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COURT OF APPEALS

STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

NO. 101

VILMA BAUTISTA,

Appellant.

20 Eagle Street
Albany, New York
September 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: Number 101 on the calendar,
2 the People of the State of New York v. Vilma Bautista.

3 MR. DERSHOWITZ: Good afternoon, Your Honors.
4 I'd like to reserve two minutes, if I may?

5 CHIEF JUDGE DIFIORE: Of course.

6 MR. DERSHOWITZ: My name is Nathan Dershowitz,
7 and I represent Vilma Bautista. I understand the court is
8 familiar with the facts, but I would just like to highlight
9 a number of facts in terms of specific dates, because I
10 think they're critical on the question of intent.

11 On April 4, that's when Bautista and Abaya went
12 to see James Sherwood. They told him that Bautista sold
13 the painting on behalf of Imelda Marcos. That was
14 inconsistent with the People's theory throughout this trial
15 and was consistent with an extensive amount of evidence
16 throughout the trial.

17 What then happens is that that ties in, of
18 course, to the tax counts as well. And what he was told at
19 that point - - - what - - - what Sherwood told them at that
20 point is you can't - - - Vilma, you can't pay her taxes.
21 She has to pay her taxes. But more importantly, he also
22 said: I'm not sure she has any taxes. And if Marcos has
23 no taxes, that solves the whole problem.

24 So at that point in time, there were a lot of
25 complex questions. And the tax return gets filed on April

1 16th by somebody by the name of Sebastian. He was supposed
2 to have been told by Abaya - - - Abaya - - - Sherwood
3 testifies, I told Abaya to tell him to put it off, extend
4 it.

5 So the actus reus of filing the return was on the
6 16th of April, and the question then becomes did she have
7 the mens rea at that point in time - - - that was the core
8 question - - - on April 16th.

9 The defense was a very simple one. She wasn't
10 sure how much she had to pay. She wasn't sure if she had
11 to pay. She was waiting for Sherwood to get back to her so
12 she could make a determination.

13 Sherwood's testimony is extremely helpful to the
14 defense. And so you then have Sherwood asked on direct and
15 on redirect specifically: did you ever have a discussion
16 with the defendant about her tax liability? He says no.
17 As a matter of fact, I never spoke to her after - - -

18 JUDGE RIVERA: But he also had an - - -

19 MR. DERSHOWITZ: - - - it was - - -

20 JUDGE RIVERA: - - - he testifies.

21 CHIEF JUDGE DIFIORE: But they had an
22 arrangement, did they not?

23 MR. DERSHOWITZ: I'm sorry?

24 CHIEF JUDGE DIFIORE: They had an arrangement,
25 did they not, that Mr. Abaya would serve as the conduit for

1 information to flow to Mrs. Bautista?

2 MR. DERSHOWITZ: Your Honor, by the time we're
3 talking about, there were no questions that related to
4 Bautista. The only issues that he was retained to address
5 - - - the only issues that he - - - that Sherwood was
6 retained to address had to do with Marcos. And they take
7 that position - - - took that position at trial, and have
8 taken the position today.

9 CHIEF JUDGE DIFIORE: Was the tax lawyer
10 operating on full information on all the facts?

11 MR. DERSHOWITZ: Yes. And the answer is flat-out
12 yes, because at - - - despite the Government's arguments to
13 the contrary, the answer is yes, because the question at
14 that point in time was if the painting belonged to Mrs.
15 Marcos and you had the defendant acting on behalf of Mrs.
16 Marcos, then Mrs. - - -

17 JUDGE STEIN: But wouldn't it have been - - -
18 wouldn't it have been relevant to that question to know
19 whether - - - where the proceeds went?

20 MR. DERSHOWITZ: Again, there was a technical
21 legal question that was raised. But we're getting off - -
22 - with all due respect, there's a tangent. What - - - what
23 I'm talking about is on April 16th, did she have reason to
24 be confused? Did she have reason not to be sure that she
25 had to pay taxes and how much taxes? And remember the - -

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JUDGE STEIN: Well, but I - - -

MR. DERSHOWITZ: - - - only - - -

JUDGE STEIN: - - - thought - - - I thought your argument was that she was operating under the advice of counsel, and - - - am I wrong about that?

MR. DERSHOWITZ: No, I'm not - - - no, I'm not - - -

JUDGE STEIN: So she - - - so you're - - - so what you're saying is that she never sought anyone's advice about what she had to do if, in fact, that money was used in the way that at least the prosecution says it was used?

MR. DERSHOWITZ: She was told to - - - she - - - she was told to get her tax return put off. And in answer to the Chief Judge's question, Abaya was supposed to deliver that information, and he didn't. So there's no reason to assume that Abaya was acting as a conduit, because the only testimony that we have as to whether he acted as a conduit is that he didn't act as a conduit. That's first.

Second, as to whether or not Sherwood even told that information, it wasn't passed on, Your Honor.

With respect to the question as to whether Sher - - -

CHIEF JUDGE DIFIIORE: If she enters that

1 agreement in - - - with the three of them, is she not
2 charged with that knowledge?

3 MR. DERSHOWITZ: No.

4 CHIEF JUDGE DIFIORE: No?

5 MR. DERSHOWITZ: Not on the tax return. We're
6 not talking about a conspiracy charge. We're talking about
7 a - - -

8 CHIEF JUDGE DIFIORE: Well, as it goes to her
9 intent - - -

10 MR. DERSHOWITZ: - - - tax - - -

11 CHIEF JUDGE DIFIORE: - - - on criminal tax
12 fraud?

13 MR. DERSHOWITZ: But again, not everything that's
14 conveyed has to be relevant. It has to have been logically
15 extended. There's no - - - if you're talking about Marcos'
16 tax liability, why should that information - - - why should
17 something relating to Bautista's tax liability, which is
18 not the question that Sherwood was hired to discuss at all,
19 why should we assume that it was passed on?

20 Let me just add - - -

21 JUDGE RIVERA: But - - - but isn't the question
22 whether or not an inference can be drawn? And that - - -
23 that's where the People - - -

24 MR. DERSHOWITZ: That's - - -

25 JUDGE RIVERA: - - - are making their argument?

1 MR. DERSHOWITZ: That's correct, and - - -

2 JUDGE RIVERA: And that's what they presented to
3 the jury, an appropriate inference based on the evidence
4 admitted?

5 MR. DERSHOWITZ: And - - - and let me be clear on
6 that. As far as I am concerned, you can never misstate the
7 factual testimony of a witness. You cannot say this
8 witness said A, B, C, and D. He told her to pay her taxes
9 - - - told her to pay her taxes.

10 JUDGE STEIN: Did - - - didn't the court take
11 corrective action on that, repeatedly?

12 MR. DERSHOWITZ: And - - - but not - - - not all
13 the time.

14 JUDGE STEIN: Well, but more than once?

15 MR. DERSHOWITZ: Fran Hoffinger objected each
16 time - - -

17 JUDGE STEIN: More than once. And is - - - is
18 there any indication in the record that the jury ever asked
19 to hear any of this testimony again?

20 MR. DERSHOWITZ: No, there's no - - - no - - -
21 nothing in the record. But Your Honor, as to the third
22 effort - - - the first effort was: "defense witness
23 confirms she was told you must report." That was
24 inaccurate. He then rephrased it. The rephrasing was:
25 "he told them." There was an objection to that. The - - -

1 he then withdrew that. The third one was: "the limited
2 advice he gave Bautista, he fails to follow, simple as
3 that."

4 That's objected to. The court allows that
5 testimony in. He then says - - -

6 JUDGE FEINMAN: Well, it's not testimony. It's
7 only a summation.

8 MR. DERSHOWITZ: I'm sorry?

9 JUDGE FEINMAN: When he comes back to it in
10 summation, it's a summation point, right?

11 MR. DERSHOWITZ: This is in summation.

12 JUDGE FEINMAN: Yeah, he's - - -

13 MR. DERSHOWITZ: And in summation he then goes on
14 - - - I'm reading the summations. And then he goes off - -
15 -

16 JUDGE FEINMAN: That was my point.

17 MR. DERSHOWITZ: - - - to say: "It was
18 communicated multiple times you must file taxes on your
19 gain." Each one of those is incorrect.

20 If you want to have an inference, inconsistent
21 with a witness' testimony, the best example would be if you
22 have a witness who had a discussion with a defendant, and
23 the defendant denies culpability but says certain things at
24 that time which may be inculpatory, I have no problem
25 saying the witness said A, but you can infer B, C, and D,

1 from what was said. But you can't say the witness said he

2 - - -

3 JUDGE RIVERA: Can you infer - - -

4 MR. DERSHOWITZ: - - - the witness testified that

5 he - - -

6 JUDGE RIVERA: - - - can you infer - - -

7 MR. DERSHOWITZ: - - - confessed.

8 JUDGE RIVERA: - - - B, C, and D if the witness
9 walked out of the room and a conversation kept going on
10 because they've entered this arrangement where there's a
11 conduit that stays in the room?

12 MR. DERSHOWITZ: The - - - the arrangement, again
13 - - - you have to differentiate between Marcos, which is
14 the only issue that was pending - - - and they concede
15 that, that Marcos is the only issue that was pending - - -
16 not Bautista. Can I take one minute on - - -

17 CHIEF JUDGE DIFIORE: Counsel, do you care to - - -

18 -

19 MR. DERSHOWITZ: - - - on Brady?

20 CHIEF JUDGE DIFIORE: - - - address the Brady
21 issue?

22 MR. DERSHOWITZ: Yeah, that's what I - - - I'd
23 like to address.

24 CHIEF JUDGE DIFIORE: Please, take a minute.

25 MR. DERSHOWITZ: Okay. The - - - this court has

1 established two different standards with respect to Brady.
2 And the - - - there's a significant difference between the
3 two. And one is the reasonable possibility - - - which
4 applies in our situation - - - where there was a specific
5 request for a document. And the other is the federal
6 standard which is a much higher standard. And I think it's
7 Judge Kaye in one of her decisions who highlighted that
8 you're really adding a burden onto a defendant when you
9 presume the accuracy of the factual materials when you look
10 at it retrospectively as compared to what you want to do is
11 put the obligation on the prosecutor to disclose the
12 information openly and - - - and accurately.

13 The Supreme Court decided a case about two months
14 ago, Turner v. The United - - - United States. And in
15 Turner, it reaffirmed exactly what the standard is in
16 Brady. But what is interesting is the court went out of
17 its way, both in the majority and in the dissent, to say
18 that the reason they're doing that is largely because - - -
19 and let me try to get the quote - - - because there was an
20 open policy on the part of the prosecutors where they will
21 provide information the defendant might wish to use. Okay?
22 They said it was a generous policy of disclosure, therefore
23 we don't have to change the standard.

24 In New York, there is no - - - certainly this
25 case shows that there is no generous policy of disclosure,

1 and certainly they don't disclose information that a
2 defendant might use or might wish to use.

3 So if you want to enforce the principles that
4 you've articulated, then you have to have a lower standard
5 and you have to review it in terms of whether or not there
6 is a reas - - - reasonable possibility of a result.

7 Let me give you one specific factual example of
8 why it's clearly obvious that this could have had an
9 impact. You have Abaya saying he knows Vilma's signature -
10 - - I mean, not Vil - - -

11 CHIEF JUDGE DIFIORE: Marcos.

12 MR. DERSHOWITZ: - - - Marcos' signature. The
13 prosecutor had argued throughout the case on the basis of
14 this authorization that had been given that we don't even
15 know whose signature that is. We don't know - - -

16 CHIEF JUDGE DIFIORE: But how does that undermine
17 the jury's confidence with respect to the ta - - - the
18 criminal tax fraud - - -

19 MR. DERSHOWITZ: Yes.

20 CHIEF JUDGE DIFIORE: - - - that he could
21 recognize her signature?

22 MR. DERSHOWITZ: Because what they argued was the
23 whole thing is a scam. It's a lot different to argue the
24 whole thing is a scam - - -

25 CHIEF JUDGE DIFIORE: Well, I'm focusing on the

1 criminal tax fraud and the offering the false instrument.

2 MR. DERSHOWITZ: If I can answer that indirectly
3 and I'll get back to my - - - what I was going to say.
4 This case is in a strange posture because all of the errors
5 that occurred at the trial, we argue this should be a
6 spillover. When there was a reversal on all of the other
7 charges, ninety-five percent of the case, Your Honors don't
8 have before you the issue of the spillover effect.

9 CHIEF JUDGE DIFIORE: Correct.

10 MR. DERSHOWITZ: And - - - and so it makes it
11 artificial in terms of what we're doing. And I've asked
12 that the court read over, for example, the closing
13 arguments where you have thirty-six objections to Fran
14 Hofinger's closing argument and - - - and being pulled up
15 to the bench and all these conversations, I suggest the
16 whole trial was not fair.

17 But going back to the - - - and it's hard for you
18 to evaluate that. I understand that. But the point I was
19 making with respect to - - - there's a big difference
20 between a notary not being - - - having the signatory
21 present when they sign it. But the argument that was being
22 made here was that this whole thing was a fraud and she had
23 no authorization to - - - to sell the painting. We don't
24 even know if it was her signature. And again, the defense
25 here was simple. On April 16th - - - as to the tax count,

1 on April 16th, on that day, did she have the intent to
2 defraud or did she - - - was she waiting for a
3 determination to be made as to what her tax liability would
4 be so that she could then file an accurate return. And
5 Abaya never conveyed that information over. The - - - what
6 Sherwood said to Abaya, Abaya never conveyed over to the
7 person who filed the return. So it ties in, Your Honor.
8 Thank you.

9 CHIEF JUDGE DIFIORE: Thank you, Mr. Dershowitz.
10 Counsel?

11 MR. LYNCH: Good afternoon. Thank you, Your
12 Honor, and may it please the court. I'm Garrett Lynch on
13 behalf of the District Attorney for New York County.

14 Now, while cases in - - -

15 JUDGE STEIN: Counsel, if we assume that - - -
16 that the prosecutor in summation can ask the jury to make
17 certain inferences from the evidence, would you agree that
18 here that wasn't made clear that that was what the
19 prosecutor was asking the jury to do?

20 MR. LYNCH: That the prosecutor, I think, was
21 drawing a very fair and logical inference. They're allowed
22 to draw that inference and make that argument. I don't
23 think there's a - - -

24 JUDGE STEIN: But - - - but I guess my question
25 is - - -

1 MR. LYNCH: Yeah.

2 JUDGE STEIN: - - - should - - - should the
3 prosecutor have said, you know, here are the facts - - -
4 here's what the testimony was, but because of this whole
5 arrangement, you can infer that she knew that - - - that
6 this information was presented to her or communicated?

7 MR. LYNCH: Sure. But I don't think there's a
8 requirement to break it down into its constituent
9 analytical parts. I mean, that obviously may be the - - -
10 a more fulsome explanation of what's going in the
11 prosecutor's mind. But at the time, he's making the
12 inference that they can draw. And the inference - - -

13 JUDGE STEIN: When - - - when defense counsel
14 objected to all of this, should - - - should the court have
15 made it clear to the jury that that's what was going on?

16 MR. LYNCH: Well, I'm not sure. I mean, I think
17 the court acted appropriately saying - - - at - - - at one
18 point, the court makes explicit, ladies and gentlemen,
19 obviously there's a disagreement between the prosecution
20 and the defense about what Mr. Sherwood said and the
21 inference to be drawn. It's up to you and your
22 recollection, and please consult the record.

23 And actually - - - and in fact, the de - - - the
24 prosecutor then reiterated that.

25 JUDGE GARCIA: Did they get the record during

1 deliberation?

2 MR. LYNCH: They actually told the jury, please
3 consult the record.

4 JUDGE GARCIA: Did they ask for this record
5 during deliberations?

6 MR. LYNCH: They did not. They did not. But
7 again, I think it's firmly rooted in the record and the
8 evidence that the - - -

9 JUDGE FEINMAN: Did the court give a charge - - -

10 MR. LYNCH: - - - inference was - - -

11 JUDGE FEINMAN: I'm sorry to interrupt.

12 MR. LYNCH: That's okay.

13 JUDGE FEINMAN: Did the court give a charge as
14 part of its final charge that in order to draw an inference
15 you first have to find the underlying fact as - - -
16 established beyond a reasonable doubt?

17 MR. LYNCH: I - - - I don't think there was a - - -
18 - a fair inference charge given to the - - - to the jury
19 explicitly. But of course the charge was given to them
20 explicitly that it is your recollection of the facts that
21 controls, and it is the record, and you can access the
22 record.

23 So again, I think that the - - - the inference
24 that was drawn was logical. It was - - - frankly, it was
25 the only inference that could be drawn.

1 And I do want to correct one thing that - - -
 2 that counsel did say, which is the - - - the - - - the one
 3 statement that the prosecutor made that wasn't corrected by
 4 the court, or the instruction did not follow was that
 5 Sherwood made it expressly clear on multiple occasions that
 6 she had to pay her taxes. That's unobjectionable. That's
 7 not saying that he told her, it's saying that's what he
 8 said. And that is - - - and I don't think that's an
 9 objectionable statement.

10 And - - - because again, the express arrangement,
 11 when all three parties sat down, was all communications
 12 with - - - with Ms. Bautista will flow through Mr. Abaya.
 13 And that was consistent with other testimony throughout the
 14 trial of people who were involved in this transaction.

15 The attorneys for the seller of the painting that
 16 Ms. Bautista sold, that was the express arrangement with
 17 them as well. Frank Lord testified - - -

18 JUDGE FAHEY: Can I - - -

19 MR. LYNCH: - - - that all communications - - -

20 JUDGE FAHEY: - - - can I - - -

21 MR. LYNCH: - - - went through Abaya.

22 JUDGE FAHEY: Excuse me. Now would be a good
 23 time maybe to turn you - - - so if that was their express
 24 arrangement, then let's turn to the Brady issue for a
 25 second, all right? The - - - the Appellate Division

1 analysis basically says that - - - it presumes that Abaya
2 would have taken the Fifth. You - - - you agree that's
3 what it says?

4 MR. LYNCH: Well, what I - - - well, I - - - I
5 would clarify, Your Honor. The Appellate Division said two
6 things.

7 JUDGE FAHEY: Go ahead.

8 MR. LYNCH: They said first, this is not Brady
9 material, period.

10 JUDGE FAHEY: Um-hum.

11 MR. LYNCH: Moreover, it is highly unlikely that
12 - - -

13 JUDGE FAHEY: Okay.

14 MR. LYNCH: - - - that - - - it is likely that he
15 would have invoked his - - -

16 JUDGE FAHEY: Let's stick with the presumption,
17 then.

18 MR. LYNCH: So - - - so I think they were - - -
19 they were finding two of the three Brady prongs deficient -
20 - -

21 JUDGE FAHEY: Yeah.

22 MR. LYNCH: - - - that one - - -

23 JUDGE FAHEY: Well, the court, did it - - -

24 MR. LYNCH: - - - it was not exculpatory evidence
25 - - -

1 JUDGE FAHEY: Excuse me.

2 MR. LYNCH: - - - two - - - three it wasn't
3 material.

4 JUDGE FAHEY: Excuse me. The Court did an in
5 camera review, so I suppose - - - I think they might have a
6 basis to say that. But this presumption of the invocation
7 of the Fifth, do you agree with that analysis?

8 MR. LYNCH: Your Honor, I do, because of this
9 court's opinion in Ennis, E-N-N-I-S, which makes it
10 abundantly clear that the Fifth Amendment rights of a
11 witness alone can be the basis for a finding that that
12 witness' statements are not material, because as the court
13 stated in Ennis, there's no way the defense ever could have
14 gotten those statements before the jury because they were
15 inadmissible.

16 And moreover, the - - - the witness had a Fifth
17 Amendment right that very likely would have been invoked.
18 And so in Ennis, the court found that that alone - - -

19 CHIEF JUDGE DIFIORE: So do we speculate in the -
20 - -

21 MR. LYNCH: - - - could be the basis for - - -

22 CHIEF JUDGE DIFIORE: - - - context of that Brady
23 analysis? Do we speculate as to - - -

24 MR. LYNCH: Well, it's interesting. In Ennis,
25 they didn't even speculate. They said, full stop, the fact

1 that this witness had a Fifth Amendment privilege alone is
2 enough for his statements to not be deemed material. But
3 here I think we're - - -

4 JUDGE FAHEY: Well, that's - - - that's - - - I
5 don't know. That's not my experience. My experience is
6 that usually you're given some proffer outside of the
7 presence of the jury to make some sort of a determination.

8 And beyond that, the Fifth Amendment right, it's
9 a precious right, but what's also a precious right is the
10 right to ask the question and have someone take the Fifth
11 Amendment. And that's an entirely different situation,
12 because that - - - as you say, this trial - - - as you both
13 said, this trial involved a number of moving parts, some of
14 which are not in front of us. But the effect of taking the
15 Fifth Amendment is - - - on a witness' credibility is
16 substantially undermined when you can't even ask him the
17 question.

18 MR. LYNCH: Well, Your - - - Your Honor, we're in
19 prong 3 of the Brady violation analysis.

20 JUDGE FAHEY: Yeah.

21 MR. LYNCH: Again, we would submit - - -

22 JUDGE FAHEY: And you say it's not even going to
23 be prong one?

24 MR. LYNCH: - - - that it's - - - yeah. It's - -
25 -

1 JUDGE FAHEY: Right.

2 MR. LYNCH: - - - it's done on prong one. Two
3 courts had the notes in front of them and deemed the notes
4 not to be exculpatory Brady material. Prong two - - -

5 JUDGE FAHEY: You know, it's - - -

6 MR. LYNCH: - - - wasn't - - -

7 JUDGE FAHEY: - - - to be honest, the Court of
8 Appeals, I'm not always concerned - - - obviously we're
9 concerned about the litigants in front of us, but also the
10 language itself and an effect it has on other cases. And -
11 - - and the language proposed here could have serious
12 effect in other areas. So the - - - it's not as simple as
13 that, is what I'm saying to you.

14 MR. LYNCH: Well, Your Honor, again, I think that
15 the Appellate - - - let's not confuse the Appellate
16 Division's language. Again, it said this was not Brady
17 material, full stop; moreover. So there was - - - it was
18 finding a failing on two prongs, not a single prong. So I
19 don't think necessarily this is the right case to invite
20 this analysis of whether - - - or revisiting the Ennis
21 decision of whether or not a witness' Fifth Amendment
22 privilege can be the basis for a materiality decision. I
23 don't think this is really the appropriate case for that,
24 also, because again, I think they cannot establish any of
25 the three prongs of - - - of - - - by - - - the Fuentes

1 four prongs or Strickland prongs.

2 And so again, I don't think this is the
3 appropriate case for that, because materiality has to
4 require - - - requires some level of speculation, right, of
5 what would the impact be if this information had been
6 disclosed? What would the impact have been?

7 And so I don't think it's inappropriate to, in
8 the basket of things and determining whether or not
9 prejudice flowed from this material not being given to the
10 defense, there - - - there is an element of speculation,
11 which includes, for instance, in this case specifically,
12 none of Abaya's statements were admissible. It was all
13 hearsay. It was all speculation, opinion. None of this
14 would ever get in front of a jury anyway.

15 Moreover, he was an unindicted co-conspirator
16 represented by counsel who had a Fifth Amendment right. So
17 that's - - - yeah, that's another issue that you put into
18 the basket of what is the possible impact of this evidence
19 on a jury potentially.

20 And again, in the - - - the larger context, the
21 potential impact on the tax crime - - -

22 CHIEF JUDGE DIFIORE: Was there - - - was there
23 anything in those notes that was based on Mr. Abaya's
24 personal knowledge besides perhaps the statement that he
25 recognized Mrs. Marcos' signature?

1 MR. LYNCH: I'm not even sure that was based on
2 his personal knowledge. That wasn't clear, Your Honor,
3 from the notes.

4 So I would submit that there was very little, if
5 anything in there, that was based on personal knowledge.
6 There was a lot of personal speculation and opinion. And
7 there was a lot of hearsay of what Ms. Bautista had told
8 him herself. So this couldn't even have led to any
9 admissible evidence.

10 But in - - - again, in the larger context,
11 getting back to the remaining tax counts, because there's a
12 lot of fascinating facts in this case about Marcos and so
13 forth, the - - - the fundamental issue here is this is a
14 defendant who sold a painting. She received thirty-two
15 million dollars for that sale, kept one hundred percent of
16 the proceeds. She - - - it was an entirely - - - she
17 orchestrated the entire sale. She ensured that it was
18 entirely secretive. And then when it come - - - came time
19 to pay her taxes, she approached her tax preparer, Romeo
20 Sebastian, did not tell him she sold this painting, did not
21 tell him she had received twenty-eight million dollars, did
22 not tell him she had spent twelve million of the twenty-
23 eight million dollars on herself and her family and her
24 friends, did not give him the essential records that would
25 have shown him that. She gave him some records of her bank

1 - - - of some bank accounts, but not the records of this
2 bank account.

3 She affirmatively withheld that from her tax
4 preparer. She reported 10,000 dollars in income from all
5 sources that year and paid the State of New York seventy-
6 eight dollars in tax. The - - - this Sherwood issue, we
7 maintain, is a red herring. They approached him as a ruse,
8 this whole - - - trying to cover up what they had done.
9 This was a sale on behalf of Marcos. They created this
10 very Rube Goldberg analysis for him to try to figure out
11 this factual scenario. But her scenario was really, really
12 simple. She received twenty-eight million dollars, spent
13 twelve, kept the rest, paid seventy-eight dollars in tax.

14 CHIEF JUDGE DIFIORE: Thank you, Mr. Lynch.

15 MR. LYNCH: You're welcome.

16 CHIEF JUDGE DIFIORE: Mr. Dershowitz, what about
17 your adversary's suggestion to us that Mrs. Bautista sat
18 with the tax preparer and failed to apprise him of the fact
19 that she had deposited in her account, she bought an
20 apartment, she bought - - - gave her cous - - - cousins or
21 brothers money?

22 MR. DERSHOWITZ: Again, the defense was - - - two
23 answers to that. I think - - - what - - - what I mentioned
24 before about justice - - - Judge Kaye is really applicable
25 here. They're looking at it now retroactively putting all

1 of the re - - - all of the burdens on us. If you look at
2 it the other way, take a look at what the defense was when
3 it was looking for some of that information.

4 The defense was a very simple one. She - - - she
5 acquired the funds. Sherwood says getting money doesn't
6 require tax payments. You don't pay on what you receive,
7 you pay on what you earn. That was what Sherwood testified
8 to. That's what he said half a dozen times during his
9 testimony.

10 So the fact that she received it - - - if she got
11 a gift, Imelda would have to pay the gift tax. She
12 wouldn't have to pay the gift tax. She doesn't have to pay
13 on whatever she received. If she got a big gift for
14 everything that occurred, she wouldn't have to pay taxes.
15 But again, we're talking about intent.

16 I need to go over just four very quick items - -
17 -

18 CHIEF JUDGE DIFIORE: Of course.

19 MR. DERSHOWITZ: - - - if I may? First, hearsay.
20 If you look at the vast majority of Brady cases, they deal
21 with notes by prosecutors and notes by investigators.
22 Those are all hearsay. So you have to disclose - - - of
23 course, the - - - they're confused. The trial court was
24 confused. They are presently confused. And we cite at
25 least one or two cases where it's clear that Brady is much

1 broader than admissible evidence. It's evidence that could
2 lead to other evidence.

3 JUDGE STEIN: But it's a question of what's in
4 those notes. And if what's in those notes is - - - is - -
5 -

6 MR. DERSHOWITZ: That's right.

7 JUDGE STEIN: - - - not based on personal
8 knowledge, then - - -

9 MR. DERSHOWITZ: But we don't know that. They
10 don't know that; we don't know that. That's the whole
11 point. You want to investigate it. You want to check it.
12 That's the whole point of giving the Brady material, so
13 that you can then take the next step.

14 CHIEF JUDGE DIFIORE: But when he was questioned
15 and he was asked for his source or basis of knowledge he
16 said, well, I assumed that, in several places. And I
17 looked through the notes.

18 MR. DERSHOWITZ: A few.

19 CHIEF JUDGE DIFIORE: I assumed this. I assumed
20 that.

21 MR. DERSHOWITZ: Right. And then the question is
22 why do you assume it? What knowledge did you have? You
23 follow it up. I mean, Your Honor, clearly - - - just as a
24 broad matter - - - the idea that only hearsay is Brady is
25 simply wrong and this court should come down with a clear

1 decision that says you can't justify not providing evidence
2 because you say it's hearsay. It's just flat out wrong.

3 Let me deal with the inferences for two seconds;
4 and that is, one, there's a big difference between a false
5 statement. And contrary to what the prosecutor said, the
6 two admitted statements, no objections, they came in: "The
7 limited advice he gave Bautista" - - - it says he, it
8 should be "she failed to follow, simple as that.
9 Objection. Overruled." Okay?

10 So you're saying on intent - - - I can't imagine
11 anything more harmful on intent than saying you went to
12 your lawyer; your lawyer told you what to do; and you
13 didn't do it. That's clear on intent, and there's no basis
14 for it.

15 The second later on again: "I submit to you what
16 I am saying that I was - - - it was communicated multiple
17 times, you must file taxes on your gain." It was not
18 communicated multiple times that you have to pay your
19 taxes. That's just a false statement. And it's a false
20 statement on the core - - - the only issue that was
21 litigated. And you have a right to litigate it. And to
22 just simply say, as they say, oh, there was a big scam
23 here, therefore she obviously was guilty on this, just
24 shows the carryover effect, the spillover effect from
25 everything that was done in this case.

1 If they had tried it separately just as a tax
2 case, I wonder whether the result would have been anything
3 like that?

4 I just want one more point, and that is with
5 respect to the Fifth Amendment. Remember, Abaya wasn't
6 indicted. We don't know why he wasn't indicted. Who said
7 that the - - - you know, frequently a co-defendant does
8 testify in a case. There's no logical reason to assume as
9 a practitioner for over fifty years, that a co-defendant is
10 always going to come and tell me everything that he knows.
11 That doesn't happen in the real world.

12 So you know, Abaya may well have - - - I've seen
13 a hundred cases where - - - where a co-conspirator
14 testifies in a case. Maybe he gets immunity. They could
15 have given him immunity if they wanted. I don't know if
16 they would have given immunity or they wouldn't have given
17 immunity.

18 If he is exonerated, they didn't want to indict
19 him, they thought - - - they named him as a coconspirator
20 and didn't indict him, maybe they would have given him
21 immunity. That would have solved the problem. Thank you,
22 Your Honor.

23 CHIEF JUDGE DIFIORE: Thank you, counsel.

24 (Court is adjourned)

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

I, Penina Wolicki, certify that the foregoing transcript of proceedings in the Court of Appeals of The People of the State of New York v. Vilma Bautista, No. 101 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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