that doesn't demean
13 his client, but that's okay, because you could
14 explain what happened. That's the rule?

15 MR. EIDA: Yes. And the - - - it's the
16 same rule that - - - that you propounded in - - - in
17 - - - in Nelson in 2006, that a defense counsel's
18 explanation of his performance, it does not create a
19 conflict.

20 JUDGE FAHEY: Well, yeah. It's - - - the
21 way I - - - the way I understand it and I think Judge
22 Lippman's totally right. It's a - - - it's a ninety-
23 eight percent rule, but those two percent matters if
24 you're one of the two percent. But it seems that
25 there's a difference between counsel responding to

1 questions regarding his or her representation or the
2 efficacy of the representation, and counsel becoming
3 a witness in the case at bar, and I think that's the
4 broad line distinction that has to be drawn. It - -
5 - it - - - there are obviously a million subtleties,
6 but it seems to me that that's what we're confronted
7 here with, whether there should be a black line rule
8 or - - - or we have to look at each one individually.
9 So - - -

10 MR. EIDA: Right. And in a case like this,
11 as you said, the defense attorney is not becoming a
12 witness against his client. He's making informal
13 remarks about his representation.

14 JUDGE FAHEY: Well, he's - - - he's - - -
15 you can argue that he's becoming a witness in the
16 sense that he's speaking against a motion that the
17 client made and the client may think that that's in
18 their interest, but that's not an - - - the issue
19 that's at bar, the underlying case that's at bar.

20 MR. EIDA: Exactly.

21 JUDGE FAHEY: And so - - - so we - - - we -
22 - - we - - - he's addressing his representation which
23 is a little bit different.

24 MR. EIDA: Right.

25 JUDGE STEIN: Doesn't counsel say well, I -

1 - - I - - - I don't agree with what he's telling you,
2 this is what actually happened, but - - - but - - -
3 but I - - - I'm not saying you should deny his
4 motion. That - - - that's okay?

5 MR. EIDA: Yes. I think - - - I think the
6 attorney should be able to say I - - - I did turn
7 over discovery or I have met with my client, and
8 leave it at that.

9 CHIEF JUDGE LIPPMAN: Okay, counsel,
10 anything else?

11 MR. EIDA: Nothing else.

12 CHIEF JUDGE LIPPMAN: Thank you.

13 MR. EIDA: If there are no further
14 questions, I rest on my brief.

15 CHIEF JUDGE LIPPMAN: Thank you, counsel.
16 Rebuttal, counsel.

17 MS. LIZARRAGA: And going to the court's
18 question about the potential for abuse, lying about
19 ineffective assistance, the same could be said in
20 Mitchell, which concerned attorney coercion. In that
21 context, a defendant can just as easily make up those
22 allegations. Yet in that case, this court announced
23 a rule that while, yes, defense counsel can explain
24 his performance, he may not do so if it means
25 adopting a position adverse to his client.

1 Certainly, I think we can all agree that the
2 potential abuse - - - for abuse by a few cannot
3 nullify the Constitutional right for everyone else.
4 And this - - -

5 JUDGE ABDUS-SALAAM: Counsel, could you - -
6 - can you posit a case where defendant makes an
7 allegation and it wouldn't - - - and - - - and a
8 explanation by his counsel or her counsel would not
9 be adverse to the client?

10 MS. LIZARRAGA: Yes, Your Honor. For
11 example, a defendant may file a motion saying I'm
12 making an ineffective assistance claim, and he says
13 my attorney did not raise this argument I wanted him
14 to raise, like I'm in - - - incompetent to - - - to -
15 - - to stand trial; that is an undisputed that the
16 court will know, yeah, he didn't - - - he didn't make
17 that decision, so counsel can explain his performance
18 without contradicting his client. He can explain
19 this is why I did it, because his client has placed
20 those decisions at issue. Also, perhaps, defendant -
21 - -

22 JUDGE PIGOTT: That could be much more
23 serious than the ones you were talking about before,
24 though, couldn't they?

25 MS. LIZARRAGA: I'm sorry.

1 JUDGE PIGOTT: In - - - in giving the
2 explanation, he can say, you know, he says he's nutty
3 as a hoot owl, and I think he's saner than the judge.
4 I mean that'd be awfully adverse to a client,
5 wouldn't it?

6 MS. LIZARRAGA: Yes, that would be adverse
7 to a client, if in his explanation, he adopts adverse
8 positions - - -

9 JUDGE PIGOTT: But you say that's okay.

10 MS. LIZARRAGA: - - - and disparages his
11 client. No, I would not say that that's okay.

12 JUDGE PIGOTT: Oh, so if he says - - - he
13 says I - - - I want a - - - I want a psychiatric
14 exam, the lawyer can't say, you know, I'm not - - -
15 you know, I - - - I disagree with that because I've
16 been talking to him for the last six months and he's
17 been fine.

18 MS. LIZARRAGA: That is definitely more - -
19 - that that's - - - that - - - I think that that
20 presents a difficult question, Your Honor. In that
21 case - - -

22 CHIEF JUDGE LIPPMAN: But that - - - but
23 that would be really adverse to his client. Under
24 your theory, that's adverse. The guy's saying he's
25 nuts, I want a psych - - - I'm nuts, I want a

1 psychiatric exam, and his counsel's saying, he's not
2 nuts. Isn't that, under your rule, the - - - the - -
3 - the - - - a classic example of saying someone ad -
4 - - something adverse to your client?

5 MS. LIZARRAGA: Yes, Your Honor. I agree
6 with that. I do, yes. And another thing I wanted to
7 address is that coun - - - my - - - the respondent
8 raised is Nelson, which is that Nelson did not
9 purport to announce a categorical rule. It said that
10 in that case, client's remarks did not create a
11 conflict, but if you look at the underlying facts of
12 that case, the comments that were made by counsel
13 played no role in the court's decision. There the
14 court said, I deny this because it's the eve of
15 trial. You're raising this motion literally with the
16 jury outside of the door. This is a transparent
17 delay tactic, and that's a classic ground under this
18 court's precedent on which to deny a reassignment
19 motion, but that's not what the court did here. Here
20 it said - - -

21 JUDGE PIGOTT: But even - - - but even that
22 - - - even that, because I thought at some point you
23 - - - you'd raised the idea of - - - because it
24 always comes up, is alibis. You're - - - you - - -
25 you - - - you're going to trial. You're - - - you're

1 representing the defendant. The defendant says by
2 the way, I got a twin brother in Ohio, and it was
3 him, that wasn't me, and you know it's nonsense. Now
4 - - - now what are you supposed to do with that? You
5 know, he's going to - - - he goes into the judge and
6 says he won't - - - he won't call a witness that I
7 need.

8 MS. LIZARRAGA: If - - - okay. If the
9 defendant says he won't call a witness that I need
10 who has an alibi and the lawyer knows that that is
11 false, no, he cannot factually contradict his client.
12 He needs to ask the court to appoint new counsel, and
13 that's a situation, actually, that is somewhat
14 analogous to Berroa, and demonstrates why the basic
15 principles apply in all these different context.
16 They apply - - -

17 JUDGE PIGOTT: But you were saying - - -
18 you were saying earlier - - - you're saying if it's
19 on eve of trial, you know, and it's obviously bogus,
20 then you - - - you - - - you dismiss it without
21 further ado.

22 MS. LIZARRAGA: The trial courts, Judge, I
23 believe are very well ecliped - - - equipped to apply
24 these standards. We see in many of the cases that
25 they handle these claims without resorting to a

1 credibility determination between defendant and the
2 client. They say this is a strategic disagreement,
3 this is a transparent delay tactic.

4 JUDGE PIGOTT: Did you get the impression
5 though that - - - that the judge in this case was
6 totally discounting what the defense did and totally
7 credited whatever the - - - the lawyer said - - -

8 MS. LIZARRAGA: Yes, Your Honor.

9 JUDGE PIGOTT: - - - without a hearing.

10 MS. LIZARRAGA: Yes, Your Honor, that was
11 expressed in his ruling. He said - - - when he moved
12 to the merits, he said based on what I've heard from
13 you and counsel, I don't believe you. I accept what
14 Mr. Spellman says. The things that you say are not
15 true, and he expressly contrasted the two version of
16 events. He said he, counsel, says you did get
17 discovery. You say he didn't consult with you on
18 strategy, he says he did that. And he said, I
19 believe what counsel says. It really couldn't be
20 more express that the court's decision here rested on
21 a credibility determination and in that situation, he
22 is rendered an adversary to his client.

23 CHIEF JUDGE LIPPMAN: Okay, counsel. Thank
24 you, counsel.

25 MS. LIZARRAGA: Thank you.

1 CHIEF JUDGE LIPPMAN: All right. Let's - -
2 - let's go to Lovett.

3 Counsel, you want any rebuttal time?

4 MS. KNIGHT: Yes, Your Honor, two minutes,
5 please.

6 CHIEF JUDGE LIPPMAN: Okay. What's - - -
7 what's different about your case than the last case,
8 and what's the rule in relation to what we've been
9 talking about in Washington?

10 MS. KNIGHT: The rule I think we urge is
11 similar, that where an attorney makes materially
12 adverse statements refuting factual allegations and
13 the court relies on those representations, there's a
14 conflict of interest. But these are different cases
15 and Mr. Love - - - I would say that Mr. Lovett's
16 allegations of a conflict went not just to whether or
17 not documents were turned over or communications, but
18 went deep into the heart of the attorney-client
19 communications that they had about - - -

20 JUDGE ABDUS-SALAAM: Counsel, did you make
21 any of these allegations about conflict when you were
22 - - - when your client was complaining of ineffective
23 assistance of counsel? Did you say that - - - or did
24 he say - - - counsel say that he was entitled to
25 conflict-free counsel? Did you even bring up

1 conflict at all?

2 MS. KNIGHT: We didn't bring that up below.
3 We - - - what we raised in the Appellate Division was
4 focused primarily on the court's, the Appellate
5 Division's, broad equitable jurisdiction because - -
6 -

7 JUDGE READ: But isn't that a big problem
8 for you, that you didn't bring it up below?

9 MS. KNIGHT: Absolutely not. I - - -

10 JUDGE READ: Why not?

11 MS. KNIGHT: Because we made a strategy
12 decision there that this is a case that was really
13 crying out for the court, the Appellate Division's,
14 equitable interest of justice jurisdiction to reduce
15 the sentence or to impose a determinate sentence
16 given that the court was clearly biased against Mr.
17 Lovett below, and I would refer to page 671 of the
18 transcript where the court said this case has been,
19 "One baby whining, crying on your part, saying
20 there's a" - - - if there - - - on page 673, "if
21 there is a parole officer, if there is a parole board
22 whoever thinks there's a reason to release you from
23 jail, they should be fired. You are sentenced as
24 best as possible to die in jail." So we didn't raise
25 them be - - - below, but they are properly before the

1 court and we are asking this - - -

2 JUDGE ABDUS-SALAAM: Well, why are they
3 properly before the court now if you didn't preserve
4 it below?

5 MS. KNIGHT: Because the deprivation of the
6 right to counsel doesn't need to be preserved and
7 statutorily, things don't need to be raised in the
8 Appellate Division to be raised before this court.
9 Even respondent doesn't claim that this court does
10 not have the power to hear this claim.

11 You know, in hindsight, obviously, we
12 should have raised it bef - - - before, but here
13 there were serious complaints made both prior to
14 trial and before the sentencing proceeding. And
15 going to the conflict, since Your Honor asked about
16 that, not only did it go to the heart of the
17 communications between Mr. Lovett and his attorney
18 about whether or not he had told - - - spoken about
19 whether or not there were other witnesses, whether or
20 not counsel had received the information, here we do
21 have a situation where the conflicts clearly spilled
22 over into the sentencing, and there were a lot of
23 questions about what can counsel say.

24 I think Mr. Lovett's case is a clear
25 example of what counsel can't say. Counsel piled on

1 here. He filed an affirmation prior to sentencing.
2 He amplified it at the sentencing proceeding. Even
3 after the motion had been denied, when he was
4 supposed to be arguing for leniency, he said that the
5 allegations in the motion were ludicrous. So in tone
6 and tenor, his statements were completely adverse to
7 his clients in terms of the fact that the motion had
8 already been denied and he continued with it. They
9 were gratuitous and uninvited at that point.

10 He had abandoned his role as a - - - as an
11 advocate. He relied on matters that were outside the
12 record, confidential communications, and even if he
13 didn't say, this motion therefore should be denied,
14 it couldn't be more clear.

15 And this is a case where counsel, as
16 demonstrated in the motion for resentencing, could
17 have made very substantive arguments on Mr. Lovett's
18 behalf in terms of leniency, but you can't make those
19 arguments to a court when you're saying, you know
20 what, you know, here's my arguments for leniency.
21 First of all, he's a liar, but I'd like to give you -
22 - - like you to exercise leniency here. Mr. Lovett
23 had worked, had involvement in his church, he had
24 community involvement. There were - - -

25 JUDGE ABDUS-SALAAM: But the coun - - - but

1 counsel did make those arguments to the judge.

2 MS. KNIGHT: Abs - - - he didn't. We would
3 actually disagree with that. Counsel made the most
4 tepid of statements. He said he has children.
5 That's all he said, and he misstated how many
6 children Mr. Lovett's wife had actually fathered - -
7 - or had - - - said Mr. Lovett had only fathered two
8 of the three children. He didn't raise arguments
9 that Mr. Lovett had tutored his son and niece, that
10 he had - - - that all of his family members said that
11 he was very active in their life. If you look at the
12 resentencing motion, it shows he had, I believe,
13 eleven letters from family members attesting to the
14 role that Mr. Lovett had played. So this is a unique
15 case in that there was the counsel's statements, even
16 if you can say something, went so far beyond that
17 there was a conflict of interest and the case does
18 need to be remanded, at the very least, for a new
19 sentencing proceeding.

20 And Mr. Lovett's complaints at sentencing -
21 - - I do want to address briefly one thing that
22 wasn't raised in the other case - - - is that he had
23 made a motion even prior to trial saying that his
24 attorney had failed to investigate, and that motion
25 was improperly handled. The court told him that he

1 could not - - - that he could not make a statement
2 first, pages 47 to 48 of the appendix; three times
3 told him not to say anything.

4 JUDGE STEIN: But then he let him say
5 whatever he wanted to say.

6 MS. KNIGHT: The court did allow Mr. Lovett
7 to speak, but if you look at the actual record, the
8 court did not change its opinion that the motion was
9 untimely, and I direct your attention to page 51 of
10 the appendix. "As I said, if there was any
11 possibility that a motion were going to be made on
12 that subject, it should have been made in Justice
13 Ubiller's (ph.) part." He al - - - the court also
14 said, "I don't know what he has done by way of
15 preparation. I don't know the contacts, if any, he's
16 had with you. I don't know what investigation he's
17 done."

18 So this is very different than Porto. You
19 have hostility to the motion being raised at all, no
20 questions of Mr. Lovett, the court's admitted
21 ignorance as to whether or not the - - - they had
22 been communicating or an investigation would have be
23 - - - be done, and in the end, denial on improper
24 timeliness grounds, which is contrary to this court's
25 decisions in People v. Linares and People v. Sides,

1 saying that there is an ongoing duty to look at
2 these.

3 And I also would finally like to point to
4 the extremely extenuating facts in this case. I know
5 that the timing of the motion right before trial
6 might, in some cases, be a red flag, but here you
7 have a case where Mr. Lovett had plummeted sixty to
8 seventy feet to the ground, he was severely injured,
9 he required four surgeries, he suffered memory gaps,
10 he was sedated and hospital - - -

11 JUDGE ABDUS-SALAAM: Counsel, when did he
12 leave the hospital?

13 MS. KNIGHT: It - - -

14 JUDGE ABDUS-SALAAM: It was months before
15 the trial, wasn't it?

16 MS. KNIGHT: It was either at the end of
17 January or beginning of February of 2003. The trial
18 was May 22nd of 2003, but there were only a handful
19 of court appearances in the intervening time. And
20 certainly, this court shouldn't - - - shouldn't
21 suggest a rule that his problem with counsel need to
22 be raised at the first possible opportunity. What
23 happened here is that once the case went out to
24 trial, once it became clear that his problems weren't
25 being addressed, he asked the court for new counsel.

1 The court discouraged it, and to the extent that
2 there aren't as many factual allegations as we would
3 like, the onus falls on the court which discouraged
4 him from even making the motion.

5 CHIEF JUDGE LIPPMAN: Okay, counsel.

6 JUDGE FAHEY: Don't - - - don't close up
7 yet.

8 CHIEF JUDGE LIPPMAN: Judge Fahey, go
9 ahead.

10 MS. KNIGHT: Oh.

11 JUDGE FAHEY: Don't - - - don't close up
12 yet. Listen, the third point I think in your brief
13 was a failure to object to the jury charge.

14 MS. KNIGHT: Yes, Your Honor.

15 JUDGE FAHEY: Was that raised at the
16 Appellate Division?

17 MS. KNIGHT: It was raised in the Appellate
18 Division. It was raised both in the CPL 440.10
19 motion and at the Appellate Division, Your Honor.

20 CHIEF JUDGE LIPPMAN: Okay, thank - - -

21 JUDGE FAHEY: Thank you.

22 CHIEF JUDGE LIPPMAN: Thank you, counsel.

23 MS. COVIELLO: May it please the court;
24 Nicole Coviello for the People of the State of New
25 York. Beginning first with the conflict of interest

1 point, I think that this court established a very
2 clear role in Mitchell.

3 JUDGE STEIN: How can calling your client
4 ludicrous, the client's allegations ludicrous, not be
5 a conflict?

6 MS. COVIELLO: Your Honor, that comment was
7 direct - - - was a factual characterization of - - -

8 JUDGE STEIN: It sure was.

9 MS. COVIELLO: It was a factual - - -

10 JUDGE STEIN: At - - - at a point in time
11 when you're asking the court to give your client
12 leniency.

13 MS. COVIELLO: Well, Your Honor, at - - -
14 the only reason that defense counsel revisited the
15 issue is because defendant himself renewed his - - -
16 renewed his motion and brought - - - and again
17 reiterated the allegations suggesting that his - - -
18 that his attorney had not - - -

19 JUDGE STEIN: Assuming that counsel was
20 permitted to continue to respond to those continuing
21 allegations, can counsel - - -

22 MS. COVIELLO: Yes. And of course - - -
23 and, Your Honor, coun - - -

24 JUDGE STEIN: So then where - - - is there
25 a line at all? Is there anything that counsel - - -

1 MS. COVIELLO: Yes.

2 JUDGE STEIN: - - - can't say?

3 MS. COVIELLO: Yes, of course.

4 JUDGE STEIN: What - - - what would that
5 be?

6 MS. COVIELLO: This court stated in
7 Mitchell that defense counsel is permitted to explain
8 his performance, he is permitted to defend that
9 performance - - -

10 JUDGE STEIN: But does he need - - -

11 MS. COVIELLO: - - - until he takes an
12 adverse position on his client's motion.

13 JUDGE STEIN: Calling your client lud - - -
14 ludicrous isn't taking an adverse position?

15 MS. COVIELLO: He was not calling - - - he
16 did not call the - - - his client ludicrous.

17 JUDGE STEIN: He called his allegations
18 ludicrous.

19 MS. COVIELLO: He called a very specific
20 factual allegation, Your Honor, where defendant
21 repeated not only in his affidavits but also at - - -
22 when given the opportunity to speak at sentencing,
23 repeated again and again that he - - -

24 JUDGE STEIN: So he has to say the magic
25 words?

1 MS. COVIELLO: - - - that counsel had not
2 consulted.

3 JUDGE STEIN: He - - - he has to say the
4 magic words my client's motion has no merit? Is that
5 what happ - - - is that what's required here?

6 MS. COVIELLO: He never said that his
7 client's - - - his - - - his motion - - -

8 JUDGE STEIN: No. Is - - - is that what
9 you're saying has to happen in order to create a
10 conflict?

11 MS. COVIELLO: Yes. Actually, Your Honor,
12 I am saying that counsel, as this court made clear in
13 Mitchell, in Deleazer (ph.), in Glynn, in Vasquez,
14 defense counsel has to addr - - -

15 JUDGE RIVERA: Well, what - - - what part
16 of the motion remains meritorious if you've said it's
17 ludicrous?

18 MS. COVIELLO: He hasn't said the motion is
19 ludicrous. Again - - -

20 JUDGE RIVERA: He said the allegations of -
21 - - -

22 MS. COVIELLO: He did - - - he specifically
23 - - - he is characterizing defendant's allegation
24 that he never consulted with him, and defense counsel
25 says that right after he's - - -

1 JUDGE RIVERA: Isn't that - - - isn't that
2 the equivalent of saying, that allegation is without
3 merit?

4 MS. COVIELLO: It's saying that what
5 defendant is alleging is not correct. That is no
6 different than what the defense counsel did in Nelson
7 when a defense - - - when defendant alleged that he
8 had, you know, not actually described the charges
9 against him.

10 JUDGE RIVERA: Well, it does suggest a - -
11 -

12 MS. COVIELLO: And defense counsel says
13 you're mistaken.

14 JUDGE RIVERA: It does suggest a little bit
15 more than just it's - - - it's - - -

16 MS. COVIELLO: It's a strong word, Your
17 Honor, but - - -

18 JUDGE RIVERA: - - - not correct. It's - -
19 - it's - - -

20 MS. COVIELLO: But at the same time he's
21 again, this attorney - - -

22 JUDGE RIVERA: Inured from reality is what
23 it's suggesting, no?

24 MS. COVIELLO: No. Your Honor, this
25 counsel was simply trying to put across the point

1 then I'll let you - - -

2 MS. COVIELLO: Okay.

3 JUDGE FAHEY: - - - don't worry, I'll give
4 you time. Explain to me the difference between the
5 two, because they've been characterized as the same
6 charge. Go ahead.

7 MS. COVIELLO: Okay. So in Johnson, the
8 court gave a two-inference charge that included
9 language that essentially said that when you're
10 finding facts, the burden of proof is 49 point - - -
11 or 50.1 beats 49.9. The court did not use that
12 language in the two-inference charge it gave here,
13 and moreover it couched the two-inference charge with
14 a statement that the jury was required to give
15 defendant every reasonable inference, that defendant
16 was entitled to that.

17 JUDGE FAHEY: So your - - -

18 MS. COVIELLO: That language - - - I'm
19 sorry.

20 JUDGE FAHEY: So your position is then that
21 the - - - the charge itself that was given by the
22 court was correct?

23 MS. COVIELLO: Yes. It was - - - and it
24 has been a - - -

25 JUDGE FAHEY: I see. So it wasn't - - - so

1 therefore then it wasn't ineffective assistance of
2 counsel not to object.

3 MS. COVIELLO: Exactly, Your Honor.

4 JUDGE FAHEY: I see.

5 MS. COVIELLO: That's our position on the
6 jury charge - - - the jury instruction.

7 Just turning back quickly to the conflict
8 of interest point, there - - - it is this court's
9 decisions in Friedman and in Nelson and in Mitchell
10 demonstrate that a - - - a defense counsel is allowed
11 to make factual statements that contradict his client
12 on the record, and that in doing so they do not
13 create a conflict of interest.

14 In Friedman, the defense counsel - - -
15 defendant was moving to withdraw his plea on the - -
16 - on the ground that he had - - - was under the
17 influence of truth serum at the time that he was - -
18 - that he pled guilty, and his attorney said to the
19 court, you know, I - - - he appeared well to me on
20 the morning he gave the plea, and you know, his
21 examining psychiatrist who administered the truth
22 serum said it was unlikely he was still going to be,
23 you know, adversely affected at the time of the plea.
24 The court relied on that defense counsel statement in
25 denying - - - in denying the motion without an

1 evidentiary hearing, and I think that demonstrates
2 that it's - - - it is perfectly appropriate, and, in
3 fact, counsel has an obligation to prevent the - - -
4 his client from misleading the court.

5 I'll just turn very quickly, Your Honors,
6 to the motion for substitution of counsel. In
7 Arriave (ph.), this court said that defen - - - the
8 trial court should be particularly skeptical of
9 motions that are made on - - - on the eve of trial
10 because they implicate serious consideration, public
11 policy considerations, against delay, and that absent
12 a demonstration of compelling or exigent
13 circumstances, the court can deny them.

14 And here, defendant, after nearly eight
15 months of representation by counsel, had apparently
16 never voiced any sort of dis - - - dissatisfaction
17 with him, and then the minute the trial judge calls
18 out for a new - - - a panel, a jury panel, all of a
19 sudden he's making a motion that is completely
20 generic and conclusory. The only thing that was
21 arguably factual in it is that he said that he had
22 not seen his attorney for - - - he had only seen his
23 attorney once in court and they had not had a
24 conversation, but that was belied by the record. The
25 parties had just been discussing with the court the

1 history of plea negotiations in this - - - in this
2 case, which counsel had obviously related to
3 defendant, defendant had rejected.

4 JUDGE ABDUS-SALAAM: Counsel, can I return
5 to the allegations of conflict?

6 MS. COVIELLO: Yes. Yes.

7 JUDGE ABDUS-SALAAM: My understanding that
8 the affidavit that was submitted in this case was
9 submitted by defendant's wife, not by the defendant
10 himself.

11 MS. COVIELLO: The defendant himself filed
12 - - - there were two affidavits by defendant and one
13 by his wife, Charlene Braithwaite (ph.). Defense
14 counsel himself did not - - - contrary to what
15 defense counsel has said, did not file his
16 affirmation before - - - before sentencing. He had
17 it, he brought it with him, and there's no indication
18 that he would have filed that unless the trial court
19 had ask - - - not asked him for comment.

20 JUDGE ABDUS-SALAAM: Well, my question
21 concerns the affidavit filed by the wife - - -

22 MS. COVIELLO: Yes, Your Honor.

23 JUDGE ABDUS-SALAAM: - - - that counsel
24 essentially did a line-by-line recitation or
25 explanation or refutation of. Would - - - how does

1 that impact the conflict for defendant if it's the
2 wife, not the defendant himself, making the
3 allegations, or does it matter?

4 MS. COVIELLO: Well, I think, just in a
5 general con - - - I - - - again, I think it's
6 entirely appropriate for the counsel to make spec - -
7 - specific - - - refute those allegations if they're
8 untrue, but I think that in the long - - -

9 JUDGE ABDUS-SALAAM: Even - - - even if the
10 position that counsel's taking is adverse to the
11 client?

12 MS. COVIELLO: Well, again, I think that
13 this court has delineated the difference between
14 taking a position that's adverse on the actual motion
15 and contradicting factual allegations made by a
16 client that may be misleading or untrue, and I think
17 that in the general sense - - - like in the more, in
18 the broader conflict arena when we're discussing
19 instances where an attorney actually takes the stand
20 and testifies against his client, such as in Berroa.
21 You know, in that instance - - -

22 JUDGE ABDUS-SALAAM: So is it your position
23 that every factual alle - - - every factual
24 refutation of an allegation is - - - cannot be or
25 there are no factual refutations that could be

1 adverse to the client?

2 MS. COVIELLO: In the context of an
3 ineffective assistance of counsel claim, I - - - I -
4 - - I don't think so, Your Honor, and I think that
5 Nelson demonstrates that fact. In that case, the
6 attorney contradicted and refuted every single one of
7 the allegations that his - - - that defendant and
8 defendant's brother lodged against him, and at the
9 end, opined that he had actually been effective in
10 his assistance and provided excellent counsel, and
11 this court still didn't find that there was a
12 conflict of interest. What happened here did not - -
13 - even was nowhere near what had happened in Nelson.

14 If there are no other questions, we'll rest
15 on our brief. Thank you.

16 CHIEF JUDGE LIPPMAN: Thank you.

17 Counsel, rebuttal.

18 MS. KNIGHT: Yes, Your Honor. In regard to
19 Judge Abdus-Salaam's question, there's no distinction
20 between the affidavit submitted by his wife; it was
21 submitted in support of the motion and it said that
22 she had provided counsel with information about
23 potential witnesses who could have cast reasonable
24 doubt on whether or not - - -

25 JUDGE ABDUS-SALAAM: What if the - - - the

1 attorney doesn't realize that a motion has been filed
2 he just gets the affidavit, as the attorney said in
3 this case, didn't even know that a motion had been
4 filed by his client?

5 MS. KNIGHT: He did know that a motion had
6 been filed by his client.

7 JUDGE ABDUS-SALAAM: Hadn't received - - -

8 MS. KNIGHT: What he didn't - - - he didn't
9 know that the second motion had been filed by his
10 client, so there was actually - - - Mr. Lovett filed
11 a motion to set aside the verdict which had his
12 wife's affidavit in support, then there was another
13 motion that was submitted afterward that he hadn't
14 read, but he had clearly received the motion by Mr.
15 Lovett. He had read it and he fil - - - filed a
16 written affirmation saying that what Mr. Lovett's
17 wife is say - - - that is being said in support of
18 the motion is not true, they never told me about
19 that, and then on page 650 of the appendix, "What's
20 in her sworn affidavit are things that we had never
21 talked about." So there is a clear conflict of
22 interest here.

23 This is different than Nelson, where this
24 court didn't even go into the underlying facts, but
25 the Appellate Division definitely found that the

1 statements by counsel were not even relied upon on
2 the court, and there it was things like whether or
3 not a plea app - - - like plea negotiations had taken
4 place. Here, it's whether or not an investigation
5 had taken place, and again just repeating the - - -
6 you know, if there's ever going to be a situation,
7 and we stridently suggest there should, where factual
8 allegations cross that line, this is one in terms of
9 tone and tenor, in turns of taking every opportunity
10 to pile on. And really most strikingly, I don't
11 think I've ever seen a case where after the motion
12 has been denied, counsel is still defending his
13 reputation and not representing his client.

14 CHIEF JUDGE LIPPMAN: Okay, counsel. Thank
15 you. Thank you both, all of you.

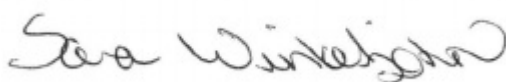
16 (Court is adjourned)

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

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Kareem Washington, No. 110, and People v. Cleveland Lovett, No. 111 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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