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COURT OF APPEALS  
STATE OF NEW YORK

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PEOPLE,  
  
Respondent,  
  
-against-  
  
JOSE AVILES,  
  
Appellant.

No. 186

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20 Eagle Street  
Albany, New York  
October 18, 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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Sara Winkeljohn  
Official Court Transcriber

1 (Break in audio)(2:54)

2 MR. LIVSHITS: - - - here primarily affects  
3 foreign-born individuals. So that's - - -

4 JUDGE GARCIA: Again, impact.

5 MR. LIVSHITS: Right. That's one. And next is  
6 that the New York State and New York City have issued  
7 orders, executive orders, directing its agencies to provide  
8 comp - - - comprehensive language services, and NYPD is one  
9 of those agencies. Furthermore, the NYPD is required - - -

10 JUDGE STEIN: But that doesn't make it a  
11 constitutional - - - (3:16)

12 (Break in audio) (15:35)

13 MR. KAPLAN: Your Honor, if I may just queue off  
14 one thing that was said, the last thing that was said which  
15 is this idea of altering an argument. They faced a problem  
16 because the Salazar decision had come down from the  
17 Appellate Division. When they were at the Appellate Term,  
18 recognizing that it would be binding upon the Appellate  
19 Term, they say in their reply brief to this court: "We  
20 were free to - - - to alter our argument." But they're not  
21 free to alter their argument. That's what's very  
22 disturbing about this case because, although the oral  
23 argument today focuses on one dimension, the brief does  
24 not. The brief proposes that this was an individual who  
25 speaks English to a degree but the police were derelict in

1 not determining that. That is a complete good friend  
2 elementary appeals 101 problem.

3 There's an undeveloped record on this. We have  
4 absolutely no idea. I could say, as an officer of the  
5 court, that I have seen the IDTU tape in which Spanish was  
6 the language that was used for the refusal warnings. And  
7 that's a good indication for a highway officer if the  
8 person is relying upon the Spanish refusal tape. Also, in  
9 his statement to an assistant district attorney, he had a  
10 Spanish-speaking interpreter. So there - - - so while this  
11 is an undeveloped record, and I think we really can't get  
12 into it, there's a subtle backstory on this appeal which I  
13 think even merits its dismissal.

14 Because - - - because really, you'd have to then  
15 razor out all of this and then just get to the pristine  
16 sort of Salazar question. And I don't think that - - - I  
17 mean you could do it but I think this is so freighted with  
18 - - - with other material that it - - - it's hard to ask  
19 what this court is supposed to do. Is it supposed to find  
20 that the Salazar rationale was correct or incorrect, or  
21 that a person who speaks English but it's not - - - it's  
22 not adequately divined by the police is - - - is at a  
23 disadvantage. That's an entirely different scenario and it  
24 poses a different problem.

25 JUDGE PIGOTT: Didn't they - - -

1 JUDGE RIVERA: But - - - I'm sorry.

2 MR. KAPLAN: Yeah.

3 CHIEF JUDGE DIFIORE: Judge Pigott.

4 JUDGE RIVERA: I'm sorry.

5 JUDGE PIGOTT: Didn't they make due process and  
6 equal protection arguments in criminal court?

7 MR. KAPLAN: Yes. Strictly as a nonEnglish  
8 speaker which - - -

9 JUDGE PIGOTT: Well, but that - - - my point is -  
10 - -

11 MR. KAPLAN: Yeah.

12 JUDGE PIGOTT: - - - that they - - - they made  
13 the arguments that they're making here.

14 MR. KAPLAN: Well, today, yes. But - - -

15 JUDGE PIGOTT: I'm almost done. And then - - -  
16 and then - - -

17 MR. KAPLAN: Sorry.

18 JUDGE PIGOTT: - - - when it got to the Appellate  
19 Term, you know, up pops Salazar. And - - - but it's all  
20 still due process equal protection. Salazar was in  
21 October.

22 MR. KAPLAN: These cases already existed. It's  
23 true the Appellate Division decision had not come down but  
24 there was a raft of cases in Bronx County elsewhere. In  
25 fact - - -

1 JUDGE PIGOTT: Well, that's a different argument  
2 than you were making. You were saying, you know, after  
3 Salazar - - -

4 MR. KAPLAN: Right.

5 JUDGE PIGOTT: - - - they changed all their - - -  
6 all their argument.

7 MR. KAPLAN: They're saying it.

8 JUDGE PIGOTT: They - - -

9 MR. KAPLAN: They're saying that they altered - - -  
10 - it's on - - - it's in their brief at page 3. They're  
11 saying he's free to alter the emphasis of his argument.  
12 But he's not free to alter the emphasis of argument - - -

13 JUDGE PIGOTT: Well, that's what I want to ask  
14 you about because maybe - - - maybe we're just fencing over  
15 nonsense because - - -

16 MR. KAPLAN: Um-hum.

17 JUDGE PIGOTT: - - - he's saying we - - - we're  
18 altering the emphasis of our argument. We're not saying -  
19 - - we're not saying it's not due - - -

20 MR. KAPLAN: He's saying that.

21 JUDGE PIGOTT: Okay. We're not saying it's not  
22 due process. We're not saying it's not equal protection.  
23 We're making those same arguments. We're changing the  
24 emphasis because Sal - - -

25 MR. KAPLAN: No.

1 JUDGE PIGOTT: Okay.

2 MR. KAPLAN: No.

3 JUDGE PIGOTT: Never mind.

4 MR. KAPLAN: I disagree totally because the ques

5 - - -

6 JUDGE PIGOTT: I - - - I wanted to get a thought  
7 out and - - - and I thought it was a good one. You know.

8 MR. KAPLAN: Yeah. And I'll give you a thought,  
9 that - - - well, I hope it's a good one, that the nisi  
10 prius - - - well, you'll be the - - - you're the judge. I  
11 hope it's a good one. The nisi prius court said he's  
12 Spanish speaking only and that therefore, one says it was a  
13 violation of equal protection and due process. Then when  
14 the good - - - when the Salazar case come down in which it  
15 gave, I think, a very cogent ruling as to why language is  
16 not a suspect class, it's not unduly burdening suspect  
17 class because you have people who speak Greek, Russian,  
18 Latvian, not only Hispanic people. You have - - -

19 JUDGE PIGOTT: Suppose Salazar's wrongly decided.  
20 I'm not saying it is, but I think that's their argument.  
21 They're saying that when - - - when the Appellate Term made  
22 its decision it felt bound by Salazar. Are they right  
23 about that?

24 MR. KAPLAN: But that's under the circumstance  
25 that's it's a - - -

1 JUDGE PIGOTT: Are they right about that?

2 MR. KAPLAN: - - - nonEnglish speaking person.

3 JUDGE PIGOTT: Are they right about that?

4 MR. KAPLAN: Well, but they're - - - they're  
5 conflating it.

6 JUDGE PIGOTT: So I guess it's yes.

7 MR. KAPLAN: But they're - - - yes, but they're  
8 conflating it.

9 JUDGE PIGOTT: Okay. I understand that. But  
10 what I'm saying is they're now arguing because the  
11 Appellate Term was bound by Salazar, and we think Salazar  
12 is wrongly decided because our argument's on due process -  
13 - -

14 MR. KAPLAN: Right.

15 JUDGE PIGOTT: - - - and equal protection. We  
16 want to make these arguments.

17 MR. KAPLAN: You can't because - - - because you  
18 can't say from a nisi prius court he's Spanish speaking  
19 only and then on appeal says look, he can speak English and  
20 the police, as part of their dereliction, don't investigate  
21 and determine what defendants actually can speak. That's -  
22 - - that's - - -

23 JUDGE PIGOTT: So your arg - - -

24 MR. KAPLAN: - - - totally different. It's 180  
25 degrees.

1           JUDGE PIGOTT: Your argument is that so what. So  
2           - - - you know, so what if we violated our rules, so what  
3           if we - - - if we are treating Hispanics differently? The  
4           fact of the matter is that's not the argument that was  
5           before the court at the Appellate Term?

6           MR. KAPLAN: It's not justiciable.

7           JUDGE PIGOTT: Excuse me?

8           MR. KAPLAN: It's not justiciable.

9           JUDGE PIGOTT: That's - - - so you're saying yes?

10          MR. KAPLAN: Yes.

11          JUDGE PIGOTT: That's - - - okay.

12          MR. KAPLAN: It's not justiciable. But I - - -  
13          but if you wish me to get into the Salazar which is the  
14          shred of argument that is - - - remains from the Nisi prius  
15          court, I would say that Your Honor's questions are highly  
16          indicative of the problems that there are in this case  
17          because, as I said, you have - - - language has been found  
18          not suspect because you're not burdening one group. Now if  
19          it's a suspect group, such as Hispanics, it still has to be  
20          because of not in spite of. And I should note this also,  
21          which maybe was not made clear - - -

22          JUDGE RIVERA: But the U.S. Supreme Court has,  
23          post-Soberal-Perez and these other cases, said that under  
24          circumstances - - - certain circumstances for certain  
25          populations, language is a proxy for race or national

1 origin.

2 MR. KAPLAN: Well - - -

3 JUDGE RIVERA: That - - - that was a New York  
4 case that went up to the Supreme Court.

5 MR. KAPLAN: Um-hum. But I - - - but - - -

6 JUDGE RIVERA: I think their argument is that  
7 this is that case.

8 MR. KAPLAN: Well, but it's not because there's  
9 so many people - - -

10 JUDGE RIVERA: Why not?

11 MR. KAPLAN: New York is a polyglot city, and I  
12 don't think you - - - if - - - what you'd be doing is  
13 shifting onto other racial ethnic groups the burden of  
14 having to deal with this. If you say Hispanic - - -  
15 Hispanic people, well, does touch on ethnicity or race and  
16 so we must have that scrutiny, what's going to happen with  
17 the Chinese-speaking person? It's going to then shift onto  
18 that person and they - - - they - - - with impunity?

19 JUDGE RIVERA: Well, I think the Supreme Court's  
20 ruling or their statement at the end of that case is that  
21 it - - - it depends on the nature of the case. But can I  
22 just go back - - -

23 MR. KAPLAN: Okay. Sure.

24 JUDGE RIVERA: - - - to explore this - - - your  
25 point about the undeveloped record, because the record is

1 quite thin in this case. Is - - - is the People's position  
2 that there was not an opportunity to really address these  
3 claims in the sense of establishing what is your rationale  
4 for this rule then that, indeed, it - - - it is not  
5 unconstitutional?

6 MR. KAPLAN: No, no. We were not encumbered in  
7 the - - -

8 JUDGE RIVERA: Um-hum.

9 MR. KAPLAN: - - - strictly in the Salazar  
10 argument. What we were encumbered and we feel it is  
11 completely - - - more than encumbered, we were completely  
12 denied, was the argument that was raised for the first time  
13 at the Appellate Term in response to our appeal, not his  
14 appeal, that a completely different scenario. We didn't  
15 have the opportunity to develop any record on that nor did  
16 the court below.

17 JUDGE RIVERA: Oh, about - - - about the  
18 defendant's actual language ability?

19 MR. KAPLAN: Yes. Absolutely.

20 JUDGE RIVERA: Yes.

21 MR. KAPLAN: Absolutely. There was no such. So  
22 I can - - -

23 JUDGE ABDUS-SALAAM: Well, what was - - -  
24 counsel, what was the - - -

25 MR. KAPLAN: Yes.

1 JUDGE ABDUS-SALAAM: What was the origin of that?  
2 Was - - - did the defendant put in an affidavit saying he  
3 didn't speak English or was that - - -

4 MR. KAPLAN: The attorney - - -

5 JUDGE ABDUS-SALAAM: - - - an affirmation by his  
6 counsel?

7 MR. KAPLAN: Yes.

8 JUDGE ABDUS-SALAAM: What was it?

9 MR. KAPLAN: The attorney said he was not - - -  
10 he did not speak English, and Judge Adler, who was the nisi  
11 prius judge, begins his decision with saying defendant is  
12 Spanish speaking only and therefore, he was denied his  
13 equal protection and due process that would be afforded,  
14 let's say, an English speaker. But this is totally - - -  
15 that is one argument. But - - - but this case is freighted  
16 with other material. And I just wanted to bring that to  
17 the attention of the court why this is such a problematic  
18 case for what you're going to decide.

19 JUDGE RIVERA: I'm sorry. What - - - what is  
20 this footnote, though, in the criminal court's decision?  
21 "The People have not refuted the defendant's assertion that  
22 the failure to administer a physical coordination test was  
23 due solely to the fact that the defendant speaks only  
24 Spanish" - - -

25 MR. KAPLAN: Yes.

1 JUDGE RIVERA: - - - "and not English."

2 MR. KAPLAN: Yes. That's right. I - - - that's  
3 exactly my point.

4 JUDGE RIVERA: It says you didn't refute it. Are  
5 you saying - - -

6 MR. KAPLAN: Well, no, no. But it - - - but this  
7 was not - - - he's refuted that he speak - - - we're not in  
8 the position to say he's - - - his adequacy in speaking  
9 English. That's the defendant's argument. That's not our  
10 argument. They put forward the typical argument that was  
11 in Bronx County, that went up on Salazar, that he was not  
12 an English speaker, and that, therefore, equal protection  
13 because of language and the - - -

14 JUDGE RIVERA: But isn't there already something  
15 in the record - - - I mean, again, the record's a little  
16 bit difficult to get through - - -

17 MR. KAPLAN: No.

18 JUDGE RIVERA: - - - I agree but - - -

19 MR. KAPLAN: No. It's not.

20 JUDGE RIVERA: - - - don't you already have  
21 something - - -

22 MR. KAPLAN: No.

23 JUDGE RIVERA: - - - that's like a full paragraph  
24 of what he says - - -

25 MR. KAPLAN: No. Because he - - -

1 JUDGE RIVERA: - - - to the officer?

2 MR. KAPLAN: No. Because he's saying that we - -

3 -

4 JUDGE PIGOTT: Well, what - - -

5 JUDGE RIVERA: But what language did he say that

6 in? Or there's no way to know? Is it your position

7 there's no way to know if that more-than-one paragraph

8 that's quoted - - -

9 MR. KAPLAN: Don't know.

10 JUDGE RIVERA: - - - as well, he communicates - -

11 -

12 MR. KAPLAN: Don't know and - - -

13 JUDGE RIVERA: - - - was in Spanish or English?

14 MR. KAPLAN: No. That's right; don't know. And

15 second - - -

16 JUDGE RIVERA: Do we know if the breathalyzer was

17 done with an interpreter?

18 MR. KAPLAN: Spanish. Spanish refusal. It was

19 Spanish.

20 JUDGE RIVERA: Was there an interpreter involved?

21 MR. KAPLAN: They just said below. That's all.

22 I mean it just said below which we're saying it's not the

23 same thing - - -

24 JUDGE RIVERA: Okay. Okay.

25 MR. KAPLAN: - - - as the details that are in a

1 coordination test. Because the point of a coordination  
2 test, and let me just make this point, if I may, it's not  
3 exculpatory. That goes to the due process aspect. It's to  
4 gather information but it's really protective of a  
5 defendant, in a way. It's - - - because I realize he blew  
6 a 0.06.

7 JUDGE RIVERA: Why isn't it potentially useful to  
8 his defense, right? Because if - - - if he does, indeed,  
9 show he - - - he's absolutely able to complete - - -

10 MR. KAPLAN: Yes.

11 JUDGE RIVERA: - - - this test - - -

12 MR. KAPLAN: Yes, but what if he isn't?

13 JUDGE RIVERA: - - - doesn't that give him  
14 something better than just his word against the police  
15 officer?

16 MR. KAPLAN: He could still say to the jury I was  
17 never given that at 0.06. The - - - the People did not  
18 prove adequately - - -

19 JUDGE RIVERA: That is not the same.

20 MR. KAPLAN: Well, all right - - -

21 JUDGE RIVERA: - - - as actually succeeding on  
22 the test.

23 MR. KAPLAN: I understand your point but - - - or  
24 your question. But the - - - but the point I want to make  
25 is that - - - that where they do not give the test, they

1 are, in effect, protecting because if he stumbled because  
2 of language and he could not understand the highway  
3 officer, then you'd have - - - you would have a bad  
4 situation in which he has a 0.06 yet he has a terrible  
5 physical coordination test. So by not giving it to them  
6 he's actually - - - the police actually, in a way, are  
7 protecting him. So that's one of many reasons they don't  
8 give - - - just as Judge Abdus-Salaam was saying, someone's  
9 hard of hearing, someone may have physical impairment,  
10 someone may be too drunk to take the test.

11 JUDGE PIGOTT: Yeah.

12 MR. KAPLAN: But actually which is sort of - - -  
13 and that they're falling down already. And so that they -  
14 - - so they don't give a - - -

15 JUDGE RIVERA: That test may work against them,  
16 right?

17 MR. KAPLAN: Well, the - - -

18 JUDGE RIVERA: The - - - or whoever gives the  
19 test will say he was too drunk as a skunk, I couldn't give  
20 this test to him, right?

21 MR. KAPLAN: Well, the point is they have to make  
22 a determination. Now in this case, as I said, this is - -  
23 - because there's a very thin record, that he had the  
24 breathalyzer refusal in Spanish. That would indicate to a  
25 highway officer I don't want to give this test. He's not

1 comfortable in English. And this is more complicated. It  
2 has thirty or so complex things that have to be done in a  
3 sequence. The highway officer cannot delegate it to a  
4 surrogate, cannot do that. Because he's the one, or she,  
5 who's trained to do this. And that by giving it to someone  
6 who translates, the highway officer - - -

7 JUDGE RIVERA: But did he ever make a claim below  
8 that - - - to criminal court that, indeed, that - - - that  
9 process, to properly identify whether or not the defendant  
10 was able to do this test in English was not followed or  
11 there's not some protocol? Did he ever make that kind of  
12 argument?

13 MR. KAPLAN: I'm sorry. Could - - - I'm sorry.  
14 Could you repeat that?

15 JUDGE RIVERA: I said did he make any argument -  
16 - -

17 MR. KAPLAN: Yes.

18 JUDGE RIVERA: - - - that there is not in place -  
19 - -

20 MR. KAPLAN: Right.

21 JUDGE RIVERA: - - - a protocol by which NYPD  
22 properly assesses whether or not a defendant can, indeed,  
23 complete these tests in English even if they are a Spanish  
24 speaker or have some limited English ability?

25 MR. KAPLAN: Well, I think that there's always



1 MR. LIVSHITS: Thank you. Well, one point I want  
2 to bring up, and - - - and this is important. I did not  
3 know if he spoke - - - if Mr. Aviles spoke English  
4 sufficiently enough to perform a coordination test, but  
5 that's the point. The point of our argument as part of the  
6 intentional discrimination claim under strict scrutiny is  
7 that the police, the NYPD, does not have any protocol to  
8 determine whether or not a person - - - a person speaks  
9 English sufficiently enough to perform a coordination test.

10 JUDGE ABDUS-SALAAM: Well, in this case, counsel,  
11 as I read the record, allegedly, your client responded to  
12 the officer initially in English about how many beers he -  
13 - - he had had within a certain period of time and maybe a  
14 couple of other things in English, as well. So are you  
15 saying that the - - - the officer could have made a  
16 determination that he spoke English sufficiently based on  
17 that to give him the test in English?

18 MR. LIVSHITS: The offic - - - so NYPD does not  
19 have any protocol to - - - to make a call. The - - - in  
20 our case, Mr. Aviles made a statement in English, and the  
21 officer still determined that there was a language barrier.  
22 But there is no specific protocol that the officer follows.  
23 And - - -

24 JUDGE ABDUS-SALAAM: Do they have to have one?

25 MR. LIVSHITS: They do because that's part of the

1 intentional discrimination claim. You have a city, which  
2 is a quarter of - - - of - - - a quarter of the people do  
3 not speak English, and you have something like drunk - - -  
4 drunk driving which happens every single day in - - -

5 JUDGE PIGOTT: If they have a protocol, and I  
6 think they do, right? There's a protocol there?

7 MR. LIVSHITS: There - - - there is no - - -  
8 there is an unwritten protocol which says they're not  
9 provide - - - sorry. There's no protocol to determine  
10 whether or not a person speaks - - - speaks English.

11 JUDGE PIGOTT: But if they choose not to give the  
12 test, that's their - - - within their discretion, right?  
13 Within the - - -

14 MR. LIVSHITS: That is within their discretion.

15 JUDGE PIGOTT: They don't have to give it all,  
16 they can give it - - -

17 MR. LIVSHITS: Exactly. So it invites profiling  
18 and - - -

19 JUDGE PIGOTT: Well, no. I mean if it's raining  
20 out or it's cold or - - -

21 MR. LIVSHITS: Well, it's performed indoors.

22 JUDGE PIGOTT: No. It's not.

23 MR. LIVSHITS: In - - - in New York it - - - it  
24 is.

25 JUDGE PIGOTT: There's a lot of other counties.

1 And if - - - and if - - - I know you get stuck by that but  
2 it's - - - so if they decide not to give it, it's okay?  
3 You can - - - and as Mr. Kaplan points out, if the person  
4 is - - - Salazar, apparently, was almost - - - he was  
5 falling down drunk so they didn't give him one.

6 MR. LIVSHITS: Right. So - - -

7 JUDGE PIGOTT: Okay.

8 MR. LIVSHITS: - - - in New York City, and we're  
9 talking about New York City's - - - New York Police  
10 Department's practice, not a practice of another police  
11 department, so in Rochester, for example. We're talking  
12 about New York City. And in New York City there are six  
13 facilities where the coordination test is performed.

14 JUDGE RIVERA: So - - -

15 CHIEF JUDGE DIFIORE: Thank you, sir.

16 JUDGE RIVERA: I'm sorry. In - - - in the record  
17 - - -

18 CHIEF JUDGE DIFIORE: One more question.

19 JUDGE RIVERA: I'm sorry. Just - - - I just want  
20 to be clear because you said this before. Is it you're  
21 conceding that he's - - - that first paragraph, that first  
22 interaction when he talks about hitting the car and the  
23 beers and all that, he said that in English?

24 MR. LIVSHITS: I do not know. I do not know a  
25 hundred percent.

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JUDGE RIVERA: There's nothing in the record that indicates or clarifies that?

MR. LIVSHITS: There's nothing in the record that ind - - -

JUDGE RIVERA: You never conceded that?

MR. LIVSHITS: There - - - the briefs below had the statement. It didn't say whether or not the statement was made in English - - -

JUDGE RIVERA: Okay.

MR. LIVSHITS: - - - or in Spanish. But it seems that because it was written out in English that it was made in English.

JUDGE RIVERA: Thank you.

CHIEF JUDGE DIFIORE: Thank you.

(Court is adjourned)

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

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Jose Aviles, No. 186 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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