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COURT OF APPEALS

STATE OF NEW YORK

PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

NO. 103

JAKIM GRIMES,

Appellant.

20 Eagle Street
Albany, New York
September 13, 2018

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE PAUL FEINMAN

Appearances:

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1 CHIEF JUDGE DIFIORE: The next appeal on the
2 calendar is appeal number 103, People of the State of New
3 York v. Jakim Grimes.

4 Good afternoon, counsel.

5 MR. PERRY: Good afternoon. May it please the
6 court, my name is Joseph Perry, the law firm of Baker
7 Botts, and I represent the appellant, Mr. Jakim Grimes.
8 May I reserve one minute for rebuttal, Your Honor?

9 CHIEF JUDGE DIFIORE: Yes, of course.

10 MR. PERRY: Four years ago in People - - -

11 JUDGE RIVERA: Counsel, I'm sorry. Just to go -
12 - - a quick question on the procedural posture of the case.
13 Is it proper, on a 460.30 for a client in the position of
14 your client, to have sought leave at the Court of Appeals
15 or as was done here at the Appellate Division to file the
16 late leave application with this court?

17 MR. PERRY: I think in the first instance, it was
18 proper for the appellant to file an error - - - error coram
19 nobis petition with the Appellate Division for - - - to
20 evaluate its claim, even though the issue was the failure
21 to file a criminal-leave application with this court. I
22 think the relief in the first instance must be sought with
23 the Appellate Division.

24 In four years ago, in People v. Andrews, this
25 court expressly left open the question whether the failure



1 to timely file a criminal-leave application with this court
 2 constitutes ineffective assistance of appellate counsel as
 3 a matter of New York State Constitutional law. Today, this
 4 case presents the opportunity to answer that question. And
 5 Mr. Grimes would urge this court to answer that question in
 6 the affirmative and find - - - and to - - - and hold that
 7 the due-process clause of the new - - - New York State
 8 Constitution guarantees effective assistance of appellant
 9 counsel at every stage of a critical - - - of a criminal
 10 proceeding, including the stage at which we are here, the
 11 fa - - - the - - -

12 JUDGE GARCIA: But could I just - - - I'm sorry
 13 to interrupt you, but can we get back to Judge Rivera's
 14 question? And maybe it's a bit of an aside, but under
 15 460.30, if you are trying to make a motion out of time, but
 16 within the extra time you're allowed to make the motion,
 17 you make the motion to this court, right? That motion
 18 under 460.30 is made to the Court of Appeals. So why would
 19 a coram nobis for time outside of the time provided by the
 20 statute be made to the Appellate Division?

21 MR. PERRY: Well, Your Honor, the reason - - -
 22 because we - - - it's as - - - as - - - as you just pointed
 23 out, we did fall outside of the one-year statutory period.
 24 So when you're seeking coram nobis relief, I think this - -
 25 - the precede - - - the procedural precedent is to file in



1 the first instance with the Appellate Division.

2 JUDGE GARCIA: But it would be somewhat unusual,
3 right, to allow the Appellate Division to pass on whether
4 or not we're going to excuse a late notice for appeal to
5 this court, when the statute provides that this court has
6 the authority to excuse a late filing? And this is an
7 extra-late filing, right?

8 MR. PERRY: Yeah, I - - - I understand the
9 question, Your Honor, but again, I think because we fell
10 outside the one-year statutory period, I think the proper
11 vehicle would - - - the proper procedural way to go about
12 seeking relief was to - - - in the first instance, to go to
13 the Appellate Division.

14 And again, the Appellate Division is evaluating
15 the criminal procedure law, and it's saying, well, we're
16 outside of 460.30 and applying New York State law, whether
17 or not relief was proper, you know - - - is there another
18 avenue of relief? And the Appellate Division, indeed, did
19 - - - did pass on that question and denied the relief,
20 which - - - which they felt it was proper for them to
21 consider. And subsequently, file - - - Mr. Grimes sought
22 to appeal that decision of - - - of the Fourth Department.

23 So I think, procedurally, it was okay for Mr.
24 Grimes to go about it in that way.

25 CHIEF JUDGE DIFIORE: Mr. Perry, what about in



1 Bachert where we held that the defendant was entitled to
2 bring the motion in the appellate tribunal which considered
3 the primary appeal in which counsel was allegedly
4 deficient. What is the primary appeal here in your - - -
5 under your argument?

6 MR. PERRY: I mean, the primary appeal here is to
7 seek further relief from this court. But again, in order
8 to - - - to get to this court, Mr. Grimes wanted to
9 commence the coram nobis proceed - - - or felt he needed to
10 commence a coram nobis proced - - - proceeding with the
11 Appellate Division in order to - - - in order for that - -
12 - in order for that question in the first instance to be
13 answered.

14 JUDGE RIVERA: But in - - - but in Andrews, both
15 the majority and myself, in deciding Kruger, said we
16 weren't opining on whether or not filing the coram with the
17 Appellate Division was proper - - - in the Kruger case - -
18 - and took no position on it. So we have not decided the
19 question, so we could in this case. I'm not saying we
20 will, but we could in this case, could we not, decide that
21 it's not in a proper procedure posture?

22 MR. PERRY: That - - - that question was left
23 open, I - - - I agree with you, Your Honor, and - - -

24 JUDGE RIVERA: And if we do that, would that
25 foreclose you of your counsel or at least the client from



1 then seeking or - - - or submitting the request
2 specifically to this court? Would you be foreclosed from
3 doing that?

4 MR. PERRY: I don't think it would foreclose in
5 this case, because there was no opposition by the People
6 when Mr. Grimes filed the coram nobis in the Fourth
7 Department in the first instance. In fact - - -

8 JUDGE STEIN: We would have to find that it was a
9 jurisdictional issue, right?

10 MR. PERRY: You would have to reach - - - that
11 would be - - - that'll - - - that's correct, Your Honor.
12 You would have to - - - the court would have to find it was
13 jurisdictional and could reach that - - - an otherwise
14 unpreserved issue.

15 JUDGE STEIN: Getting - - - getting back to the
16 merits. You know, something in - - - in reviewing all this
17 struck me, and - - - and that is the fact that our court
18 rules do not provide for the assignment of counsel for a
19 criminal leave application. And we can - - - we can go
20 into the possible reasons for that, but so are - - - are
21 you suggesting then that that court rule is
22 unconstitutional under our state Constitution?

23 MR. PERRY: No, I was actually reviewing the
24 rules of practice, and I noticed 500.21 of your rules do
25 provide, however, that what should leave be granted, the



1 assignment of counsel is - - - is available to - - -

2 JUDGE STEIN: Well, that's right, but here we're
3 talking about the failure to file the criminal leave
4 application, not whether there was ineffective
5 representation once that application was granted on the
6 appeal itself. So it seems to me that that's the very
7 question that we're looking at, and you know - - - and - -
8 - and you know, the Supreme Court, in *Ross v. Moffitt*, gave
9 a whole analysis, right, of - - - of all of the reasons why
10 a - - - a second-tier appeal might be different from a
11 first-tier appeal. And what is it in our - - - our state
12 Constitutional analysis that would differentiate that? Or
13 - - - or are there any state statutes or regulations or
14 anything that you feel supports your argument that - - -
15 that under our state Constitution, there are greater
16 rights?

17 MR. PERRY: I mean, I would begin with the
18 premise that this court has long recognized that our
19 state's due-process clause often provides defendants with
20 broader rights than the federal counterpart. There are a
21 series of cases from this court that say that the due-
22 process clause and the ineffective assistance of counsel
23 standard is broader. And I would point to the CPL, the
24 fact that defendants are afforded a - - - a right to apply
25 for leave. That is a right that we're talking about here.



1 We're not talking about the right to appeal to this court.
2 What - - -

3 JUDGE STEIN: Well, there's a right to apply for
4 certiorari to the United States Supreme Court as well, but
5 that doesn't - - - that didn't affect the analysis under
6 federal Constitutional law.

7 MR. PERRY: Right, again, I - - - well, Mr.
8 Grimes would rely on the fact that in - - - in ma - - - in
9 many instances this court has recognized broader
10 protections under the new - - - under the due-process
11 clause of - - -

12 JUDGE STEIN: But that has to be based on - - -
13 based on something. And - - - and so I - - - you know, I'm
14 - - - I'm looking at the whole - - - the whole picture - -
15 -

16 MR. PERRY: Yeah.

17 JUDGE STEIN: - - - of our court rules, and - - -
18 and you know, in our - - - we - - - we recently said that
19 you don't have the right to counsel in a poor-person
20 application. And I realize there are some differences - -
21 -

22 MR. PERRY: Sure.

23 JUDGE STEIN: - - - between the two, but one
24 might argue that there are also some similarities, so.

25 MR. PERRY: Yeah.



1 JUDGE STEIN: So what is it in that - - - you
2 know, in particularly about our jurisprudence or - - - or
3 you know - - - or our - - - our state law that would argue
4 in support of your analysis?

5 MR. PERRY: Yeah, I mean, I think the fact that
6 this court has - - - has broad powers in their - - - under
7 the CPL to - - - to make decisions about under - - - on
8 direct review of - - - of powers to look at errors and
9 defects of law, both that occurred at the Appellate
10 Division and in the court of first instance. CPL 470.35
11 vests this court with broad - - - broad jurisdiction to
12 review issues of law - - -

13 JUDGE FAHEY: Let me ask you - - -

14 MR. PERRY: - - - mode of proceedings error.

15 JUDGE FAHEY: While - - - while we're in this
16 area, what would be the effect - - - well, on the court's
17 caseload and how would it affect other areas of the law?
18 And let me give you two examples. First, do you think it
19 would have any effect on - - - on the caseload of the court
20 itself and our management of the caseload? Because it
21 seems like you're eliminating our certiorari power, and in
22 essence, making certain types of what are discretionary
23 appeals, now mandatory, not in - - - not necessarily in
24 granting, but in reviewing. That's the first part.

25 The second part is, if we did this, would this



1 have an effect on other areas of the law, such as 440? In
2 other words, with - - - with the same arguments being - - -
3 being used and we would have a difficult time cabining our
4 discretionary appeals once we open the door here.

5 MR. PERRY: I think - - -

6 JUDGE FAHEY: Do you see what I'm saying?

7 MR. PERRY: I do.

8 JUDGE FAHEY: Okay.

9 MR. PERRY: With respect to the opening of the
10 floodgates with this court, I mean, those concerns were
11 also - - -

12 JUDGE FAHEY: Well, the floodgates problem, you
13 know, there's always - - - it's always an argument against
14 something, you know, but you have - - - it seems to me you
15 have two different parts to that. One is, are - - - how -
16 - - how's it going to affect our - - - our granting these -
17 - - our - - - our controlling our own caseload in terms of
18 discretionary review of appeals. That may be manageable.
19 But the other, more significant, area is - - - is the logic
20 from this discretionary grant going to undermine other
21 parts of the CPL, where a vast number of cases are handled
22 through discretionary appeals, without counsel? And I use
23 440 as an example.

24 MR. PERRY: I think 440 is a nice distinction
25 here, because 440 - - - under a CPL 440 motion, there's no



1 time bar imposed for defendants to make - - - to raise
2 claims. There's no due-diligence requirements, which is -
3 - - which is in 460.30. So 4 - - - I don't think a rule -
4 - -

5 JUDGE FEINMAN: Yeah, except that it's built into
6 other aspects of the 440 jurisprudence, such as, you know,
7 you have to have raised it - - - if it could have been
8 raised in the direct appeal, you're out of the box. I
9 mean, so I don't know that that's such a neat distinction.

10 MR. PERRY: Well, in - - - for 440, there's - - -
11 in the context where newly discovered evidence that - - -
12 things that couldn't be raised on direct appeal, in those
13 kinds of cases, there are no time limits. I - - - I see
14 the distinction you're making between things that could
15 have been raised on direct review, but again, I think the
16 rules of 440 would limit those kinds of cases, and - - -
17 and a rule here wouldn't change that.

18 JUDGE STEIN: And - - - but and - - - but
19 wouldn't it sort of take the guts out of 460.30? I mean,
20 what - - - really, what purpose would 460.30 serve anymore?

21 MR. PERRY: Yeah, I mean, again, I think that - - -
22 - that the same question - - -

23 JUDGE STEIN: And do we have the right to - - -
24 to do that, to something the legislature has seen fit - - -

25 MR. PERRY: Right.



1 JUDGE STEIN: - - - to enact?

2 MR. PERRY: I mean, that's the same question that
3 was im - - - implicated by the Syville case in 2010, when -
4 - -

5 JUDGE STEIN: We said Syville was extremely
6 narrow.

7 MR. PERRY: Yeah, and here, in the rule that Mr.
8 Grimes seeks here is - - - is equally narrow. This is an -
9 - - a limited circum - - -

10 JUDGE GARCIA: But wouldn't, counsel - - -
11 wouldn't we have to find, to find for you, that he has a
12 right to counsel in this discretionary appeal process,
13 right? He has a right to counsel on a CLA?

14 MR. PERRY: Yes, in order to reach the question
15 that we're saying here - - -

16 JUDGE GARCIA: Wouldn't that - - - I think, going
17 to Judge Fahey's questions - - - wouldn't that itself open
18 up other cases? For example, I had a right to counsel and
19 my CLA might - - - my lawyer made these two arguments, but
20 this was the winner. And he never raised that in my CLA
21 application and I am entitled to effective assistance on
22 that application, and we'll have to hear that. I mean, we
23 may not grant it, but we'd have to hear it.

24 MR. PERRY: But I think in the scenario that
25 you're describing, I think there are situations where a



1 defendant could - - - if a CLA is - - - one counsel makes a
2 CLA that wholly ignores an - - - an argument, I think a
3 coram nobis would be - - - or - - - application would be
4 inappropriate (sic) for relief, and I think it would be
5 grounded on the fact that a defendant has a right to
6 effective assistance of counsel at all stages of - - - of
7 the criminal proceeding.

8 And I just want to make one quick point. You
9 know, the rule - - - the rules of the Appellate Division
10 provide for - - - for counsel. And provide - - - provide
11 for the right to counsel, and in many cases, a defendant
12 could opt to apply for leave to this court at the Appellate
13 Division, and this - - - and because the rules of the
14 Appellate Division apply - - - would guarantee a
15 defendant's right to counsel, should he opt to apply for
16 leave through the Appellate Division, it would be kind of
17 an anomalous result to say that there's no right to counsel
18 before the Court of Appeals - - -

19 JUDGE STEIN: That's the status - - - the state
20 of the law rules as - - - as it stands today is, I mean,
21 absent a Constitutional violation, that's the Appellate
22 Division rules and our rules are different, so that's the
23 way it's been.

24 MR. PERRY: Yes, but - - - but I think the rules
25 contemplate with respect to - - - at the CLA stage, that



1 the attorney who represented the defendant at the Appellate
2 Division, and lost, would file the criminal leave
3 application, have counsel, and then if - - - if leave were
4 to be granted, then the decision could be whether that
5 counsel stays on to represent the defendant before this
6 court, or wants to apply, once the def - - - once leave is
7 granted, for new counsel.

8 So I think there's a continuum of - - - of
9 representation that's - - - that's not lost.

10 CHIEF JUDGE DIFIORE: Thank you, Mr. Perry.
11 Mr. Maxwell?

12 MR. MAXWELL: Good afternoon, may it please the
13 court. Our position is that the rules as exist in 460.30,
14 paragraph 1, sufficiently balance the interests involved,
15 and provide a one-year grace period that is perfectly
16 Constitutional, fair, and appropriate, that to alter it by
17 a court decision does create potential for all kinds of
18 ramifications.

19 JUDGE RIVERA: No, but the real question is a
20 Constitutional question. So it - - - obviously, if the
21 legislature passed a statute that violates a defendant's
22 Constitutional rights, it trumps the statute.

23 But can I just ask you the - - - those first
24 series of questions - - -

25 MR. MAXWELL: Yes.



1 JUDGE RIVERA: - - - we were asking about the
2 procedural posture of the case.

3 MR. MAXWELL: Yes.

4 JUDGE RIVERA: Is it a jurisdictional matter?

5 MR. MAXWELL: I believe it is, and I - - - the -
6 - - the unseemly thing about it is it would seem to give
7 the - - - if you'll allow the defendant to go to the
8 Appellate Division at this point, the Appellate Division
9 then has somehow the - - - has to take the authority to
10 decide what this court's jurisdiction is and it - - - I
11 don't know if "unseemly" is the word, but it just seems
12 like that it shouldn't work that way.

13 And several parts of my brief, I see instances
14 where the defense here is trying to push for greater rights
15 if they violate the statute than if they go along with it.
16 For - - - what I mean is, especially if you look at the
17 amicus brief, if somebody misses the one-year grace period,
18 the amicus brief is arguing that the defendant should have
19 no burden to show due diligence, to show that they could
20 not have reasonably discovered the error. And I just see
21 that as fraught with problems.

22 JUDGE STEIN: Well, but getting back to the - - -
23 the procedural question, if we agreed with you, would there
24 be anything to prevent this defendant from now bringing the
25 error coram nobis application in this court, if we



1 dismissed this proceeding?

2 MR. MAXWELL: No, if you decide the question that
3 you footnoted in Andrews and decided not to decide, I
4 suppose now he could - - - he could bring that and it'd be
5 even later, but, you know, because of the litigation.

6 JUDGE STEIN: Right, so - - - so - - - so
7 eventually, I guess, my point is, is that wouldn't we - - -
8 wouldn't we hear the issue? So as a matter - - -

9 MR. MAXWELL: So, why not hear it now?

10 JUDGE STEIN: - - - as a matter of practicality,
11 at least, assuming it's not jurisdictional - - -

12 MR. MAXWELL: Right.

13 JUDGE STEIN: - - - what would be the point?

14 MR. MAXWELL: Well, again, and at least you would
15 be deciding at this point, I suppose. The - - - the
16 problem that I think, as a court, you would be concerned
17 about is if the Appellate Division had granted this and
18 said, aha, yes, it's up to us at the Appellate Division to
19 decide what the Court of Appeals can hear and can't hear.
20 Now, that does happen in the applications when - - -

21 JUDGE FAHEY: Mr. Maxwell - - -

22 MR. MAXWELL: Sure.

23 JUDGE FAHEY: - - - it happens more times than
24 I'd want to say, but don't quote me here.

25 MR. MAXWELL: But you don't want to even more, I



1 hope.

2 JUDGE FAHEY: You don't want to make it worse.
3 Well, that's a legitimate argument, okay.

4 MR. MAXWELL: But I - - - I think there are also
5 - - - I mean, this does lead to policy questions that you
6 haven't decided and are important. Where do we draw the
7 line? Is there finality for crime victims? For when we
8 know we can safely get rid of the evidence? When we know
9 we can tell the trial court, you know, this case is done?

10 JUDGE RIVERA: Counsel, did - - - did you raise
11 the - - - this question with the Appellate Division? No,
12 right?

13 MR. MAXWELL: No. I - - -

14 JUDGE RIVERA: And you didn't file any
15 objections. So isn't it somewhat unfair - - - he sort of
16 filed it, you could have ended it at that point, he then
17 could have sought relief here - - - to now raise it with
18 us?

19 MR. MAXWELL: Well, Your Honor, to be honest, I
20 made an error. I - - - I - - - when I came in, I was kind
21 of mystified by the whole thing and I was kind of wondering
22 why is the Appellate Division going to be able to do this,
23 but - - - I didn't think they could do it, but I - - - I
24 let it go, and let them figure it out without me. And that
25 was my error, you know.



1 The attorney on the other side, I actually felt
2 bad for him at that point, that he was now claiming his own
3 ineffectiveness. But I thought, well, the Appellate
4 Division will - - - will decide this. And when they said,
5 motion denied, there are multiple grounds that come to mind
6 of why they said that, and to say now that they erred as a
7 matter of law in saying that, I - - - I don't think you can
8 say that.

9 JUDGE RIVERA: So let's go to - - - to, as you
10 say, his attorney admits the error. Isn't the case then
11 different with respect to some of the questions that were
12 posed to - - - to counsel? Isn't the question different
13 from when you don't have a lawyer, when here, he had a
14 lawyer, and that lawyer made representations?

15 MR. MAXWELL: Yeah.

16 JUDGE RIVERA: And he relied on those
17 representations. How is that not the core of that
18 ineffective assistance, because now he's been deprived of
19 this statutory right to seek - - - we don't have to grant -
20 - - but just to seek an opportunity for review, which also
21 has now put in question whether or not he's preserved his
22 habeas petition - - - position.

23 MR. MAXWELL: Well, Your Honor, along those
24 lines, according to the attorney's affidavit - - - he
25 doesn't attach an affidavit from his client, but according



1 to the attorney's affidavit, what his communication, you
2 know, and - - - it's not the defendant saying, I want this
3 done, it's the attorney saying, I'm going to do it. And
4 that's - - - that's what they do, okay.

5 You - - - you have - - - I'm sure in all your
6 chambers, you have a pile of criminal leave applications in
7 cases where you have to decide whether to grant leave. The
8 attorneys do them routinely. He meant to do it routinely
9 here. But he also told the client, and you'll be getting a
10 copy of this shortly. And that's where I say that any
11 argument falls down that he could not have reasonably
12 discovered the error.

13 If you're told you're going to get a copy
14 shortly, and then you wait thirteen-and-a-half months, and
15 I - - - I believe it's fairly inferenced from this that he
16 got arrested again and that's when he called - - - then
17 that's when he wrote to the lawyer, that he hasn't
18 exercised - - - that - - - that he - - - he lost that
19 opportunity.

20 JUDGE STEIN: Would - - - would you agree that if
21 - - - if his lawyer had made that same representation
22 eleven months later, right on the cusp of the one-year
23 period, that it - - - it might be a different result?

24 MR. MAXWELL: Perhaps, I'm not sure if I'm
25 following.



1 JUDGE STEIN: In terms of determining whether he
2 had exercised due diligence.

3 MR. MAXWELL: Oh, whether the defendant had
4 exercised - - - yes, I think it would be a different
5 equation. But here, he - - - you know, within a day, I'm
6 going to do it. As a matter of fact, he did do it that
7 day, but he didn't mail it out; he didn't catch it. And
8 I'm kicking myself for not giving him a call and saying,
9 what gives with this case? You always make these leave
10 applications. But - - - but I didn't.

11 And - - - but I think the defendant has some
12 responsibility. And if - - - again, if - - - with the
13 lawyer saying you'll be getting a ca - - - copy shortly,
14 and he lets it go, it shows, I think, that he really wasn't
15 that interested.

16 JUDGE FAHEY: Can we take a step back, though?
17 It - - - it seems that the defense had two good
18 policy/Constitutional arguments that maybe you can address.
19 The first is in this situation, if there was a clear
20 underlying appellate error, there would be no way to
21 correct that error, unless there - - - there was some way
22 to require that it was - - - we characterize it now as a
23 discretionary ap - - - appeal, to give that person a right
24 to bring that appeal forward, at least to apply. So that -
25 - - so there'd be no way to correct any appellant error, if



1 there's clear error. Let me just finish.

2 MR. MAXWELL: Okay.

3 JUDGE FAHEY: You can answer the same question.

4 MR. MAXWELL: Sorry. Got it, all right.

5 JUDGE FAHEY: The second - - - the second part,
6 and I'm not as sure about this, is that - - - because it's
7 been pointed out to me that this may be - - - not be
8 exactly right - - - but it seems that - - - that this could
9 also be a mandatory prerequisite to a federal habeas corpus
10 petition. So those two issues seem to me - - - I'm not as
11 sure about the second as the first - - - as - - - as
12 legitimate points that the appellant has on their side.

13 MR. MAXWELL: All right. To try and go back to
14 the first question.

15 JUDGE FAHEY: Go to correction of error first.

16 MR. MAXWELL: Correction of error.

17 JUDGE FAHEY: Yeah.

18 MR. MAXWELL: I - - - I think that the statutory
19 discretionary leave to this court is as - - - is important.
20 I'm not saying what you do is not important. But it's a
21 different level than having, like, the Syville situation,
22 where you don't have to go at all.

23 JUDGE FAHEY: But you - - - you've seen
24 situations - - - you've been at it a long time - - - where
25 there's clear error by the Appellate Division. And we



1 would be allowing that error to go unchecked under the
2 system if we promulgated the way we have it now. And point
3 of fact, that can happen, and that seems to be - - - to be
4 a clear injustice.

5 MR. MAXWELL: Well, Your Honor, again, I agree
6 with you that there are cases where you reverse the
7 Appellate Division and - - - and it's - - - it's - - -

8 JUDGE FAHEY: It's clear on its face.

9 MR. MAXWELL: It's clear, yeah.

10 JUDGE FAHEY: Sure. And when that happens - - -

11 MR. MAXWELL: But those aren't the norm - - -

12 JUDGE FAHEY: Now put yourself in the procedural
13 posture of that defendant who would not have been able to
14 do it because his attorney made an error.

15 MR. MAXWELL: Right. But any system we have is
16 not going to be perfect. And the system we have creates
17 this - - -

18 JUDGE FAHEY: But - - -

19 MR. MAXWELL: - - - poverty of - - -

20 JUDGE FAHEY: But you yourself would - - - would
21 recognize - - - and you probably did, because you didn't
22 object to the lower, so - - - so on a personal level, you
23 recognize that, while it may be imperfect, we strive for
24 perfection in the - - -

25 MR. MAXWELL: Yeah.



1 JUDGE FAHEY: Yeah, so.

2 MR. MAXWELL: And here the attorneys on both
3 sides, me and the other attorney, made a - - - each made a
4 mistake.

5 But - - - I know my red light's on, but just on
6 the habeas, again, the - - - the ability of the federal
7 court to intercede, I - - - I would think that that's up to
8 them how they handle that, if they feel that they have to
9 make an exception to the - - - the exhaustion - - -

10 JUDGE FAHEY: The exhaustion-of-remedies
11 argument.

12 MR. MAXWELL: Yeah, right. And I - - - I would
13 leave that to them, rather than to you to try and figure
14 out what federal court would do if they're faced with this
15 situation and an applicant says, oh, I was shut out from
16 this because of my attorney. And I - - - I think it's - -
17 - that would be their call, so. So I'd ask you to affirm.

18 CHIEF JUDGE DIFIORE: Thank you, counsel.

19 Counsel?

20 MR. PERRY: Your Honors, I'd like to - - -

21 JUDGE GARCIA: Oh, briefly, going to this point
22 that was raised just now, it seems to me in Andrews, when
23 we went on in a federal Constitutional claim, we said that
24 because there's no federal Constitutional entitlement to
25 legal representation on a discretionary appeal, like a CLA,



1 therefore, failure to file a CLA alone doesn't necessarily
2 establish ineffective assistance. It's not your position
3 that even if you weren't entitled to representation, the
4 fact that he had a lawyer who was ineffective entitles you
5 to relief, is it?

6 MR. PERRY: Your Honor, I'm not sure I follow
7 your question.

8 JUDGE GARCIA: So I understood your position to
9 be, under the state Constitution, you're entitled to
10 representation on a discretionary appeal.

11 MR. PERRY: Yes, that would be our argument, that
12 at - - -

13 JUDGE GARCIA: Right.

14 MR. PERRY: - - - because a defendant is entitled
15 under New York law to apply for leave, he's entitled to
16 apply for leave with the benefit of the effective
17 assistance of counsel. And he - - -

18 JUDGE GARCIA: He has a right to counsel or
19 because he had counsel here and that counsel was
20 ineffective, he's entitled to relief? Those seem to be
21 different arguments.

22 MR. PERRY: I would submit that he has a right to
23 counsel, because the New York - - - because the statute
24 confers a right to apply for leave. A defendant has a
25 right to the benefit of effective counsel and that - - -



1 and that necessarily would mean effective counsel.

2 JUDGE GARCIA: Understood. That's how I
3 understood it.

4 MR. PERRY: And - - - and I think because leave
5 to this court is discretionary, I think it's critical to
6 have that meaningful representation, because this is a
7 defendant's last opportunity to raise questions of law,
8 mode-of-proceedings errors. And because leave is - - -
9 there's not that strong likelihood that leave will be
10 granted, you want to put your best arguments forward, and
11 to do so, you need the benefit of counsel to do that.

12 JUDGE RIVERA: Could you address the - - - the
13 point the People were making that possibly here he never
14 asked. That it was just appellate counsel working on
15 automatic pilot, just filing it to protect his rights, or
16 intending to file it, didn't go through it, and whether or
17 not the defendant in that kind of a case, who perhaps
18 didn't ask, but it's just appellate counsel acting pursuant
19 to that counsel's practice.

20 MR. PERRY: Under these facts, there was really
21 no opportunity to ask I want to - - - within the thirty
22 days to apply for leave, because a day - - - a day or two
23 after the Fourth Department rendered its decision, counsel
24 sent a letter to Mr. Grimes, saying that the Appellate
25 Division had affirmed and I'm going to file your criminal



1 leave application. So there was no need on - - - on this
2 record to make that request.

3 JUDGE STEIN: So - - -

4 MR. PERRY: And as to the point that counsel made
5 about the fact that counsel represented that he would send
6 the application shortly to him as - - - for his record - -
7 - I mean, the - - - the due-diligence test shouldn't hinge
8 on the fact that he didn't ask for the status of that
9 application.

10 JUDGE RIVERA: You're - - - you're not taking the
11 position of the amici that there shouldn't be a due-
12 diligence test that's applied to these types of ineffective
13 assistance of counsel claims?

14 MR. PERRY: Yeah, we didn't make that argument.
15 I understand where they're coming from, because the
16 decisions, both in Rosario and Arjune, I think there was a
17 threshold finding that there was effective assistance, or
18 that the defendants didn't meet their burden in showing
19 ineffective assistance, so there was no need to show the
20 due - - - there was no need to reach the due-diligence
21 question.

22 But I would, in fairness, point out the fact that
23 the CPL 460.30 imposes a due-diligence requirement, within
24 that one-year period, so it - - - it would be a little
25 strange for a defendant not to have a due-diligence



1 requirement in a coram nobis proceeding where that - - -
2 where the period is longer than one - - - one year.

3 So in any event, like, we meet the due diligence.
4 Whether or not there is a due-diligence requirement, we
5 meet that standard here.

6 JUDGE STEIN: Can I just ask you about your
7 statement about the need for an attorney to file the CLA,
8 because of its significance? But what do you say to the
9 fact that a lot of the criminal leave applications that we
10 get merely say that we're relying on the briefs in the
11 Appellate Division? And that in virtually every case that
12 would come here, there would be arguments of counsel in - -
13 - in - - - already in a prior appellate court. There would
14 be - - - there would be, obviously, briefs. There would be
15 the decision of the court.

16 So there really isn't that much that - - - that a
17 defendant would have to do to add to that for the purpose
18 of that review. What - - - what's your response to that?
19 Unlike the first tier of appellate review.

20 MR. PERRY: Yeah, I understand your point, but
21 again, there is a right to apply for leave and a defendant
22 who has counsel - - -

23 JUDGE STEIN: Well, there's also a right to apply
24 for poor-person status to - - - to get your - - - your
25 application before the court, but we said you don't have a



1 right to an attorney there, either.

2 MR. PERRY: Well, I think poor person is
3 different than the actual merits consideration, because
4 poor-person relief is merely indicating your income
5 thresholds and why you'd be entitled to appointment of
6 counsel.

7 JUDGE STEIN: Well, I'm just saying that your
8 right to do that isn't the an - - - isn't the answer to the
9 question as to whether you're entitled to counsel.

10 MR. PERRY: That's correct, Your Honor. But I -
11 - - you have an opportunity to file papers before the
12 court, and a defendant has - - - has the right to put those
13 - - - the best foot forward and to make nuanced arguments
14 in the form that are above and beyond the briefing at the
15 Appellate Division and above and beyond what's in - - -
16 indicated in the record below and the benefit of the
17 Appellate Division's decision.

18 JUDGE RIVERA: That may include a challenge to
19 the Appellate Division's determination - - -

20 MR. PERRY: That is correct.

21 JUDGE RIVERA: - - - which wouldn't be in the
22 briefs, correct?

23 MR. PERRY: That - - - that's correct. So you
24 know, in - - - in many instances, the fact that that
25 opportunity is not taken advantage of doesn't mean that - -



1 - that there's not that right to - - - to do that.

2 CHIEF JUDGE DIFIORE: Thank you, counsel.

3 MR. PERRY: Thank you.

4 (Court is adjourned)

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

I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Jakim Grimes, No. 103 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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