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COURT OF APPEALS

STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

No. 55

REYNALDO PEREZ,

Appellant.

PEOPLE,

Respondent,

-against-

No. 56

IVAN CALAFF,

Appellant.

PEOPLE,

Respondent,

-against-

No. 57

ALEXANDER DOCKERY
A/K/A JOHN HARRIS,

Appellant.

PEOPLE,

Respondent,

-against-

No. 58

TEOFILO LOPEZ
A/K/A GARCIA LOPEZ
A/K/A ISIDORO GARCIA,

Appellant.

1 Before:

2 CHIEF JUDGE JONATHAN LIPPMAN
3 ASSOCIATE JUDGE VICTORIA A. GRAFFEO
4 ASSOCIATE JUDGE SUSAN PHILLIPS READ
5 ASSOCIATE JUDGE ROBERT S. SMITH
6 ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
7 ASSOCIATE JUDGE JENNY RIVERA
8 ASSOCIATE JUDGE SHEILA ABDUS-SALAAM

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Karen Schiffmiller
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: We're going to start
2 with, I guess, let's - - - let's do the appellants.
3 And Attorney Birnbach, you're going to start?

4 MR. BIRNBACH: Thank you, Your Honor.

5 CHIEF JUDGE LIPPMAN: Do you want any - - -
6 any rebuttal time of your five minutes?

7 MR. BIRNBACH: No, Your Honor.

8 CHIEF JUDGE LIPPMAN: Okay, let it all rip
9 out. Go ahead.

10 MR. BIRNBACH: May it please the court, my
11 name is Howard Birnbach, counsel for Reynaldo Perez.

12 Your Honors, my client has been in prison
13 since July 27th, 1996. He was twenty-one years old
14 the date of his sentencing. And he's never had any
15 appellate review of his conviction. And he - - - he
16 stands to be in jail for the rest of his life without
17 ever having an appeal review.

18 And we - - - we maintain, under People v.
19 Ventura, where this court specifically said, "as a
20 matter of fundamental fairness, all" - - - I
21 emphasize the word all - - - could not be more broad
22 - - - "all criminal defendants shall be permitted to
23 avail themselves of the intermediate appellate
24 courts."

25 JUDGE RIVERA: Yeah, but they have a right

1 to appeal - - - avail themselves. They actually have
2 to perfect the appeal, do they not?

3 MR. BIRNBACH: Clearly, Your Honor. And in
4 this - - - in this particular case, in 2003, six
5 years later after counsel was retained - - - prior
6 counsel, of course, Your Honor - - - the attorney was
7 adjudicated in neglect by the disciplinary committee.
8 And nine years later, he never even perfected the
9 appeal.

10 So the question is, if there's negligence
11 of that magnitude, should my client spend the rest of
12 his life in jail - - -

13 JUDGE SMITH: Well, should - - - but didn't
14 - - -

15 JUDGE GRAFFEO: Perhaps - - -

16 JUDGE SMITH: Go ahead.

17 JUDGE GRAFFEO: That's all right.

18 JUDGE SMITH: Didn't - - - didn't there
19 come time when - - - though, when your client, I mean
20 - - - after the six years or after the nine - - - I
21 mean, how many years was it, before your client
22 finally got around to doing anything?

23 MR. BIRNBACH: Well, in - - - in 2003, he
24 filed a grievance, okay. In 2009, prior counsel
25 submitted a 440 application. And in 2012 - - - it

1 was either 2011 or 2012 - - - it was denied by - - -
2 leave to appeal was denied. Now, the Supreme Court
3 said in the 440 motion - - -

4 JUDGE SMITH: You - - - you mean, leave to
5 appeal from the 440 or you're talk - - -

6 MR. BIRNBACH: Yeah, leave to appeal of the
7 440 was denied.

8 JUDGE SMITH: When did he - - - when did he
9 try to - - - when did he first try to perfect or when
10 did he first perfect his direct - - - he never
11 perfected it - - - well - - -

12 MR. BIRNBACH: Never perfected, Your Honor.

13 JUDGE SMITH: Huh?

14 MR. BIRNBACH: Never perfected as - - -

15 JUDGE SMITH: Never perfected it.

16 MR. BIRNBACH: Never perfected it.

17 JUDGE SMITH: Isn't there some point at
18 which the - - - he has to share part of the blame for
19 that?

20 MR. BIRNBACH: Sharing part of the blame is
21 one thing. He shared part of the blame by the fact
22 that he's been in prison for the last sixteen years.

23 JUDGE SMITH: Yeah, but - - - but the
24 system - - - the system doesn't work if people are
25 allowed to sit around for twenty - - - for decades -

1 - - and not do anything.

2 MR. BIRNBACH: Well, I think what this
3 court said in Ventura, is clearly there's a tension.
4 There's a tension between rules and regulations that
5 have court-filing deadlines and people possibly being
6 in jail for the rest of their lives - - -

7 CHIEF JUDGE LIPPMAN: Where - - - where's
8 the balance, counselor? How do we find the right
9 balance?

10 MR. BIRNBACH: Well, I think you found it
11 correctly in Ventura. I think you said that court-
12 filing deadlines as important as they may be - - -

13 JUDGE READ: So could he wait another ten
14 years?

15 MR. BIRNBACH: Well, I think if you wait
16 another ten years while you're in prison, you bring
17 misery and misfortune upon yourself. What would you
18 suggest - - -

19 JUDGE GRAFFEO: Well, taking - - - taking -
20 - - let's - - - let's get away from the facts of your
21 case.

22 MR. BIRNBACH: Okay.

23 JUDGE GRAFFEO: Just in a general sense, is
24 there never a time period with which an appeal is
25 going to be untimely?

1 MR. BIRNBACH: I would suggest that if you
2 follow the Appellate Division First Department rules,
3 at least for indigents, you gets notice of
4 untimeliness, and then the attorney has a right to
5 come in and at least address it.

6 In my case, the Appellate Division rules
7 are structured, so if you have retained counsel,
8 you'd never get notice. So my client never got
9 notice, and my client was under the belief that
10 because a 440 motion was going forth, he was
11 appealing the conviction. Something was going on.

12 JUDGE RIVERA: But in 2003 of - - - right,
13 he does, indeed, complain and file a complaint with
14 the disciplinary committee, or at least, his mother
15 does, someone does - - -

16 MR. BIRNBACH: Yes.

17 JUDGE RIVERA: - - - on his behalf.
18 Whether it's 2003 or earlier than that, he - - - it's
19 - - - once that committee advises him that that
20 attorney had done nothing, isn't - - - doesn't that
21 put him on notice that maybe I should do something?
22 Why does he wait almost another decade?

23 MR. BIRNBACH: Because he's under the
24 belief that an appeal will ultimately be consummated,
25 and in fact - - -

1 JUDGE RIVERA: Well, why is a belief - - -
2 what - - - what would be - - - what justifies that
3 belief?

4 MR. BIRNBACH: He retained counsel.

5 JUDGE RIVERA: Yeah.

6 MR. BIRNBACH: Counsel was admonished for
7 neglect. And therefore the matter did, in fact,
8 proceed ahead. It proceeded ahead, after a lengthy
9 period of time. But my point - - - my client did
10 avail himself of the - - - of the state process.

11 JUDGE RIVERA: So are - - - are you arguing
12 that in reality that the only delay, if any, should -
13 - - that should be charged to him is after the denial
14 of his appeal from - - -

15 MR. BIRNBACH: Yes.

16 JUDGE RIVERA: Well actually, once you
17 finish the finality of the appeal from the 440, is
18 that where you're claiming - - -

19 MR. BIRNBACH: I would - - -

20 JUDGE RIVERA: - - - that's the only delay
21 that should be charged to him?

22 MR. BIRNBACH: Yes.

23 JUDGE GRAFFEO: And how long is that period
24 of time?

25 MR. BIRNBACH: Around two years. Look,

1 this is a balancing test. Let's remember one thing
2 about the Appellate Division First Department. If I
3 didn't make that application for leave to appeal,
4 that appeal would still be viable. That appeal was
5 viable sixteen years later when I walked into the
6 case. Once I was retained, and I moved to extend the
7 time to perfect the appeal, and I gave the court my
8 brief, then they dismissed the appeal, and the appeal
9 was no longer viable.

10 So you have the extraordinary situation
11 where if I don't show up and I don't do anything, the
12 appeal remains viable. If I try to perfect, the
13 appeal gets ousted.

14 CHIEF JUDGE LIPPMAN: Well, at some pum - -
15 - some point, it has to be determined whether the
16 appeal can go or not go. That's going to happen
17 inevitably, right? Unless it just stays forever and
18 no one raises it - - -

19 MR. BIRNBACH: But I would - - - I see it's
20 time for me to go.

21 CHIEF JUDGE LIPPMAN: What's your - - -
22 it's okay. What's your bottom line? Why in your
23 case does the balance tip in your favor?

24 MR. BIRNBACH: You have an administrative
25 deadline. You have the possibility of a twenty - - -

1 twenty-one year-old man remaining in prison for the
2 rest of his life. Where do the balance of equities
3 move? Obviously the Appellate Division wasn't all
4 that agitated - - -

5 JUDGE SMITH: Are you suggesting - - -

6 JUDGE GRAFFEO: Well, it can't be the
7 seriousness of the crime? That can't be the test - -
8 -

9 MR. BIRNBACH: No - - -

10 JUDGE GRAFFEO: - - - for who's entitled to
11 an appeal and who isn't?

12 MR. BIRNBACH: I was specifically asked
13 where does the balance occur in - - - in my case. I
14 think that's certainly a critical factor. In my
15 case, if my client is denied his right to appeal, he
16 stands to be in prison for the rest of his life.

17 JUDGE PIGOTT: Mr. Birnbach, when you - - -
18 when you talk about a balancing act, would it - - -
19 would it be - - - in terms of equity. One of the - -
20 - one the com - - - one of the things that the People
21 argue is that, you know, witnesses are dead, you
22 know, memories fade, you know, it's been a long time.
23 If you were granted an appeal solely on the issue of
24 sufficiency, would that - - - would that balance the
25 equities, in your view?

1 MR. BIRNBACH: No, because I think my
2 client should not risk being in prison for the rest
3 of his life on the basis of an unjust conviction
4 because he didn't raise all the issues that should be
5 raised.

6 JUDGE SMITH: But why - - - why should - -
7 - why should the families of the victims have to risk
8 an unjust acquittal, all the - - - af - - - all these
9 years after the - - - the witnesses are no longer
10 there?

11 MR. BIRNBACH: Because the idea of somebody
12 remaining in prison for the rest of their life
13 without having an appeal is simply intolerable.

14 JUDGE RIVERA: Mr. - - - counsel, I know
15 that you are suggesting that if we're going to count
16 some delay to him, we count it from the - - - the
17 final decision on the appeal on the 440, which as you
18 say is about two years or so, but why - - - why can't
19 we view that as a strategic choice between him and
20 his lawyer, like in Lampkins - - -

21 MR. BIRNBACH: Who would make - - -

22 JUDGE RIVERA: - - - to pursue the 440 as
23 opposed to the direct appeal? Why can't we reach
24 back?

25 MR. BIRNBACH: Well, the State Supreme

1 Court, when they denied the 440, said all the issues
2 you're raising are on the record. So this was the
3 only viable option that he had. The 440 made no
4 sense at all, and ironically, in the 440, he was
5 arguing the ineffective assistance of trial counsel.

6 JUDGE RIVERA: But in - - - but in that
7 440, in the decision, the court did mention the
8 failure to have appealed.

9 MR. BIRNBACH: Yes, the court said you have
10 arguments to be raised on a direct appeal. Raise a
11 direct appeal. They said make a leave application.

12 JUDGE RIVERA: But he didn't at that time.
13 But he didn't at that time.

14 MR. BIRNBACH: He made a leave application.
15 Therefore, I think when you look at all the issues -
16 - - and I'm only concerned about Perez; these other
17 attorneys will address their particular clients - - -
18 clearly if Perez is denied his appeal, the results
19 could potentially be catastrophic, and as you can see
20 from the brief that I submitted to the Appellate
21 Division, there are many very serious arguments - - -

22 CHIEF JUDGE LIPPMAN: Okay, counsel.

23 MR. BIRNBACH: Thank you very much, Your
24 Honor.

25 CHIEF JUDGE LIPPMAN: Thanks a lot,

1 counsel.

2 MR. BIRNBACH: Thank you.

3 CHIEF JUDGE LIPPMAN: Counselor, Dockery?

4 MS. ZOLOT: One minute for rebuttal, Your
5 Honor?

6 CHIEF JUDGE LIPPMAN: Sure. What - - -
7 what distinguishes your case, counsel?

8 MS. ZOLOT: What sets Mr. Dockery's case
9 apart is that he was a juvenile in 1986, when he was
10 left on his own without counsel's help to complete
11 the paperwork required by the First Department in
12 order to obtain counsel on appeal.

13 JUDGE GRAFFEO: He had - - - he had other
14 arrests after the incident that - - -

15 MS. ZOLOT: He had - - - he had other
16 arrests - - -

17 JUDGE GRAFFEO: - - - that is the subject
18 of the appeal - - -

19 MS. ZOLOT: In 19 - - -

20 JUDGE GRAFFEO: - - - that you're trying to
21 bring.

22 MS. ZOLOT: In 1992, he had a conviction
23 for attempted weapon possession, but in fact, that
24 wouldn't - - -

25 JUDGE GRAFFEO: Did he appeal that

1 conviction?

2 MS. ZOLOT: He did not appeal that. He
3 waived his right to appeal. Our position is that
4 because of the violation that occurred in 1986,
5 because of that Constitutional violation, the period
6 that followed under the circumstances of this case,
7 is not actually something this court needs to
8 consider.

9 JUDGE GRAFFEO: Does that - - - by my
10 calculation we've got a twenty-two-year interval here
11 - - -

12 MS. ZOLOT: That's correct.

13 JUDGE GRAFFEO: - - - which is quite a long
14 period of time.

15 MS. ZOLOT: Well, West itself, said that a
16 defendant who is properly advised of his appellate
17 rights may not let the matter rest and then claim
18 waiver. That's language from West. It hinges on
19 whether the defendant, in the first instance, was
20 properly advised. And here - - -

21 JUDGE READ: So did he not get the notice?

22 MS. ZOLOT: Here, he - - - here there was
23 no adequate notice, because he was a minor.

24 JUDGE SMITH: So - - - so that means,
25 essentially, he had - - - if he didn't get adequate

1 notice the first time, he has forever?

2 MS. ZOLOT: Under the circumstances here,
3 perhaps if there's evidence of contemptuous conduct,
4 willful contemptuous conduct, an actual prejudice,
5 then under those circumstances. But our rule is that
6 a juvenile who is denied counsel's help in preparing
7 the IFP, is presumptively entitled to appeal unless
8 the People can show contemptuous or willful conduct
9 effecting an - - -

10 JUDGE RIVERA: If he's convicted in - - -
11 in '92, did he get proper notice at that time?

12 MS. ZOLOT: He - - - what happened in '92
13 is actually very interesting. He was told about his
14 right to appeal, but of course, he waived his right
15 to appeal, so that he was never - - -

16 JUDGE RIVERA: But he was on notice?

17 MS. ZOLOT: He was - - - he was - - -
18 actually, the opposite on notice, because the
19 prosecutor at the 1992 plea proceeding led him to
20 believe - - - reinforced his misperception that the
21 appeal was over and done with by actually saying, any
22 appeal would be over by now. So far from giving him
23 notice that he should start to look into that, maybe
24 there was a problem, he was, in fact, misled or his
25 misperception was perpetuated by what an agent of the

1 State said.

2 JUDGE SMITH: Is it - - - is it too much to
3 ask, though, even of a - - - well, he's no longer a
4 juvenile by 1992, but even of a juvenile, is it too
5 much to ask that - - - that he should check out
6 whether somebody's do - - - doing an appeal for him
7 or not? Or ask every couple of years how that appeal
8 is going?

9 MS. ZOLOT: That is too much. It's
10 certainly too much to ask for a juvenile. It might -
11 - - it's worth mentioning that Mr. Dockery, not only
12 was a juvenile tried in adult court, and therefore
13 held to standards that are decade - - - now probably
14 decades of neuroscience tells us are unreasonable,
15 untenable, and unfair, but then he was sent to a
16 youth facility. He was not sent to an adult prison
17 where there was no library and no legal advice - - -

18 JUDGE GRAFFEO: When was - - -

19 MS. ZOLOT: - - - so he didn't even have
20 access - - -

21 JUDGE GRAFFEO: When was Mr. Dockery facing
22 persistent - - -

23 MS. ZOLOT: That was in - - -

24 JUDGE GRAFFEO: - - - status?

25 MS. ZOLOT: - - - 2000.

1 JUDGE GRAFFEO: And that didn't tip him off
2 that he should have - - -

3 MS. ZOLOT: He - - -

4 JUDGE GRAFFEO: - - - investigated the
5 status - - -

6 MS. ZOLOT: Well, he - - -

7 JUDGE GRAFFEO: - - - of any appeals or his
8 right to appeal?

9 MS. ZOLOT: He candidly admitted in his
10 affidavit that when he did pursue for the first time
11 an appeal - - - that was - - - that was the first
12 time he actually pursued one - - - he then began to
13 question what might have happened back in 1986.

14 JUDGE GRAFFEO: Right, so, but - - -

15 MS. ZOLOT: And - - -

16 JUDGE GRAFFEO: - - - many years went by
17 after that. So why didn't he challenge the
18 persistent status at that juncture?

19 MS. ZOLOT: He began to question what
20 happened. He was pursuing remedies on the - - - on
21 the case that led to his - - - the case that directly
22 led to his persistent adjudication, but when he did
23 write the Appellate Division, and make inquiries, he
24 immediately - - - when he received back the in forma
25 pauperis at that point, he immediately submitted an

1 in forma pauperis and started to attempt to pursue an
2 appeal here.

3 JUDGE RIVERA: Did he have - - -

4 MS. ZOLOT: Unlike in West, who waited nine
5 years when - - -

6 JUDGE RIVERA: Did he have counsel is '92
7 and 2000 on those cases?

8 MS. ZOLOT: He had counsel, but it's - - -
9 it's again, it's unfair to burden a person whose
10 rights were hindered when they were a juvenile, that
11 they now have the burden to somehow conduct some kind
12 of investigation when a Constitutional violation
13 occurred in the first place - - -

14 JUDGE RIVERA: Was - - - was the coun - - -

15 MS. ZOLOT: - - - that created that delay.

16 JUDGE RIVERA: Was the counsel aware of a -
17 - - of a statement made by the prosecutor in '92 that
18 you say misled him?

19 MS. ZOLOT: It was - - - it was said in
20 open court, and everybody appeared to rely on that
21 representation.

22 CHIEF JUDGE LIPPMAN: Anything else,
23 counselor?

24 MS. ZOLOT: Well, I would like to point out
25 that in terms of this twenty-year period, I'd like to

1 direct Your Honors to Dowd v. Cook, which putting
2 aside everything else - - - the particular
3 circumstances of this case - - - Dowd v. Cook says
4 that you can't look to that period to effect a cure
5 if the defendant can't recoup exactly what he lost in
6 the first place. And here, Mr. Dockery's right to
7 appeal had degraded further along the timeline.

8 CHIEF JUDGE LIPPMAN: Okay, thanks,
9 counsel.

10 MS. ZOLOT: Thank you.

11 CHIEF JUDGE LIPPMAN: Thank you.

12 Calaff?

13 MS. TRUPP: Good afternoon. Claudia Trupp
14 on behalf of Mr. Calaff. I'd like to reserve a
15 minute for rebuttal.

16 CHIEF JUDGE LIPPMAN: A minute, sure.

17 MS. TRUPP: Mr. Calaff did not waive or
18 abandon his right to appeal merely by failing to
19 perfect it in a timely fashion. Here what you have
20 is an indigent defendant who was misinformed and
21 misled by his assigned counsel about what needed to
22 be done in order to perfect the appeal.

23 By extending People v. West, the holding of
24 People v. West to Mr. Calaff's case, the intermediate
25 appellate court denied him review of his right to

1 counsel claim - - - a legitimate right to counsel
2 claim, and did so without the basis that underlay the
3 West decision, which was adequate notice of the right
4 to appeal and contemptuous conduct by the defendant.

5 JUDGE GRAFFEO: When he went in for
6 predicate status - - - when he was challenging the
7 predicate status, he didn't challenge this
8 conviction, did he?

9 MS. TRUPP: He did not at the predicate
10 felony hearing. That was in 2004. He explained in
11 his affidavit - - -

12 JUDGE GRAFFEO: Why - - - why not?

13 MS. TRUPP: He did not - - - he believed
14 that the appeal had been taken and lost. So he did
15 not know that there was a basis for the lack of
16 appeal.

17 JUDGE GRAFFEO: And on what basis did he
18 think he lost the appeal?

19 MS. TRUPP: He believed that because he
20 hadn't heard from his attorney that he had lost the
21 appeal. This was the first appeal he had ever taken.
22 He was a totally inexperienced criminal defendant,
23 unlike the defendant in West, who had perfected two
24 appeals prior to the one that was deemed abandoned.
25 So we have a totally inexperienced criminal defendant

1 who is reliant on the state to provide him with
2 counsel, who misadvises him about the steps to take,
3 and says, I'll take care of the appeal.

4 JUDGE SMITH: Well, how - - - I mean, this
5 is, of course, what he now says. Is there - - - is
6 there any way of testing the credibility of that
7 claim that he says - - -

8 MS. TRUPP: Well, there is, because if you
9 look, what the Appellate Division said is that Mr.
10 Calaff's statements were refuted by the sentencing
11 minutes. There was never any claim here that Mr.
12 Calaff did not receive the notice of right to appeal
13 form. That was never the claim. The claim was that
14 the warnings in that form were muddled by counsel's
15 subsequent statements and - - -

16 JUDGE SMITH: Okay, but - - - but how - - -
17 but how do we know that this isn't - - -

18 MS. TRUPP: Because - - -

19 JUDGE SMITH: - - - a convenient, after-
20 the-fact invention by the defendant?

21 MS. TRUPP: Because if you look at the
22 notice of right to appeal form, it says that the
23 defendant himself must file the notice of right to
24 appeal, and the defense counsel filed that here, and
25 so manifesting Mr. Calaff's intent to appeal. He

1 filed the notice of right to appeal and the profile
2 statement which - - -

3 JUDGE SMITH: But that - - - that doesn't
4 sound like conclusive proof that the lawyer said - -
5 -

6 MS. TRUPP: But there doesn't - - -

7 JUDGE SMITH: - - - oh, don't worry; I'll
8 take care of everything; you don't have to - - -

9 MS. TRUPP: In order to find abandonment,
10 the - - - the burden is on the State. And this court
11 has found over and over again, that if the burden is
12 going to be borne - - - if the State appoints counsel
13 and there is inadequate notice or there is evidence
14 and it does not - - - if you look - - - go back to
15 Montgomery, if you go back to McLean, it doesn't have
16 to be compelling proof of abandonment, because it is
17 the agent of the State who is creating the confusion,
18 and these allegations were unrefuted by the People.
19 They never - - -

20 JUDGE SMITH: How do the - - - how do these
21 deadlines ever get enforced? I guess, you - - - you
22 - - - I suppose you're going to say as one of your
23 colleagues did, you have to give the guy notice?

24 MS. TRUPP: You have to give the guy
25 adequate notice, and you have to give him an

1 opportunity to explain the delay in a timely fashion.

2 JUDGE SMITH: So under - - - under the
3 system, and I'm beginning to think that maybe the
4 whole system ought - - - could be - - - it doesn't
5 work perfectly.

6 MS. TRUPP: It does not work at all.

7 JUDGE SMITH: But - - - but - - - under the
8 system we have, you're basically saying a guy has as
9 - - - has as long as it takes - - -

10 MS. TRUPP: Well - - -

11 JUDGE SMITH: - - - as many decades as it
12 takes.

13 MS. TRUPP: The prosecution and the court
14 are not without their remedies. The prosecution can
15 move at any time to dismiss an appeal that's been
16 noticed. The court - - -

17 JUDGE READ: Well, didn't you suggest - - -
18 didn't you suggest at one point that there should be
19 a court rule?

20 MS. TRUPP: There should be - - - what - - -
21 - our position is that there needs to be some
22 assurance that indigent defendants are not losing the
23 right to appeal because they're slipping through the
24 cracks. And that's what happening in New York State
25 right now. And that is what the legacy of the West

1 decision is.

2 JUDGE SMITH: Now of course, you say - - -
3 you say the prosecutor can move any time for
4 dismissal, but of - - - on your theory, as I
5 understand it, he can move, but he's never going to
6 get it.

7 MS. TRUPP: Well - - -

8 JUDGE SMITH: All he's going to get is a
9 deadline.

10 MS. TRUPP: What he's going to get is an
11 opportunity to move at a time before prejudice
12 ensues, and as this court recognized in Kordish, then
13 counsel will need - - -

14 JUDGE SMITH: Then I was thinking, I mean -
15 - - I'm not - - - I'm not sure whether - - - which
16 side this is an argument for, but thinking of this
17 from the - - - from the point of view of the system,
18 it's a less than perfect way of doing it, because the
19 prosecutor has very little incentive to make the
20 motion.

21 MS. TRUPP: Well, the prosecution - - - if
22 they're going to come back and say we've been
23 prejudiced, a sophisticated legal actor, who's
24 trained in the law, is going to say, we've been
25 prejudiced by the delay. They have to have some

1 capability.

2 JUDGE SMITH: Okay, aren't - - - aren't you
3 almost expecting the prosecutor to be the - - - to be
4 the defendant's lawyer here, saying - - -

5 MS. TRUPP: No.

6 JUDGE SMITH: - - - oh, this guy's taking
7 too long; I better do something about it or he'll - -
8 -

9 MS. TRUPP: It's in their interest to move
10 to dismiss these appeals if they're languishing.

11 JUDGE RIVERA: You're arguing it's in the
12 interest of - - - of the system and society as an
13 officer of the court to move on this.

14 MS. TRUPP: Yes. And for - - - if we're
15 concerned about the legitimacy of the appellate
16 process, and we're concerned about, you know, not
17 delaying retrials, then there has to be a rule that
18 allows indigent defendants to timely assert their
19 right to counsel in a way - - -

20 JUDGE GRAFFEO: Did he have - - - did he
21 have assigned counsel for his challenge to the
22 predicate status?

23 MS. TRUPP: Yes, he's always had assigned
24 counsel.

25 JUDGE GRAFFEO: So why didn't that attorney

1 investigate the earlier crime?

2 MS. TRUPP: That's a - - -

3 JUDGE GRAFFEO: I don't understand that.

4 MS. TRUPP: Are you talking about the
5 appellate counsel or the trial attorney?

6 JUDGE GRAFFEO: Either one.

7 MS. TRUPP: Well, the fact is that - - -

8 JUDGE GRAFFEO: Because there's two
9 attorneys there - - -

10 MS. TRUPP: There's two attorneys there.

11 JUDGE GRAFFEO: - - - who could have talked
12 to him about the fact that he didn't have a dis - - -
13 any appeal pending on his original conviction.

14 MS. TRUPP: There is no evidence in this
15 record that there was that discussion. Those - - -
16 those challenges are often made quickly at the time
17 of the predicate felony adjudication. There's often
18 not investigation into those claims.

19 And also with respect to the appeal, it's
20 very important to distinguish that when somebody is
21 assigned counsel on appeal, it's with respect to that
22 conviction. It's not with respect to every
23 conviction that's ever happened before. And so
24 that's why - - -

25 JUDGE SMITH: Well, but - - - well, if

1 you're being sentenced as a predicate, it is part of
2 the lawyer's job to take a look at the previous
3 conviction, isn't it?

4 MS. TRUPP: At the trial level, yes. Also,
5 with respect to the right to counsel claim here, this
6 is a case where there was a serious right to counsel
7 issue, and this court should remand the decision - -
8 - reverse the Appellate Division with a comment on
9 the merits of the right to counsel.

10 CHIEF JUDGE LIPPMAN: Okay, thanks,
11 counsel.

12 MS. TRUPP: Thank you.

13 CHIEF JUDGE LIPPMAN: Lopez?

14 Counsel, do you want any rebuttal time?

15 MR. ELGARTEN: One minute, please.

16 CHIEF JUDGE LIPPMAN: One minute, go ahead,
17 counsel.

18 MR. ELGARTEN: I'm Kerry Elgarten. I'm
19 here for Teofilo Lopez. This case - - - my case is a
20 little different from these other ones that you've
21 heard.

22 CHIEF JUDGE LIPPMAN: How so? How so?

23 MR. ELGARTEN: It's - - - there's no
24 question what happened here; was the person
25 intentionally abandoning? My client absented himself

1 from trial and remained a fugitive for approximately
2 eleven years. That's why the appeal wasn't - - -

3 JUDGE SMITH: You - - - don't you also have
4 the wrinkle that your guy in - - - arguably didn't
5 have counsel even on the - - - even on the matter
6 you're here appealing from? He had counsel, but
7 counsel wasn't given a chance to look at the record?

8 MR. ELGARTEN: No, I - - - I'm the person
9 who did his - - -

10 JUDGE SMITH: Okay, but you - - -

11 MR. ELGARTEN: - - - but I had yet to see
12 the record, if that's - - -

13 JUDGE SMITH: Yeah, that's - - - that's my
14 point. Yeah, I mean what - - -

15 MR. ELGARTEN: Yes.

16 JUDGE SMITH: Are you - - - are you making
17 the argument that by not - - - I mean, you were
18 there, of course, but how effective can you be if you
19 haven't seen the record? And was - - - was that in
20 itself a deprivation of the right to counsel?

21 MR. ELGARTEN: I don't - - - I'm not sure I
22 understand your question, because he had - - - he had
23 counsel. He - - - he absented himself during trial.
24 Counsel represented him. Counsel filed a notice of
25 appeal. That's the last thing that happened.

1 JUDGE SMITH: Okay, okay. He come - - - he
2 - - - counsel files a notice of appeal, then what
3 happened? The People move to dismiss?

4 MR. ELGARTEN: Eleven years later, he was
5 rearrested, taken back into custody - - -

6 JUDGE SMITH: Oh, okay. Okay.

7 MR. ELGARTEN: He was brought back to court
8 for resentencing on a post-release supervision
9 sentence.

10 JUDGE SMITH: He gets resentenced. You - -
11 - the - - - the appeal is taken. Is there - - - is
12 there another delay, or this - - - this proceeds more
13 or less in the normal course?

14 MR. ELGARTEN: Well, that's sort of - - -
15 the Appellate Division assigned the Legal Aid Society
16 to the resentencing appeal. The client and we
17 thought we were going to get assigned to the appeal
18 of the whole judgment. There were things said at the
19 resentencing that - - - that seem to indicate that.
20 And at that time, we moved to amend the order of
21 assignment to include the whole - - - the whole
22 trial.

23 JUDGE GRAFFEO: So the relief you're
24 looking from us is, in your case?

25 MR. ELGARTEN: The - - - the - - -

1 JUDGE GRAFFEO: The assignment to the
2 underlying appeal? Is that what you're asking us to
3 do?

4 MR. ELGARTEN: Yeah, well, at this point
5 the appeal is - - - is dismissed, so - - - so revival
6 of the appeal is - - -

7 JUDGE SMITH: It was - - - it was dismissed
8 on the People's motion?

9 MR. ELGARTEN: Yes.

10 JUDGE SMITH: And that - - - that motion
11 was made essentially as a cross-motion to your motion
12 to - - - to amend?

13 MR. ELGARTEN: Essentially, yeah.

14 JUDGE SMITH: Yeah. I guess, my - - - my
15 question is, do you have an argument that on that - -
16 - that - - - in opposing that cross-motion, your guy
17 was entitled to a lawyer who had seen the record?

18 MR. ELGARTEN: I have not previously made
19 that argument, but yes, I do think that - - -

20 JUDGE SMITH: You'll - - - you'll take it.

21 MR. ELGARTEN: I'll take it.

22 So, really this case falls under the - - -
23 the guidelines provided in Taveras, and the case was
24 dismissed there, or the dismissal was upheld there,
25 because of prejudice. Here, as we were saying, we

1 have no idea what the issues are, and certainly, if
2 sufficiency were the - - - sufficiency of the
3 evidence were the issue raised, it couldn't possibly
4 be prejudiced.

5 There's - - - there's no retrial. There's
6 no memory of witnesses that's implicated. And I
7 would say that we should have the right to present
8 our issues; if they can show prejudice, then so be it
9 on those issues, but either way, there could - - -
10 there could be a bright line - - - you suggested one
11 earlier, Judge Pigott - - - that it would - - -
12 sufficiency issues could always be raised, and in
13 this circumstance, I certainly think we should have
14 at least that opportunity.

15 But honestly, I don't know what issues the
16 record would present in - - - in this circumstance,
17 because I haven't seen the record.

18 CHIEF JUDGE LIPPMAN: Okay, thanks,
19 counsel.

20 Okay, Perez, first.

21 MR. CHAMOY: May it please the court, Noah
22 Chamoy for the People. Your Honors, the Appellate
23 Division did not abuse its discretion as a matter of
24 law in dismissing this appeal. The fact is, there's
25 been no justification for a sixteen-year delay,

1 there's been no attempt at a justification - - -

2 JUDGE RIVERA: Well, he's - - - he's
3 arguing that it's really not sixteen-years' delay
4 given the - - - the violation by his attorney of
5 failing to actually pursue the appeal on his behalf,
6 the attorney that he retained - - - the attorney that
7 someone on his behalf complained about. He says it's
8 really at - - - at most, two-and-a-half years.

9 MR. CHAMOY: Correct.

10 JUDGE RIVERA: Why isn't that correct?

11 MR. CHAMOY: Well, that's not correct,
12 because, at most, what he can get is some time before
13 May 2003, when the neglect order was issued. The
14 reason for the admonition is at that time - - -

15 JUDGE RIVERA: You're saying he should have
16 fired his lawyer and gotten another one?

17 MR. CHAMOY: He may have. Actually, we
18 don't know from this record. He may no longer have
19 been the individual's attorney. There's no - - -

20 JUDGE SMITH: Do we - - - we know if he
21 ever got - - - if he ever got his money back? I
22 suppose it doesn't matter, but - - -

23 MR. CHAMOY: We don't have an answer to
24 that. We know that he did ask that attorney at some
25 later point in 2008 to work on a 440 for him, and the

1 attorney took money for that, clearly. But this is a
2 retained attorney - - -

3 JUDGE SMITH: Maybe he earned - - - maybe
4 he - - - he was working off what he already had.

5 MR. CHAMOY: Potentially. But this is a
6 retained attorney. And the issue with retained
7 attorneys is there are really no Constitutional
8 rights at issue here. It's only a question of
9 ineffective assistance of counsel. All the
10 Constitutional rights relate to indigent defendants.
11 And it's to protect them so they are treated like
12 someone in his position of having a retained
13 attorney.

14 So what we're dealing with here is not an
15 absolute - - -

16 JUDGE SMITH: So are - - - are we - - - are
17 we penalizing him because his - - - his mother was
18 somehow able to scrape together this large sum money
19 and - - - and give it to a lawyer who turned out to -
20 - - to be irresponsible? I mean, should he - - - why
21 should he be worse off than somebody who - - - who
22 took no steps on his behalf?

23 MR. CHAMOY: We're - - - we're not
24 penalizing him for that reason. If we want to use
25 that language, we're penalizing him because he took

1 no interest in his appeal. Now from the record, it
2 appears his mother took an interest in his appeal.

3 The - - - both of those documents - - -

4 JUDGE RIVERA: Well, she's not
5 incarcerated.

6 MR. CHAMOY: Correct. Both of the
7 documents - - -

8 JUDGE RIVERA: It's easier for her to - - -
9 to deal with the attorney, right - - -

10 MR. CHAMOY: Yes.

11 JUDGE RIVERA: - - - and the issues here.

12 MR. CHAMOY: However, both the documents
13 come from her. The only evidence that we have comes
14 from letters to her.

15 JUDGE RIVERA: Well, she may be the one
16 paying.

17 MR. CHAMOY: Correct, but the complaint - -
18 - it doesn't say that the defendant was the one
19 complaining. It suggests that the mother was the one
20 complaining. The retainer letter is simply saying,
21 you know, that she paid the 30,000 dollars.

22 JUDGE RIVERA: Okay, but let's assume that
23 - - - that somehow we're persuaded by his argument
24 that you really have to only charge his client with
25 delay for two-and-a-half years, not for the entire

1 period of time. Why - - - why is that the kind of
2 delay that prejudices the People?

3 MR. CHAMOY: Well, we wouldn't make the
4 argument that two-and-a-half years is a delay that
5 prejudices the People. We make the argument that a
6 substantial amount of time does, because two-and-a-
7 half years from the time of the notice of appeal to
8 the time someone filed - - -

9 JUDGE SMITH: Well, we actually have a
10 system which two-and-a-half years is pretty - - -

11 MR. CHAMOY: Well - - -

12 JUDGE SMITH: - - - as the same as nothing?

13 MR. CHAMOY: It's pretty much actually par
14 for the course, and we mention that in our brief.

15 JUDGE SMITH: Is this - - -

16 JUDGE GRAFFEO: Did you make a - - -

17 JUDGE SMITH: And that's a problem, too,
18 isn't it?

19 JUDGE RIVERA: So, then if - - - if we were
20 persuaded by him, you lose?

21 MR. CHAMOY: However - - -

22 JUDGE RIVERA: Or he wins?

23 MR. CHAMOY: Yes, except that here what we
24 have is a problem which is, there's clearly a
25 strategy going on. And the depraved indifference

1 murder strategy is what's underpinning this entire
2 case, and if he made a strategic decision with that
3 attorney to pursue a 440, that's his choice.

4 JUDGE RIVERA: You're saying this is like
5 Lampkins?

6 MR. CHAMOY: Yes, exactly like Lampkins.
7 It is his choice. If his attorney consults him and
8 says, you have a better chance on an ineffective
9 assistance claim raising this point than going
10 through an unpreserved claim on appeal, where the
11 rule is, he'd be under the old law, because it wasn't
12 objected to - - -

13 JUDGE RIVERA: So what - - - what would be
14 the correct way to - - - to have a court consider
15 that argument?

16 MR. CHAMOY: Well - - -

17 JUDGE RIVERA: Is that an argument to be
18 considered on this motion to seek leave to extend
19 time to appeal or should that be considered on the
20 appeal itself?

21 MR. CHAMOY: Where he has an attorney, the
22 solution is not to handle this on a motion to
23 dismiss. The motion to dismiss happens. He actually
24 still has an avenue of relief. Lampkins sets it out.
25 He has the ability to file a coram nobis, present the

1 allegations we say are deficient, supply affidavits
2 from his attorney, supply the correspondence that was
3 in writing to him, and explain what it was that the
4 attorney failed to do.

5 JUDGE PIGOTT: Mr. Chamoy, when - - - when
6 I was looking at these, every - - - we got seven
7 unhappy lawyers here. I mean, you got - - - we got
8 four that have multiple-year defendants, and you got
9 three trying to say, you know, it's a little late now
10 to start a new - - - do you have a suggestion or a
11 solution as to how this does not happen in the - - -
12 in the future?

13 I know their suggestion is that you folks
14 ought to be moving faster. I mean, you could set - -
15 - you could - - - you could take that 120-day
16 deadline and docket it in your office, and then a pro
17 forma motion, you know, could come out, but I guess,
18 I think your argument there was that would - - -
19 there would be a lot of them.

20 But is there - - - is there some kind of
21 solution here, because I don't think there's are the
22 last four we're going to hear about?

23 MR. CHAMOY: Correct. The solution appears
24 to be the only thing suggested in Taveras v. Smith,
25 which is an automatic dismissal rule in the Appellate

1 Divisions. That way attorneys don't have to be
2 assigned to every single defendant who has filed a
3 notice of appeal, most of whom - - - or at least many
4 of whom, and this in the thousands - - - don't even
5 know that they have an appeal pending.

6 JUDGE READ: Well, I - - - that was my
7 question. Is there - - - do we know, or is there any
8 way to know, because you file a notice of appeal,
9 it's almost done auto - - - in every case, right?

10 MR. CHAMOY: Correct.

11 JUDGE READ: And it goes into the Supreme
12 Court, into the file of the Supreme Court - - - or it
13 goes somewhere in the Supreme Court. Is there any
14 way to know what - - - what universe or what the
15 number is of those that are unperfected, or even to
16 keep track of them?

17 MR. CHAMOY: No. We only know that we have
18 an entire file room filled with them.

19 JUDGE READ: And - - - what?

20 MR. CHAMOY: We have an entire file room
21 filled with them.

22 JUDGE READ: Okay.

23 MR. CHAMOY: Unfortunately.

24 JUDGE SMITH: You're - - - you're saying
25 that most of these defendants don't know that they

1 have an appeal pending?

2 MR. CHAMOY: Many of them do not. Taveras
3 himself, did not - - - he had - - - know he had an
4 appeal. I see my time is up, if I may - - -

5 CHIEF JUDGE LIPPMAN: It's all right. By
6 all means, answer the question.

7 MR. CHAMOY: Yes. No, the issue here is on
8 a motion to dismiss, of course, he has a right to a
9 lawyer. He has the argument that he can get a steno
10 - - - the stenographer to pull up the minutes to his
11 proceedings, so that's in every single one of these
12 cases, he has these - - - a judge has to be assigned,
13 everything has to be litigated, merits-based
14 determination. That's simply - - - this many cases,
15 it's just such a tremendous burden.

16 Whereas if the People - - - for the motions
17 to dismiss, if the People wait, it actually helps.
18 Because for those defendants who have been sitting
19 out and waiting and finally file something, it gives
20 the Appellate Division the opportunity to decide
21 those cases where the defendant actually showed an
22 interest in filing his appeal.

23 JUDGE SMITH: You - - - you sound like
24 you're saying this is absolutely the perfect system,
25 and somehow - - - something's - - -

1 MR. CHAMOY: No.

2 JUDGE SMITH: - - - something's telling me
3 it's not. There's got to be a better way.

4 MR. CHAMOY: As I said, the automatic
5 dismissal rule would unfortunately be - - - as far as
6 the case law suggests - - - it's only - - -

7 CHIEF JUDGE LIPPMAN: Yeah, but that's not
8 necessarily fair.

9 JUDGE SMITH: You - - - you say an
10 automatic dismissal rule with no notice to the
11 defendant? No opportunity to come in and - - -

12 MR. CHAMOY: All of that would be up to the
13 court, obviously. I mean, that's just the - - -
14 providing notice - - -

15 CHIEF JUDGE LIPPMAN: Yeah, but again, from
16 a policy perspective - - -

17 MR. CHAMOY: It - - -

18 CHIEF JUDGE LIPPMAN: - - - it doesn't seem
19 equitable.

20 MR. CHAMOY: It's more a question of the
21 system - - -

22 CHIEF JUDGE LIPPMAN: I understand the
23 efficiency issues.

24 MR. CHAMOY: Yes.

25 CHIEF JUDGE LIPPMAN: Yeah.

1 JUDGE GRAFFEO: Could you do a conditional?

2 MR. CHAMOY: I'm not sure how a conditional
3 would work in light of Taveras v. Smith, given that
4 the moment you start down the path of any merits-
5 based analysis, all of these additional rights
6 attach, which simply - - -

7 JUDGE SMITH: What I - - - what I - - -
8 what I thought Judge Graffeo was asking, does
9 conditional dismissal mean, unless you get - - - you
10 get it in - - - in whole months?

11 JUDGE GRAFFEO: Unless you get it in - - -
12 unless you get it in, in ninety days or whatever.

13 MR. CHAMOY: I see, yeah - - -

14 JUDGE GRAFFEO: It'll be an automatic
15 dismissal.

16 MR. CHAMOY: In our brief, I mean - - -

17 JUDGE GRAFFEO: To provide notice, because
18 it appears that notice is one of the issues that
19 keeps rearing its head here.

20 MR. CHAMOY: I think that that issue
21 actually would be better responded to by my
22 contemporaries who have the problem of having no
23 attorney involved who was retained and brought in,
24 and who had control over what was going on.

25 CHIEF JUDGE LIPPMAN: Okay, counsel.

1 MR. CHAMOY: Thank you.

2 CHIEF JUDGE LIPPMAN: Thanks, counsel.

3 Counsel, does this system make any sense
4 that we're dealing with?

5 MS. MORSE: Absolutely.

6 CHIEF JUDGE LIPPMAN: Yeah?

7 MS. MORSE: Your Honors got it - - -

8 CHIEF JUDGE LIPPMAN: Why is it a good
9 system that we have now?

10 MS. MORSE: You got it - - - the
11 legislature got it right, and Your Honors got it
12 right in terms of understanding it, because what it
13 provides is a several-part system, where, yes, there
14 are time - - - there are deadlines, which encourage
15 appeals to be done in a timely fashion, but there's
16 also a wide discretion on the part of the Appellate
17 Division to take into account factors such as the one
18 present in this case.

19 JUDGE SMITH: How - - - how can - - - how
20 can it be good that there - - - that we can even
21 think about having an appeal - - - or having appeals
22 in cases that are a decade or two old? I mean, why -
23 - - I mean, why can't we work out a system, where it
24 gets done in a few years? And - - -

25 MS. MORSE: Well, well, Your Honor, I think

1 - - - I think Your Honors covered that in West very
2 nicely, if I could - - - I could just quote one
3 sentence from West. "The right to appeal is a
4 statutory right that must be affirmatively exercised
5 and timely asserted."

6 So if - - - to follow up on Your Honor's
7 point, if defendants perfected their appeals within
8 some reasonable period of time - - - not necessarily
9 the 120 days, but within a shorter period of time,
10 then that would certainly promote - - - as Your
11 Honors also said in West in another place - - -

12 JUDGE SMITH: I mean, if - - - if all the
13 defendants and all the prosecutors were perfect, the
14 system would work perfectly.

15 MS. MORSE: Right.

16 JUDGE SMITH: But if - - - but couldn't we
17 - - - in this - - - having imperfect defendants and
18 prosecutors, isn't it possible to design a system in
19 which we don't - - - we aren't sitting here, you
20 know, discussing cases that were - - - were young in
21 the Reagan administration?

22 MS. MORSE: Well, Your - - - Your Honor, I
23 believe that the reason that there is - - - that we
24 are talking about these cases, is these are the few
25 cases that have reached this court after such an

1 amount of time - - -

2 CHIEF JUDGE LIPPMAN: Well, what does that
3 mean?

4 MS. MORSE: - - - in these - - - in these
5 cases - - -

6 CHIEF JUDGE LIPPMAN: Why - - - why is that
7 necessarily good?

8 MS. MORSE: It - - - it - - - well, it's
9 good in the sense that it - - - as I thought Your
10 Honor was suggesting, that there are - - - and I
11 think the People would agree - - - that there are
12 some situations where defendants can - - - do not
13 meet the 120 day deadline, and the de - - - and the
14 People might even consent. And there are - - - even
15 if we don't consent, the Appellate Division can - - -
16 has the discretion to extend the time. The question
17 is, at some point, it is too long. And that's why -
18 - -

19 CHIEF JUDGE LIPPMAN: Yeah, but this is not
20 a coherent system - - -

21 MS. MORSE: Well, I - - -

22 CHIEF JUDGE LIPPMAN: - - - that's all I'm
23 saying.

24 MS. MORSE: I'm sorry, Your Honor.

25 CHIEF JUDGE LIPPMAN: Go ahead, sure.

1 MS. MORSE: I believe it is the coherent
2 system, Your Honor. I think what happened in - - -
3 in - - - with the statutor - - - with the legislative
4 scheme, which Your Honors recognized in West, even if
5 it's only the underpinnings, is that it doesn't lend
6 itself - - - this kind of thing, like many things in
7 life, does not lend itself to - - -

8 CHIEF JUDGE LIPPMAN: Counsel, what - - -
9 what about your case, Dockery?

10 MS. MORSE: Yeah.

11 CHIEF JUDGE LIPPMAN: What about the fact
12 that he's a juv - - - was a juvenile?

13 MS. MORSE: Okay, if I could just correct a
14 couple of facts, though. When he appeared in front
15 of - - - first of all, he did get - - -

16 CHIEF JUDGE LIPPMAN: What's the
17 significance of his having been a juvenile?

18 MS. MORSE: It is one of the factors that
19 the Appellate Division considered. The Appellate
20 Division - - -

21 CHIEF JUDGE LIPPMAN: Is it a significant
22 factor?

23 MS. MORSE: Absolutely, it's significant
24 that, at the time of sentencing, the defendant was
25 sixteen years old. But also significant is the fact

1 that he did not appear in front of the Appellate
2 Division until he was thirty-eight years old. And
3 twenty-two years passed - - -

4 CHIEF JUDGE LIPPMAN: Is that a sad
5 commentary on our system?

6 MS. MORSE: It's a - - - well, I don't know
7 about a sad commentary on the system. I think what
8 it indicates in this case, the Appellate Division
9 recognized, is that there was - - - to be simplistic
10 about it - - - there was no good excuse for sitting
11 on this appeal for twenty-two years. And there are
12 different facets to it. And I just want to - - -

13 CHIEF JUDGE LIPPMAN: No, but again, you're
14 starting out from the point of a juvenile. I wonder
15 whether that doesn't tint the whole thing or - - -

16 MS. MORSE: It - - - it - - -

17 CHIEF JUDGE LIPPMAN: - - - the whole - - -
18 all the way through.

19 MS. MORSE: Your Honor - - -

20 CHIEF JUDGE LIPPMAN: How do you get past
21 that?

22 MS. MORSE: Well, Your Honor, what I would
23 say is two things. It could, in some other
24 hypothetical situation, where a defendant at sixteen
25 or seventeen, you know, beyond the 120 days, comes to

1 the Appellate Division - - - even if he came to the
2 Appellate Division five years after sentencing, and
3 said, you know, I was a juvenile, and all the things
4 Your Honor is suggesting. Honestly, I think the
5 People - - -

6 CHIEF JUDGE LIPPMAN: Do you agree more
7 leeway for a juvenile?

8 MS. MORSE: Absolutely, and in fact, we
9 probably would - - - the - - - the - - - the People
10 would probably even consent. And the Appellate
11 Division - - -

12 JUDGE RIVERA: Your opponent says he was
13 misled.

14 MS. MORSE: I'm sorry?

15 JUDGE RIVERA: Your opponent says he was
16 misled.

17 MS. MORSE: Well, honestly, several things
18 about that. At that same proceeding - - -

19 JUDGE RIVERA: Please.

20 MS. MORSE: - - - where it was said in open
21 court, the attorney - - - the same attorney
22 represented him at plea - - - he was getting a very
23 advantageous plea bargain in that situation. So in
24 that - - - at that time the attorney represented he
25 was going to look into it. That attorney came back

1 at the time of sentencing and there was no complaint
2 about it.

3 Now it's certainly possible - - - and I
4 think it's reasonable under the ordinary
5 circumstances of the world, where we do presume
6 competence on the part of lawyers, that the lawyer
7 found out that there was no appeal, and the defendant
8 certainly had a strategic reason to go ahead and take
9 that extremely favorable plea at that point, because
10 he wouldn't be giving anything up. He could always
11 appeal later.

12 And what happened in this case, with
13 respect to the persistent finding, is that - - - and
14 I'm not say - - - we don't know what happened, but
15 I'm just speculating - - - that there could be a
16 reason. It's not as if there's no possible reason.
17 Once the defendant was sentenced to that very long
18 sentence, sure enough all of his - - - and this
19 defendant went on to commit crime after crime after
20 crime - - - all of those cases, he got very favorable
21 plea bargains on the theory that he was already
22 serving a long sentence.

23 So perhaps he was focused on the longer
24 sentence for one reason or another - - -

25 JUDGE RIVERA: So you're saying maybe it's

1 strategic?

2 MS. MORSE: Could be.

3 JUDGE RIVERA: You, too, fall back on this
4 Lampkins - - -

5 MS. MORSE: It could - - -

6 JUDGE RIVERA: Lampkins - - -

7 MS. MORSE: Well, it could be, Your Honor,
8 honestly - - -

9 JUDGE RIVERA: But we don't know.

10 MS. MORSE: We don't know.

11 JUDGE RIVERA: So I'll ask you the question
12 also. Is that something that should be decided on
13 the motion to enlarge or on the actual appeal?

14 MS. MORSE: I - - - I'm sorry, Your Honor.
15 I don't understand the question.

16 JUDGE RIVERA: This question of whether or
17 not it's a strategic choice to conduct himself in the
18 way - - -

19 MS. MORSE: I - - - I - - -

20 JUDGE RIVERA: - - - you're suggesting he
21 conducted himself.

22 MS. MORSE: I don't think in this case,
23 Your Honor, that there's a need to reach that point,
24 because what happened is, the defendant submitted
25 papers to the Appellate Division where he gave an

1 explanation. He actually gave inconsistent
2 explanations at two different times for the delay.

3 So at this - - - in this situation we have
4 - - -

5 JUDGE RIVERA: Well, where does the - - -
6 the argument I thought you were making that it's
7 strategic and it falls under Lampkins.

8 MS. MORSE: I - - - I just - - - I just
9 meant that in - - - I wasn't so much saying that it
10 fell under Lampkins, as much as that - - - that I
11 could imagine a rational reason that a person could
12 have for the not having pursued it in this way. But
13 - - - but I'm just saying what the Appellate Division
14 had in front of it, is they had an explanation
15 affirmatively by the defendant.

16 CHIEF JUDGE LIPPMAN: Okay, counsel.

17 MS. MORSE: Could I just - - -

18 CHIEF JUDGE LIPPMAN: Sure, go ahead.

19 MS. MORSE: Could I - - - I just have one -
20 - -

21 CHIEF JUDGE LIPPMAN: Yes, go ahead.

22 MS. MORSE: - - - one more point, okay.

23 Just the fact that - - - as Your Honor said
24 in West - - - because you talked - - - Your Honor
25 talked about the system - - - improving the system -

1 - - this defendant - - - it's not too much to ask, or
2 maybe it was Judge Smith who said that - - - it's not
3 too much to ask, and in fact, this - - - that the
4 defendant, even someone who had been a juvenile,
5 thirty-one years of age in this case, he filed a
6 poor-person's application for an appellate lawyer in
7 a different case.

8 So that indicates that he had the
9 wherewithal, whatever might have happened to him ear
10 - - - long ago, he - - - this particular defendant
11 had the wherewithal. He chose not to do it in this
12 particular case.

13 CHIEF JUDGE LIPPMAN: Okay.

14 MS. MORSE: So there's - - - okay.

15 CHIEF JUDGE LIPPMAN: Thanks, counsel.

16 MS. MORSE: I apologize.

17 CHIEF JUDGE LIPPMAN: Okay, counsel, you
18 have Calaff and Lopez, right?

19 MR. COHN: Chief Judge Lippman, may it
20 please the court, David Cohn for the People in Calaff
21 and Lopez.

22 So, Your Honors, I submit that Calaff and
23 Lopez have already been decided by this court's
24 decisions in West, its companion case, Jones, and
25 People v. Taveras, as well as by the legislature's

1 clear pronouncements in CPL 460.70(1), and 470.60(1).

2 As some of the other attorneys have
3 discussed, in West, this court said very clearly, the
4 right to appeal is not a due process or a Sixth
5 Amendment right. It's a statutory right, created by
6 the legislature.

7 JUDGE RIVERA: But - - - but - - -

8 MR. COHN: It must - - -

9 JUDGE RIVERA: But in - - - in Lopez, even
10 he at least entitled to the record to see if he might
11 make an argument that perhaps will persuade the AD?
12 It is discretionary.

13 MR. COHN: Your Honor, actually, in West
14 and in Jones, the companion case to Taveras, those
15 appeals were dismissed before the attorneys actually
16 got a full record to see that - - - the only question
17 that's relevant to the dismissal of the appeal issue
18 - - - and of course, it - - - this court did notice -
19 - -

20 JUDGE SMITH: But if he's - - - but if he's
21 entitled to counsel, why is he not entitled to a
22 lawyer who's seen the record?

23 MR. COHN: Well, Your Honor - - - Your
24 Honor, in West and in Jones, all I can say is - - -

25 JUDGE SMITH: But my - - - my question - -

1 - my question was why?

2 MR. COHN: Why? Well, Your Honor, I
3 believe that Taveras v. Smith says that the reason
4 the defendant is entitled to counsel, in order to
5 respond to a People's motion to dismiss for failure
6 to prosecute, is not necessarily because it has
7 anything to do with the merits of the appeal,
8 although that could be one factor, as this court has
9 recognized.

10 The reason is, is because it's a
11 discretionary determination that requires some sort
12 of legal argument. So - - -

13 JUDGE SMITH: Yeah, but - - -

14 JUDGE RIVERA: Well, how are you going to
15 make it without the record?

16 MR. COHN: Well, you can make a legal
17 argument as to the excuse for the delay. That's - -
18 - that's the primary motivation. The reason for the
19 delay, the length for the delay, whether the
20 defendant is trying - - -

21 JUDGE SMITH: You - - - you can - - - you
22 can argue, but one of the discretionary factors is
23 what kind - - - I mean, what kind of case - - - and
24 if you look at the record - - - I mean, if he looked
25 at the record and saw - - - and found some gross

1 error that everyone had overlooked, maybe one that
2 suggested his client was innocent, you think maybe
3 we'd be looking at this case a little differently?

4 MR. COHN: Your Honor, I submit that we
5 would not, because especially in Lopez, this is a
6 case - - -

7 JUDGE RIVERA: But what - - - what if the
8 record even suggests that it's - - - that you're not
9 going to be prejudiced by a late appeal?

10 MR. COHN: Your Honor, it would hard to see
11 exactly what that scenario would be. I knew there
12 was a suggestion of the sufficiency of the evidence
13 issue. Of course, if a defendant complies with the
14 court rules, and complies with the legislature's
15 rules, and pursues an appeal in a timely fashion, and
16 the evidence is insufficient to support the
17 conviction, of course, he's entitled to appellate
18 relief.

19 JUDGE SMITH: Well, let me give you a
20 hypothetical I make up. He looks at the record, and
21 he says, well, how about that, there's - - - there's
22 a forensic sample from all these years ago, and DNA
23 testing has advanced since then. Maybe we go get it
24 tested.

25 MR. COHN: Well, Your Honor, that - - -

1 JUDGE SMITH: And - - - and you see where
2 I'm going. Shouldn't he, at least, have a chance to
3 look at the record?

4 MR. COHN: Your Honor, as far as a forensic
5 test, a new - - - or a new evidence for an actual
6 innocence claim, that could be raised in a CPL 440.10
7 motion and - - -

8 JUDGE PIGOTT: You know, there's - - - that
9 was two-edged sword I was - - - I meant to ask Mr.
10 Chamoy about that, because I think in - - - in your
11 case, Perez, it was - - - there's a Dym (ph.) factor,
12 and the claim by the People is that, you know, this
13 is strategic. That now, you know, because of John-
14 Baptiste (ph.), he can now raise the Dym, and say
15 that, you know, under - - - under our new - - - our
16 new standard he can argue it. And - - - and that's a
17 very good argument.

18 But I thought the defense can make the same
19 argument saying, you know, we do have - - - I mean,
20 maybe this isn't Dym, and maybe he shouldn't be on a
21 Dym. And I don't know where that puts us.

22 MR. COHN: I'm - - - Your Honor, I'm not
23 exactly sure how that relates - - -

24 JUDGE PIGOTT: But much like Judge Smith is
25 saying there's a D - - - there may be a DNA issue

1 saying that he might luck out - - - I mean, maybe the
2 best thing that ever happened to him that he waited a
3 few decades to - - - to appeal.

4 MR. COHN: Right, well, he could - - - in
5 essence, get an - - - what might be - - - as some
6 considered to be an undeserved windfall, because he
7 waited this long. And in fact, that's a very
8 important point in both the Calaff - - - and the - -
9 - or Calaff - - - or the Lopez cases.

10 First in Calaff, you have a defendant who
11 pled guilty in 1993. He was a very active litigant.
12 This was not an unsophisticated litigant. This was
13 someone who - - - who spoke very freely with the
14 trial court. He had a number of prior convictions.
15 He was informed of - - - informed of his appeal
16 rights on several different occasions, '92, 2000,
17 2004.

18 He - - - even though he claimed, which the
19 Appellate Division said was an incredible claim, even
20 though he claimed that his lawyer after advising him
21 of what he had to do to take an appeal, took him
22 aside off the record, and said, oh, don't worry about
23 all that. I'm going to take care of it for you, it
24 seems clear, and what the Appellate Division found on
25 this record, is that he made a decision that he liked

1 his guilty plea, and didn't want to disturb it. And
2 then, nineteen years later, when he's a persistent
3 felony offender facing a life sentence, he has
4 nothing to lose anymore by trying to vacate his
5 guilty plea.

6 So there's game playing going on in Calaff.

7 JUDGE PIGOTT: But that's gets us back to,
8 I guess, the - - - the nut here. I mean, there's - -
9 - you have a vested interest in - - - in getting
10 these appeals determined timely, for the reason you
11 just said, and as Mr. Chamoy raised. They claim to
12 have a vested interest in getting these things done
13 timely, and unfortunately it's not happening and
14 we're - - - I guess, we're looking for a solution to
15 that.

16 MR. COHN: Right, Your Honor, and - - - and
17 it's quite possible that the legislature might look
18 at this and decide that there could be a different
19 system that could be put in place. Whether or not
20 there could be a better system than the one we have
21 now, is not a reason to give a windfall to someone
22 who sat on his appellate rights strategically for
23 nineteen years. It's not a reason to give a windfall
24 to a defendant who fled the jurisdiction for twelve
25 years, trying to avoid his punishment.

1 JUDGE RIVERA: Well, I'm not clear on the -
2 - - I'm not - - - I'm not so clear on the windfall.
3 I understand the argument on the person in absentia,
4 but the other windfall - - - I mean, the person's
5 incarcerated, and they - - - they risk, because this
6 is a - - - losing the right to appeal, because this
7 is discretionary now, I don't - - - I'm not really
8 clear on what this great windfall is that you're
9 describing.

10 MR. COHN: Well, the windfall - - -

11 JUDGE RIVERA: I mean, it sounds like a
12 heck of a risk to take on the hopes.

13 MR. COHN: Well, Your Honor, I respectfully
14 submit, Your Honor, that the windfall in - - - in the
15 Calaff case is that the defendant was happy with his
16 plea bargain at the time that he - - -

17 JUDGE READ: So you're saying he changed
18 his mind?

19 MR. COHN: He changed his mind, because now
20 he's a persistent felony offender who's subject to a
21 life sentence, and by the way, this guilty plea is
22 one of the reasons why he's a persistent felony
23 offender, so he has nothing to lose. If he had
24 appealed immediately after the plea bargain, he could
25 have gone to trial. He could have gotten a - - - a

1 conviction of a higher count and a greater sentence.

2 So he had a lot to lose by appealing. The

3 - - - it is - - -

4 JUDGE RIVERA: Although he might have
5 gotten free. He had a lot to win.

6 MR. COHN: He might have, but he could have
7 looked at the evidence and - - - and as the evidence
8 in this case was, it was a burglary and he was
9 identified shortly after the crime - - -

10 JUDGE SMITH: Are you - - -

11 JUDGE RIVERA: Not pure speculation on your
12 side, no?

13 MR. COHN: Pure speculation - - -

14 JUDGE RIVERA: Of what you just said.

15 MR. COHN: That's - - - no, that's in the
16 VDF; it's in the record. It's in the record. He was
17 identified shortly - - -

18 JUDGE SMITH: Are you suggesting maybe
19 should be a different rule for - - - for plea cases?
20 I - - - if Calaff the only one of these that's a
21 plea?

22 MR. COHN: Calaff is a plea. Lopez is a
23 trial in absentia. And I believe that Calaff is the
24 only one of these that's a - - - a plea case.

25 JUDGE GRAFFEO: Based on your knowledge of

1 the system, is there any way we can improve it?
2 Particularly in terms of providing notice?

3 MR. COHN: Your Honor, I - - - I think that
4 this court made it very clear in West and Taveras
5 that it is a defendant's right by statute and it's a
6 defendant's responsibility by statute to exercise in
7 a timely fashion. Now to the extent that this court
8 could encourage the defense bar to be very diligent
9 in following up on those appeals - - -

10 JUDGE SMITH: The only - - - the only way
11 to improve this system is to - - - is to increase the
12 diligence of the defense bar? I mean, otherwise, the
13 system's perfect?

14 MR. COHN: Your Honor, I'm not saying it's
15 perfect. I'm saying that - - -

16 CHIEF JUDGE LIPPMAN: But the DA has no - -
17 - no responsibility to make it better in terms of - -
18 - you want the same thing as the defense bar wants.
19 You want justice to be at the end - - - the product
20 of all of this. Isn't there something - - - I guess
21 we're all saying - - - isn't there some way where
22 both sides can cooperate and the court can put into
23 place some kind of coherent system that would ensure
24 that - - - that people have their day in court?

25 MR. COHN: Your Honor, this really does

1 sound like a question for the legislature. It sounds
2 like a question for the Appellate Division and its
3 rule-making authority.

4 CHIEF JUDGE LIPPMAN: But it's certainly a
5 mess, and we see it right in front of us.

6 JUDGE PIGOTT: But - - - but even then,
7 what would the rule be? I mean, we would be happy to
8 recommend it. I - - - I realize you may say it's a
9 legislature - - - it could be the Office of Court
10 Administration; it could be somebody, but I just
11 don't know what the rule would be.

12 MR. COHN: Your Honor, our office doesn't,
13 at this time, have a - - - a formal position on that,
14 so I - - - I don't feel like I can answer that
15 adequately. Certainly, if the legislature wants to
16 look at - - - at the system, and say, you have X
17 amount of time to take an appeal, and after that X
18 amount of time expires, your appeal is dismissed.
19 That might be a - - - a clearer rule.

20 I don't think there's an allegation in
21 either the Calaff or the Lopez case that the
22 defendants were un - - -

23 JUDGE SMITH: Well, what - - - what about
24 Judge Graffeo's idea of a conditional dismissal?
25 Your appeal's dismissed unless you perfect it in

1 ninety days.

2 MR. COHN: If that were the Appellate
3 Division rule, I imagine that would - - - that would
4 be an appropriate rule. I do not know under Taveras
5 v. Smith, whether a counsel would have to be assigned
6 at that point to the dismissal of the appeal, and I
7 don't even - - - I don't know if that would have any
8 effect on the Calaff and Lopez cases.

9 My - - - my contention is - - - just
10 limited to those cases, is that you have defendants
11 who abuse the system. You have one defendant who
12 pled guilty, liked his plea for a very long time,
13 until he became a persistent felony offender. You
14 have another defendant who deliberately tried to
15 evade justice and - - - and in fact, in Ventura, this
16 court recognized that there's - - - there's a
17 difference where a defendant deliberately tries to
18 evade justice.

19 This court should not participate in that
20 sort of conduct that - - -

21 JUDGE RIVERA: Well, as the system exists,
22 is there - - - putting aside my comment before about
23 being officers of the court, and - - - and the Chief
24 Judge's comment that you're all interested in
25 achieving justice, if I was going to be jaded, I

1 would say that there is - - - right now, as the
2 system exists, an incentive to the People, because
3 the longer they wait, or the greater the delay, based
4 on your advocacy, if we - - - if we indeed followed
5 your advice or your arguments here - - - it's very
6 unlikely that they could ever succeed in enlarging
7 time for an appeal with these extensive delays. So
8 it's - - - it strikes me that right now you're very
9 invested in this system as it exists.

10 MR. COHN: Your Honor, I actually believe
11 that if you look across the country, New York is
12 quite generous to defendants compared to other
13 systems. We have Supreme Court cases - - -

14 JUDGE RIVERA: Is that a bad thing?

15 MR. COHN: Sorry? I'm not saying it's bad.
16 I'm - - - I'm just saying that - - - that - - -

17 JUDGE SMITH: Generous in terms of the
18 number of years we allow cases to kick around.

19 MR. COHN: Right, and in fact - - -

20 JUDGE SMITH: Is that - - - wouldn't there
21 be a better way to achieve fairness than by letting
22 people take nineteen years to prosecute their
23 appeals? I mean, that - - - we're all in favor of
24 being generous to defendants, but is that a good kind
25 of generosity?

1 MR. COHN: Well, I think we would all like
2 appeals to be resolved in less than nineteen years.
3 I don't believe that that goal is furthered by
4 reinstating an appeal of somebody who has waited
5 nineteen years for strategic reasons, or because they
6 absconded - - -

7 CHIEF JUDGE LIPPMAN: Okay, counsel.
8 Thanks, counsel.

9 MR. COHN: Thank you.

10 CHIEF JUDGE LIPPMAN: Appreciate it.

11 All right. So we have a few one-minute
12 rebuttals.

13 MS. ZOLOT: Before I address the
14 particulars of Mr. Dockery's case, since we've been
15 discussing possible rules and solutions, there's
16 really a very simple solution.

17 CHIEF JUDGE LIPPMAN: Give it to us.

18 MS. ZOLOT: That is, overrule West. If we
19 overruled West, and we extended assigned counsel's
20 agency at the trial level to filling out the IFP, and
21 making the motion for assignment of counsel, these
22 problems would be resolved.

23 JUDGE READ: But what would be the - - -

24 MS. ZOLOT: Certainly in both Dockery and
25 Calaff's case.

1 JUDGE READ: What would be the cost of
2 that? Do you have any - - -

3 MS. ZOLOT: In dollars and cents?

4 JUDGE READ: Yeah, do we have any notion
5 what would be the cost of that, because I gather that
6 a lot of these notices of appeal are filed for people
7 who really don't want to perfect the appeal.

8 MS. ZOLOT: Well, along with that, and
9 what's lacking in today's sys - - - today's system,
10 is a meaningful discussion with the client about the
11 pros - - - what's required in the Family Court Act
12 actually - - - a meaningful discussion with the
13 client about the costs and benefits of appealing, the
14 possible appellate issues in the case, whether
15 there's a value to appealing, how long it will take.
16 Maybe there's a risk to appealing for a plea client.
17 Maybe the - - - the client would choose not to appeal
18 once made aware that's there's a risk.

19 If there were that meaningful discussion
20 and then extending trial counsel's agency for the
21 IFP, which is just another part - - - he's already
22 filing or she's already filing a notice of appeal - -
23 -

24 CHIEF JUDGE LIPPMAN: Right.

25 MS. ZOLOT: - - - you understand - - -

1 CHIEF JUDGE LIPPMAN: Yeah, okay, give us
2 Dockery.

3 MS. ZOLOT: As for Dockery - - -

4 CHIEF JUDGE LIPPMAN: Yeah, give us
5 Dockery.

6 MS. ZOLOT: I'd like to get back to first
7 principles there. Mr. Dockery was fifteen years old
8 when he was charged, sixteen years old at sentencing.
9 My adversary quotes West, but what she fails to quote
10 is that a waiver under Dockery is found only if the
11 defendant, in the first instance, is properly advised
12 of his appellate rights.

13 Our position is that as a matter of law, a
14 minor is not properly advised when a written notice
15 in - - -

16 JUDGE SMITH: Is this - - - is this - - -
17 is this notice something the average, or even a
18 subaverage fifteen-year-old can't read?

19 MS. ZOLOT: I - - - no. It isn't. In
20 fact, in Mr. Dockery's case, amicus points out that
21 it's written at, at least, a tenth-grade level. My
22 client was in the ninth grade.

23 JUDGE PIGOTT: Well, plus he said - - - I
24 think he said he had trouble with the questions
25 about, what is your income? Do you own a house?

1 MS. ZOLOT: Well, it's so confusing for a
2 minor. I'm still not clear exactly whose information
3 would be sought in this, whether it's the minor's or
4 the - - - or the parent's. It's just - - - it's just
5 set up to be not understood. So to the extent that
6 in West - - - to the extent there's any vitality to
7 West, that it's clear for adults; it's certainly not
8 clear for minors.

9 So back to first principles, Mr. - - - Mr.
10 Dockery's due process rights were violated in 1986
11 and that has to color how we see that entire period
12 after that.

13 JUDGE RIVERA: It doesn't matter if he
14 subsequently appreciates and understands these
15 rights?

16 MS. ZOLOT: No - - - I would say no, but -
17 - -

18 JUDGE RIVERA: There was no point when this
19 - - -

20 MS. ZOLOT: - - - more to the - - -

21 JUDGE RIVERA: - - - this proc - - - let's
22 assume there was an error. Let's ass - - - let's go
23 with you on that. There's no point in time, moving
24 down the line, someone like this individual who ends
25 up back in the system - - - there's no point in time

1 when that error is cured?

2 MS. ZOLOT: Only if the People could show
3 contemptuous conduct and actual prejudice. An action
4 alone is not enough to - - - to deprive him of his
5 fundamental right to appeal.

6 CHIEF JUDGE LIPPMAN: Okay, thanks,
7 counsel.

8 Okay, Calaff, go ahead.

9 MS. TRUPP: I also want to urge you to
10 overrule People v. West, and to point out that New
11 York State is one of only two states that leaves a
12 gap in representation between the time trial - - - an
13 appointed trial attorney's agency ends, and appellate
14 counsel is perfected.

15 JUDGE SMITH: Well, we decided in West, I
16 think, what - - - when - - - the extent of the
17 Constitutional right to counsel. Presumably, it's
18 one thing to say the guy doesn't have a
19 Constitutional right to have someone fill out the
20 form for him, as a policy matter, it might be wise to
21 have a rule, the lawyer has to fill out the form.

22 MS. TRUPP: This court has a role in
23 assuring that the right to appeal is not dissipated
24 because somebody is indigent, and that is what is
25 happening right now.

1 CHIEF JUDGE LIPPMAN: You're just saying
2 the gap is - - - is - - -

3 MS. TRUPP: The gap - - -

4 CHIEF JUDGE LIPPMAN: - - - an
5 unconscionable situation.

6 MS. TRUPP: You are seeing the tip of the
7 iceberg here. These are the defendants who made it
8 up to the Court of Appeals. You are not seeing the
9 myriad of - - -

10 CHIEF JUDGE LIPPMAN: Yes.

11 MS. TRUPP: - - - other defendants who are
12 surrendering their rights to appeal, simply because
13 they do not know how to file an in forma pauperis.
14 And I understand - - -

15 JUDGE SMITH: I - - - but - - - but what
16 about - - - you're Calaff?

17 MS. TRUPP: I'm Calaff.

18 JUDGE SMITH: Yeah, so you're the - - - you
19 - - - why - - - why isn't it plausible that your guy
20 and a lot of other guys never pursued an appeal
21 because they - - - because it was not in their
22 interest to do so, because they might, God forbid,
23 get their plea back?

24 MS. TRUPP: There's - - - first of all,
25 there's no reason to believe Mr. Calaff didn't want

1 to pursue an appeal. On this record, he was
2 unsatisfied with his sentence, because he believed
3 that the original promise had been two-and-a-half to
4 - - -

5 JUDGE SMITH: Nobody's ever thrilled to sit
6 in jail.

7 MS. TRUPP: No, no, no. But there would
8 have been no benefit for him not to appeal, because
9 he got a higher sentence than what he thought he was
10 initially got - - -

11 JUDGE SMITH: What - - - what - - - what
12 about - - - but he - - - but he - - - no, they told
13 him what the sentence was going to be, and he still
14 took the deal. He thought it was beneficial then.

15 MS. TRUPP: Because he was so - - - told
16 that he had a chance to challenge it on appeal. That
17 was the reason that he accepted it.

18 JUDGE SMITH: You - - - you mean, he plead
19 - - - people plead guilty because their lawyer said,
20 don't worry, plead guilty, and we'll beat it on
21 appeal?

22 MS. TRUPP: There are - - - the belief that
23 you have a chance to challenge it on appeal could
24 absolutely rationally inform your decision to plead
25 guilty.

1 JUDGE SMITH: I think - - - I'm not talking
2 about a case with a suppression motion. This is just
3 a - - - the case against you is really strong; you
4 better plead guilty and now, don't worry, we'll win
5 the appeal? Doesn't make sense.

6 MS. TRUPP: There's no suggestion here that
7 Mr. Calaff had a strategic reason, at least as of
8 2004, to sit on his appellate rights, because at that
9 point, his sentence is being enhanced. If he knew he
10 had an appeal then, there would have been - - - if he
11 was a sophisticated - - -

12 JUDGE SMITH: I mean, can't - - - can't the
13 - - - I mean, is it - - - is it - - - why can't the
14 Appellate Division cast a skeptical eye on the claim
15 that a lawyer who was at, the very - - - in the very
16 moment advising the guy to plea, was assuring him
17 that he was going to get the - - - get the thing
18 reversed on appeal. That sounds like a very odd
19 thing for a lawyer to do.

20 MS. TRUPP: Well, there's a presumption
21 against abandonment of a fundamental right. And the
22 Appellate Division's findings are not supported by
23 this record. They said that the sentencing minutes
24 refuted the claim. The claim was based on what
25 happened after the sentencing minutes.

1 So, yes, if they said we have reviewed
2 these for credibility - - - if they had made a
3 legitimate factual finding here, and placed it on the
4 record the basis, then perhaps this would not have
5 been an abuse of discretion. What we have here is a
6 reasoning that makes no sense on its face. And for
7 that reason, it's an abuse of discretion.

8 CHIEF JUDGE LIPPMAN: Okay, counselor.
9 Thanks, counsel.

10 Counsel, Lopez?

11 MR. ELGARTEN: The defects in the system
12 that we've been talking about, my co - - - these
13 counsel have been talking about, is not the cause of
14 the delay in this case.

15 But on the other hand, the tension that the
16 People have in terms of what - - - what should they
17 do to bring an end to the case, doesn't exist here
18 either, because here, while the - - - the - - - Mr.
19 Lopez was a fugitive. Had they brought a motion to
20 dismiss, it just would have been granted under the
21 dis - - - the fugitive disentitlement doctrine.

22 And it's - - - it would be very obvious and
23 very easy to follow such a person. He was a fugitive
24 at trial. Let's see what - - - wait the designated
25 time period and then move to dismiss. So those

1 things aren't implicated here, and they fail to do
2 that here, and now they're saying, oh, I'm getting a
3 wind - - - Mr. Lopez is getting a windfall, but he's
4 not getting a windfall.

5 He's getting a - - - we're seeking a chance
6 to appeal and make sure and see if he didn't get a
7 fair trial and see if an innocent man wasn't
8 convicted or if he wasn't convicted of something he
9 didn't actually commit.

10 So especially in the absence of a record, I
11 think it's totally a - - - was an abuse of discretion
12 to have granted dismissal, and I'd ask for the
13 reversal.

14 CHIEF JUDGE LIPPMAN: Okay, counsel,
15 thanks.

16 Thank you all. Appreciate it.

17 (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. Reynaldo Perez, No. 55, and of People v. Ivan Calaff, No. 56, People v. Alexander Dockery a/k/a John Harris, No. 57, People v. Teofilo Lopez a/k/a Garcia Lopez a/k/a Isidoro Garcia, No. 58, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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Date: February 27, 2014