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COURT OF APPEALS
STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

No. 21

JOSE DELORBE,

Appellant.

20 Eagle Street
Albany, New York
February 13, 2020

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 next appeal on this
2 afternoon's calendar is appeal number 21, the People of the
3 State of New York v. Jose Delorbe.

4 Good afternoon, counsel.

5 MS. NICHINSKY: Good afternoon. Excuse me. My
6 name is Robin Nichinsky. I represent appellant, Jose
7 Delorbe. I'd like to request two minutes for rebuttal
8 time.

9 CHIEF JUDGE DIFIORE: Of course.

10 MS. NICHINSKY: Thank you very much.

11 So this case asks whether the DA handing an
12 immigration consequences form to a defendant at
13 arraignment, with no record evidence before the court that
14 its contents were ever conveyed to him, imposes a
15 preservation requirement when the court fails to give a
16 Peque warning.

17 JUDGE FEINMAN: Well, wait a minute. Can I just
18 stop you right there? When you say there's no record
19 support that it was ever conveyed to him - - -

20 MS. NICHINSKY: Correct, that its contents - - -

21 JUDGE FEINMAN: - - - I thought his counsel - - -

22 MS. NICHINSKY: - - - were ever conveyed.

23 JUDGE FEINMAN: - - - handed it to him and says
24 right on the record: I'm handing it to him.

25 MS. NICHINSKY: Yes, Your Honor. A piece of



1 paper was handed to my client, an immigration consequences
2 form was handed, but there's no record evidence that the
3 contents of that form were ever conveyed to him. We submit
4 that this is insufficient - - -

5 JUDGE FEINMAN: Well, I don't know what you mean
6 by "conveyed" because - - -

7 MS. NICHINSKY: - - - notice.

8 JUDGE FEINMAN: - - - if I give you a piece of
9 paper that says something, it's conveyed. Whether you
10 choose to read it - - -

11 MS. NICHINSKY: Well, Your - - -

12 JUDGE FEINMAN: - - - is a different story.

13 MS. NICHINSKY: Your Honor, I think you have to
14 look at this in the context of how it occurred. It
15 occurred at the arraignment. This form was handed over to
16 the defendant, so the indictment was also given to counsel.
17 The defendant had to plead; he pled not guilty.

18 JUDGE STEIN: But he didn't plead the next day or
19 that day or - - -

20 MS. NICHINSKY: No.

21 JUDGE STEIN: - - - even the following week. He
22 pled seven months later, right? So - - -

23 MS. NICHINSKY: Yes, Your Honor.

24 JUDGE STEIN: So if there - - - even if there was
25 a lot going on, there - - - you would agree that there was



1 an opportunity for him to ask his lawyer what does this
2 mean, what is this about, or ask the - - - the judge or - -
3 - or certainly by the time of the plea hearing to say you
4 know - - -

5 MS. NICHINSKY: No, Your Honor, I would not
6 agree, and the reason is because the circumstances under
7 which this was handed to him did not give him a reasonable
8 opportunity to even know what this was. He wasn't given
9 time to read it. There was no time given in open court.
10 He didn't even acknowledge he got it. He wasn't asked to
11 sign it. It wasn't discussed whatsoever.

12 My client has learning disabilities in reading.
13 We don't know if he did read it. It didn't - - - he
14 certainly didn't read it in court.

15 JUDGE RIVERA: Did the prosecutor in open court
16 announce that he was serving and filing a copy of the
17 immigration consequences and the indictment?

18 MS. NICHINSKY: Immigration consequences - - -

19 JUDGE RIVERA: And the indictment.

20 MS. NICHINSKY: - - - and the indictment. He - -
21 - the DA handed the two forms to the lawyer.

22 JUDGE RIVERA: And announced in open court that
23 that's what the DA - - -

24 MS. NICHINSKY: He said - - -

25 JUDGE RIVERA: - - - ADA was doing?



1 MS. NICHINSKY: Yes. He said that's what I'm
2 handing, and then the - - - the lawyer handed it to - - -
3 handed the immigration - - -

4 JUDGE FAHEY: As I understand - - -

5 MS. NICHINSKY: - - - to the defendant.

6 JUDGE FAHEY: Go ahead, finish.

7 MS. NICHINSKY: And the defendant then pled not
8 guilty. Discovery was discussed, motion practice was
9 discussed, a plea had been made and rejected. The client -
10 - - he was not asked to acknowledge it. He wasn't given
11 time to read it. As I said, he has disabilities, and he
12 was then - - - the - - - there are three - - -

13 JUDGE STEIN: In this case - - -

14 MS. NICHINSKY: - - - pages of minutes. All this
15 occurred in a three-page span, and then he was sent back
16 into the pen, so we don't even know - - -

17 JUDGE FAHEY: Let me ask you this.

18 MS. NICHINSKY: - - - if he took it with him.

19 JUDGE STEIN: In this case he eventually brings a
20 440 motion, right? Does he ever say I didn't have an
21 opportunity to ask my lawyer, I couldn't understand it when
22 I read it? Did he ever say anything like that in these - -
23 -

24 MS. NICHINSKY: The form never came up again,
25 Your Honor. In that seven-and-a-half months, there were



1 several adjournments. Nobody talked about the form.

2 JUDGE GARCIA: No, but I think the - - -

3 JUDGE STEIN: But he - - -

4 JUDGE GARCIA: - - - judge's question is: In his
5 440 papers, did he raise this issue?

6 MS. NICHINSKY: No, he didn't mention the form.
7 Our - - - the - - - the circumstances under which he got
8 this form are almost guaranteed to be circumstances where
9 he's not even going to realize it.

10 JUDGE STEIN: But doesn't he have an obligation
11 to bring that forth in his 440 motion?

12 MS. NICHINSKY: Not if he wasn't really aware of
13 it, not if he never read it.

14 JUDGE STEIN: Well, he - - - he - - -

15 JUDGE RIVERA: Isn't it on his direct appeal?

16 MS. NICHINSKY: Excuse me, Your Honor?

17 JUDGE RIVERA: Are you raising it on a direct
18 appeal?

19 MS. NICHINSKY: This is the direct appeal.

20 JUDGE RIVERA: Right, but do you have to raise it
21 in both?

22 MS. NICHINSKY: This is the direct appeal and
23 also the appeal of his 440 motion.

24 JUDGE GARCIA: But on the direct appeal - - -
25 you're saying he has a learning disability. Where is that



1 in the - - - in the record?

2 MS. NICHINSKY: It's in the pre-sentence report,
3 Your Honor, which is part of the record. He was then put
4 back into the pens. We don't know if he brought this form
5 with him. And nothing was said about it as his plea.
6 Nothing was said about it at his sentence.

7 JUDGE FAHEY: Can I take you back a second here,
8 all right, if you're done answering Judge Garcia's
9 question. The way I understood your argument is - - - is
10 that it's a two-fold argument. First it's a generic notice
11 of immigration that was served at arraignment, and it's - -
12 - and it - - - it said that - - - that his [Peck'-you]
13 claim - - - is that how you say it?

14 JUDGE RIVERA: [Peck-kay'].

15 JUDGE FAHEY: [Peck-kay']? The Peque claim
16 wasn't adequately preserved. Secondly, there was an error
17 - - - you allege there was an error on the denial of the
18 440 motion, per Padilla, without a hearing and without
19 assigning counsel to represent him on the 440.

20 But the core of this, though, is that the
21 notification of your rights must be done by a judge. And
22 is there anything in the record at all that shows that the
23 court discussed the form on the record, ever, with the
24 defendant, ever discussed whether he read or understood it?
25 Was anything said by the court at all in reference to this



1 to establish the necessary knowledge, intelligent, and
2 voluntariness of any action that he took?

3 MS. NICHINSKY: Not at all, Your Honor.

4 JUDGE FAHEY: All right. So that's - - -

5 MS. NICHINSKY: My - - - my - - -

6 JUDGE FAHEY: It's what the court did here, not
7 what he did. Because what he did here was clearly
8 insufficient because he didn't preserve it. So there's not
9 much argument about that. The question is what did the
10 court do, right? Isn't that what we're talking about here?

11 MS. NICHINSKY: Well, we - - - we submit that the
12 court has a responsibility, under Peque, to make sure that
13 a defendant knows that he will be deported. But we lost
14 this in the Appellate Division on the preservation issue.

15 And under Williams, which is relied upon by my -
16 - - my adversary, that Williams, it - - - as the - - - the
17 reason why it's not preserved here, Williams was a
18 completely different situation. The issue came up there
19 before the court and was discussed in open court - - - it
20 was the sentencing issue - - - four times. Or - - - or the
21 defendant appeared four times before the court.

22 JUDGE GARCIA: Counsel, just to go - - -

23 MS. NICHINSKY: And - - -

24 JUDGE GARCIA: - - - to go to Judge Fahey's
25 point, yes, Peque says what it says about the judge's



1 obligation, but Peque also imposes the standard
2 preservation requirement, right, and Peque says that if the
3 defendant had no practical opportunity to object, and isn't
4 this case really about does this form create the practical
5 opportunity to object? So it's not - - - I don't think
6 there's any dispute that the judge didn't do this here, the
7 Peque - - -

8 MS. NICHINSKY: Correct.

9 JUDGE GARCIA: - - - admonition. But isn't this
10 case - - - does the form create a practical opportunity to
11 object? Because Peque itself, I think the Peque case - - -
12 and there are two, I think, in there, but Peque lost on
13 preservation even - - -

14 MS. NICHINSKY: Yes, Mr. Peque himself - - -

15 JUDGE GARCIA: Yeah.

16 MS. NICHINSKY: - - - was totally aware at the
17 sentencing.

18 JUDGE GARCIA: Right.

19 MS. NICHINSKY: He told the court - - -

20 JUDGE GARCIA: And this is different - - -

21 MS. NICHINSKY: - - - deport me sooner.

22 JUDGE GARCIA: Right, this is - - -

23 MS. NICHINSKY: He clearly knew.

24 JUDGE GARCIA: This is a very - - - it's a
25 different case.



1 MS. NICHINSKY: Very different case.

2 JUDGE GARCIA: So, you know, that's why we're
3 here. So what's your argument that he gets this form in
4 Spanish and in English, in open court, there's a record
5 that he certainly is served with it. I think, as Judge
6 Rivera said, there is a record of the prosecutor saying I
7 served him with the indictment and this document. So why
8 does not that create this opportunity to object?

9 MS. NICHINSKY: Your Honor, we need evidence. In
10 order to impose this preservation requirement, you need a
11 practical opportunity, a reasonable opportunity, however
12 you want to describe it, for the defendant to be alerted to
13 the fact that this important - - - that he - - - that this
14 important issue is there.

15 JUDGE FEINMAN: Would it have been enough if they
16 said we're asking the defendant to sign this form?

17 MS. NICHINSKY: He was not asked to sign the
18 form.

19 JUDGE FEINMAN: I know that, but I'm asking would
20 that be enough.

21 MS. NICHINSKY: That certainly - - - that - - -
22 that might be enough. I mean, we - - - we - - - what we
23 say is that because of the devastating nature of
24 deportation, which Peque recognized, and the uniquely
25 devastating nature, and - - - and Judge Stein said - - -



1 JUDGE FEINMAN: I understand your position - - -

2 MS. NICHINSKY: - - - as much in Suazo, as well,
3 the loss is so great as to be unquantifiable, you really
4 have to have notice when you're asked - - - when you're
5 trying to say that you'll have no preservation.

6 JUDGE FEINMAN: Are you requiring an admission of
7 knowledge by the defendant in order to require
8 preservation?

9 MS. NICHINSKY: Well, Your Honor, we think,
10 because of the unique nature of - - - of the devastation of
11 deportation, that actual knowledge should be required, but
12 we understand that - - - but - - - but even under the
13 Williams standard, which is the practical opportunity here,
14 where a defendant, in a busy arraignment, is given some
15 boilerplate form seven-and-a-half months before his plea -
16 - -

17 JUDGE RIVERA: Well, then does it matter that the
18 document is coming from the prosecutor and that the
19 document is coming with an indictment? One is supposed to
20 alert you to your rights, the other is charging you with
21 something. So in that way perhaps you're not aware that
22 these are different things, but - - -

23 MS. NICHINSKY: Right, there was so much going
24 on, Your Honor. He was probably completely overwhelmed,
25 and there was nothing on the record in front of the judge,



1 and it should be in front of the judge. This is an
2 obligation of the judge. Peque put this obligation - - -

3 JUDGE STEIN: So where - - -

4 MS. NICHINSKY: - - - on the judge to assure - -
5 -

6 JUDGE RIVERA: But what's the point of handing it
7 to lawyer, though? They've got defense counsel who has the
8 form too, right?

9 MS. NICHINSKY: I don't know. I think he's just
10 handing it - - - handing over all the papers. There was a
11 - - - a lot of stuff going on. I - - - I don't even know
12 if the defendant was paying attention.

13 JUDGE RIVERA: So - - -

14 MS. NICHINSKY: He didn't acknowledge anything.

15 JUDGE RIVERA: So your position is there's not an
16 obligation, on the defendant's part, to inquire of the
17 lawyer since the lawyer is handing these documents over to
18 him?

19 MS. NICHINSKY: No, Your Honor. There shouldn't
20 be a responsibility on the defendant in this context. I
21 mean, Padilla talked about how these defendants are the
22 least able to represent themselves. Under the Padilla
23 claim then, you know, maybe we're talking about what the
24 lawyer may have told him, and we can talk about that at a
25 prejudice hearing. But we're talking about preservation



1 requirement, and we're talking about reasonable - - -

2 JUDGE STEIN: Would this expand - - -

3 MS. NICHINSKY: - - - at the least, reasonable
4 notice.

5 JUDGE STEIN: Would this expand how we have
6 looked at reasonable opportunity to raise in the past? It
7 seems to me that - - - maybe I don't know every case we've
8 - - - we've addressed that, but at least most of the cases
9 refer to a period of time. So in other words, you're not
10 being indicted or you're not being, you know, arraigned and
11 then pleading and - - - and being sentenced right away.
12 That's - - - you know, that's the - - -

13 MS. NICHINSKY: Your Honor - - -

14 JUDGE STEIN: - - - the easiest case. But - - -
15 and now - - - but now you're talking about something a
16 little bit different I think, and - - - well, I think a lot
17 different, actually, so - - -

18 MS. NICHINSKY: Your Honor, I would argue that
19 this would be the expansion. Every single case that was
20 cited in our briefs, the discussion of what the issue was
21 was before the court. It happened at the plea. It
22 happened at the sentence. In some instances it happened
23 before then. This is the only case where a piece of paper
24 is given seven-and-a-half months before anything happens.
25 He's not thinking about his plea, his trial, or anything.



1 He's given the indictment. The lawyer's probably showing
2 him the indictment, not the form, and saying are you
3 pleading not guilty. This is not sufficient notice. This
4 notice would be much less than any of the other cases cited
5 in these briefs.

6 CHIEF JUDGE DIFIORE: Thank you, counsel.

7 MS. NICHINSKY: I think this is where we would be
8 having - - -

9 CHIEF JUDGE DIFIORE: Thank you.

10 MS. NICHINSKY: - - - the expansion. Thank you.

11 CHIEF JUDGE DIFIORE: Counsel?

12 MR. MICHAELS: May it please the court.
13 Alexander Michaels on behalf of the People.

14 At the outset, on the subject of the practical
15 opportunity, I just want to stress that the entire premise
16 of both defendant's Peque claim and his Padilla claim is
17 that the issue of deportation was of paramount importance
18 to him. So when, at his arraignment on his - - - on the
19 indictment in this case, he is served, on the record, in
20 open court, with the notice of immigration consequences,
21 that's not something that he's going to ignore. That's not
22 something that he's going to forget about.

23 JUDGE FAHEY: I agree with you about that. What
24 I'm wondering, though, is does the court have an
25 independent obligation to ascertain that the plea is - - -



1 is knowing, voluntary, and intelligent? And - - - and can
2 that only be fulfilled by the court, or can it be fulfilled
3 by the exchange of written forms?

4 MR. MICHAELS: Well, it's important to
5 distinguish between the merits - - -

6 JUDGE FAHEY: But I need you to answer my
7 question.

8 MR. MICHAELS: Yes, the court absolutely has that
9 independent obligation.

10 JUDGE FAHEY: All right. So did that happen
11 here?

12 MR. MICHAELS: No, the court did not issue a
13 Peque warning in this case, and we're not suggesting that
14 it was.

15 JUDGE FAHEY: So let's take it a - - - a step
16 further. Could you hand a series of forms to a defendant
17 at an arraignment and say we fulfilled our - - - our notice
18 requirement on a number of different obligations at
19 arraignment, and is that good enough then the court doesn't
20 have to engage at all in independently verifying at the
21 plea that he understands the effects of his action?

22 MR. MICHAELS: Well, the only form that was
23 handed to him at his arraignment in this indictment was - -
24 -

25 JUDGE FAHEY: No, but do you understand - - -



1 MR. MICHAELS: - - - this particular one.

2 JUDGE FAHEY: - - - the reason I ask this is
3 because the logic of what you're saying is that defendant
4 comes up, been charged with a crime, maybe he's bilingual,
5 maybe he's not; maybe he's just Spanish-speaking in this
6 circumstance. He's given a form that has both Spanish and
7 English on it. But he's given a series of forms, telling
8 him what rights he has, whether or not he can plead guilty,
9 whether or not he can call witnesses, a series of those
10 things. Doesn't the court still have an independent
11 obligation to verify, at a plea, later down the road, that
12 he understands those rights before he takes the plea?

13 MR. MICHAELS: Yes, but the preservation
14 requirement - - -

15 JUDGE FAHEY: And now aren't we then - - -

16 MR. MICHAELS: - - - would still apply.

17 JUDGE FAHEY: I'm sorry; I didn't mean to
18 interrupt you. Go ahead.

19 MR. MICHAELS: But the preservation requirement
20 can still apply in the - - -

21 JUDGE FAHEY: I agree with that.

22 MR. MICHAELS: - - - in the hypothetical that
23 you're positing.

24 JUDGE FAHEY: I agree with that. There are only
25 some where it doesn't; you're totally correct about that.



1 So does the court then here have an independent obligation
2 to make sure that that person understands this very, very
3 serious consequence, particularly after our Suazo decision?

4 MR. MICHAELS: Well, yes, the court has an
5 independent obligation under Peque - - -

6 JUDGE FAHEY: So let me ask this.

7 MR. MICHAELS: - - - to deliver a Peque warning.

8 JUDGE FAHEY: So if it does, under - - - under
9 Peque, how is this an expansion? It just seems to me like
10 more of an error than an expansion. It just seems it's
11 kind of a - - - you know, the - - - the failure to preserve
12 it here because of the procedure that was followed, this
13 isn't as much a legal problem as an error that was made in
14 the process.

15 MR. MICHAELS: Well, if I understand your - - -
16 if I understand what you're saying correctly, it's not - -
17 - I'm not sure what you're talking about as an expansion -
18 - -

19 JUDGE FAHEY: I don't view it as a grand
20 expansion is what I'm saying, in terms of rights for
21 defendants. I view it more - - -

22 MR. MICHAELS: Well, it would be an expansion in
23 the sense that this court said in Peque and in Pastor,
24 subsequently, that the preservation requirement applies to
25 Peque claims. And then the crucial consideration for that



1 purpose is whether the defendant had a practical
2 opportunity to raise the issue below.

3 JUDGE WILSON: And so let me go to that and to
4 where you started your argument, which was with the point
5 that this defendant who has said immigration consequence is
6 tremendously important to me, he gets a form entitled,
7 presumably, "immigration consequences", and would certainly
8 be expected to read that form.

9 So in Peque, the case makes a distinction between
10 Mr. Peque's case and Mr. Diaz's case that seems to me to be
11 based on knowledge. Did they know the deport - - - and
12 Peque clearly did; Diaz didn't.

13 As I understood the beginning of your argument,
14 you were really saying we can use the form here as evidence
15 that Mr. Delorbe knew.

16 MR. MICHAELS: Yes. Our position is that - - -

17 JUDGE WILSON: You're not saying he doesn't have
18 to know. You're saying there's record evidence from which
19 we can infer that he did know.

20 MR. MICHAELS: Well, we're saying both of those
21 things. We're - - - we're saying that there is record
22 evidence from which we can clearly infer that he did know.

23 JUDGE WILSON: But he doesn't have to know?

24 MR. MICHAELS: We're also saying that the crucial
25 issue, and this is what's spelled out in the Williams



1 decision, is that a practical opportunity to learn about
2 the error is all that's required for preservation purposes.

3 JUDGE WILSON: So you're saying if he has - - -
4 if it's possible for him to have learned something but it's
5 clear on the record he never learned about the deportation
6 consequences, he still has to preserve?

7 MR. MICHAELS: If it were clear on the record - -
8 -

9 JUDGE WILSON: So let me ask it a different way.

10 MR. MICHAELS: - - - that he never learned about
11 the - - -

12 JUDGE WILSON: Let me ask it a different way. If
13 - - -

14 MR. MICHAELS: Sorry.

15 JUDGE WILSON: If - - - if he absolutely did not
16 know about the deportation consequences, did he have a
17 practical opportunity to withdraw his plea?

18 MR. MICHAELS: Not necessarily, and the logic in
19 Williams is actually informative on this subject because,
20 in Williams, the court was saying that he had a practical
21 opportunity to learn, and he in fact appeared to have
22 learned it; it was just that there's no opportunity on the
23 record for that actual knowledge to come out.

24 The court was saying that actual knowledge almost
25 never shows up on the record. And that was a very astute



1 observation in that case. So in a sense, it's whether the
2 court can infer from the record that this defendant
3 actually knew, but of course the court can't look for
4 concrete evidence of actual knowledge because the record
5 normally doesn't have that. So instead, what the court
6 needs to rely on is at least the practical opportunity to
7 learn about the issue.

8 And to return to Judge Fahey's hypothetical, I
9 would note that the service of many different notices on a
10 particular defendant would diminish the practical
11 opportunity for that defendant. If - - - if a defendant
12 showed up at an arraignment and the People served the penal
13 law and the CPL on him, of course that defendant would not
14 be in a position to understand all of the rights that he is
15 later going to be able to assert in one way or another.
16 But that's not what happened - - -

17 JUDGE FAHEY: You understand that to keep - - -

18 JUDGE FEINMAN: Before all of this, the only
19 typical notice that was served on a defendant was a request
20 for alibi witnesses.

21 MR. MICHAELS: Sorry, I'm not sure I heard that.

22 JUDGE FEINMAN: I mean, the only other notice
23 that was typically served at arraignment on the defendant,
24 back in the day when the immigration consequences were
25 still considered collateral, was a request for alibi



1 witnesses. What other notices are we talking about?

2 MR. MICHAELS: The record shows that in this case

3 - - -

4 JUDGE FAHEY: No, I think you were talking - - -

5 MR. MICHAELS: - - - there was only one document.

6 JUDGE FAHEY: You were talking about the

7 hypothetical that I put to you - - -

8 MR. MICHAELS: Right, right, I was just talking -

9 - -

10 JUDGE FAHEY: - - - not what was or - - -

11 MR. MICHAELS: - - - about that hypothetical

12 where there could be a notice - - - there could be

13 additional notices.

14 JUDGE STEIN: Speaking of "back in the day", this
15 case actually was pre-Peque, right?

16 MR. MICHAELS: Absolutely, yes.

17 JUDGE STEIN: Okay. And it seems like it's been
18 awhile that this has been percolating before it got up
19 here. Do you have any idea how many pre-Peque cases are
20 still - - - still in the First Department?

21 MR. MICHAELS: My sense is that there are not
22 many of them at this point. I - - - I think one of the
23 reasons this one took so long is because it's a
24 consolidated appeal involving the Padilla issue as well,
25 and of course it's getting to this court - - -



1 JUDGE STEIN: And of course that's part of the
2 problem, because the court didn't know that it was - - - it
3 had the obligation to - - - to inform the defendant, right?

4 MR. MICHAELS: Absolutely, and I want to make - -
5 -

6 JUDGE RIVERA: Well, the statute existed,
7 correct?

8 MR. MICHAELS: The statute did exist.

9 JUDGE RIVERA: The statute, yes. So the judge
10 knew.

11 MR. MICHAELS: Um-hum. But the Peque decision,
12 which obviously did change analysis about - - -

13 JUDGE RIVERA: No, I appreciate that. That's
14 absolutely true.

15 MR. MICHAELS: So yes - - -

16 JUDGE RIVERA: Let me ask you this. Is there
17 anything on the record to clarify whether or not he took
18 the form with him?

19 MR. MICHAELS: The record does not conclusively
20 indicate one way or the other.

21 JUDGE RIVERA: So let me give you this
22 hypothetical. So he gets the form, he's then returning to
23 the pens, as is described, but the foam - - - form is
24 actually taken from him.

25 MR. MICHAELS: Well, I think there's - - -



1 JUDGE RIVERA: And he doesn't have the form.

2 MR. MICHAELS: There's no reason to assume that
3 the form would be taken from him. Counsel handed it to
4 him.

5 JUDGE RIVERA: No, this is my hypothetical.

6 MR. MICHAELS: Um-hum.

7 JUDGE RIVERA: This is my hypothetical.

8 MR. MICHAELS: Um-hum. Well, if he had - - -
9 again, assuming the paramount importance of the possibility
10 of deportation here, he receives this form that immediately
11 lays out the possibility of deportation in this case. If
12 he then loses track of the form, for whatever reason, he's
13 not going to forget about it. He's not going to ignore it.
14 He's going to talk to his lawyer about, and if necessary,
15 he's going to raise it with the court below.

16 JUDGE RIVERA: So then it sounds to me like your
17 rule, taken to its logical extension, means that even
18 without a form, if the prosecutor had merely, at
19 arraignment, said: And there may be immigration
20 consequences; I'm just putting that on the record, that
21 that would have been enough. Is that your rule?

22 MR. MICHAELS: That - - - it would depend on the
23 facts of the case.

24 JUDGE RIVERA: That's the facts of the case. I
25 just gave it to you. Is that enough under your rule?



1 MR. MICHAELS: If that's the only fact, then yes,
2 the defendant would have a practical opportunity to raise
3 the issue.

4 JUDGE RIVERA: So the form is not even important
5 in this case?

6 MR. MICHAELS: Well, in this case it is because
7 it's the only - - -

8 JUDGE RIVERA: No, because I just asked you about
9 your rule, and here indeed the prosecutor did say I'm
10 serving a copy of the immigration consequences. So you've
11 got some language on the record that, under your rule,
12 would mean that the defendant has to go, ah-hah, let me ask
13 about that.

14 MR. MICHAELS: Well, the notice spells out more
15 clearly what those consequences are and thus puts him a
16 better position to raise any Peque concerns below.

17 JUDGE RIVERA: Is your position that it depends
18 on the content of the notice then, that you have to give
19 enough information about the potential consequences?

20 MR. MICHAELS: Well, it - - - yes, it definitely
21 needs to provide enough to give the defendant a practical
22 opportunity to raise the issue below.

23 I just want to point out also that in this case
24 there's an entirely separate basis for concluding that this
25 defendant was aware of the possibility of deportation,



1 which was his 364-day sentence on his prior - - - on his
2 predicate felony conviction.

3 Now, the only reason to reach a 364-day sentence
4 is if it's specifically tailored to minimize the
5 possibility of deportation. That's exactly what happened
6 in defendant's predicate violent felony conviction. He
7 must have known, going through those proceedings, that they
8 were targeting it a 364-day sentence precisely because of
9 the possibility of deportation. So in fact, before he even
10 received the notice in this case, it's abundantly clear
11 that he was aware - - -

12 JUDGE STEIN: Didn't he also make an inconsistent
13 argument that, A, he didn't know about the immigr - - -
14 that there were immigration consequences, and on the other
15 hand, he also said that what he was really worried about
16 was getting back in?

17 MR. MICHAELS: Discretionary cancellation of
18 removal.

19 JUDGE STEIN: Discretionary cancellation of
20 removal, yeah.

21 MR. MICHAELS: Yes, absolutely. That was in his
22 motion papers, in the 440 motion papers. And yes, those
23 two assertions are flatly at odds with one another, and
24 it's an example of how he really has no hope of showing
25 prejudice in a case like this, again, because he clearly



1 already knew of the possibility of deportation, and for
2 various other reasons, including that he received a very
3 favorable plea offer.

4 Unless the court has any further questions, I'll
5 ask that you affirm.

6 CHIEF JUDGE DIFIORE: Thank you, counsel.

7 Counsel?

8 MS. NICHINSKY: Your Honor, we are saying that
9 the court has - - - has an obligation to ensure not only
10 that the client knows about deportation but that - - - that
11 there's sufficient notice to require preservation as well,
12 and that it should be on the record, it should be under the
13 court's supervision so the court knows. Here none of that
14 happened; there was no discussion.

15 And in terms of his prior case, we don't know
16 what happened with the prior case. We don't know if
17 immigration was discussed with him. That's exactly why you
18 would want a prejudice hearing.

19 And in terms of the - - - the - - - and Williams,
20 as I said, was very distinct, four times discussed in open
21 court. Nothing like this.

22 The 440, there were some inconsistent statements.
23 We're talking about a detained pro se defendant. He asked
24 for an attorney; he should have gotten an attorney. The
25 Court actually didn't rule on the deficiency prong. It



1 only erroneously ruled on the - - - on the prejudice prong
2 where it found - - - where it found that one fingerprint
3 was enough to preclude any reasonable person from going to
4 trial.

5 Judge Fahey, I watched the argument yesterday. I
6 know what you said about fingerprint evidence.

7 The Court failed to mention in that case that - -
8 - that somebody else had been identified as having
9 committed the crime. That's in the appendix in the - - -
10 in the - - - the - - - the court appearance - - - one of
11 the court appearances in between. Our client was never
12 identified. And he was arrested far away from this crime,
13 and he asserted his innocence. There was no confession.
14 The pre-sentence report was also part of the record on
15 appeal. And on the 440, the court didn't mention that as
16 well.

17 So on the 440, we did allege - - - he did allege
18 sufficient facts. Any inconsistencies could be due to the
19 fact that he's got learning disabilities, doesn't express
20 himself well. There should have been a hearing on that,
21 but that deficiency prong was not decided. So I just
22 wanted to make that point.

23 And I want to make a really important point. If
24 this court rules today that - - - against us and says that
25 this piece of paper is sufficient to - - - to give rise to



1 some kind - - - to a preservation requirement, tomorrow
2 every DA's office across New York State is going to be
3 handing out this form at arraignment, and Peque will
4 effectively be gone.

5 JUDGE FEINMAN: And why is that a bad thing?

6 MS. NICHINSKY: Well, Your Honor, there'll be no
7 more consequences when the court fails to give a Peque
8 warning.

9 JUDGE GARCIA: Do you think a judge would look at
10 that and say, you know, the guy got the form, and I know
11 I'm not going to get reversed if I don't do this, or are we
12 to assume that our trial judges, after Peque, are thinking
13 that way?

14 MS. NICHINSKY: No, Your Honor, they're not
15 thinking that way.

16 JUDGE GARCIA: So then it really would be kind of
17 to deter a judge from doing that, right? That would be
18 almost like a suppression ruling for us.

19 MS. NICHINSKY: Well, Your Honor, though, in CPL
20 220.57, when that was in effect, because there was no - - -
21 no teeth to that, that's part of what gave rise to Peque,
22 when this court really emphasized the severity of this
23 consequence, the fundamental nature of this.

24 JUDGE GARCIA: And we imposed on these judges
25 this obligation which I think we have to assume. This is a



1 pre-Peque case. It wasn't that that happened here,
2 although there was a statute - - -

3 MS. NICHINSKY: That did not happen here, Your
4 Honor.

5 JUDGE GARCIA: - - - but we hadn't made that
6 statement that you're quoting. And so what we would be
7 doing, in essence, is creating almost a per se rule that
8 the judge has to do this and if not, the punishment, the
9 punitive result of that, even if there was an opportunity
10 to object, would be that you undo the plea.

11 MS. NICHINSKY: Not exactly, Your Honor. What
12 we're saying is that if you're going to do something that's
13 going to result in such a severe penalty to the defendant,
14 because all defendants will then have to preserve this, if
15 you're going to do this, then you should ensure, on the
16 record, which would be before the court, that the person
17 has reasonable notice, practical notice that this is what
18 he's being told.

19 JUDGE GARCIA: And absent that, it's error?

20 MS. NICHINSKY: And that it didn't happen in this
21 case.

22 CHIEF JUDGE DIFIORE: Thank you, counsel.

23 MS. NICHINSKY: Thank you.

24 (Court is adjourned)

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

I, Sharona Shapiro, certify that the foregoing transcript of proceedings in the court of Appeals of The People of the State of New York v. Jose Delorbe, No. 21, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Sharona Shapiro

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