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COURT OF APPEALS
STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

No. 115

MARIO ARJUNE,

Appellant.

20 Eagle Street
Albany, New York
October 12, 2017

Before:

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

Appearances:

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1 CHIEF JUDGE DIFIORE: The first appeal on today's
2 calendar is number 115, the People of the State of New York
3 v. Mario Arjune.

4 Counsel.

5 MS. YOUNES: Good afternoon, Your Honors. My
6 name is Jenin Younes. I'm from Appellate Advocates, and
7 I'm representing Mr. Arjune, the appellant. Mr. Arjune's
8 attorney deprived him of the effective assist- - - -

9 CHIEF JUDGE DIFIORE: Ms. Younes, would you like
10 rebuttal time? Excuse me.

11 MS. YOUNES: Yes. I'd like to reserve two
12 minutes for rebuttal. Thank you so much for reminding me.
13 Mr. Arjune's attorney deprived him of the effective
14 assistance of counsel by failing to explain to Mr. Arjune
15 his right to appeal - - -

16 JUDGE RIVERA: Didn't he get written notification
17 of his rights, of his appellate rights?

18 MS. YOUNES: Is this the notice that you're
19 talking about - - -

20 JUDGE RIVERA: Yes. Correct.

21 MS. YOUNES: - - - at sentencing? He was given
22 that notice but it's - - - it - - - that is not a very
23 detailed notice. It just says you have the right to an
24 appeal and you have the right to poor person relief. Now
25 Mr. Arjune is - - -



1 JUDGE RIVERA: What more should go - - - well,
2 let me ask you this. If it was a more detailed notice
3 would that have been enough?

4 MS. YOUNES: In this case, no. Because Mr.
5 Arjune was illiterate, as the record shows. Sorry, barely
6 literate. He was unable to read and - - -

7 CHIEF JUDGE DIFIORE: So, Ms. Younes, what is
8 retained trial counsel's obligation here?

9 MS. YOUNES: Retained trial counsel's obligation
10 is to have a conversation with his client sufficient to
11 allow his client to understand his right to appeal, how to
12 pursue that right, whether that's getting poor person
13 relief or retaining another attorney. The consequences of
14 not appealing, which Mr. Arjune also didn't understand - -
15 -

16 CHIEF JUDGE DIFIORE: So it's his - - - so his
17 duty and obligation is impacted by his appreciation or
18 understanding of the defendant's ability to understand. Is
19 that what you're saying?

20 MS. YOUNES: That's correct. I think that it's a
21 fact-specific inquiry that depends on a particular client.
22 And I would draw an analogy to other circum- - - - other
23 situations that a right to appeal is one of four - - - four
24 areas in which the defendant is ultimately - - - it's
25 ultimately to the defendant's choice. Another is the right

1 to testify, pleading guilty, waiving a jury trial, and in
2 those context, we don't expect it to be sufficient for
3 counsel to just - - - well, actually, in this - - - the
4 analogy would be just the court to hand something written
5 saying you have the right to plead guilty and you're giving
6 up your right to a jury trial. We expect counsel to engage
7 with his client and to ensure that his client can actually
8 understand what he's doing.

9 JUDGE WILSON: And so is part of it to give
10 advice or - - -

11 MS. YOUNES: Yes. It's to give advice and - - -

12 JUDGE WILSON: And to discuss the merits of
13 whether - - - what the grounds might be for an appeal, what
14 the relative merits and demerits are, so on.

15 MS. YOUNES: Exactly. Yes. I think - - -

16 JUDGE STEIN: Is that - - - is that - - - is that
17 the obligation of trial counsel or is that the obligation
18 of appellate counsel?

19 MS. YOUNES: Well, it's the obligation of trial
20 counsel. I believe that the case law and - - - and the
21 rules clearly establish that. The Department rules, the
22 ABA rules all - - - all prevailing standards of the
23 profession require - - - require trial counsel.

24 JUDGE FEINMAN: So - - - so when you say the
25 court rules, because there are some differences in the



1 Appellate Division rules that the four departments had - -
2 -

3 MS. YOUNES: Sure.

4 JUDGE FEINMAN: - - - at the time this arose.
5 Are you familiar with the new uniform rules of the
6 Appellate Division, and are they different?

7 MS. YOUNES: I'm actually - - - I was unfamiliar
8 with any new rules.

9 JUDGE FEINMAN: Okay.

10 MS. YOUNES: However - - -

11 JUDGE FEINMAN: You would say that it has to go
12 by the Second Department rule that was in effect at that
13 time?

14 MS. YOUNES: It's not just the Second Department
15 rule. I think that's one way of understanding counsel's
16 obligation. But I - - - I do think it's a fact-specific
17 inquiry, and in fact, the Second Department rules require
18 the attorney to give the defendant written notice. In this
19 case, I might argue that that was insufficient because Mr.
20 Arjune is barely literate. He was unable to read anything
21 beyond the most basic material.

22 JUDGE STEIN: There is - - -

23 JUDGE FEINMAN: So - - - so even - - - I'm sorry.

24 JUDGE STEIN: I'm sorry. Go ahead.

25 CHIEF JUDGE DIFIORE: Ms. Younes, getting back to



1 the concept of the duty being defined by the defendant's
2 ability, how would a court measure that? How would they
3 apply that and determine - - - make - - -

4 MS. YOUNES: Well, I think - - -

5 CHIEF JUDGE DIFIORE: And what would the process
6 for that be?

7 MS. YOUNES: One of the - - - one of the ways in
8 which we can do that here is looking at what happened. Mr.
9 Arjune did not effectuate his right to appeal, and we have
10 documentation. We have a psychiatric report saying that
11 he's - - -

12 JUDGE FAHEY: So - - - so the court would have to
13 have a hearing and then measure the cognitive impairment of
14 a particular defendant to determine - - - to determine
15 whether or not the person understood the instructions?

16 MS. YOUNES: Well, I don't think that would
17 actually happen that much. I mean it doesn't happen in the
18 guilty plea - - -

19 JUDGE FAHEY: But take a step back a second here.
20 Wouldn't it - - - it seems to me the point of weakness in
21 the defendant's continual representation is that period
22 from when a determination is made and then the appeal
23 begins, right. That - - - that's the period we're talking
24 about here. And - - - and there are various remedies that
25 you could - - - you could deal with if there is a problem.

1 You're suggesting a hearing which seems to be an entirely
2 subjective analysis on - - - on someone's relative
3 cognitive abilities to understand. To ask a court to say
4 how well somebody can read, what - - - what grade level
5 they read at, whether or not the - - - the - - - the form
6 is sufficient for them almost places an impossible burden
7 on the court. But - - - let me finish. But what about the
8 ABA rule which says that there has to be - - - that counsel
9 represents until appellate counsel is either assigned or
10 comes as a determination there's not going to be an appeal?

11 MS. YOUNES: I - - -

12 JUDGE FAHEY: What's your position on that?

13 MS. YOUNES: First of all, we're not asking for
14 there to be hearings. We're simply saying that the - - -
15 the governing standards already require this of counsel.
16 The Sixth Amendment already requires it. If you look at
17 *Roe v. Flores-Ortega, Syville*, all the rules governing - -
18 -

19 JUDGE FAHEY: Well, let's about it. Without
20 expanding *Syville*, how - - - is - is there a remedy through
21 the rules that could solve this problem?

22 MS. YOUNES: I think there is a remedy through
23 the *coram nobis* situation as we have here. But I would - -
24 -

25 JUDGE FAHEY: No. I'm talking - - - I'm talking



1 about in - - - not just in your particular case but that
2 transition period when somebody's got an attorney at the
3 end of the trial and then they've got to make a decision
4 and they don't have an appellate attorney yet. There's
5 that period where right now they don't have an attorney,
6 but the ABA rules say you continue on as counsel.

7 MS. YOUNES: Sure.

8 JUDGE FAHEY: And wouldn't that solve the
9 problem? Until appellate counsel comes in or the - - - or
10 there's a determination made not to appeal?

11 MS. YOUNES: Sure. I mean that would be ideal
12 but we're not even asking for that. We're just asking that
13 - - - for counsel to put his client in a position to
14 understand his rights and how to effectuate them. And - -
15 -

16 JUDGE FAHEY: The reason I ask is because the - -
17 - it seems the remedy of a hearing is - - - is more
18 cumbersome and difficult to administer without a clear-cut
19 standard than the more simple expedient saying someone
20 represents you and you continue on until appellate counsel
21 is assigned. That expedient seems to be much clearer.

22 MS. YOUNES: I - - - I wouldn't complain if that
23 was the rule, but we're not necessarily asking for this - -
24 -

25 JUDGE GARCIA: Counsel, don't you also have



1 something of a problem with the record? So I think the
2 conviction is 2009. This is at least five years, whatever,
3 later. The sentence is relatively minor, right. It's six
4 months or - - - three - - -

5 MS. YOUNES: It was one-to-three years but he had
6 served some period of that time.

7 JUDGE GARCIA: One-to-three. And he files a
8 notice of appeal. How do we know that this wasn't a - - -
9 you know, a decision? He's retained counsel at that point.
10 I'm not taking an appeal. The sentence is decent. Later
11 on, there are collateral issues with immigration
12 consequences and now he wants to do the appeal. And all we
13 have in this record is an affirmation from the attorney
14 which says almost nothing and can be read in very many
15 different ways, and there's no development of a record here
16 to indicate whether or not there was a discussion on
17 whether an appeal was worth taking. So how do you get by
18 that and not have a flood of these types of motions coming
19 back to the Appellate Division five, six, seven years later
20 on essentially abandoned appeals when there's no record of
21 what the advice was that was given to the client?

22 MS. YOUNES: I - - - a couple things. First of
23 all, I believe that the record establishes that no - - -
24 that there was no conversation. Mr. Arjune says there
25 wasn't. His mother says there wasn't. Counsel doesn't



1 rebut that. He doesn't say anything like I typically have
2 these conversations. Based on an un rebutted - - - the
3 un rebutted allegations of Mr. Arjune and his mother, as
4 well as what happened later, I think it's clear that there
5 was no conversation, there was no warning to Mr. Arjune
6 about what could happen later. As far as the floodgates
7 issue, this is - - -

8 CHIEF JUDGE DIFIORE: And the notice is to no
9 effect, the notice of appeal?

10 MS. YOUNES: The - - - what do you - - - I'm
11 sorry?

12 CHIEF JUDGE DIFIORE: The notice of his right to
13 appeal.

14 MS. YOUNES: It's of no effect. And - - -

15 CHIEF JUDGE DIFIORE: No effect in that
16 discussion, analysis?

17 MS. YOUNES: We don't know if that - - - there
18 was a - - - attorneys routinely file notices of appeal with
19 with no conversation with their clients. As far as the
20 floodgates - - -

21 JUDGE STEIN: I - - - I think the question is
22 about the notice that was given by the court - - -

23 MS. YOUNES: Right.

24 JUDGE STEIN: - - - presumably with counsel
25 standing right there with the defendant when he received



1 that notice so counsel would have known that he got that
2 notice.

3 MS. YOUNES: Sure.

4 JUDGE STEIN: So isn't there some - - - some
5 burden on the defendant to show that that wasn't enough?

6 MS. YOUNES: It wasn't enough. I mean he
7 couldn't - - - he - - -

8 JUDGE STEIN: Well, he - - -

9 MS. YOUNES: - - - has shown that he does not
10 lack the - - - or sorry, that he lacks the capacity to
11 understand that notice and to understand what to do with it
12 and how - - -

13 JUDGE STEIN: Well, he had the capacity to know
14 with the help of his family to retain an attorney in the
15 first place. So I - - - I don't think we can just assume
16 that. My - - - my understanding of our case law says that
17 the burden is on the defendant to - - - to make a showing
18 that his rights were - - - were abridged and that he could
19 not have realized that within the one-year period required
20 by statute.

21 MS. YOUNES: I think that's exactly what happened
22 here. He couldn't understand that, and the fact that he
23 was - - -

24 JUDGE STEIN: But what - - - but that - - -
25 you're - - you're stating that as a conclusion. I'm asking



1 you what showing did the defendant make as to that?

2 MS. YOUNES: Well, this - - -

3 JUDGE STEIN: Other than - - - other than just
4 his - - - his statement which I think - - -

5 MS. YOUNES: His statements - - -

6 JUDGE STEIN: - - - we said is not sufficient.

7 MS. YOUNES: His statements, his mother's
8 statements, the psychiatric report which documents his low
9 cognitive abilities.

10 JUDGE STEIN: So in Perez there was one of the -
11 - -

12 MS. YOUNES: Sure.

13 JUDGE STEIN: - - - companion cases dealt with a
14 sixteen-year-old.

15 MS. YOUNES: Yes.

16 JUDGE STEIN: And - - - and that didn't seem to
17 inhibit the court's ruling. So - - -

18 MS. YOUNES: I think there's also a situation
19 where you have somebody sitting in prison for a number of
20 years, so it - - - it's harder to understand how that
21 person cannot understand his right to appeal. And at that
22 point it might start to look like he actually gave it up
23 and is just changing his mind down the road. Whereas in
24 this situation he was not in prison very much - - - very
25 long past the verdict. So - - -



1 JUDGE FEINMAN: So - - - so if I could take you
2 away from the specifics of this case what is the broader
3 rule that you're advocating? Because it's going to have an
4 impact, as Judge Garcia is - - - is suggesting, on many
5 cases if we were to go someplace that you're suggesting.

6 MS. YOUNES: I - - -

7 JUDGE FEINMAN: So what - - - what is the actual
8 rule you want us to adopt?

9 MS. YOUNES: The rule that I would advocate is
10 that counsel must have some discussion with his client
11 about his right to appeal, taking into account that
12 client's particular situation and ensure that he is able to
13 take the steps that he needs to. I - - - just to be clear,
14 we're not asking for a new rule. We think that this is an
15 application of the current rules that exist based on Roe v.
16 Flores-Ortega, Syville, numerous other cases, as well as
17 all the prevailing standards of the profession which - - -
18 which all say that counsel's - - -

19 JUDGE RIVERA: Counsel, let me - - - let me ask
20 you - - -

21 MS. YOUNES: Sure.

22 JUDGE RIVERA: - - - somewhat different, also.
23 So let - - - let's assume for one moment that the attorney,
24 because he's filed this notice of appeal, tells him you
25 have the right to an appeal. I'll file the notice of



1 appeal. You can go seek poor person relief. Here's the
2 document that tells you how to do that. And then, as in
3 this case, later on the attorney gets some letter
4 indicating that the appeal hasn't been perfected. What
5 would be the attorney's duty, in your opinion, in that
6 hypothetical?

7 MS. YOUNES: If - - -

8 JUDGE RIVERA: Assuming that there has been some
9 discussion, that's why you have the notice of appeal filed.
10 Even assuming there's been some basic information, look, if
11 you can't - - - I know you paid for me but if you can't
12 afford a lawyer, you can go and apply for that but doesn't
13 fill out the form.

14 MS. YOUNES: I think that the - - - if the first
15 conversation was adequate under the rules that I've just
16 advocated than the motion to dismiss issue is less
17 pertinent. That sort of shows that counsel's initial
18 management of the situation was - - - was not effective,
19 and he was then on notice that he hadn't done enough to
20 impress upon Mr. Arjune the importance - - -

21 JUDGE STEIN: Well, but that assumes that in
22 every case the defendant will want to perfect the appeal or
23 couldn't be there be cases in which they - - - they have -
24 - - they go to appellate counsel and appellate counsels
25 says you don't have any - - - you know, there are - - -



1 there are no meritorious issues?

2 MS. YOUNES: There are almost always issues that
3 can be raised on appeal, but - - - and this was a - - -

4 JUDGE STEIN: Think theoretically.

5 MS. YOUNES: - - - this was a trial felony
6 conviction. This was not a plea or - - -

7 JUDGE STEIN: What I'm saying is is that your - -
8 - your rule assumes that if there is no appeal taken that -
9 - - that were some lapse there, and that's not always true,
10 right?

11 MS. YOUNES: Not necessarily. But under the
12 circumstances that we have here it's clear that that's what
13 happened based on what Mr. Arjune says as well as his
14 mother and based on - - - and counsel not rebutting that
15 and not saying that he did have such a conversation - - -

16 JUDGE GARCIA: But couldn't the Appellate
17 Division, which I assume they did, look at all these
18 things? They had the affidavits, they had everything, they
19 applied Syville, and they say no. What's our standard - -
20 - if there's no new rule, what's our standard for reviewing
21 that decision?

22 MS. YOUNES: Well, the standard for reviewing it
23 is that they - - - that the Appellate Division misapplied
24 the - - - the rule.

25 JUDGE GARCIA: Well, couldn't it be that they



1 looked at this affidavit - - - which says nothing neither
2 here or there, the attorney leaves, certainly, a lot of
3 room for there to have been these types of conversations,
4 looks at the timing, looks at all these other factors and
5 decides no, we're, our court, Appellate Division, is not
6 going to hear this? We're not going to let you do this.
7 And now we're reviewing their decision based on kind of
8 what almost seems like should have been a hearing. How do
9 we do that?

10 MS. YOUNES: Well, I'm not sure what the
11 Appellate Division's - - - the basis for its decision is.
12 They didn't really write on it, but it's clear to me that
13 they - - - they did not properly apply the standards that
14 exist.

15 CHIEF JUDGE DIFIORE: Thank you, counsel.

16 MS. YOUNES: Thank you.

17 CHIEF JUDGE DIFIORE: Counsel.

18 MR. BRANIGAN: Good afternoon, Your Honors;
19 William Branigan for the People. May it please the court.
20 Your Honors, defendant failed in his burden to establish in
21 his motion that he received - - - or that he was denied his
22 right to appeal by ineffective counsel. The - - - the
23 papers he submitted, including an affidavit from the trial
24 attorney, which didn't say what advice he gave and what
25 discussions they had regarding the appeal, along with his



1 own motion where it said he knew nothing about his appeal
2 and that was contradic- - - -

3 JUDGE RIVERA: Counsel, I'm going to change the
4 hypothetical a little bit. Let - - - let's say that there
5 - - - the record makes clear that the attorney did nothing
6 other than file the notice of appeal and that the defendant
7 got the form that was handed out in this particular case.
8 And then the lawyer gets the letter that it's not been
9 perfected. Does the lawyer at that point have any duty and
10 obligation, that trial counsel?

11 MR. BRANIGAN: Your Honor, if the - - - if the
12 defendant was notified of his - - - his right to appeal, at
13 that point - - -

14 JUDGE RIVERA: With the form and that's all
15 that's - - - that's been used as a notification - - -

16 MR. BRANIGAN: With the form - - -

17 JUDGE RIVERA: Take this hypothetical as
18 presented.

19 MR. BRANIGAN: Okay. I - - - no, no. I'm taking
20 it. But - - - and I'm assuming that he - - - he read the -
21 - - that he read the form. Okay. Then at that point as
22 far as the constitutional - - - as far as the
23 constitutional issue he wasn't prevented from his appeal by
24 - - - by effective - - - ineffective counsel. Now - - -

25 JUDGE WILSON: Can I - - - can I ask you about



1 the constitutional issue then because there are a few
2 pieces of Flores-Ortega that I'm not sure are consistent
3 with the last answer you gave. So Flores-Ortega says:
4 "Counsel has a constitutionally imposed duty to consult
5 with the defendant about an appeal when there's a reason to
6 think that a rational defendant would want to appeal." And
7 it says: "We employ the term 'consult' to convey a
8 specific meaning advising the defendant about the
9 advantages and disadvantages of taking appeal and making a
10 reasonable effort to discover the defendant's wishes."
11 Then it goes on to say it has a hypothetical that is very
12 much like the notice here, although it's not a written
13 notice. It says: "There could be a situation where a
14 sentencing court's instructions to a defendant were so
15 clear and informative as to substitute for counsel's duty
16 to consult," consult being defined earlier in the opinion.
17 And then says in that circumstance counsel might reasonably
18 conclude that he or she didn't have to do a - - - repeat
19 that information essentially. But how is - - - how is what
20 happened here not a violation of - - - of what the court
21 says in Flores-Ortega?

22 MR. BRANIGAN: Okay. I'm sorry. Are we still on
23 the hypothetical or we - - -

24 JUDGE WILSON: No. Let's take the actual
25 language of Flores-Ortega - - -



1 MR. BRANIGAN: Okay.

2 JUDGE WILSON: - - - and the language - - - and
3 the facts here.

4 MR. BRANIGAN: Okay. Your Honor, if - - - again,
5 it - - - we'd have to presume - - - like let's say we'd
6 presume under - - - under that rule that the - - - that
7 basically nothing was done. First, I'll - - - I'll say
8 yes. If he - - - he read the thing and he didn't turn to
9 his attorney and say, you know, I - - - I'd like, you know
10 - - - you know, I'd like to appeal my conviction or, well,
11 I - - - I don't know or said something to that effect, the
12 attorney at that point, you know, goes - - files the - - -
13 the notice of appeal, assumes that the - - - the defendant
14 two years later when he gets the motion to dismiss, assumes
15 that the defendant did not wish to take the appeal, then
16 under those circumstances we couldn't say that he was - - -
17 he was prevented from filing the appeal by - - - by the
18 ineffectiveness. Now if the - - - again, in this case, our
19 argument - - - our argument - - -

20 JUDGE WILSON: I have a question about - - -
21 [indecipherable]

22 JUDGE STEIN: Are you - - - are you saying that
23 because I'm not - - - I'm not - - your argument isn't
24 clear. Are you saying that because Flores - Flores-Ortega
25 has to do with the filing of the notice of appeal itself?



1 Are you making that distinction?

2 MR. BRANIGAN: No, no, no, Your Honor. There - -
3 - there's two things. One is the - - - I'm sorry. One is
4 that the attorney actually filed the notice of appeal,
5 which he - - - which he did there and that the defendant
6 received - - - and that the defendant received the written
7 notice. Now our argument is that the - - - the Appellate
8 Division can take - - - can take the inference that there
9 was some discussion between defendant and his attorney
10 about whether to pursue the appeal and that the fact that
11 he didn't was because he didn't wish to pursue the appeal.
12 Whether that's because he got acquitted from the - - - the
13 top count or for some other reasons we don't understand,
14 but that the - - - that it was the defendant's burden to
15 establish - - - and in particular establish what - - - what
16 counsel did. Counsel never said what he did in - - - in
17 this case.

18 JUDGE FAHEY: See I - - - I - I had thought that
19 notice equated to the minimal contact that was necessary to
20 satisfy Flores-Ortega. I thought that was your argument
21 and then you were saying that but Syville, while it does
22 demand notice, it does not require - - - or you don't want
23 the rule extended to perfection of the appeal. That's
24 where I thought you were ultimately going.

25 MR. BRANIGAN: Yes. Once the - - - once he is



1 advised - - - once he is told that he has the right to
2 appeal and that he can apply for poor person notice, which
3 he is in - - - in the notice, and once the - - - once the
4 notice of appeal is taken care of, the defendant under - -
5 - under West has some obligation to - - - to - to fill out
6 the poor person paperwork and send it to the Appellate
7 Division if he wants to go forward with his appeal.

8 JUDGE FAHEY: Um-hmm.

9 JUDGE RIVERA: I'm - - - I'm not really clear why
10 - - - why you're saying the form in this case replaces
11 advice by counsel.

12 MR. BRANIGAN: Your Honor, the - - - the form in
13 this case tells the defendant that he's - - - that - - that
14 he can - - - if - - - he has a right to appeal and that he
15 can apply for - - - for poor person relief.

16 JUDGE RIVERA: But really - - - but the notice of
17 the appeal is filed. So that's not really what you're
18 talking about. You're talking about the poor person
19 filing?

20 MR. BRANIGAN: I'm talking about the - - - I'm
21 talking about the notice - - - the actual notice that he -
22 - - he gets at sentence which is given in - - - in every
23 case in - - - in Queens and I think throughout the state.

24 JUDGE RIVERA: Yes. I know what you're talking
25 about. Yeah.



1 MR. BRANIGAN: So the - - -

2 JUDGE FEINMAN: Well, the - - - the notice is
3 actually different in different parts of the state because
4 in the First Department there's a clip-off which is really
5 clear and this is how you do it and you mail it in and then
6 they contact you to process the poor person relief if you
7 need it. And then - - - so it's not the same in every part
8 of the state.

9 MR. BRANIGAN: I - - - I apologize. I was
10 comparing - - - I thought reading - - - reading West and
11 reading the notice that issued there I thought it was
12 similar to the - - - to the one that we used.

13 JUDGE FEINMAN: They're similar but they're not
14 exactly the same. And so the question, you know, to the
15 extent that under Flores-Ortega you're going to rely on the
16 courts giving the notice in such detail that it substitutes
17 for counsel's obligation, I'm not sure that this record is
18 clear at all what he got because, correct me if I'm wrong,
19 you know, you - - - you did put in a copy of the Second
20 Department form that's given, but I don't know that it's
21 really established in the record that that's the one he
22 got.

23 MR. BRANIGAN: Your Honor, let me - - - let me
24 step back for a second.

25 JUDGE FEINMAN: Yeah.



1 MR. BRANIGAN: The - - - the trial attorney
2 should advise the defendant about his - - - his right to
3 appeal. All right. We are not saying any - - - anything
4 different. But - - -

5 JUDGE WILSON: And consulted - - - and consulted
6 him about the merits or no?

7 MR. BRANIGAN: Your Honor, I - - -

8 JUDGE WILSON: Is that part of the constitutional
9 obligation?

10 MR. BRANIGAN: Your Honor, right now as far as -
11 - - no. But our argument here, even assuming that he - - -
12 he did have that obligation to discuss that with him, our
13 argument here is that the defense counsel here - - - what
14 the burden as far as granting a coram nobis motion is is
15 that they should have at least established what the
16 conversations were between defendant and - and - the - - -
17 and his counsel. And if counsel didn't remember in this
18 case, which is possible, he should have at least said, you
19 know, this is my standard course of business in every case.
20 I tell a defendant X and Y regarding his - - - his right to
21 appeal. He must have told him something. He filed the
22 notice of appeal. He said, well, it was known that I was -
23 - - I was not the - - - the appellant counsel, that I was
24 only the trial counsel.

25 JUDGE RIVERA: But does the case turn on he must



1 have told him something? It's got to turn on more. But
2 let's assume for the moment - - - let's assume for the
3 moment we agree with you that at a minimum he's told him
4 you have a right to appeal. So how does he notify him,
5 though, and - - - and explain to him about how to perfect
6 that appeal?

7 JUDGE RIVERA: How - - - how do you get that from
8 the record?

9 MR. BRANIGAN: Again, we - - - we can take first
10 of all the fact that he - - - he files the notice of
11 appeal, the fact that this slip advising the defendant of -
12 - -

13 JUDGE RIVERA: He's retained counsel, right?

14 MR. BRANIGAN: He's retained counsel.

15 JUDGE RIVERA: So it may very well be that he
16 doesn't even think that it's necessary to have a
17 conversation about indigency and the ability to get
18 appointment of counsel for the appeal.

19 MR. BRANIGAN: Your Honor, I - - - I don't know
20 what his - - - his understanding was of defendant's
21 indigency.

22 JUDGE RIVERA: Well, that's - - -

23 MR. BRANIGAN: But again - - -

24 JUDGE RIVERA: Yeah.

25 JUDGE FEINMAN: So - - - so I think this brings



1 up back to what Judge Fahey was alluding to with opposing
2 counsel which is do we have to have a hearing in each one
3 of these to figure out what people knew and - - - and
4 didn't know what and what they were told? I mean does that
5 become a cumbersome process, or is there some rule that we
6 can put in place that is more efficient and avoids having
7 to do individualized findings?

8 MR. BRANIGAN: The - - - the rule as far as that
9 goes, Your Honor, is that it's - - - is that the defendant
10 had to come forward with - - - with the facts. He
11 presented this affirm - - - affirmation from the - - - from
12 the trial attorney. That - - - that affirmation should
13 have been complete. It should have said what discussions
14 were held or at least what the - - - the course of
15 discussions are between him and - - - and his clients. A
16 hearing would only have to be held in a very - - - in a
17 very rare case.

18 JUDGE WILSON: And so if - - - if the affidavit
19 that wasn't provided - - - but if the affidavit said I
20 didn't actually have any conversations with my client about
21 appealing I just filed a notice of appeal, you would then
22 say we should reverse here?

23 MR. BRANIGAN: Your Honor, if - - - if he said
24 that he told him nothing, we would - - - we would probably
25 still argue that this was - - - that this wasn't the cause



1 of his - - - his forfeited appeal. But, yes. We'd be in a
2 much worse position at that point. We probably would have
3 lost in the - - - in the Appellate Division.

4 JUDGE STEIN: What if he - - -

5 JUDGE GARCIA: And what's the - - - I'm sorry.

6 JUDGE STEIN: I'm sorry. What - - - what if he
7 said okay, you just got this notice, do you want to talk
8 about it, do you have any questions, do you understand it?
9 Would that be enough?

10 MR. BRANIGAN: That type of conversation would -
11 - - would be sufficient. Yes, Your Honor.

12 JUDGE GARCIA: May I, Chief, just ask one - - -

13 CHIEF JUDGE DIFIORE: Yes.

14 JUDGE GARCIA: So what's the standard the
15 Appellate Division is applying in granting or denying this
16 motion? What do you have to show at the Appellate
17 Division?

18 MR. BRANIGAN: You have to - - - you have to
19 establish that your appeal was forgone because the - - -
20 the attorney did something and that could have been not
21 giving the advice, that could have been filing the notice
22 of appeal and not telling him, that the - - - the attorney
23 did something. And if you - - - if you file an affirmation
24 from an attorney, the affirmation should be complete and
25 the affirmation should say exactly what discussions they



1 had regarding an appeal.

2 JUDGE GARCIA: And so your point I think is - - -
3 your argument is this affirmation, which essentially says
4 after the conviction and the acquittal I filed a notice of
5 appeal then jumps to after that I didn't have any
6 conversations with him. And there's this gap in between
7 where there could have been a lot of conversations around
8 the filing of the notice of appeal.

9 MR. BRANIGAN: That's correct, Your Honor. It's
10 up to the defendant to fill that gap if he wants relief.

11 CHIEF JUDGE DIFIORE: Thank you, counsel.

12 MR. BRANIGAN: Thank you, Your Honor.

13 CHIEF JUDGE DIFIORE: Did the defendant file a
14 motion to reinstate the appeal at the Appellate Division?

15 MS. YOUNES: Yes. He did. And that was denied.
16 I - - - I just want to go back to the issue of the - - -

17 JUDGE STEIN: Is there anything - - - besides
18 that is anything in the interim years that defendant had an
19 obligation to do? Did defendant have to exercise any kind
20 of due diligence to - - - to find out what was going on or
21 anything like that? I mean we know he got at least a
22 written notice of his right to appeal, and then nothing
23 happens for a number of years. Is there some burden on the
24 defendant to show that he - - - that he was unable to
25 ascertain his - - - his right to go forward?



1 MS. YOUNES: Again, Mr. Arjune actually was
2 unaware of the - - - of everything because of his - - - his
3 limitations, he - - - he didn't know what to do. And he
4 was unaware once he got released from prison that there - -
5 - that there could be further consequences to his - - - his
6 conviction, and he didn't realize that until he was put in
7 ICE detention.

8 JUDGE STEIN: But I mean that's - - - well, go
9 ahead.

10 MS. YOUNES: No. I'm not - - - I guess I'm not
11 sure how if he didn't realize any of these things in
12 actuality what he could have done.

13 JUDGE RIVERA: Your - - - correct me here, what
14 you presented was his own statement.

15 MS. YOUNES: Yes.

16 JUDGE RIVERA: His family statement who paid for
17 the trial attorney, correct?

18 MS. YOUNES: Yes.

19 JUDGE RIVERA: And then some medical proof about
20 his cognitive abilities, correct?

21 MS. YOUNES: Yes.

22 JUDGE RIVERA: Is there anything else you put in?

23 MS. YOUNES: Well, defense counsel's - - -

24 JUDGE RIVERA: I'm sorry.

25 MS. YOUNES: Yeah. The affidavit, yeah.



1 JUDGE RIVERA: And the counsel's affirmation.
2 I'm sorry. Yes.

3 MS. YOUNES: I believe those are the things.
4 Also, his immigration attorney's affidavit saying that she
5 spoke with him. She was convinced that he didn't
6 understand any of these rights, and she became aware after
7 fairly limited interactions with him that he was
8 cognitively impaired. And that's why she got the
9 psychiatric report. Presumably, again, this was a trial.
10 This wasn't a plea. Defense counsel must have had extended
11 interactions with Mr. Arjune and must have known that he
12 was cognitively impaired and that he - - - and barely
13 literate and that he would need - - -

14 JUDGE STEIN: But it's just as possible - - - I
15 mean he got - - - he got acquitted of some pretty serious
16 charges and ended up with a pretty minor sentence. And it
17 - - - it's certainly possible that counsel did - - - did
18 discuss it with him and - - - and a decision was made not
19 to perfect the appeal and that he filed the notice of
20 appeal just to make sure, just to protect his rights. But
21 because we don't have anything from the trial attorney
22 about, as Judge Garcia says, that gap, we don't know.

23 MS. YOUNES: I - - - I think what we have from
24 the trial attorney is as much as one can expect. It was
25 years ago. It is understandable that he might not have



1 remembered, but again, he didn't say he routinely had such
2 a conversation. So based on that, Mr. Arjune and his
3 mother's assertions were unrebutted, and I think it's very
4 - - - the inference should be drawn that no such
5 conversation took place.

6 CHIEF JUDGE DIFIORE: Thank you, counsel.

7 MS. YOUNES: Thank you so much.

8 (Court is adjourned)

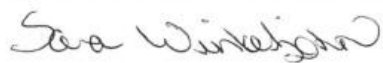
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C E R T I F I C A T I O N

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Mario Arjune, No. 115 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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