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COURT OF APPEALS

STATE OF NEW YORK

PEOPLE,

Appellant,

-against-

No. 120

VINOD PATEL,

Respondent.

PEOPLE,

Respondent,

-against-

No. 93

CHURCHILL ANDREWS,

(Papers Sealed)

Appellant.

PEOPLE,

Respondent,

-against-

No. 94

KEVIN KRUGER,

Appellant.

20 Eagle Street
Albany, New York 12207
April 29, 2014

Before:

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

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1 CHIEF JUDGE LIPPMAN: 120, 93, and 94,
2 which are the first three cases. And the first case
3 is going to be 120, People v. Patel.

4 MR. CASTELLANO: Thank you, Your Honor.
5 I'm John Castellano for the People. I'd like to
6 reserve one minute of rebuttal time, if I may?

7 CHIEF JUDGE LIPPMAN: One minute, you have
8 it, counselor. Go ahead.

9 MR. CASTELLANO: Thank you. May it please
10 the court, the Appellate Division in this case
11 contravened the criminal procedure law and well
12 established precedent from this court when it
13 provided to the defendant an extra statutory remedy,
14 even though the defendant got full merits review of
15 his claim under a statutory remedy, and even though
16 the statute specifically precludes - - -

17 CHIEF JUDGE LIPPMAN: Is there any remedy
18 here, counsel?

19 MR. CASTELLANO: There - - - there - - - is
20 there a remedy for a defendant after the one-year-
21 and-thirty-day period?

22 CHIEF JUDGE LIPPMAN: Yeah.

23 MR. CASTELLANO: There's no remedy in coram
24 nobis. It - - -

25 CHIEF JUDGE LIPPMAN: Why is there no

1 remedy in coram nobis?

2 MR. CASTELLANO: Because before a defendant
3 like - - -

4 CHIEF JUDGE LIPPMAN: Is the statute - - -
5 yeah?

6 MR. CASTELLANO: Because of the statute.
7 Because of the strict jurisdictional one-year-and-
8 thirty-day time period, which this court has said,
9 cannot be modified or extended by the courts, except
10 in the most exceptional circumstances.

11 CHIEF JUDGE LIPPMAN: What's the
12 exceptional circumstance, and why isn't this one of
13 those exceptional circumstances?

14 MR. CASTELLANO: The exceptional
15 circumstance in Syville was that there was no other
16 recourse available, and the reason there was no other
17 recourse available was because the defendants in
18 those cases neither knew nor could have known, nor
19 could have discovered, that their attorneys had
20 failed to file a notice of appeal.

21 JUDGE SMITH: Suppose - - - suppose the
22 defendant in Syville had found out at the last
23 possible moment, and they'd scrambled and got
24 together a totally inadequate motion, and the motion
25 had been rejected, would that - - - that have barred

1 his claim?

2 MR. CASTELLANO: That - - - if - - - if he
3 had found out within the one-year-and-thirty-day
4 period and was - - - was unable to make the motion at
5 that time?

6 JUDGE SMITH: Yeah, he made - - - he made a
7 pro se motion, but it just wasn't - - - he was - - -
8 it was pro se; he had no lawyer; it was a bad motion;
9 it was denied.

10 MR. CASTELLANO: He would have a different
11 form of relief. He - - - once - - - once the one-
12 year-and-thir - - - I guess - - - I guess you could
13 look into the equities of the situation as to how
14 late he actually found out, if it was the day before,
15 or two days before. But in any event, the one-year-
16 and-thirty-day period, if the defendant had failed to
17 make the motion within that period, coram no - - -
18 and knew and could have made the - - -

19 JUDGE SMITH: I - - - I understand - - -

20 MR. CASTELLANO: - - - I guess the question
21 is could he have made the motion.

22 JUDGE SMITH: - - - I understand what
23 you're saying, but are you really saying that if he
24 succeeds in getting something on paper and putting it
25 in, he's penalized for that; that he's better off

1 doing nothing if he finds out at the last moment?

2 MR. CASTELLANO: He's certainly not better
3 off doing nothing, because if - - - and the defense
4 makes this argument in the case - - - a nondiligent
5 defendant, a defendant who waits more than the one-
6 year-and-thirty-day period, is not going to get any
7 relief under Syville.

8 JUDGE PIGOTT: But - - - but if - - - I
9 think was Mr. - - - what Judge Smith is - - - is
10 suggesting is if it's - - -

11 (Audio malfunction)

12 JUDGE PIGOTT: - - - it was an example of,
13 here it is, it's 6 o'clock at night on the last day,
14 and he says, oh, my God, you know, I'm - - - and so
15 he - - - he writes a thing on a - - - he said, I
16 didn't get an appeal and I need help. And he puts it
17 in an envelope and mails it to the Appellate
18 Division, and - - - and it's timely on - - - due - -
19 - because it's mailed. And is that a bad thing? I
20 mean, has he now really hurt himself because he had a
21 Syville claim the following day, where he doesn't
22 have it now?

23 MR. CASTELLANO: He - - - it - - - I guess
24 the question is, did he have an adequate opportunity
25 to raise the issue, and maybe if he found out the day

1 before, and he only had a day to raise that issue, it
2 wouldn't - - -

3 JUDGE SMITH: So - - - so - - - so you
4 would - - -

5 MR. CASTELLANO: - - - be an adequate
6 opportunity - - -

7 JUDGE RIVERA: I thought - - -

8 MR. CASTELLANO: - - - under the statute.

9 JUDGE RIVERA: I thought your position in
10 part was that if he files within time, and it's
11 perhaps not the most artful presentation of his
12 argument, he might be able to present a better
13 argument, not in a coram nobis, because that's the
14 second bite at the apple, but through reconsideration
15 or reargument. That might give him more time to
16 perhaps present something that is of greater
17 substance.

18 MR. CASTELLANO: Absolutely. He can make a
19 motion for reconsideration, like the defendant did in
20 this case. A defendant - - -

21 JUDGE RIVERA: How much more time does that
22 buy him?

23 MR. CASTELLANO: That buys him, I guess,
24 until the - - - within thirty days of the order
25 issued by the Appellate Division.

1 JUDGE GRAFFEO: What's - - - what's - - -

2 MR. CASTELLANO: So it buys him additional
3 time.

4 JUDGE GRAFFEO: - - - what's your primary
5 objection to extending Syville to this situation?
6 That you feel it's a second bite at the apple? Is
7 that what's troubling you?

8 MR. CASTELLANO: It's - - - it's a second
9 bite at the apple, and it also - - - it undermines, I
10 guess, all the interests in finality. It undermines
11 the ability of the People to retry the case, should
12 it become necessary, because there's no limit in the
13 time - - - on coram nobis. It could be two years,
14 four years, or four and a half years as here, five
15 years, ten years, fifteen years down the line. And
16 it could be as many petitions as he wants to file.

17 So part of the ability - - - part of the
18 issue is the ability of the People to retry the case,
19 five or ten or fifteen years down the line. There's
20 also the ability - - -

21 CHIEF JUDGE LIPPMAN: What was the purpose
22 of the statute?

23 MR. CASTELLANO: The - - - I think the
24 purpose of the statute is at least fourfold. Part of
25 that is the ability to - - - making sure that these

1 claims are addressed in a timely manner. That's
2 implicated here as well, because the defendants often
3 make new allegations in subsequent petitions.

4 So a defendant who initially may complain
5 about prison authorities not filing his notice of
6 appeal, may complain about the attorney later on. So
7 those - - - those claims are distinct, and the
8 ability to answer those claims is definitely an
9 issue.

10 JUDGE SMITH: You - - - you suggested
11 earlier that the defendant could make a - - - a
12 motion to reconsider the denial, if it's 460.30?

13 MR. CASTELLANO: Absolutely.

14 JUDGE SMITH: And he could make it even
15 after the year's up?

16 MR. CASTELLANO: I believe he can, because
17 it's a motion for reconsideration, as long as it's
18 been timely - - -

19 JUDGE SMITH: And why - - - and why - - -
20 why can't - - - so if he'd labeled the motion he now
21 makes "motion for reconsideration", we should affirm?

22 MR. CASTELLANO: Well, I don't - - - well, I
23 believe it would have to be done in the period for
24 reconsideration or reargument in the Appellate
25 Division. That would be a thirty-day period from the

1 date of, I guess, notice of entry of the order.

2 JUDGE SMITH: So - - -

3 JUDGE RIVERA: But I thought I understood
4 your argument that he did make that motion, and that
5 was similarly denied.

6 MR. CASTELLANO: No, that was denied. That
7 was denied. But that's because of - - -

8 JUDGE RIVERA: So he's already had every
9 opportunity he could have under the statute. So I
10 thought that was your position.

11 MR. CASTELLANO: He - - - he had the
12 opportunity - - - he had the opportunity under the
13 statute to, number one, make the motion in the first
14 place, because he had the knowledge that was
15 necessary for it; number two, make the motion for
16 reconsideration. And I guess, in the example, he
17 could make that motion for reconsideration within
18 thirty days of the denial, if that denial occurred
19 outside the period of time of thirty days of the
20 notice of entry.

21 I'd like to say this, as well.

22 JUDGE SMITH: But in the motion for
23 reconsideration, doesn't he have to show the court
24 that it overlooked something that was in his previous
25 motion? You're not allowed to bring in new matter,

1 are you?

2 MR. CASTELLANO: That's correct, Your
3 Honor. He has to - - - if it's a mo - - -

4 JUDGE SMITH: What - - - so what - - - so
5 what - - -

6 MR. CASTELLANO: - - - if it's a motion to
7 renew, unfortunate - - -

8 JUDGE SMITH: So if you didn't have an
9 adequate opportunity to make - - - to - - - to get
10 stuff in the first time, what good is a motion for
11 reconsideration?

12 MR. CASTELLANO: It - - - it could, I
13 guess, either be a motion to renew or a motion for
14 reconsideration. If there were facts that he knew of
15 previously, that he didn't raise in his petition,
16 then he might be barred.

17 I would like to - - -

18 CHIEF JUDGE LIPPMAN: Okay, counsel, you'll
19 have your rebuttal time.

20 MR. CASTELLANO: Thank you, Your Honor.

21 CHIEF JUDGE LIPPMAN: Let's have your
22 adversary - - - let's hear from your adversary.

23 MS. FAHEY: Thank you. Lynn Fahey
24 representing Mr. Patel.

25 JUDGE GRAFFEO: What do you think the

1 purpose of the statute is? Because the legislature
2 set this time period; they didn't set two, three,
3 four, or five years.

4 MS. FAHEY: Right. Well, I think the - - -
5 I think the presumption was that people would find -
6 - - if there were a problem, people would find out
7 within the year, so it gave them that year grace
8 period. I think the main thing the statute meant to
9 do was replace the cumbersome process of Montgomery
10 resentencings, which is what proceeded the - - - the
11 statute. And I think it set the one-year - - -

12 JUDGE SMITH: But - - - but the purpose of
13 the - - -

14 MS. FAHEY: - - - limit be - - -

15 JUDGE SMITH: What's the purpose of the
16 one-year-thirty-day limitation?

17 MS. FAHEY: Well, Your Honor, I - - - I
18 think that that was supposed to be the outside limit,
19 because they thought that people would find out
20 within that year - - -

21 JUDGE SMITH: Well, which - - -

22 MS. FAHEY: - - - and gave them the one
23 year to do it.

24 JUDGE GRAFFEO: Was - - - was finality a
25 consideration?

1 MS. FAHEY: I'm sure finality was a
2 consideration. But as this court held in Syville, it
3 - - - the one-year period in the statute doesn't
4 provide a cure-all for all of your problems.

5 CHIEF JUDGE LIPPMAN: How nar - - - how
6 narrowly do we view Syville? What - - - what do you
7 think the - - - the premise of that is, and does it
8 go beyond this not finding out within the one year?

9 MS. FAHEY: Your Honor, I - - - I think it
10 does. I think it - - - it applies if someone has
11 been deprived of their right to appeal through
12 ineffective assistance of counsel, and they have no
13 other remedy, and Mr. Patel, at the time he filed his
14 coram petition, had no other remedy because he had
15 used the other stat - - -

16 JUDGE SMITH: But you - - - you - - - you
17 would acknowledge, though, that the - - - the
18 Appellate Division can't extend the one-year-thirty-
19 days, unless there's been a deprivation of due
20 process or the - - - the right to counsel.

21 MS. FAHEY: The right to counsel.

22 JUDGE SMITH: So you - - - you - - - the
23 Appellate Division had to do what it did here; had to
24 find a constitutional violation.

25 MS. FAHEY: I think it had to find a

1 constitutional violation. But here, you know - - -

2 JUDGE SMITH: It can't - - - it can't just
3 say, oh, let's give the guy - - - he looks like a
4 good guy; give him another chance.

5 MS. FAHEY: No, Your Honor. But I - - - I
6 think probably we all have assumed that if someone
7 made a motion, and I make these motions for clients
8 all the time, because someone files a notice of
9 appeal as to case 1, but not as to case 2, and
10 they're concurrent sentences. I make motions all the
11 time for - - - to file a late notice of appeal for a
12 client. Those - - - it's a minimal showing. They're
13 routinely granted. The situation we have in this
14 case - - -

15 JUDGE SMITH: After - - - after the - - -
16 after the - - -

17 MS. FAHEY: - - - is very rare.

18 JUDGE SMITH: After the year is up, they're
19 routinely granted?

20 MS. FAHEY: No. During the year, they are
21 very routinely granted. Here, what you have - - -
22 you know, the People keep saying he had a full merits
23 review. Well, it wasn't a full merits review. It
24 was a pro se complete novice in the criminal justice
25 system, floundering around while the People brought

1 every argument that there is - - -

2 JUDGE RIVERA: Well, so then he - - -

3 CHIEF JUDGE LIPPMAN: Is this - - - is this
4 a rare - - -

5 JUDGE RIVERA: Then - - -

6 CHIEF JUDGE LIPPMAN: - - - is this a rare
7 situation?

8 MS. FAHEY: I think it's a rare situation,
9 because I think it's very rare that a motion made
10 within the year is not granted, at least, in the
11 Second Department. My experience - - - I've made
12 dozens of these motions over the years. I don't
13 recall I've ever had any that weren't granted.

14 JUDGE RIVERA: So if the - - - if the
15 Appellate Division had denied the coram, could he
16 have then polished it up some more and - - - and
17 filed another coram on the same grounds?

18 MS. FAHEY: Well, you can file successive
19 corams. That's D'Alessandro and Turner and a whole -
20 - - a whole wrath (sic) of cases.

21 JUDGE RIVERA: How would that further the
22 interest in finality and the concern about the stale
23 evidence?

24 MS. FAHEY: Well, Your Honor, I - - - I
25 think going on forever does not further the interest

1 of finality. On the other hand, I would say that
2 someone is entitled to at least one review of the
3 merits of an issue - - -

4 JUDGE READ: So that's your limit - - -

5 MS. FAHEY: - - - with counsel?

6 JUDGE READ: That's your limiting
7 principal? That's your limiting principal?
8 Everybody's entitled to at least one review?

9 MS. FAHEY: He should have at least one
10 review with counsel to help him, so it's not a pro se
11 - - -

12 JUDGE READ: With counsel to help him,
13 okay.

14 MS. FAHEY: - - - with - - - right. So
15 it's not a pro se defendant flailing around - - -

16 CHIEF JUDGE LIPPMAN: Is that the - - - is
17 that the - - -

18 MS. FAHEY: - - - against the People.

19 CHIEF JUDGE LIPPMAN: - - - is that the
20 rule, counselor, you'd like us to articulate?

21 MS. FAHEY: Well, I would say certainly at
22 - - - at the very least that Syville should extend to
23 provide relief - - -

24 JUDGE PIGOTT: Where's the limit?

25 MS. FAHEY: - - - when - - -

1 JUDGE PIGOTT: If - - - if we - - - if we
2 grant this, I mean, where - - - where he had filed an
3 appeal waiver, and then - - - and then files this - -
4 - this motion saying, I told my lawyer to file a
5 notice of appeal and he didn't, so let me, where - -
6 - where do we stop? I mean, why - - - why have the
7 year and thirty? Why not just simply say, you - - -
8 you can appeal at any time until your sentence is
9 complete?

10 MS. FAHEY: Well, Your Honor, I think if he
11 make - - - I mean, he - - - he obviously has to show
12 some sort of diligence.

13 JUDGE PIGOTT: Why?

14 MS. FAHEY: He can't just sit back - - -
15 well, Syville says - - - recognizes, I think, that
16 there - - - there's a need for diligence. You can't
17 just sit back and twiddle your thumbs for years and
18 years and years.

19 JUDGE PIGOTT: Well, he waited - - - this
20 guy waited three years from the time that - - - that
21 his motion for reconsideration was denied until he
22 brought his writ.

23 MS. FAHEY: Well, Your Honor, in the Second
24 Department, they did not recognize coram as available
25 in this situation - - -

1 JUDGE PIGOTT: I understand that - - -

2 MS. FAHEY: - - - until Syville was
3 decided.

4 JUDGE PIGOTT: I understand that. But
5 you're saying, you know, you can't just go on and on
6 and on. Well, what was he doing for the last three
7 years, that he didn't immediately upon having been
8 denied reconsideration bring something?

9 MS. FAHEY: He did. He sought leave to
10 appeal to this court. He filed a 440.10. He filed a
11 440.20.

12 JUDGE PIGOTT: Well - - -

13 MS. FAHEY: He sought leave from when they
14 were denied. He sought cert. And finally, when
15 Syville was decided, he had a new remedy available to
16 him, unavailable before in the Second Department, and
17 then he brought the coram.

18 JUDGE ABDUS-SALAAM: In a situation like
19 this one, where the pro se defendant does make an
20 application before the year is up, could he ask for
21 additional time, instead of just making an
22 application? Could he say, well, I just found out
23 about this, and I'd like to get counsel, but I want
24 to make this application timely?

25 MS. FAHEY: I imagine he could make that

1 request. Whether it would be honored or not, I don't
2 know. Mr. Patel, I would note, not only made the
3 motion under 460 - - - 460.30, but also moved for
4 counsel, and in forma pauperis relief at the same
5 time. The People opposed both.

6 When he moved for argument, he also again
7 moved for in forma pauperis relief, and counsel to be
8 assigned to him. He attached the Appellate
9 Division's order assigning him counsel in the Nassau
10 case, so they clearly had already found him indigent.
11 The People still opposed his motions, including the
12 motion for counsel. In fact, they said, even if you
13 grant him a late notice of appeal, you should deny
14 his motion for counsel and for in forma pauperis
15 relief.

16 JUDGE GRAFFEO: Counsel, do the - - - does
17 a valid waiver of the right to appeal have any
18 meaning in these situations?

19 MS. FAHEY: Well, Your Honor, this waiver
20 was not valid. The Second Department - - - Appellate
21 Division have - - -

22 JUDGE GRAFFEO: But separate from this
23 case, I'm ask - - - I'm just asking generally.

24 MS. FAHEY: If there were a valid right to
25 appeal, it would foreclose - - -

1 JUDGE GRAFFEO: A valid waiver.

2 MS. FAHEY: A valid - - - a valid waiver of
3 the right to appeal, it would foreclose consideration
4 on appeal of some issues. It would not foreclose - -
5 -

6 JUDGE GRAFFEO: Right. But not all of it.

7 MS. FAHEY: - - - the appeal itself, and
8 there might well be issues in a case, as I think
9 there are here - - -

10 JUDGE GRAFFEO: It would be - - - it would
11 be a consideration as - - -

12 MS. FAHEY: It might be a consideration.

13 JUDGE GRAFFEO: Even if a - - - even if a
14 coram was valid, it would still be a consideration.

15 MS. FAHEY: It might still be a
16 consideration. Of course, if - - -

17 JUDGE SMITH: When you have - - - when you
18 have a situation like this where you have a guilty
19 plea, an appeal waiver, concurrent time, and a guy
20 who apparently is not indigent and is paying his
21 lawyer and might not want to throw his money away,
22 what - - - is it really - - - is it really
23 ineffective assistance not to file a notice of appeal
24 in the case, where he got the lesser concurrent time?

25 MS. FAHEY: Well, Your Honor, they filed a

1 notice of appeal in the Nassau case; and at
2 sentencing, in the Queens case - - -

3 JUDGE SMITH: But in Nassau - - - Nassau he
4 got - - - as I remember he got a lot more time in
5 Nassau.

6 MS. FAHEY: He got more time in Nassau, but
7 he was appealing the Nassau case. If he had been
8 successful on that appeal, he would have been stuck
9 with the Queens conviction: two felonies, eight
10 years in prison, SORA registration for life.

11 JUDGE SMITH: But he can - - -

12 MS. FAHEY: This was not - - - this was not
13 a nothing of a case. This was not a little
14 misdemeanor and time served. This was a significant
15 case for him. And there was no point in appealing -
16 - - if he got concurrent time in two cases, why - - -
17 why in the world would you file a notice of appeal as
18 to one and not the other?

19 CHIEF JUDGE LIPPMAN: Okay.

20 JUDGE PIGOTT: Because you waived it.

21 MS. FAHEY: But, Your Honor, this was - - -
22 this was not a valid waiver of the right to appeal.

23 JUDGE PIGOTT: Okay.

24 CHIEF JUDGE LIPPMAN: Okay.

25 MS. FAHEY: The Appellate Division has

1 repeated held precisely this waiver by this judge
2 invalid.

3 CHIEF JUDGE LIPPMAN: Okay, counsel, thank
4 you, counsel.

5 MS. FAHEY: Thank you.

6 CHIEF JUDGE LIPPMAN: Rebuttal, counsel?

7 MR. CASTELLANO: Yes, Your Honor. I'd just
8 like to say that I think the problem is that there is
9 no end to the repetitive applications that could be
10 made under coram nobis. That there is no time limit
11 that - - - it could be five years, or ten years or
12 fifteen years down the line.

13 JUDGE SMITH: Don't - - - don't we have - -
14 - don't we have - - - I mean, I see your point, but
15 don't we have to assume that the Appellate - - - the
16 Appellate Division granted this application. Don't
17 we have to assume that they found ineffective
18 assistance?

19 MR. CASTELLANO: I - - - I believe the
20 basis for the Appellate Division determination really
21 is more Syville and more what it took from Syville,
22 which is that this court - - -

23 JUDGE SMITH: Well, Syville - - - Syville
24 is an ineffective assistance case, isn't it?

25 MR. CASTELLANO: It - - - it is. But what

1 I think the Appellate Division took from Syville is
2 that this court would liberally grant or give to the
3 defendants the opportunity - - - multiple
4 opportunities - - -

5 JUDGE SMITH: How - - - how - - -

6 MR. CASTELLANO: - - - and the opportunity
7 to - - -

8 JUDGE SMITH: I mean, shouldn't - - - I
9 mean, they didn't - - - they didn't say all this.
10 They didn't say anything, as I remember.

11 MR. CASTELLANO: They didn't say - - - they
12 didn't say much at all, Your Honor.

13 JUDGE SMITH: Yeah, so don't - - - don't we
14 have to take this - - - at this point, we have to
15 resolve all the inferences in the defendant's favor.
16 And if you can see ineffective assistance, or the
17 possibility of finding ineffective assistance on this
18 waiver, we have to affirm - - - on this record, we
19 have to affirm, don't we?

20 MR. CASTELLANO: There were absolutely no
21 merits to this - - - well, there are two answers to
22 that. The first one is, that there should - - - no -
23 - - no review should be available because Syville
24 itself says that only when no other recourse is
25 available can coram nobis be invoked. It says it

1 several times.

2 JUDGE PIGOTT: But it was easy - - - isn't
3 it easy to read Syville to say you're entitled to one
4 appeal?

5 MR. CASTELLANO: It says - - - it says that
6 you are entitle - - - you can only invoke coram nobis
7 when there was no other remedy available to you, and
8 there's good reason for that, because the interest in
9 finality that was - - -

10 JUDGE PIGOTT: I was going behind that. In
11 other words, I'm suggesting that the Appellate
12 Division could have looked at this and said, you
13 know, they've - - - they've sort of said every - - -
14 every conviction ought to be reviewed at least once.
15 And this one wasn't, and so we're going to grant
16 coram and see if it should have been.

17 MR. CASTELLANO: That would leave open the
18 possibility of endless repetitive motions. What the
19 legis - - -

20 JUDGE PIGOTT: I don't disagree with you,
21 but - - - go ahead.

22 MR. CASTELLANO: What the legislature did
23 in this case was to try to avoid the situation, I
24 believe, that the court was in maybe a couple of
25 months ago, where you have nineteen- and twenty- and

1 twenty-two-year-old appeals. Instead, what it said
2 was, you know, we're going to impose a time limit, a
3 one-year-and-thirty-day time limit. And this court
4 has said where that doesn't work, where that remedy
5 is inadequate because the defendant didn't know the
6 circumstances that were necessary to make the motion

7 - - -

8 CHIEF JUDGE LIPPMAN: Okay, counsel.

9 MR. CASTELLANO: - - - then - - - then it
10 could bring it. But otherwise not - - -

11 CHIEF JUDGE LIPPMAN: Okay.

12 MR. CASTELLANO: - - - and it very clearly
13 states the basis for coram nobis review.

14 CHIEF JUDGE LIPPMAN: Thank you, counsel.
15 Thank you both. Appreciate it.

16 People v. Andrews? Counsel.

17 MS. NAPOLI: Good afternoon, Your Honors.
18 My name is Lisa Napoli of Appellate Advocates for
19 Churchill Andrews.

20 I have seven minutes this afternoon. I'd
21 like to reserve one minute for - - -

22 CHIEF JUDGE LIPPMAN: You've got it; go
23 ahead.

24 MS. NAPOLI: Thank you very mu - - - very
25 much, Your Honor. Mr. Andrews was denied his right

1 to counsel. At the point where he was deciding
2 whether to appeal or not, he wasn't given that
3 option. He wasn't able to make a knowing decision
4 about the options available - - -

5 JUDGE SMITH: Because of - - - because of a
6 Padilla - - - because of a Padilla violation, right?

7 MS. NAPOLI: No, not because of a Padilla
8 violation at all, because counsel had the obligation
9 to tell him about the advantages and disadvantages of
10 appealing his conviction, and that she did not do.

11 JUDGE SMITH: Well, the main advantage he
12 didn't tell her - - - the main disadvantage she
13 didn't tell him about was that he was removable under
14 the immigration laws.

15 MS. NAPOLI: That's one of the advantages -
16 - - that's - - - that's one of the consequences. But
17 the advantage and disadvantage - - -

18 JUDGE SMITH: Why - - - I mean, if you take
19 - - - assume this guy was a citizen and had - - - and
20 had no immigration problem, how - - - how was
21 counsel's advice deficient?

22 MS. NAPOLI: Well, the appealing - - - what
23 the - - - what the consequence of appealing the
24 conviction would mean for him?

25 JUDGE SMITH: Um-hum.

1 MS. NAPOLI: Well, it would mean either a -
2 - - possibly another - - - that he wouldn't have
3 ended up with a felony conviction.

4 JUDGE SMITH: But he - - - but - - - but
5 she didn't tell him not to appeal. He said I want
6 this thing over with - - -

7 MS. NAPOLI: No, what - - - what she - - -

8 JUDGE SMITH: - - - and I don't want to
9 appeal.

10 MS. NAPOLI: - - - what she did is she
11 said, do you want to appeal? And he said - - -

12 JUDGE SMITH: And he said - - - and - - -
13 and - - -

14 MS. NAPOLI: But she didn't say - - - she
15 didn't say what it would mean to appeal or not to
16 appeal. And he said I just want it to end. And
17 instead of her explain - - -

18 JUDGE RIVERA: So - - - so is your argument
19 that she must inform him of his right to appeal in a
20 way that's more meaningful than what she did here,
21 regardless of the grounds for any potential appeal?

22 MS. NAPOLI: Absolutely. Absolutely. The
23 right to counsel in this state does not mean that you
24 have somebody standing next to you with a law degree
25 reciting a rote catechism. What you are entitled to,

1 particularly at a point like this, where it was - - -
2 the right to appeal is - - - is the defendant's
3 decision to make, not counsel's. So the defendant -
4 - -

5 JUDGE READ: But he doesn't say that,
6 though, at any point, does he? He doesn't say that -
7 - - that the - - that the trial counsel failed to
8 discuss with him his right to appeal.

9 MS. NAPOLI: Defense - - -

10 JUDGE READ: Or the pros and cons - - -

11 MS. NAPOLI: Defense counsel says that.

12 JUDGE READ: Defendant doesn't say that,
13 though.

14 MS. NAPOLI: But defend - - - but we don't
15 - - -

16 JUDGE READ: He doesn't put anything in the
17 record.

18 MS. NAPOLI: - - - we don't need him to say
19 that, because the defense attorney admits that she
20 didn't give him that advice. The defense attorney
21 says that all she said to him was, do you want to
22 appeal? And when he told her what he wanted, which
23 is that he wanted the case to end, she just said
24 nothing more, instead of - - -

25 JUDGE SMITH: But if - - - if - - - if we

1 go your way, what happens in - - - as a practical
2 matter, doesn't everybody - - - anybody who - - - who
3 tells his lawyer I don't want to appeal, forget about
4 it, and then changes his mind a year later, can do
5 it.

6 MS. NAPOLI: No, what - - - what you would
7 be enacting here is a robust right to counsel, which
8 is, in fact, what exists in New York State. What
9 counsel - - -

10 JUDGE SMITH: Well, I guess, wouldn't - - -
11 wouldn't one of the consequences of that robust right
12 to counsel be that the one-year limitation would
13 pretty much go by the boards?

14 MS. NAPOLI: No, not at all. What the - - -
15 - what were - - - what would happen - - - what would
16 have happened in this case is that counsel would have
17 said to her - - - to her client, this is what it
18 would mean to appeal your conviction.

19 JUDGE PIGOTT: When - - - when would that
20 have happened in - - - in - - -

21 MS. NAPOLI: At the time that he was
22 sentenced.

23 JUDGE PIGOTT: No, the exact date. What do
24 you - - - because he - - - he - - - didn't he move to
25 withdraw his plea at one time?

1 MS. NAPOLI: That's right. He di - - - he
2 - - - well, he wanted to withdraw his plea - - - his
3 plea, which - - -

4 JUDGE PIGOTT: And he had a new lawyer at
5 that time.

6 MS. NAPOLI: Right. He had - - -

7 JUDGE PIGOTT: Now, are we talking about
8 before, when he said - - - when he was given the
9 option of having the case dismissed, if he went into
10 drug treatment and successfully completed it?

11 MS. NAPOLI: Well, what she - - - she - - -

12 JUDGE PIGOTT: Did he want to appeal that?

13 MS. NAPOLI: What he would - - - what he
14 would have appeal - - - I'm not sure what your
15 question is; I'm sorry.

16 JUDGE PIGOTT: Well, there are - - - there
17 are just so many dates here, you know, where he - - -
18 he pleads - - -

19 MS. NAPOLI: Well, what - - -

20 JUDGE PIGOTT: - - - to a situation where -
21 - - where if he just does the drug treatment, you
22 know, he - - - the case is dismissed. And apparently
23 he falls off the wagon on that stuff, and all of a
24 sudden he's back with new counsel. He wants to
25 withdraw his plea. He fails to show a new attorney

1 request, another date for sentencing, and this thing
2 goes on and on and on.

3 And I'm just wondering where his process
4 that he was due didn't occur, because there are more
5 dates in here as to when he was given drug treatment
6 opportunities and things like that, and he - - -
7 finally he gets sentenced to six months, and he's
8 released the same day.

9 MS. NAPOLI: This is not an unusual
10 progression in Brooklyn Treatment Court, and in fact
11 - - -

12 JUDGE PIGOTT: I certainly understand that,
13 but what - - -

14 MS. NAPOLI: Yeah, and - - -

15 JUDGE PIGOTT: - - - but I'm - - - what
16 you're doing here is you're standing here now fall -
17 - - this all happened in '08 - - -

18 MS. NAPOLI: That's right.

19 JUDGE PIGOTT: - - - and saying, you can't
20 believe what a due process violation occurred here,
21 and therefore we want 460.30 to be essentially
22 abrogated, and we want Syville to be expanded to say
23 that if - - - if a situation like this occurs, all
24 bets are off. We're going to appeal, and we're going
25 back to the six years ago, when he was first arrested

1 on this, so we can try the case.

2 I - - - I don't know how we can - - -

3 MS. NAPOLI: This is squarely within
4 Syville. Syville, the - - - the 460.30 is not an
5 inflexible bar. It is available - - -

6 CHIEF JUDGE LIPPMAN: What's the rule,
7 counsel? What's - - - what's in your - - - in your
8 view?

9 MS. NAPOLI: The rule is exactly what
10 Syville says.

11 CHIEF JUDGE LIPPMAN: Yes, tell us.

12 MS. NAPOLI: Is that - - - is that if
13 within the 4060 - - - the 460.30 period, counsel - -
14 - the defendant is unaware that he has the right to
15 appeal, or could not reasonably discover it during
16 that - - - that period, then he can prevail under
17 Syville.

18 JUDGE GRAFFEO: But then what - - - what -
19 - -

20 MS. NAPOLI: And that is exactly what
21 happened here.

22 JUDGE GRAFFEO: - - - happened to the 440
23 here, though? Supreme Court denied the 440.

24 MS. NAPOLI: That's right.

25 JUDGE GRAFFEO: Then - - - then what

1 happened?

2 MS. NAPOLI: It's - - -

3 JUDGE GRAFFEO: He didn't pursue it with
4 the Appellate Division?

5 MS. NAPOLI: No, no. The 440 - - - the 440
6 - - - the denial of the 440 was appealed.

7 JUDGE PIGOTT: And what happened?

8 MS. NAPOLI: And that was pending - - -

9 JUDGE GRAFFEO: But - - - but then he filed
10 a coram - - -

11 MS. NAPOLI: That's right.

12 JUDGE GRAFFEO: - - - didn't he, instead of
13 pursuing - - -

14 MS. NAPOLI: That's right, the - - -

15 JUDGE GRAFFEO: - - - the 440?

16 MS. NAPOLI: No, no, the 440 was
17 continuing. I'm sorry that that's unclear. The 440
18 was continuing, but Chaidez was - - -

19 JUDGE GRAFFEO: It was held in abeyance, is
20 that what happened?

21 MS. NAPOLI: Chai - - - Chaidez was
22 decided. The 440 and the 440 appeal were - - - the
23 legal landscape looked very different until Chaidez
24 was decided.

25 JUDGE READ: Could we - - -

1 MS. NAPOLI: And once Chaidez was decided -
2 - -

3 JUDGE SMITH: You're - - - you're - - -

4 MS. NAPOLI: - - - it changed things
5 significantly.

6 JUDGE SMITH: You're - - - you're familiar
7 with the Baret case that is coming up - - -

8 MS. NAPOLI: That's right.

9 JUDGE SMITH: - - - later this week? If -
10 - - if the appellant should prevail in that case,
11 what happens to your guy?

12 MS. NAPOLI: It depends on exactly how your
13 decision is decided, but we would move to - - - for
14 leave to appeal. Leave to appeal was denied in that
15 case. I asked for a reconsideration when that
16 application is still pending. So - - -

17 JUDGE SMITH: So you would - - - you would
18 ask - - - you would ask - - -

19 MS. NAPOLI: - - - we - - - we - - -

20 JUDGE SMITH: If - - - if - - - if what's
21 it - - - Baret goes the way you want it to, you will
22 seek reconsideration - - -

23 MS. NAPOLI: That's - - - that's right. We
24 can seek - - -

25 JUDGE SMITH: - - - so we might see you - -

1 -

2 MS. NAPOLI: - - - reconsideration of the -
3 - - of the - - -

4 JUDGE SMITH: - - - so then maybe we'll see
5 you again in this case.

6 MS. NAPOLI: That's - - - that's right.

7 CHIEF JUDGE LIPPMAN: Okay.

8 MS. NAPOLI: Maybe you will.

9 CHIEF JUDGE LIPPMAN: Okay, counsel. Thank
10 you.

11 MS. NAPOLI: Okay, thank you.

12 CHIEF JUDGE LIPPMAN: You'll have your
13 rebuttal.

14 Counselor?

15 MS. SLEVIN: May it please the court,
16 Assistant District Attorney Joyce Slevin for the
17 respondent.

18 The defendant received effective
19 representation on appeal, and the coram nobis was
20 properly denied. The real focus - - -

21 CHIEF JUDGE LIPPMAN: What's the
22 significance of the deportation issue here?

23 MS. SLEVIN: Well, the significance is that
24 the defendant claims that he wasn't informed about
25 the advantages and the disadvantages of appealing.

1 But the determinative factor that the defendant says
2 he wasn't informed about was deportation. And the
3 determinative factor as to why he'd want - - - would
4 have wanted to appeal is to prev - - - it's his last
5 line of defense against deportation.

6 So because Padilla rules that an attorney,
7 at this point in time, did not have a duty to inform
8 about deportation, then this defendant cannot benefit
9 from the ben - - - the rule of Padilla. So actually,
10 deportation is - - -

11 JUDGE READ: Well, I guess that may depend
12 on what we decide later on, might it not?

13 MS. SLEVIN: Well, as far as that, that
14 seems a long process, whatever this court decides in
15 Baret, which may or may not be preserved in Baret, as
16 I understand. I read there was leave applications.

17 JUDGE RIVERA: But I - - - I - - - I
18 thought your opponent was also arguing - - - I
19 thought the defendant was also arguing that
20 regardless of whatever grounds for the appeal, that
21 he's claiming his attorney failed to properly inform
22 him about the possibility of appealing, the
23 opportunity of appealing, how to pursue an appeal,
24 that he had a right to an appeal - - -

25 MS. SLEVIN: Well, at the - - -

1 JUDGE RIVERA: - - - regardless of taking
2 the plea. And I thought that was the argument, that
3 regardless of the grounds, that the defendant (sic)
4 failed to properly inform and notify the defendant.

5 MS. SLEVIN: Well, two things. I think
6 first of all - - -

7 JUDGE RIVERA: Yes.

8 MS. SLEVIN: - - - you - - - you really
9 cannot consider the deportation issue. It's just
10 really out of the box, so then we're left - - - if
11 the attorney didn't have a duty to talk about
12 deportation, what was the attorney's duty, which is
13 controlled by Roe v. Flores-Ortega, and these court's
14 decisions in - - - this court's decision in Lynn v. -
15 - -

16 JUDGE RIVERA: But - - - but again, I think
17 I'm not being clear. Perhaps, I'm not being clear.
18 I - - - I thought your adversary's argument was,
19 regardless of the ground - - - because that is one
20 ground. There may be other grounds. Who knows,
21 right?

22 MS. SLEVIN: Grounds for appeal?

23 JUDGE RIVERA: There may be other grounds.
24 And so I thought the argument was, and perhaps I've
25 misunderstood the argument - - - I'll ask her when

1 she comes back up on rebuttal - - - that the lawyer
2 had to explain that regardless of taking the plea,
3 there was still an opportunity to appeal, and why
4 that might be advantageous, besides the most obvious
5 reasons.

6 MS. SLEVIN: Well - - -

7 JUDGE RIVERA: Are you saying that that is
8 - - - that that - - - there is - - - that the lawyer
9 had no such duty and obligation?

10 MS. SLEVIN: I'm saying that an attorney's
11 duty is a case-by-case basis, and when there's a
12 guilty plea, there is far less of a duty, because
13 there's a presumption on a guilty plea, that the
14 defendant has no reason or desire to appeal.

15 And if you take deportation out of this
16 picture, then the defendant hasn't shown that he
17 wanted to undo this plea. He got out of jail the day
18 of sentence. He would have been put back to his pre-
19 plea status - - -

20 JUDGE RIVERA: So when someone takes a
21 plea, what the lawyer's duty and obligation with
22 respect to informing them about their right and
23 opportunity to appeal?

24 MS. SLEVIN: It depends - - - it depends on
25 the case. It depends on whether one - - -

1 JUDGE RIVERA: What would be the minimum?
2 What's the minimum?

3 MS. SLEVIN: Well, it - - - it really - - -
4 it depends on the case. I mean, if a defendant is
5 unaware whatsoever that there's even an appeal - - -

6 JUDGE RIVERA: Um-hum.

7 MS. SLEVIN: - - - he would probably have
8 some kind of recourse down the line. And if you're
9 looking at the better practice, I mean, certainly the
10 better practice is to go on about the appeal. But if
11 you're looking for is this attorney deficient? Was
12 this defendant denied effective assistance? That's a
13 different test.

14 JUDGE PIGOTT: Well, Ms. Slevin, I'm - - -
15 I'm curious, because there's an appeal waiver here,
16 right? He signed in a wa - - -

17 MS. SLEVIN: Yes, he did.

18 JUDGE PIGOTT: - - - a waiver. If that's
19 no good, if the appeal waiver is no good - - - I
20 worry about pleas being offered. It's usually the DA
21 who says, you know, you got - - - you know, we'll
22 give you this plea - - - in this case it was drug
23 rehabilitation and a dismissal - - - if there's - - -
24 if there's no appeal waiver.

25 And if - - - and if we're going to

1 collaterally attack every one of these appeal
2 waivers, and say they're no longer valid, I worry
3 that we're going to - - - we're going to infect the
4 plea procedure by saying there is no such thing as a
5 valid plea - - - appeal waiver.

6 MS. SLEVIN: So, I'm sorry; what's your
7 question, Your Honor?

8 JUDGE PIGOTT: Well, I was throwing you a
9 softball.

10 JUDGE READ: You're supposed to agree - - -

11 MS. SLEVIN: I thought so, but I wasn't
12 sure.

13 JUDGE READ: You're - - - you're supposed
14 to agree with him, I guess.

15 JUDGE PIGOTT: It seems odd that I would
16 throw you a softball.

17 MS. SLEVIN: Yes, it would - - - I mean, if
18 the - - - if the waiver of the right to appeal is to
19 have any meaning to it, then the defendant would have
20 to file a timely appeal. Or he'd have to show - - -
21 he still has to show that he would've wanted to
22 appeal.

23 And once you plead guilty, especially in a
24 case like this, why would the defendant want to
25 appeal? He shows absolutely no reason why he

1 would've wanted to appeal, except we're going back to
2 deportation, and it's circular.

3 And the reason why this is circular is
4 because the right to be advised about deportation
5 occurs at a guilty plea. And this happened at the
6 time of the sentence regarding an appeal. And that's
7 - - -

8 JUDGE PIGOTT: Now he appealed - - - he
9 appealed the 440, right?

10 MS. SLEVIN: Yes, Your Honor.

11 JUDGE PIGOTT: And - - - and the last I
12 knew it was still pending. Do you know what happened
13 to it?

14 MS. SLEVIN: The 440 was denied, and then
15 he sought leave before this court and that was
16 denied. So he actually had two leave applications
17 before this court, the denial of the 440, this court
18 did not grant leave, and we're here now in this case.

19 JUDGE ABDUS-SALAAM: Counsel, your
20 adversary said this Syville. Is this Syville or is
21 this another request for an extension or another sort
22 of exception?

23 MS. SLEVIN: Well, first of all it's very
24 different from Syville, because there's a plea, so
25 the standard is very different. It's also different

1 from Syville in a very important way. Well, in
2 Syville, there were trials and the attorneys told the
3 defendants, don't worry; I'm going to file a notice
4 of appeal. So there's a detrimental - - -
5 detrimental reliance, which this defendant didn't
6 have here.

7 So I think here the focus is more on what
8 was the duty of the attorney to talk to the defendant
9 upon a guilty plea, and did the defendant show any
10 indication that he wanted to appeal, whether or not
11 frivolous claims should be raised on appeal. So it's
12 almost not even in the Syville universe, so it would
13 be quite an extension of Syville under the facts of
14 this case.

15 CHIEF JUDGE LIPPMAN: Okay, counselor,
16 thank you.

17 MS. SLEVIN: Thank you.

18 CHIEF JUDGE LIPPMAN: Counsel, rebuttal?

19 MS. NAPOLI: I think we're all getting
20 really sidetracked by the immigration issue.

21 CHIEF JUDGE LIPPMAN: How so? Go ahead.

22 MS. NAPOLI: Because it doesn't - - - the -
23 - - the - - - Mr. Andrews' immigration situation is a
24 specific fact about him, but that doesn't change the
25 defense attorney's duty. The defense attorney's duty

1 is to explain the advantages and disadvantages of
2 appealing. And Mr. Andrews - - -

3 JUDGE PIGOTT: So where - - - where - - -
4 where do you think Syville ends? In the earlier one,
5 it sounded like the argument is that you got to get
6 one appeal. Whether you waived it or not, you're
7 entitled to one appeal or at least some attempt to
8 get that one appeal up. Is this one the same? I
9 mean, is this - - - because he never had one appeal?

10 MS. NAPOLI: He never had one appeal, and
11 this case shows how important that is. And it shows
12 how it easy it is to fall in between the cracks in
13 that transition phase when - - - as you move from
14 trial, or plea in this case, to the appellate phase.

15 JUDGE PIGOTT: But this one is three years
16 later, right? I mean, it - - - I think he took the
17 plea in '08, and now here in - - - and in '11, he's
18 trying to do this.

19 MS. NAPOLI: That's right.

20 JUDGE PIGOTT: At some point, you wonder
21 where the - - - where the complainants are, where the
22 witnesses are, where - - - I mean - - -

23 MS. NAPOLI: This is - - -

24 JUDGE PIGOTT: - - - it would be very easy
25 to say, you know, you were - - - you weren't granted

1 an appeal, so you know what? We're going to vacate
2 your plea, and we're going to send everybody back to
3 square one. We find out there's nobody standing
4 there.

5 MS. NAPOLI: And this is a ca - - - is a
6 case where - - - where the fact that it's a plea
7 works for - - - works in his favor.

8 JUDGE PIGOTT: Yeah.

9 MS. NAPOLI: Isn't it? Because there are
10 no witnesses. What we have here is Brooklyn
11 Treatment Court. It is really important to recognize
12 that this was an offense that nobody thought - - -
13 not the People, not the court - - - thought was worth
14 prison time, or jail time. They didn't even think -
15 - -

16 JUDGE PIGOTT: Well, that's what I asked
17 your opponent. You know, this - - - this keeps up -
18 - - I mean, why - - - why go get an appeal waiver?
19 Why not say, let's try this thing? I mean, they - -
20 - I'm guessing, they probably had him pretty cold - -
21 -

22 MS. NAPOLI: This - - -

23 JUDGE PIGOTT: - - - because he wanted to
24 plead guilty. And - - - and so now you can do your
25 time, and we don't have to worry about all of this,

1 and you can appeal all you want.

2 MS. NAPOLI: This - - - this is not about
3 skating past the waiver of the right to appeal, or -
4 - -

5 JUDGE PIGOTT: But you're attacking
6 Brooklyn Treatment Court.

7 MS. NAPOLI: - - - or - - - or skating past
8 deadlines.

9 JUDGE PIGOTT: You're attacking the
10 Brooklyn Treatment Court, saying this is a problem
11 that they have with the Brooklyn Treatment Court.

12 MS. NAPOLI: No, I didn't say that. You -
13 - -- you were upset about the chain of events - - -

14 JUDGE PIGOTT: Yes.

15 MS. NAPOLI: - - - and I simply said, that
16 that's not unusual.

17 CHIEF JUDGE LIPPMAN: You're saying this is
18 par for the course - - -

19 MS. NAPOLI: Exact - - - it's par for the
20 course - - -

21 CHIEF JUDGE LIPPMAN: - - - in the Brooklyn
22 Treatment Court.

23 MS. NAPOLI: There's nothing bad about
24 Brooklyn Treatment Court, but it's a court in which
25 we've decided we are not going to punish the people

1 going to this court - - -

2 CHIEF JUDGE LIPPMAN: So you give people
3 chances - - -

4 MS. NAPOLI: Exactly.

5 CHIEF JUDGE LIPPMAN: - - - and chances and
6 chances.

7 JUDGE PIGOTT: But how many chances do you
8 get before three years have expired and now you say I
9 want to vacate my plea, and by the way, the officer's
10 retired, and nobody can find the drugs, and I guess I
11 can get out of here.

12 MS. NAPOLI: We're - - - we're not at the
13 point where that is happening. What we had here is a
14 man who pled guilty in a case where everyone dis - -
15 - agreed that punishment wasn't what was warranted
16 here. Not prison time, not jail time. But the - - -

17 JUDGE PIGOTT: Okay, let's assume all
18 that's true. What's going to happen now?

19 MS. NAPOLI: What the - - - what the courts
20 and the People agreed was what this was worth, was
21 drug treatment, help, not punishment.

22 JUDGE PIGOTT: But let's assume you're
23 right.

24 MS. NAPOLI: But - - -

25 JUDGE PIGOTT: Let's assume you get your

1 appeal and they affirm it. Now, what have we
2 accomplished? Let's assume you get your appeal and
3 it gets reversed. Now, what have you accomplished?
4 What - - - what then happens?

5 MS. NAPOLI: Well, what - - - in Mr. - - -
6 in Mr. Andrews' case, his overriding concerns were
7 getting drug treatment and avoiding removal. Right?

8 JUDGE PIGOTT: That's what you said - - -
9 you - - -

10 MS. NAPOLI: So at this - - - at this
11 point, he - - - he - - -

12 JUDGE PIGOTT: You said - - - you said
13 immigration is getting - - - screwing this up, and -
14 - -

15 MS. NAPOLI: No, no, I said - - -

16 JUDGE PIGOTT: - - - we shouldn't be
17 talking about that - - -

18 MS. NAPOLI: I - - -

19 JUDGE PIGOTT: - - - while the whole point
20 is that until ICE came around, that's when all of a
21 sudden the lights went on, and he's - - - and he's
22 moving to vacate.

23 MS. NAPOLI: No, that's not true. No
24 lights went on, because he didn't know what the - - -
25 he didn't know anything. He pled guilty with the - -

1 - with the goal of getting drug treatment. Right?

2 JUDGE PIGOTT: Right.

3 MS. NAPOLI: And - - -

4 JUDGE PIGOTT: And it would have been
5 dismissed.

6 MS. NAPOLI: And that - - - but even if it
7 had been dismissed, that would have been - - - he
8 would have still been re - - - mandatorily and
9 permanently removable even if the case was dismissed.
10 The fact of his plea alone rendered him permanently
11 and mandatorily removable, right?

12 JUDGE PIGOTT: Right.

13 MS. NAPOLI: So it didn't matter if he
14 failed or succeeded at drug treatment. But his - - -

15 JUDGE PIGOTT: But he got sentenced on the
16 3rd, ICE came after him on the 4th, and he files this
17 440 on the 24th.

18 MS. NAPOLI: That's right. He fi - - -
19 through counsel, he files a 440.

20 JUDGE PIGOTT: But you're making it sound
21 like that ICE part doesn't even have to be in there.

22 MS. NAPOLI: No. But - - - but the ICE - -
23 - I feel like we're collapsing two issues together.
24 We're talking about what counsel's duty is.
25 Counsel's duty when it comes to deciding whether to

1 appeal from a conviction or not, that is the
2 defendant's decision to make.

3 JUDGE PIGOTT: But wasn't that in '08?

4 MS. NAPOLI: Yes. And counsel's duty at
5 that time was to explain to him the advantages and
6 disadvantages of doing so.

7 JUDGE PIGOTT: And having signed a waiver -
8 - -

9 MS. NAPOLI: Right.

10 JUDGE PIGOTT: - - - and having had a year
11 and thirty days to appeal - - -

12 MS. NAPOLI: That - - - that's right. And
13 - - - and that waiver, as we - - - you know, this is
14 not a - - - a questionable waiver. It is a plainly
15 invalid waiver. And in order for waivers of appeal -
16 - - in order for the plea - - - for a plea to work, a
17 system that relies in great part on pleas to work, we
18 have to respect a waiver, and waivers have to be
19 knowing and voluntary choices. So we can't skate
20 past those times - - -

21 CHIEF JUDGE LIPPMAN: Okay, counsel.

22 MS. NAPOLI: - - - when it - - - when it
23 wasn't.

24 JUDGE RIVERA: Can I just ask - - -

25 CHIEF JUDGE LIPPMAN: Thank you.

1 JUDGE RIVERA: I'm sorry.

2 CHIEF JUDGE LIPPMAN: Judge Rivera, go
3 ahead.

4 JUDGE RIVERA: Chief Judge, may I ask one
5 question - - -

6 CHIEF JUDGE LIPPMAN: Sure.

7 JUDGE RIVERA: Very briefly, obviously,
8 because your time is up. Is - - - is there anything
9 that was said during the colloquy, either at the plea
10 or the sentencing either way, that somehow would have
11 misled him regarding to - - - his right to appeal?

12 MS. NAPOLI: Absolutely. He - - -

13 JUDGE RIVERA: What would that be?

14 MS. NAPOLI: Well, he was a layman. It's
15 his first offense. He - - - he's at forty-three;
16 this is first offense. And when he - - - when - - -
17 at his plea, he waives his right to appeal. Now it
18 is an invalid waiver, and there's no colloquy on the
19 record. So it is a legally invalid waiver, but in a
20 layman's eyes he would have thought, well, I waived
21 my right to appeal.

22 And then when he's sentenced, the court
23 says, incorrectly, you waived your right to appeal,
24 and counsel didn't correct that. So he was
25 uninformed and misled.

1 CHIEF JUDGE LIPPMAN: Okay. Thanks,
2 counsel.

3 MS. NAPOLI: Thank you.

4 CHIEF JUDGE LIPPMAN: Kruger?

5 MR. OSTRER: Good afternoon, I'm Benjamin
6 Ostrer on behalf of appellant Kevin Kruger.

7 CHIEF JUDGE LIPPMAN: Do you want any
8 rebuttal time out of your three minutes?

9 MR. OSTRER: No, Your Honor.

10 CHIEF JUDGE LIPPMAN: Okay. Take your
11 three; go ahead.

12 MR. OSTRER: Thank you, Your Honor.
13 There's no dispute that there was ineffective
14 assistance with respect to Mr. Kruger's
15 representation.

16 JUDGE PIGOTT: I was struck by the fact
17 that it - - - that you seem to be arguing that it's
18 the Appellate Division that decides whether or not
19 something is timely filed with us.

20 MR. OSTRER: Well, no, Your Honor. What
21 we're stating is that within the compass of the right
22 to appeal to the Appellate Division is a right to
23 file a leave application to this court. We sought to
24 enlarge that time to file a late leave application to
25 this court. That is something that a defendant

1 appellant can do as of right.

2 JUDGE PIGOTT: I just wasn't - - - I guess
3 I'm being educated. I thought you would make that
4 application to this court and not to the Appellate
5 Division.

6 MR. OSTRER: Well, the way we read it, we
7 needed to make it to the Appellate Division through
8 coram nobis.

9 JUDGE PIGOTT: So - - - good - - - so I
10 mean, you're - - - you're saying that the - - - the
11 Appellate Division could say, you know, you only got
12 X-number of days to go to the Court of Appeals.
13 We're going to give you an extra thirty. And - - -
14 and we're - - - and we're bound by that?

15 MR. OSTRER: Well, if - - - if I can file
16 my - - - apparently so. If I was mistaken, then I've
17 advised - - -

18 JUDGE PIGOTT: Just didn't know.

19 MR. OSTRER: - - - Mr. Kruger incorrectly.
20 But I believe that what we were compelled to do was
21 to seek relief from the Appellate Division to file a
22 late claim and to enlarge our time to file with the
23 Court of Appeals.

24 JUDGE SMITH: Do you - - - do you have - -
25 - I mean, you say that the lawyer was ineffective,

1 but - - -

2 MR. OSTRER: Well, it's me, Your Honor.

3 JUDGE SMITH: - - - did he have a right to
4 - - - to effective assistance at this - - -

5 JUDGE PIGOTT: You're pro se today.

6 MR. OSTRER: Well, I am - - - I - - -

7 JUDGE SMITH: Go ahead, answer - - - answer
8 him first.

9 MR. OSTRER: No, no, I'm sorry, Judge. I
10 didn't - - - I'm sorry, I - - -

11 JUDGE SMITH: Do you - - - do you have a
12 right to effective assistance at the second appeal
13 stage?

14 MR. OSTRER: Well, it's not the second
15 appeal; it's the leave application for that appeal,
16 and that is a matter of right that a defendant or
17 appellant in the Appellate Division - - -

18 JUDGE SMITH: By statute it's a matter of
19 right - - -

20 MR. OSTRER: Right.

21 JUDGE SMITH: - - - but do you - - - do you
22 have a constitutional right to effective assistance
23 at that stage?

24 MR. OSTRER: Well, I believe due process
25 applies to any advice from counsel on anything the

1 appellant is doing as a matter of right. You - - -
2 Syville states that we - - - as a matter of
3 constitutional concern, is the advice that somebody
4 gets with respect to his appeal as of right to the
5 Appellate Division. Well, the leave application is a
6 matter of right to that same person - - -

7 JUDGE SMITH: Are you saying any - - - any
8 - - -

9 MR. OSTRER: - - - and he should be - - -

10 JUDGE SMITH: - - - anything that the - -
11 - the state gives you a statutory right to do, it
12 also has to provide counsel for you to do it?

13 MR. OSTRER: Not necessarily, but that
14 doesn't mean that you should be compromised by
15 incorrect advice from your counsel, and I think - - -

16 JUDGE RIVERA: Well, I take it what - - -

17 JUDGE GRAFFEO: What if - - -

18 JUDGE RIVERA: - - - well, I take it what
19 you're saying is that even if you don't have this
20 right, if indeed, the attorney - - - if the reliance
21 is on the attorney doing it, and the attorney does
22 not, that somehow now you have some protections that
23 we should recognize and you should be allowed to be
24 able to file this late CLA?

25 MR. OSTRER: Well, because - - - yes.

1 Because the leave application is a matter of right.
2 So the failure to provide appropriate legal advice
3 and correct legal guidance to the defendant deprived
4 him of his opportunity for his leave. There is
5 certain - - -

6 JUDGE ABDUS-SALAAM: Well, if we - - -

7 MR. OSTRER: - - - further consequences
8 which are not of concern to this court, but it
9 certainly deprived him of the ability to exhaust his
10 state remedies - - -

11 JUDGE ABDUS-SALAAM: But how - - -

12 JUDGE GRAFFEO: Is - - - is your view - - -

13 MR. OSTRER: - - - which forecloses other
14 relief.

15 JUDGE GRAFFEO: Is your view that your
16 client's situation falls under Syville, or do you
17 think - - -

18 MR. OSTRER: Well - - -

19 JUDGE GRAFFEO: - - - we have to extend
20 Syville to cover your claim?

21 MR. OSTRER: I believe Syville can be read
22 as covering this circumstance, because in the express
23 language of Syville, in carving out this second
24 exception, there is the issue of the attorney's
25 failure. And here there is an undisputed failure on

1 the counsel's part - - - on my part - - - to advise
2 him adequately regarding his - - - the importance of
3 the leave application that he had as of right to this
4 court.

5 CHIEF JUDGE LIPPMAN: Okay.

6 MR. OSTRER: And having failed to do that,
7 I believe it does come within the compass of the - -
8 -

9 CHIEF JUDGE LIPPMAN: Judge Smith?

10 MR. OSTRER: - - - second section.

11 JUDGE SMITH: One - - - short question.

12 CHIEF JUDGE LIPPMAN: Sure.

13 MR. OSTRER: Yes, sir.

14 JUDGE SMITH: Do you agree - - - as I
15 understand it, the argument you're making is under
16 the state constitution. Under Wainwright, you'd - -
17 - you're going to lose under the federal
18 constitution.

19 MR. OSTRER: Yes, sir.

20 JUDGE SMITH: You - - - you think we should
21 not follow it under the state constitution?

22 MR. OSTRER: Yes.

23 CHIEF JUDGE LIPPMAN: Okay, thanks,
24 counselor.

25 MR. KASS: May it please the court, I'm

1 Andrew Kass. I represent the People in this matter.

2 The Appellate Division correctly denied
3 relief. One, there's no right to counsel in
4 connection with this. What we have, as the court has
5 recognized, is a statutory right. Now, we have a
6 perfectly valid statutory remedy, 460.30, which also
7 - - -

8 CHIEF JUDGE LIPPMAN: Why about Syville?

9 MR. KASS: We don't have to reach Syville
10 be - - -

11 CHIEF JUDGE LIPPMAN: Is this a Sy - - -
12 could this be read as a Syville situation?

13 MR. KASS: The problem is we would be
14 extending extraordinary relief where a defendant if
15 he had exercised any amount of due diligence, could
16 easily have moved for 460.30 relief.

17 And by the way, just to clarify one thing
18 in connection with the court's question to counsel,
19 if a defendant were - - - were beyond the thirty days
20 after notice of entry, 460.30 in filing a
21 discretionary leave application probably could be to
22 either court, because leave can be sought from an
23 Appellate Division through either court, the
24 Appellate Division or the Court of Appeals.

25 But in any event, we have a perfectly valid

1 remedy. It is a state statutory remedy, but it also
2 comes within the constit - - - there is no
3 constitutional defect when it comes to a
4 discretionary leave application in saying that 460.30
5 is our - - - is the only avenue of review. We do not
6 need to apply a constitutional remedy, which as I
7 understand in Syville, addresses a critical gap when
8 a defendant had no opportunity with respect to an
9 appeal that was - - -

10 JUDGE RIVERA: But - - -

11 MR. KASS: - - - as of right.

12 JUDGE RIVERA: But what do we do when - - -
13 when the defendant relies on the attorney, right?
14 The attorney - - -

15 MR. KASS: But where - - -

16 JUDGE RIVERA: - - - is going to file my
17 CLA.

18 MR. KASS: In this record - - -

19 JUDGE RIVERA: Of course, the defendant
20 could do it pro se; you're correct.

21 MR. KASS: Well, but we've - - - one,
22 460.30 - - -

23 JUDGE RIVERA: Um-hum.

24 MR. KASS: - - - is there for that purpose,
25 because it's not just thirteen months, but it's

1 thirteen months starting from when notice of entry is
2 served. I believe in this case, that would have
3 afforded the defendant - - -

4 JUDGE SMITH: But - - - but you - - -

5 MR. KASS: - - - an additional twenty-two
6 days.

7 JUDGE SMITH: - - - but you still can - - -
8 maybe I - - - you'll say this case isn't it - - - but
9 you still can have a case where a guy runs out of
10 time through no fault of his own, where it's entirely
11 his lawyer's fault.

12 MR. KASS: That case is not before the
13 court, because - - -

14 JUDGE SMITH: And what - - - what is your
15 position on that? Does he have a remedy or not?

16 MR. KASS: The remedy is 460.30, because
17 we're only - - -

18 JUDGE SMITH: But if - - - but if the - - -

19 MR. KASS: - - - dealing with a
20 discretionary appeal.

21 JUDGE SMITH: Whatever - - - if the 460.30
22 deadline has been completely and irretrievably blown,
23 and the defendant is without fault, is it your
24 position that he's out of luck?

25 MR. KASS: Yes. Syville should not be

1 extended, because it - - - also, we believe, that
2 even under 460.30, or even if the court were to apply
3 - - - look at a Syville remedy, there's still a due
4 diligence requirement. And sitting on an appeal for
5 two and a half years - - -

6 JUDGE PIGOTT: Well, that's not the point
7 here, though, is it? It's the - - - it's the mo - -
8 - it's the motion that was made and the 440 that was
9 - - -

10 MR. KASS: I'm sorry; there's no 440 in
11 this case.

12 JUDGE PIGOTT: I'm sorry; then I'm looking
13 at - - - I'm looking at either the wrong facts - - -

14 MR. KASS: There was a coram nobis made in
15 the Appellate Division - - -

16 JUDGE PIGOTT: That's what I'm talking
17 about, yeah. And it says the defendant was
18 specifically advised by his counsel that he wanted to
19 seek leave and - - - and counsel agreed to do so for
20 free. And it wasn't until February 2012, that he
21 learned that the lawyer had not done so. And counsel
22 told him that there was still a remedy necessary - -
23 - and a necessary motion application to be filed.

24 So it's - - - it's - - - there's no - - -
25 there's no lack of diligence with respect to this.

1 And he's saying I'm not looking - - - I'm not
2 suggesting that the Court of Appeals must grant
3 leave, I'm just saying that I should have the right
4 to make the application.

5 MR. KASS: But the problem is it's the - -
6 - raises the same issues addressed previously:
7 finality. At some point, if a defendant believes - -
8 - let's say - - - assume a defendant does reasonably
9 have reason to believe that his attorney's going to
10 seek leave. One, it's only discretionary, so that
11 the prejudice is very - - - it's nearly impossible to
12 gauge, if you fail to do so.

13 JUDGE ABDUS-SALAAM: Why is it - - - why is
14 it only discretionary? Counsel says - - -

15 MR. KASS: I'm sorry?

16 JUDGE ABDUS-SALAAM: Why is it only
17 discretionary? Counsel says it's part of the whole
18 leave application he made - - -

19 MR. KASS: Because all leave applications
20 are - - -

21 JUDGE ABDUS-SALAAM: Are discretionary.

22 MR. KASS: - - - discretionary. It's - - -
23 that's by definition. It's by permission only. And
24 - - -

25 JUDGE ABDUS-SALAAM: And what - - - and

1 what - - - what standard of review are we using to
2 review the Appellate Division's denial of this? Is
3 it abuse of discretion or something else?

4 MR. KASS: No, I - - - I think it's a
5 question of law that the court correctly - - - as a
6 matter of law, the correctly - - - the Appellate
7 Division correctly said that Syville did not afford
8 relief, but - - -

9 JUDGE SMITH: You - - - you think it would
10 have been beyond their power to grant relief?

11 MR. KASS: Yes. Because there was no
12 articulated Sixth Amendment right to counsel, and
13 therefore, what your remedy is, is a state statutory
14 rule, 460.30.

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

17 MR. KASS: Thank you, Your Honors.

18 CHIEF JUDGE LIPPMAN: Thank you all,
19 appreciate it.

20 (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. Vinod Patel, No. 120, People v. Churchill Andrews, No. 93, People v. Kevin Kruger, No. 94, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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