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COURT OF APPEALS

STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

No. 31

RASHID BILAL,

Appellant.

20 Eagle Street
Albany, New York 12207
February 11, 2016

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA

Appearances:

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Official Court Transcriber

1 CHIEF JUDGE DIFIORE: Okay, next on the
2 calendar is number 31, People v. Rashad Bilal.

3 Counsel, would you like to reserve any
4 rebuttal time?

5 MS. GOLDBERG: Good afternoon, Your Honors;
6 may it please the court. I would like three minutes
7 for rebuttal, please.

8 CHIEF JUDGE DIFIORE: You have your three
9 minutes.

10 MS. GOLDBERG: Rachel Goldberg on behalf of
11 Appellant Rashid Bilal. Mr. Bilal's attorney failed
12 to move for a Mapp hearing in this gun possession
13 case because he was ignorant about the rules
14 governing suppression hearings. Everybody agrees
15 that his attorney should have moved for suppression,
16 that he would have gotten a suppression hearing if he
17 would have moved for one, and that suppression of the
18 gun would have meant the end of the case. Under
19 these circumstances, in order to show that Mr. Bilal
20 was prejudiced under our state's ineffective
21 assistance of counsel standard, Mr. Bilal needs to
22 show that his underlying suppression claim was
23 colorable.

24 JUDGE ABDUS-SALAAM: Is that the only thing
25 that he has to show, that it's colorable, as opposed

1 to also close?

2 MS. GOLDBERG: I think in - - - under these
3 circumstances, yes. The close standard in Clermont
4 was in a case where there at least was a suppression
5 hearing, where the focus of the proceeding was on the
6 legality of the police conduct.

7 JUDGE STEIN: Why should there be a
8 different standard?

9 MS. GOLDBERG: Because here, the - - - in a
10 trial in front of a jury, it was a guilt or innocence
11 determination, and the last thing the defense
12 attorney wanted to do was suss out how suspicious his
13 client appeared. I mean, it - - - it was a
14 completely different focus. At a suppression
15 hearing, you know, the focus is on the police and the
16 defendant at the time of the police intervention.
17 You know, and in Clermont, at least, there - - - the
18 facts came out, so a reviewing court could make a
19 legal determination based on a proceeding where that
20 - - - where that was the focus. Where - - - you
21 know, where a reviewing court only has a trial, we
22 don't know - - -

23 JUDGE ABDUS-SALAAM: Are there - - - are
24 there - - -

25 MS. GOLDBERG: - - - what would have

1 happened.

2 JUDGE ABDUS-SALAAM: Counsel, are there
3 instances where suppression most likely won't be won
4 in any event, so counsel may not ask for a
5 suppression hearing, and you're saying if counsel
6 doesn't, even though there may be a colorable
7 argument for suppression, that's ineffective
8 assistance of counsel?

9 MS. GOLDBERG: Not at all. You still - - -
10 you have - - - we always have the first hurdle of
11 attorney's performance. And there - - - there may
12 be, as you say, cases where the attorney chooses not
13 to seek suppression for a strategic reason. Here we
14 have an admission by the defense attorney; he said, I
15 didn't know I could move for suppression. So - - -

16 JUDGE PIGOTT: I - - - I don't believe him.
17 Now, if I don't believe him, what happens then? I
18 mean, or - - - or do we just simply say every lawyer,
19 if they're going to properly represent their client,
20 should say, I didn't know what a 710.30 notice was or
21 should - - - or should make up some other thing
22 saying gee, if I'd only known that, you know, then my
23 client might have gotten off. Therefore, even though
24 he's been convicted, you've got to - - - you've got
25 to let him out.

1 MS. GOLDBERG: I think there - - - there
2 are controls on this kind of gamesmanship. I mean I
3 think, under those circumstances, to presume that a
4 defense attorney would lie - - - I mean, you know, in
5 order to say, like, I'm going to risk going to trial
6 and if I lose, then I get a relief in order to - - -

7 JUDGE PIGOTT: No, I'm not saying that.
8 I'm saying you - - - you do. You - - - you go to
9 trial and you get beat and then - - - and then you
10 say well, gee, my client told me that he had a twin
11 brother in Ohio and I didn't believe him, and now it
12 turns out that, you know, if I had brought in the
13 twin brother, he would have - - - he would have been
14 acquitted so, you know, I'm entitled to a new trial.
15 I'm ineffective.

16 MS. GOLDBERG: So I think, you know, in
17 this case, he would have gotten a suppression
18 hearing, I think; you know, and you don't just get
19 one for the asking. The attorney admitted that he
20 was lying. I mean, it's not just - - -

21 JUDGE PIGOTT: But I mean, wouldn't - - -
22 wouldn't - - - if he had brought the motion, wouldn't
23 the People respond to the motion, and maybe based
24 upon the response of the People, the - - - the
25 suppression motion would have been denied?

1 MS. GOLDBERG: Maybe, but in - - - but in
2 this case, everybody agreed that he would have gotten
3 the suppression - - - the suppression hearing. I
4 think, you know - - - I'm not sure if I'm answering
5 your - - - your question. So, you know, I think - -
6 - I think there are controls and I think there - - -
7 there's a reason that this court hasn't seen this
8 before is because attorneys don't usually do this. I
9 mean, most attorneys will file for a suppression
10 hearing.

11 JUDGE GARCIA: So, counsel, the - - - the
12 remedy here, if we find this, would be to send it
13 back for a suppression hearing?

14 MS. GOLDBERG: So my argument is that in
15 order to remedy the harm that was done to Mr. Bilal,
16 he - - - he - - - the conviction should be reversed
17 and he should get a new trial.

18 JUDGE GARCIA: Is that required, or that's
19 - - - why is that you - - -

20 MS. GOLDBERG: It's - - - I think fairness
21 dictates that the remedy be tailored to the harm, and
22 in this case, Mr. Bilal was harmed beyond whether or
23 not he would have lost the suppression hearing. For
24 example, his attorney completely abandoned the main -
25 - - the only defense in this case, which was

1 suppression. So he couldn't have adequately advised
2 his client about plea option, for example, even if he
3 had lost the hearing to say, you know, the People's
4 case is strong, you should probably plead guilty. I
5 mean, he didn't get that opportunity.

6 JUDGE PIGOTT: Well, you see, that's - - -
7 that's the can of worms that you're opening up here,
8 it seems to me. I mean, why - - - why wouldn't, if -
9 - - if there had been the motion, the - - - the
10 police officer say I saw him throw the gun away;
11 where are we going - - - where are we going with the
12 hearing? And - - -

13 JUDGE FAHEY: Wouldn't abandonment - - -
14 just like Judge Pigott said, wouldn't abandonment - -
15 - I - - - it's hard for me to see that. He doesn't
16 have standing in a gun that's abandoned. It's
17 uncontested that - - - at least the proof I read it
18 was uncontested - - - that - - - that he had
19 abandoned the gun, so that seems dispositive. So
20 it's even less than colorable. There's almost no
21 chance of success on that argument without the
22 standing to get at - - -

23 MS. GOLDBERG: So - - - so he did have
24 standing in - - - in this case, and I think the
25 abandonment - - - I mean, to the extent that we're -

1 - -

2 JUDGE FAHEY: Well, not if - - - not if the
3 court was going to rule against him on abandonment
4 and he was chased, he threw a gun over a fence in a
5 construction site. Those cases are all abandonment
6 cases.

7 MS. GOLDBERG: Well, we can't know what
8 would have happened at a suppression hearing.

9 JUDGE PIGOTT: Well, that's the point. I
10 mean, did the defense lawyer say and this is what I
11 would argue if I had the motion?

12 MS. GOLDBERG: Did the trial attorney?

13 JUDGE PIGOTT: Yeah, did anybody?

14 MS. GOLDBERG: I mean, no, but - - -

15 JUDGE PIGOTT: So - - - so that's my - - -

16 MS. GOLDBERG: Right.

17 JUDGE PIGOTT: If - - - if on the face of
18 it it looks like, you know, he threw the gun away.
19 You want to have a hearing on - - - let's suppose you
20 there on a suppression, what is the basis upon which
21 you think this gun could be suppressed?

22 MS. GOLDBERG: On the - - - for the
23 abandonment issue? I mean - - -

24 JUDGE PIGOTT: On any issue. I mean - - -

25 MS. GOLDBERG: Well, there - - -

1 JUDGE PIGOTT: - - - to say that, you know,
2 I have standing to challenge that I possess this gun
3 and I want it suppressed because what?

4 MS. GOLDBERG: Well, the police didn't have
5 reasonable suspicion to pursue. I mean - - -

6 JUDGE PIGOTT: They didn't have what?

7 MS. GOLDBERG: Reasonable suspicion to - -
8 - to pursue in the first place. I mean, the - - -
9 they - - - at most, they had a level 2 - - - and this
10 is all - - - you know, we shouldn't have to look at
11 the trial to get at the suppression facts.

12 JUDGE PIGOTT: No, right.

13 MS. GOLDBERG: So if we have to, if we're
14 being forced to because of an attorney's failure, I
15 think - - - and, you know, putting aside that facts
16 may have come out differently at suppression, if - -
17 - if - - - even if they had come out identically, I
18 think, you know, there's an - - - there's a good
19 argument that, you know, police - - - he didn't know
20 he was running from police. There was barely a level
21 2 right to inquire. You know, as far as the
22 abandonment issue goes, you know, he threw the gun
23 away while he was being actively pursued by police.
24 This was a spontaneous act as a - - - because of the
25 police illegal pursuit.

1 JUDGE ABDUS-SALAAM: So that - - - that
2 gets - - - that seems to me, counsel, to get you
3 possibly to a suppression hearing, but not a reversal
4 and a remit for a new trial.

5 MS. GOLDBERG: So for the reversal, I think
6 if we look at the context as a whole - - - I mean, he
7 was denied a fundamental structural part of the trial
8 where, you know, he was denied an attorney who could
9 have adequately advised him of - - - of whether or
10 not to plead guilty before a suppression hearing,
11 after a suppression hearing. You know, and - - - and
12 regardless of how the suppression hearing came out,
13 he - - - he - - - that opportunity was lost.

14 CHIEF JUDGE DIFIORE: Counsel - - -

15 MS. GOLDBERG: Yes.

16 CHIEF JUDGE DIFIORE: - - - if this court,
17 excuse me, finds that the 440 court's finding that
18 the seizure was lawful, is your client entitled to a
19 suppression hearing?

20 MS. GOLDBERG: I don't believe so. I think
21 - - - I'm sorry, could you - - - if the seizure was
22 lawful?

23 CHIEF JUDGE DIFIORE: This - - - um-hum.

24 MS. GOLDBERG: So no, actually, because the
25 - - - I think the question is, did he have a

1 colorable argument, not whether or not it was lawful.
2 I mean, I don't think the court can make a
3 determination on the merits because it would be based
4 on a proceeding where that wasn't the focus. I mean,
5 it - - - this court has to kind of look at the facts
6 in a vacuum, and so, you know, that's - - - it's
7 unfair to find the merits of the argument against Mr.
8 Bilal when it was his attorney's fault for not having
9 a - - - not have a proceeding where that could be
10 further explored.

11 JUDGE PIGOTT: Missing the fault, I - - -
12 if it - - - if he's saying, you know, they didn't
13 have a right to pursue me, fine. But is - - - is he
14 going to say I had the gun and they didn't have a
15 right to pursue me and that's - - - but - - - and I
16 admit I threw it away but, you know, all of this has
17 to fall?

18 MS. GOLDBERG: He doesn't - - - I mean, in
19 order to get the hearing, he doesn't have to admit
20 that he possessed it. He can rely on the People's
21 proof. And I think - - -

22 JUDGE PIGOTT: He can what?

23 MS. GOLDBERG: He could rely on the
24 People's proof to - - - to get the standing for the
25 hearing in the first place. And - - - you know, the

1 People have an obligation to show that the police
2 action was - - - was lawful, and we don't know - - -
3 I mean, you know, Mr. Bilal could testify, his friend
4 could testify, other officers could testify at a
5 suppression hearing, and so lots of different facts
6 may have come out.

7 JUDGE PIGOTT: But does that sound
8 speculative to you, I mean, that - - - that - - -

9 MS. GOLDBERG: Of course it's speculative,
10 and that's the problem. I mean, that's why Mr. Bilal
11 - - - we should have the proceeding to actually
12 litigate the issue where that's the focus.

13 JUDGE PIGOTT: This happened in 2008. He
14 gets convicted in 2010. And here we are in 2016
15 talking about whether or not we can go back and try a
16 case that happened in 2008 because he may or may not
17 have abandoned the weapon and he may or may not have
18 been legally pursued. And because somebody made - -
19 - I mean, if I'm a lawyer and I think, you know, this
20 is going to be a waste of time and, you know, he's
21 going to get on the stand or they're going to get on
22 the stand and it's going to get worse for my client,
23 I'm not doing it, those are all logical explanations.

24 MS. GOLDBERG: Well, I mean, I think, you
25 know, we brought the 440, you know, way earlier. So

1 - - - and - - - but also, you know, I think this is
2 about a - - - a defendant's fundamental right to
3 counsel and so yes, time has passed but he still
4 needs to get relief because he was denied an
5 effective attorney who knew the most basic law about
6 suppression.

7 JUDGE RIVERA: You're trying to put him
8 back to the place he would have been if this lawyer
9 had indeed not been defective in the representation?

10 MS. GOLDBERG: Yes, exactly. And the only
11 way to do that is to reverse for a suppression
12 hearing.

13 JUDGE PIGOTT: How about - - - how about
14 having a hearing on the 440?

15 MS. GOLDBERG: That's an option. I don't
16 think it's - - - it's the full remedy that Mr. Bilal
17 deserves, but, you know, I think that's within the
18 court's - - - I mean, you could do that.

19 JUDGE PIGOTT: It's one of - - - it's one
20 of - - - yeah, and then - - - and then all of this
21 could be fleshed out by a trier of fact.

22 MS. GOLDBERG: That's right. Yes. But I
23 think - - - you know, I think, given that Mr. Bilal
24 really lost an opportunity for plea negotiations, to
25 get a sense of - - - of what he should have done, and

1 an attorney who could have actually advised him on
2 what to do, who knew the law, I don't think - - - I
3 don't think that would be enough. So I will sit down
4 - - -

5 CHIEF JUDGE DIFIORE: Thank you, counsel.
6 Respondent.

7 MR. MORROW: May it please the court,
8 Philip Morrow for the People. In the 440.10 motion
9 brought by defendant's appellate attorney, defendant
10 relied exclusively on the trial proof to claim that
11 the police officers lacked reasonable suspicion to
12 pursue him and that trial counsel was, therefore,
13 ineffective for not moving to suppress the gun that
14 he abandoned. However, in rejecting that claim, both
15 the trial court and the Appellate Division correctly
16 concluded that based on the undisputed trial facts,
17 defendant could not have succeeded in suppressing the
18 gun if counsel had moved for a Mapp hearing. Under
19 these circumstances, defendant has failed to carry
20 his burden of showing that - - -

21 JUDGE STEIN: But isn't that the question -
22 - - I mean, how - - - how do we know - - - without
23 the suppression hearing, how do we know what the
24 proof would have been? I mean, there are all kinds
25 of questions here about timing and - - - and what - -

1 - what the defendant knew or didn't know. And, you
2 know - - - and that - - - the hearing - - - I mean,
3 I'm sorry, the trial is not where that gets fleshed
4 out, it would normally be a suppression hearing. So
5 to say we're limited to what was at the trial, it
6 seems to me, is - - - is unfair.

7 MS. GOLDBERG: Well, it's not a question on
8 fairness because of something that the - - - the
9 People or the judge did. Defendant brought his
10 440.10 motion relying on the trial evidence and the
11 criti - - - the critical thing is that because it was
12 a 440.10 motion, he could have brought in additional
13 evidence, if he had it, to say that the actions of
14 the police were illegal. He could have put in an
15 affidavit from himself; he could have had an
16 affidavit from his friend, Matthew Taylor, who was
17 with him; any other witnesses; any other evidence.
18 And the trial record itself presents more than ample
19 evidence that the actions of the police that night
20 were lawful. And on these - - - on this record, it's
21 clear that defendant couldn't have obtained
22 suppression of the gun that he abandoned. And - - -

23 JUDGE PIGOTT: What's the standard in your
24 view for - - - for our review of this?

25 MR. MORROW: The standard here would be the

1 same as in other ineffective assistance of counsel
2 cases where there's a sole claimed error by the
3 attorney. It's the Turner standard that the error
4 has to be egregious and prejudicial and it has to be
5 clear-cut and completely dispositive in the
6 defendant's favor. And here, the - - - the record
7 shows that defendant could not have - - -

8 JUDGE STEIN: Well, isn't that - - - isn't
9 that the standard that we use for determining whether
10 the counsel should have done something? In other
11 words, unless - - - you know, where there's a pretty
12 high burden because there may be strategic reasons
13 for - - - for doing or not for doing something and
14 then - - - and then only if we find that counsel
15 should have done something do we have to - - - you
16 know, now do we get to the second part of the
17 question. Because here that's conceded, counsel
18 should have done that. So then the second question
19 becomes what standard do we use - - -

20 MR. MORROW: Well - - -

21 JUDGE STEIN: - - - to determine, you know,
22 whether - - - whether that was prejudicial or - - -
23 we don't use the word prejudicial, but - - - you
24 know, but ineffective assistance. So - - -

25 MR. MORROW: Yeah, the - - - the meaningful

1 representation inquiry, but there are cases from the
2 Court of Appeals where the court had said that the
3 attorney should have made the motion but, you know,
4 the argument wasn't clear cut and dispositive, so
5 defendant can't establish ineffective assistance.

6 JUDGE FAHEY: Well, is - - - isn't that the
7 standard that we should be looking at now? Is the
8 stand - - - is the motion, did he have a colorable
9 chance of success, did he have more than a little
10 chance of success, did he have a reasonable
11 probability of success, and - - - what's the other
12 one, there were four in mind, I couldn't remember
13 four - - - oh, was the one in Clermont - - -

14 JUDGE ABDUS-SALAAM: Close.

15 JUDGE FAHEY: - - - was there a close - - -
16 is there a close chance of success? I count four
17 different standards that this - - - that I think
18 three are actually referred to in this case because I
19 think reasonable probability was caused - - -
20 referred to in the Appellate Division decision and
21 that's the wrong standard. So everybody needs to
22 know what the standard is when we're reviewing these
23 motions. What do you say it is? What do they - - -

24 MR. MORROW: Your Honor, I'd say that it's
25 the - - -

1 JUDGE FAHEY: - - - have to show?

2 MR. MORROW: - - - it's the Turner standard
3 and here, you know, the colorable claim standard goes
4 more to the first part about the deficient
5 performance. because when the court mentioned
6 colorable in Garcia and Rivera, it's that - - -

7 JUDGE FAHEY: Um-hum.

8 MR. MORROW: - - - defendants couldn't
9 prevail on their claims because they didn't
10 demonstrate an absence of strategic reasons for the
11 inactions of the attorney, and so defendant has to
12 demonstrate more than just he had a colorable claim.
13 And in Clermont, you know, that's perhaps more - - -

14 JUDGE FAHEY: What I meant - - - what I
15 think what I'm - - - inarticulately, I'm trying to
16 get to the point is how much of a longshot does the
17 motion have to be? If - - - if the client - - - if
18 the counsel's required to make every motion that
19 isn't frivolous, then we've really lowered the bar
20 for checking it for ineffective assistance of
21 counsel. But does he have to show a chance of
22 succeeding or a fair chance of succeeding and - - -
23 and where does this fall on that continuum?

24 MR. MORROW: Well, this - - - this is some
25 - - - this is towards the other end of the continuum

1 where there was little or no chance of this motion
2 succeeding.

3 JUDGE FAHEY: And that - - - you say that
4 because of the abandonment argument?

5 MR. MORROW: Well, because of the
6 abandonment argument, because of the - - - you know,
7 the police having a level 2 right to inquire, and
8 then defendant's immediate flight. And, you know,
9 the - - - the Appellate Division described this issue
10 as not close. The - - - the trial judge said that
11 there's - - -

12 JUDGE STEIN: Well, is there any evidence
13 in the record as to, you know, how much time elapsed
14 and whether he purposely crossed the street and - - -
15 you know, and, I mean, there are a whole lot of
16 factors involved in determining the abandonment issue
17 that I - - - I don't see any evidence about. Does
18 that get back to your argument that he should have
19 brought that up in his 440?

20 MR. MORROW: The - - - I mean, that's part
21 of it, but the - - - but the trial record did discuss
22 in depth the - - - the officers' pursuit of defendant
23 and it didn't go, you know, minute-by-minute or
24 second-by-second, but we know that he ran along
25 Seventh Avenue, he turned on, I think, 149th Street,

1 ran in front of the police car, came to the
2 construction site, climbed up the fence, and then
3 abandoned the gun. So I think that that record would
4 be - - -

5 JUDGE RIVERA: You're saying under De Bour,
6 the argument's completely foreclosed? There's just
7 no opportunity at all, no basis by which to
8 challenge?

9 MR. MORROW: There - - - there's a basis to
10 challenge but - - -

11 JUDGE RIVERA: And isn't that the point,
12 that he - - - that his lawyer not realizing that and
13 failing to file a motion to suppress, the defendant
14 is, from your perspective, foreclosed from trying to
15 present that to a court?

16 MR. MORROW: No, defendant's - - -
17 defendant's not foreclosed. He brought this up in a
18 440.10 motion in which he could have made arguments
19 to challenge the - - -

20 JUDGE RIVERA: Is it - - - but at the
21 suppression hearing, whose burden was it going to be?

22 MR. MORROW: The - - - the People have the
23 burden of going forward, but - - -

24 JUDGE RIVERA: Right, so you've shifted the
25 burden in your approach have you not?

1 MR. MORROW: No, no, we haven't shifted;
2 the - - - the evidence in the trial record would be
3 more than adequate to meet that burden. And - - -

4 JUDGE RIVERA: But again, that's the point,
5 right? It sort of begs the question about whether or
6 not that's enough. His point is - - - his argument
7 is it's not enough; my attorney should have filed
8 this motion and then put the People to the test at
9 the suppression hearing.

10 MR. MORROW: Right, but the - - - you know,
11 the test for ineffective assistance of counsel is not
12 just that there's, you know, any claim that counsel
13 could have raised that, you know, isn't completely
14 frivolous, Your Honor.

15 JUDGE RIVERA: Well, what did we say in
16 Clermont about this failure to file these suppression
17 motions?

18 MR. MORROW: Well, in Clermont, there was a
19 suppression motion. The - - - the defendant's
20 attorney made a number of errors at the hearing and
21 the court said that its confidence in the fairness of
22 the proceedings was undermined because it was a close
23 case. But here, the - - - the case for suppression
24 really isn't close and, you know, there are - - -

25 JUDGE ABDUS-SALAAM: Well, what if we

1 decided it was close? What would be - - - and - - -
2 and that there was a colorable claim. What would be
3 the remedy in your view?

4 MR. MORROW: I think if the - - - if the
5 court decided that there was a colorable claim and
6 defendant's attorney's failure to raise it denied him
7 meaningful representation, then the remedy would be
8 to remand for a suppression hearing and then
9 defendant would only be entitled to a new trial if he
10 were to prevail at the hearing. There's - - -

11 JUDGE RIVERA: But, counsel, let me get
12 back to Clermont. Your argument is if you make the
13 motion and you do a bad job, you might get another
14 shot, but when a lawyer doesn't make the motion at
15 all, you get no shot. Where is - - - where is the
16 logic in that?

17 MR. MORROW: Well, the logic in that is
18 that the - - - you know, the court described the
19 issue in Clermont as close, and the - - - you know,
20 Appellate Division and the trials courts here looked
21 at it and said this is not - - - it's not a close
22 issue. And in the - - -

23 JUDGE STEIN: So you would agree that we
24 should use the same standard regardless of whether
25 there was a - - - there was a hearing or there

1 wasn't? Or do - - - do you agree with - - - with
2 defense counsel that it should be a different
3 standard?

4 MR. MORROW: I - - - I don't agree with
5 defense counsel that it should be a different
6 standard. And I - - - I think here that, you know,
7 the - - - the posture of this is on a 440.10 motion
8 relying on the trial evidence and, you know, there
9 would be a more compelling argument to, you know,
10 remand for a hearing on the 440.10 motion or have
11 further fact finding if there were, you know, any
12 kind of evidence that the - - - the police actions
13 were illegal here, but we have - - - we have nothing
14 in that respect.

15 JUDGE PIGOTT: Your - - - your point in the
16 beginning was that the defendant relied on the trial
17 record and didn't bring in new evidence. Is - - - on
18 the 440, the burden is on the defendant, correct?

19 MR. MORROW: Yes.

20 JUDGE PIGOTT: All right, so they - - - he
21 or she has to bring in evidence to demonstrate that
22 they're entitled to either a hearing or to the
23 relief.

24 MR. MORROW: Exactly, and you know, in this
25 case, the - - - you know, given that the facts were

1 undisputed, the trial judge was able to rely on the
2 record and resolve the motion and, you know, the - -
3 - you know, if the court were to find that defendant
4 were entitled to some kind of remedy, as Justice
5 Abdus-Salaam was talking about, the - - - I think
6 it's Carracedo and, Clermont stand for the idea that
7 the - - - the most that he would be entitled is
8 remand for a suppression hearing, not, you know, a
9 whole new trial.

10 But, you know, in this case, given the - -
11 - given the evidence at trial, the - - - the level 2
12 inquiry elevated to level 3 by defendant's immediate
13 flight, and then the abandonment issue, you know, the
14 - - - the outcome of any suppression hearing is, you
15 know, beyond debate.

16 JUDGE STEIN: The evidence of immediate
17 flight has some possible avenues for challenge, too,
18 based on what defendant did or didn't know about the
19 police being police.

20 MR. MORROW: There - - - there are
21 potential ave - - - avenues, but again, there's no -
22 - - there was no evidence brought out at the 440.10
23 motion. It would be easy for defendant to say in an
24 affidavit, you know, anything of that nature that,
25 you know, he - - - or somehow he didn't know that

1 they were police officers, he didn't know who he was
2 running from.

3 If the court doesn't have any further
4 questions, then we would rest on the arguments in our
5 brief. Thank you.

6 CHIEF JUDGE DIFIORE: Thank you, counsel.

7 JUDGE RIVERA: Counsel, are the 440 papers
8 deficient?

9 MS. GOLDBERG: We asked for a 440.30
10 hearing, you know, the judge denied it, where we
11 could have presented additional facts. You know, at
12 that opp - - - the issue in front of that - - - of
13 the 440 judge was, you know, counsel's
14 ineffectiveness, and so, you know, we could have had
15 the opportunity to present facts at that oppor - - -
16 at that proceeding, but we were denied.

17 I think, you know, the - - - a case that
18 this court is going to hear this afternoon shows just
19 how different facts can come out at a suppression
20 hearing and at a trial and so, you know, I - - - I
21 think, Judge Stein, you're right that, you know, we
22 have no idea how this would have come out at a
23 suppression hearing and it - - - and all of these
24 facts could have come out completely differently. So
25 - - -

1 JUDGE PIGOTT: Is that the - - - is that -
2 - - that's what troubles me. You - - - you say we
3 have no idea how it would turn out. Well, then why
4 are we having a hearing? I mean, it - - - it would
5 seem to me at this point you ought to be able to say
6 we - - - we have a more-than-likely chance that this
7 gun would be suppressed because of one, two, three,
8 and four, not there wasn't a hearing and we have no
9 idea what would have happened at the hearing so the
10 lawyer's ineffective and the - - - the conviction has
11 to be reversed and we're entitled to a new trial.

12 MS. GOLDBERG: Right. I mean, I think - -
13 - you know, I think you're - - - you're right that
14 there should be some - - - some bar, some test, and
15 there is, and that's the colorable test. I mean, you
16 shouldn't just - - -

17 JUDGE PIGOTT: Well, you said you have no
18 idea how the - - - how it's going to turn out.

19 MR. MORROW: But given the constraint that
20 we have to look at the trial facts. I mean, I think,
21 you know, to the extent that you need some kind of
22 limiting - - -

23 JUDGE PIGOTT: Suppose he had pled guilty.

24 MS. GOLDBERG: Yes.

25 JUDGE PIGOTT: Does that mean you foreclose

1 from a 440 because there's no trial?

2 MS. GOLDBERG: Well, you could look at - -
3 - in those circumstances, you look at the facts that
4 you have, so you would have the complaint.

5 JUDGE PIGOTT: You would bring them out.
6 That - - - that's what your - - - your opponent's
7 arguing. So you - - - you just relied on the trial.
8 You didn't - - - you didn't come in with any new
9 evidence or new facts that would have indicated that
10 the - - - the police actions would have been found
11 lawful under - - - under De Bour and that the - - -
12 the gun was abandoned.

13 MS. GOLDBERG: I mean, under those
14 circumstances, you would look at the facts you have.
15 And another alternative would be to say look, you
16 know, if - - - if you can't look at the trial record
17 at all, then, you know, if you would have gotten the
18 suppression hearing, then, you know, that's - - -
19 that's enough, that shows prejudice. Because you - -
20 -

21 JUDGE PIGOTT: Just, you didn't get one.

22 MS. GOLDBERG: Right.

23 JUDGE PIGOTT: Because the lawyer didn't
24 ask for one, I'm entitled to vacate my guilty plea,
25 vacate my sentence, and go to trial?

1 MS. GOLDBERG: The lawyer didn't ask for
2 one and I would have gotten one because, you know,
3 you - - - we can say that on this case and in other
4 cases, too, like, is there a material fact in
5 dispute. You would have gotten the suppression
6 hearing, and if you didn't get one and suppression
7 was the issue in the case, like it was here, then
8 yes, you get - - - you get your plea back. I mean -
9 - -

10 JUDGE STEIN: So - - - so if - - - if it
11 goes - - - if we were to send it back for just a
12 suppression hearing and it turns out that there - - -
13 there really isn't anything else that would have been
14 presented or it comes out the way it - - - it's
15 denied anyway that - - - that the defendant wasn't
16 entitled to suppression, then that's the end of it,
17 right?

18 MS. GOLDBERG: Right. I mean, again, under
19 those circumstances, he - - - he won't ever get back
20 what he truly lost. But - - - but yes, that would -
21 - - I mean - - -

22 CHIEF JUDGE DIFIORE: Thank you.

23 MS. GOLDBERG: - - - under those - - -

24 CHIEF JUDGE DIFIORE: Thank you, counsel.

25 MS. GOLDBERG: He would be able to appeal

1 that decision, the suppression decision to the
2 Appellate Division. Thank you.

3 CHIEF JUDGE DIFIORE: Thank you.

4 (Court is adjourned)

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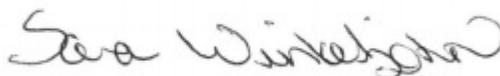
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C E R T I F I C A T I O N

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Rashid Bilal, No. 31 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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