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COURT OF APPEALS
STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

NO. 18

MARQUESE SCOTT,

Appellant.

20 Eagle Street
Albany, New York
February 11, 2025

Before:

CHIEF JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE MADELINE SINGAS
ASSOCIATE JUDGE ANTHONY CANNATARO
ASSOCIATE JUDGE SHIRLEY TROUTMAN
ASSOCIATE JUDGE CAITLIN J. HALLIGAN

Appearances:

NICHOLAS P. DIFONZO, ESQ.
LEGAL AID BUREAU OF BUFFALO, INC.
Attorney for Appellant
290 Main Street
Buffalo, NY 14202

MICHAEL J. HILLERY, ESQ.
ERIE COUNTY DISTRICT ATTORNEY'S OFFICE
Attorney for Respondent
25 Delaware Avenue
Buffalo, NY 14202

Alexander Reaves
Official Court Transcriber

1 CHIEF JUDGE WILSON: Next on the calendar is
2 People v. Marquese Scott.

3 MR. DIFONZO: May it please the court. Nicholas
4 DiFonzo for Marquese Scott. I'd like to reserve one minute
5 for rebuttal.

6 CHIEF JUDGE WILSON: Yes.

7 MR. DIFONZO: Preservation exception applies to
8 this plea challenge because Mr. Scott never had a
9 reasonable opportunity to discover or object to a
10 fundamental defect in his plea.

11 JUDGE SINGAS: Why didn't he?

12 MR. DIFONZO: Why didn't he?

13 JUDGE SINGAS: Yeah.

14 MR. DIFONZO: Because the court - - - the court's
15 statements were made at the plea and at the sentence, and
16 they were never challenged or otherwise called into doubt,
17 and there's - - - there's - - -

18 JUDGE SINGAS: Right. Isn't that the point, that
19 he could have challenged it? Didn't we say in Williams
20 that you have the opportunity, and wasn't there an
21 opportunity at that stage or the five months in between the
22 plea and sentencing?

23 MR. DIFONZO: No, what I mean is the court
24 misadvised Mr. Scott as to the potential sentencing range,
25 and there's nothing in the record that indicates that Mr.

1 Scott knew or should have known that the court had inflated
2 the range by twenty-five years, so that's what I mean. So
3 an opportunity isn't just an ability to speak. It's
4 something in the record that calls the defect or calls
5 attention to the error.

6 JUDGE HALLIGAN: So where is Williams - - -

7 JUDGE TROUTMAN: What was his attorney's
8 responsibility?

9 MR. DIFONZO: What was that?

10 JUDGE TROUTMAN: What was his attorney's
11 responsibility with respect to being knowledgeable about
12 his exposure and/or taking action when the court in fact
13 misstated it?

14 MR. DIFONZO: There's certainly a responsibility
15 to provide meaningful representation, and one would think
16 that would involve accurately informing one's client as to
17 their sentence exposure, and we argue that he did not
18 provide that meaningful representation, at least insofar as
19 he is - - - there was no strategic reason for him to
20 interject and correct the court at that moment, and - - -
21 and that his silence implied sort of an endorsement of the
22 court's statement.

23 JUDGE TROUTMAN: But regardless of counsel's
24 responsibility, what was the court's responsibility?

25 MR. DIFONZO: Yes, the court has an independent

1 obligation to create a record of the - - - showing that the
2 plea was voluntary, and the record here does not show that,
3 because it doesn't - - - it doesn't present - - - sorry.
4 The record here doesn't show that because Mr. Scott was
5 simply never presented with legitimate alternatives about
6 his potential sentence, so it can't - - - his plea can't be
7 considered a - - - a free choice among legitimate
8 alternatives.

9 JUDGE TROUTMAN: So why - - -

10 JUDGE HALLIGAN: So in footnote 2 of Williams,
11 right, the court said that actual knowledge - - - the
12 defendant's lack of actual knowledge that an error has
13 occurred despite an opportunity to learn of it doesn't
14 excuse preservation, so I'm trying to understand what to
15 make of that.

16 If the defendant's lack of actual knowledge isn't
17 sufficient, what specifically are you asking us to look
18 at here? Is it the court itself made an error?
19 Presumably, defendant's counsel could have learned of the
20 error, had they checked it out, and presumably the
21 prosecution should have too, so what do we make of that
22 footnote?

23 MR. DIFONZO: Well, the Williams - - - okay. To
24 understand Williams, in Williams, the court called
25 attention to its own error several times, and there was

1 lots of post-plea litigation, pre-sentence litigation where
2 they focused on whether or not the court could even impose
3 a sentence it agreed to because of Williams and it's a
4 predicate felony sentence.

5 JUDGE HALLIGAN: So is the rule you're asking for
6 that if the court itself has no apparent cognizance of an
7 error, that that's sufficient not to require preservation?
8 What would you have us hold?

9 MR. DIFONZO: Well, I would - - - I'm just asking
10 for this court to just stick with the rule as it exists
11 right now, which is a reasonable opportunity to discover or
12 object.

13 JUDGE HALLIGAN: But what does that actually
14 mean? I mean, when there's a question where presumably
15 defense counsel could discover the correct answer, then why
16 is there not an opportunity there that lies? That's what
17 I'm struggling with.

18 MR. DIFONZO: Right. There has to be something
19 on the record that calls attention to the error, because in
20 every other preservation exception case, counsel could have
21 discovered the error on - - - on their own in, you know, in
22 their office when they go home for the day or the next day,
23 or whatever.

24 JUDGE TROUTMAN: But why couldn't counsel
25 discover this error? It was significant. It was a

1 significant error.

2 MR. DIFONZO: Right. So that - - - that's why,
3 to make sense of this court's prior cases, the opportunity
4 at issue has to be something that occurs on the record, or
5 like, there has to be something going on in the proceedings
6 where it either notifies the defendant or defense counsel
7 of the - - - of the error, right, or of the omission. For
8 instance, like post - - -

9 JUDGE RIVERA: Well, why isn't the the better
10 path to just do a 440.10 based on ineffective assistance of
11 counsel? Counsel didn't do what they needed to do.

12 MR. DIFONZO: Well, I would say, first of all,
13 that this court, in People v. Louree said that the the
14 proper method to raise this issue is through direct appeal,
15 not through a 440, and I gather that that has something to
16 do with the fact that it's a different issue than
17 ineffective assistance.

18 Whether or not the court created a - - - you
19 know, succeeded in creating a record of voluntariness, and
20 that if you were to raise that particular claim on a 440,
21 you might be dismissed for, you know, failing to - - -
22 because you're just looking at the record to resolve that
23 issue, and there's no off-the-record information necessary,
24 so you should have brought it on appeal, and so it could be
25 dismissed.

1 JUDGE SINGAS: Well, maybe there is an off the
2 record information. Maybe at a 440 hearing, there would be
3 evidence that counsel did in fact tell his client that the
4 cap was twenty years.

5 MR. DIFONZO: Right. But that would be - - -

6 JUDGE SINGAS: Shouldn't we be allowed to explore
7 that?

8 MR. DIFONZO: That would be a slightly separate
9 issue, right. Either that would be an ineffectiveness
10 claim, which could be a higher hill to climb, or it could
11 be a claim that the plea was coerced, which is still
12 separate from the - - - the issue here, which is whether or
13 not the court succeeded in - - -

14 JUDGE GARCIA: But let's say you had a big trial
15 coming up. Exposure is high, similar to this, and they
16 work out a plea bargain, and it's ten years rather than
17 twenty, but the judge says forty, and everybody goes home.
18 Maybe a witness dies. In between that plea and the
19 sentencing, the lawyer sits down with the client and says,
20 you know what? That's a mistake. You really were only
21 looking at twenty and you got ten.

22 Well, you know, the client says, yeah, but you
23 know, twenty is a lot, and proof was good. And I'll - - -
24 I'll take ten. Now you get sentenced. There's nothing on
25 the record, only the prior statement. We go five years

1 later. Now, maybe the witness has died or the People have
2 not pursued any of their investigative leads, and now you
3 say no, no, no, no, no, I was told it was forty.

4 And under your rule, which I understand why,
5 you're looking solely at the record, but under a 440 rule,
6 the attorney could come in and say, yeah, no, I had that
7 conversation and ten was a good deal.

8 MR. DIFONZO: Well, yeah. I think the first
9 thing I would say is that, here, there's no - - - there's
10 no independent - - - there's no indication in the record
11 that Mr. Scott had any independent knowledge that the court
12 was wrong.

13 JUDGE GARCIA: Because you're just looking at the
14 record.

15 MR. DIFONZO: Yes.

16 JUDGE GARCIA: But maybe they had that
17 conversation where he was counseled. Look, it isn't forty,
18 it's twenty, but you got ten. What do you want to do? He
19 said, I want the deal.

20 MR. DIFONZO: I suppose that's true, and under
21 your hypothetical, it could impact the preservation issue
22 on - - - if you were to raise that in the 440, but you
23 shouldn't have to.

24 JUDGE GARCIA: Well, you would still - - - well,
25 why shouldn't you have to do that since that may happen?

1 MR. DIFONZO: Yes.

2 JUDGE GARCIA: Maybe judge goes to this thing and
3 then, you know, the judge says this, the lawyer goes back,
4 and - - -

5 MR. DIFONZO: Yeah. That - - - I mean, if you're
6 looking - - - that's true if you're just looking at the
7 preservation, but if you're looking at the voluntariness of
8 the plea itself, I mean, for that, that's frozen in time,
9 and - - -

10 JUDGE GARCIA: But I thought we agreed if the
11 judge says this later - - - again, this preservation issue.
12 If the judge says this later, then you had an obligation to
13 object. If the judge comes in at sentencing and says, you
14 know what, Mr. Smith, I - - - I made a mistake. You're
15 actually - - - your exposure was twenty. You would agree
16 you'd have to preserve that?

17 MR. DIFONZO: I would agree with that, yes.

18 JUDGE GARCIA: So why, if the lawyer told you
19 that, wouldn't you have an obligation to preserve it?

20 MR. DIFONZO: I mean, I think that this court has
21 - - - has held, functionally held that - - - that very
22 thing in People v. Peque, right, so Mr. Peque had
23 independent knowledge, so he was required to preserve,
24 whereas Mr. Diaz is more similar to Mr. Scott here.
25 Nothing in the record that he knew, so he - - -

1 preservation exception applied to his case, and that's what
2 we're arguing here.

3 JUDGE CANNATARO: But doesn't that get you back
4 to the footnote in Williams? It's not actual knowledge of
5 the error. It's simply an opportunity to discover the
6 error.

7 MR. DIFONZO: Yes, but that has to mean that it's
8 - - - there's something in the record that created that
9 opportunity.

10 JUDGE CANNATARO: And we don't know what the
11 record is. I think that's the point that some of my
12 colleagues was making. If this was a 440, it would be
13 fleshed out, you know, all those interstices between when
14 they were on the record. Defendant might have learned
15 something such as, you know, don't listen to the judge,
16 it's really capped at twenty years here.

17 MR. DIFONZO: Well, no, I mean the record on
18 appeal, because if a 440 record were what was required for
19 an opportunity to discover, then that would have to be true
20 for every other preservation exception case, and it - - -
21 and it hasn't been required there.

22 JUDGE RIVERA: Can I just clarify? Let's stay
23 with with the hypothetical you're working with that the
24 lawyer actually does at some point before sentencing say,
25 that was incorrect information. It's not fifteen plus

1 fifteen plus fifteen. There's a cap. It's only twenty.
2 Right? All of that.

3 When the judge then at sentencing repeats that
4 the exposure is forty-five, give that incorrect information
5 and ask the defendant, you're aware of that?

6 MR. DIFONZO: Yes. Oh, I'm sorry.

7 JUDGE RIVERA: Yes, sir, and the defense says,
8 oh, yes, there's defense counsel. Is there any duty or
9 obligation for them to put anything on the record? I think
10 I know what your answer is, but I wanted to confirm with
11 you.

12 MR. DIFONZO: Does defense counsel have an
13 obligation to - - - to correct the court?

14 JUDGE RIVERA: Correct.

15 CHIEF JUDGE WILSON: If counsel knows what the
16 court is saying is wrong, I think is the hypothetical.

17 JUDGE RIVERA: Yes, yes, yes, because counsel has
18 told the defendant before the sentencing, that was wrong.
19 It's really twenty, not forty-five.

20 MR. DIFONZO: I think to be effective, yes. If
21 he wants to safeguard his, you know, client's decision-
22 making ability, he needs to interject and correct the court
23 so that the client doesn't rely on the court's misstatement
24 here in making a decision on what to do. So yeah, I think
25 that he does have a have a - - - or - - -

1 JUDGE RIVERA: If counsel figures it out before
2 sentencing?

3 MR. DIFONZO: Yes. Yeah. That's what I would
4 think.

5 JUDGE RIVERA: Thank you.

6 JUDGE GARCIA: Did he say it here? Did the judge
7 say that exposure again at sentencing?

8 MR. DIFONZO: He did, he did, and he he said it
9 in the context of, you know, that he could enhance the
10 sentence up to forty-five years, and does the client still
11 want to invite the probation officer over to testify? And
12 again, the statements were never corrected or called into
13 question in any way, like in Williams, right, where there
14 was always sort of a constant pervading doubt about the
15 promised sentence and the legality of it.

16 Enough doubt to, you know, really blame the
17 defense for not resolving that ahead of time before then
18 complaining about whether or not the - - - the plea was
19 voluntary based on that. There's nothing like that
20 happened in this case, and there's no indication of
21 independent knowledge, and again, just to emphasize that
22 we're not asking for the preservation exception to be
23 expanded here. Just for that - - - for it to be applied as
24 - - - as it's currently written.

25 CHIEF JUDGE WILSON: Thank you.

1 MR. HILLERY: May it please the court. Michael
2 Hillery for the People. Preservation is the rule, and the
3 exception is to be applied in the rare case, as this court
4 has said.

5 JUDGE GARCIA: But how do we know on this record
6 that he was aware that this was incorrect?

7 MR. HILLERY: We don't know, Judge, that he was,
8 which I think underscores - - -

9 JUDGE TROUTMAN: And doesn't the court have an
10 overall responsibility to make sure that a defendant
11 standing before him to take a plea must do so in a knowing
12 and intelligent manner, and that the court itself must
13 provide accurate information?

14 MR. HILLERY: Yes, Judge. That's correct.
15 That's correct.

16 JUDGE TROUTMAN: So how does that impact when the
17 judge not only wants but repeats it and grossly does so?
18 Is - - - how is this different from deportation cases where
19 inaccurate information is given?

20 MR. HILLERY: Well, Your Honor, this court has
21 said that misinformation when it comes to maximum sentence
22 exposure with this - - - this most definitely was. There's
23 no way around it, and it was significant, is but a factor
24 and not a determinative factor.

25 JUDGE TROUTMAN: Correct, a factor, but you have

1 to also look at the other things that are going on here.
2 So the gross miscalculation is a factor. It's a
3 significant factor.

4 MR. HILLERY: To be sure.

5 JUDGE TROUTMAN: What about when the defendant
6 goes to probation and says, you know, I took that plea
7 because I was facing a lot of time. Doesn't that also go
8 to, I relied upon that information in making that decision.
9 Shouldn't we be concerned about that?

10 MR. HILLERY: Certainly relevant, Your Honor,
11 although there is a little bit of ambiguity, because even
12 had he been told the correct maximum sentence exposure,
13 twenty years, he was getting six to eight and possibly
14 three and a half, so that statement that he made to the
15 probation officer would be just as applicable in that
16 scenario - - -

17 JUDGE RIVERA: He was twenty-three.

18 MR. HILLERY: I'm sorry.

19 JUDGE RIVERA: He was twenty-three.

20 MR. HILLERY: Yes.

21 JUDGE RIVERA: Get out in his 40s. I'll give you
22 the max on that versus getting out in his 60s. It's - - -
23 your whole life is left for you if you're getting out at
24 forty.

25 MR. HILLERY: Absolutely, Judge. It's

1 significant, and there's no way around that fact. But I -
2 - -

3 JUDGE TROUTMAN: And before he made the decision
4 to plead guilty, he was given this information by the
5 court, this inaccurate information, grossly inaccurate
6 information, so I agree with you. It's not just one thing.
7 You have to look at everything in the circumstances, but
8 should we not be concerned that this number is so grossly
9 wrong that it's coercive?

10 MR. HILLERY: It's a fair concern, Judge, and - -
11 - and to be perfectly candid, I mean, looking at it as an
12 advocate myself, I was concerned and am concerned.

13 JUDGE RIVERA: It's almost half a century.

14 MR. HILLERY: But in considering this, Your
15 Honors, there are multiple - - - as Your Honor has
16 indicated, there are multiple factors in play here.

17 JUDGE HALLIGAN: So what are the factors that cut
18 in the other direction? It does look to me that at some
19 point during the allocution, there's a statement from
20 defense counsel that indicates that he was concerned about
21 the length of the sentence. He says he wants to make sure
22 he's not just hearing minimum three and a half, and then in
23 ten weeks, when he appears for sentencing, he's going to
24 say, I thought you were going to give me three and a half,
25 which suggests that there is some focus on the length of

1 sentence. What cuts in the other direction, in your view?

2 MR. HILLERY: Well, Judge, that - - - that
3 certainly is a - - - a big one right there. He - - -

4 JUDGE HALLIGAN: Okay. So what exactly is on the
5 other side?

6 MR. HILLERY: You're saying, Judge, if I
7 understand your question - - -

8 JUDGE HALLIGAN: Well, you - - - I think we all
9 agree, but correct me if I'm wrong. You said and I believe
10 someone else said that you look at - - - this is one of
11 multiple factors that you consider, right, and so I think
12 that we know that the statement about the exposure was
13 substantially wrong by decades, and there is, at least in
14 my view, perhaps some indication in the record that the
15 defendant was concerned about the length of sentence that
16 he might receive. So what other specific facts in the
17 record would you point us to, which might lead us to
18 conclude that it was, in fact, voluntary?

19 MR. HILLERY: Well, Judge, there are several
20 factors that this court has articulated as to how to
21 properly evaluate, comprehensively, a plea. That includes
22 the severity of the charges. These were second degree
23 burglary charges. That includes the age and experience of
24 the defendant, and that includes the terms of the bargain
25 and the reasonableness of the bargain.

1 So if we look at, for example, the age and
2 experience of the defendant; all right, he wasn't a
3 juvenile. He was in his 20s, but that even tends to
4 obscure his experience with the criminal justice system.
5 He was about twenty-two, if memory serves. 2011, person in
6 need of supervision.

7 JUDGE HALLIGAN: But doesn't that go to the
8 question of whether or not he would reasonably apprehend
9 the parameters of the bargain that he was getting, which
10 was off by quite a substantial number of years, given what
11 he was told by the judge?

12 MR. HILLERY: It does go to that, Judge, but it
13 also goes to his ability to discern what is, in fact, a
14 good deal.

15 JUDGE TROUTMAN: But Mr. Hillery, his record,
16 juvenile offender misdemeanors are quite different from
17 being a prior or a persistent felon, and knowledgeable in
18 the criminal justice system with respect to the realistic
19 exposure of double-digit sentencing. That's different, and
20 the consequences of even staying in a state institution
21 versus a local or a juvenile facility.

22 MR. HILLERY: I absolutely agree with that, Your
23 Honor. I'm only indicating that, given his experience with
24 the criminal justice system and presumably his experience
25 with working with attorneys being counseled - - -

1 JUDGE TROUTMAN: That's not the - - - it's the
2 experience that you're referring to. You would agree a
3 juvenile - - - and even his maturity at the time of what -
4 - - using the term juvenile, that cuts against your
5 argument that he's knowledgeable and experienced because of
6 one's capacity to understand and appreciate.

7 What I'm more concerned - - - let's go back to
8 the court's core responsibility as an officer that is
9 imposing justice. The court has the paramount
10 responsibility.

11 I certainly question the attorney's role here,
12 but the court itself and the court repeatedly exaggerated
13 the amount of time. That smells of coercion, and the
14 court's failure to fulfill its own responsibility, and that
15 is concerning to me.

16 MR. HILLERY: I appreciate that, Judge, and I - -
17 - I don't disagree that it's concerning. I really don't.
18 This court, again, has indicated that there are multiple
19 factors that the exposure, sentencing exposure is but one.
20 It's not determinative. It may be significant, but it's
21 not determinative. If we were to say that that factor was
22 determinative, I think we would be on equal footing, at
23 least, to say that just as determinative is the nature of
24 the deal that the defendant gets.

25 When we get beneath that issue, and certainly



1 it's - - - there's a misstatement to be reckoned with, but
2 when we get beneath that issue, what we're left with is a
3 defendant who was - - - he was convicted of three second
4 degree burglary counts, and he got six to eight, or at
5 least he was in line to get six to eight.

6 JUDGE RIVERA: Well, it does seem that that is
7 your strongest argument, that even if it - - - even if he
8 was correctly informed that it was twenty, it's - - - it's
9 less than half the time.

10 MR. HILLERY: Exactly, Judge, and I - - - I - - -
11 I don't want to speculate, but perhaps - - - perhaps one of
12 the reasons why counsel didn't dig in to determine whether
13 or not this was a gross misstatement is simply because
14 looking at the nature of the bargain and defendant's
15 willingness and desire to take such a bargain - - -

16 JUDGE TROUTMAN: But couldn't - - - couldn't also
17 the attorney take into consideration whom the attorney was
18 appearing in front of, and that the sentence could get - -
19 - the commitment could change, and not necessarily in the
20 favor of the defendant; isn't that also a possibility?

21 MR. HILLERY: It's quite possible, and in fact,
22 the - - - the advocate for this defendant did in fact make
23 sure that he was aware of it in court, that he might not
24 get the three and a half that was on the table if he
25 assisted the prosecution in an unrelated case.

1 JUDGE TROUTMAN: Taking into consideration whom
2 the defendant was appearing in front of.

3 MR. HILLERY: It's true. That's true, Your
4 Honor.

5 JUDGE TROUTMAN: Thank you.

6 MR. HILLERY: I'm sorry. I'm not sure if my
7 - - -

8 CHIEF JUDGE WILSON: You - - - no, you still have
9 time. I'm wondering if we were to affirm what really is
10 left of Louree?

11 MR. HILLERY: I think the distinction, Judge, if
12 I can attempt to draw one between Louree in this case, is
13 that Louree dealt with the failure to mention altogether a
14 sentence component. So in this case, for example, we have
15 - - -

16 CHIEF JUDGE WILSON: But we could say - - - we
17 could say all the same things, right, and Louree says this
18 is not appropriate for a 440 because you can see this on
19 the face of the record, right?

20 MR. HILLERY: Right.

21 CHIEF JUDGE WILSON: But you could say all the
22 same things there. That is, counsel may have known that
23 PRS was required and decided not to say it, because this
24 was actually a good deal and PRS really didn't matter to
25 the defendant, but so we discount it, or at least, you



1 know, it wouldn't be consistent with our holding in Louree
2 to rely on rationales like that, and here, you know, in
3 Louree, the court forgot to say something it was supposed
4 to say. And here, the court affirmatively said something
5 that is terribly wrong. That seems worse.

6 MR. HILLERY: Yes, it does seem worse.

7 CHIEF JUDGE WILSON: And the terribly wrong thing
8 was years of incarceration, not years of supervision
9 outside of prison.

10 MR. HILLERY: But he does have recourse. The
11 defendant did have - - - as the court has indicated, he
12 does have recourse. That recourse is an ineffective claim
13 under CPL 440.10 - - -

14 JUDGE RIVERA: Why isn't that true for the other
15 cases?

16 MR. HILLERY: I'm sorry, Judge?

17 JUDGE RIVERA: Why wasn't that true in the other
18 cases where we've recognized the exception?

19 MR. HILLERY: Well, it - - - so CPL 440.10 now
20 allows a defendant - - - and an ineffective claim allows a
21 defendant to bring a challenge concerning a claim that
22 otherwise was required to be a matter of record. Not so
23 anymore. He can bring an ineffective claim even though
24 it's not a matter of - - - or I'm sorry, it is a matter of
25 record. He can bring an ineffective claim now despite the

1 fact that it is a matter of record. That wasn't always the
2 case.

3 JUDGE CANNATARO: So you're saying the Louree
4 rule is unnecessary at this point? Is that your argument?

5 MR. HILLERY: No, it's not that it's unnecessary,
6 Judge. It's just that in - - - in specifically here, in
7 the case of an ineffective claim, this defendant can
8 challenge the effectiveness of counsel based upon that
9 misinformation, where he otherwise could not have in the
10 past.

11 JUDGE RIVERA: But as I understand it, the only
12 purpose of that is to confirm whether or not he's gaming
13 the system, and he actually didn't know. Whereas what we
14 face here is everybody got it wrong. Why would he know?
15 Judge doesn't get it right. The prosecutor doesn't get it
16 right. The defense counsel makes no correction. Why - - -
17 why should a defendant - - - why should the defendant know?

18 MR. HILLERY: Well, I'm not saying that he - - -
19 the defendant himself necessarily should have known. I see
20 my time is up. If I could just complete the - - - I'm not
21 saying the defendant himself should have known, but he has
22 an attorney who should have known, and he - - -

23 JUDGE RIVERA: And he has a judge in front of him
24 who should have known.

25 MR. HILLERY: True, true, but he has recourse - -



1 -

2 JUDGE RIVERA: And who is responsible to ensure
3 that the gentleman knows that what the court is saying is
4 accurate information, and that the individual is making a
5 decision based on that accurate information; that's
6 voluntary, intelligent, and knowing, right?

7 MR. HILLERY: There's no question, Your Honor,
8 that - - - that what happened in this plea proceeding was
9 off key with the nature and objective of a valid pre-plea
10 proceeding, but it is also true that that factor alone is
11 not dispositive, and it is also true that the defendant had
12 the wherewithal - - - has the wherewithal to bring an
13 ineffective claim of counsel claim, and he can challenge
14 the effectiveness of counsel for failure - - - and the
15 court, incidentally - - -

16 JUDGE RIVERA: So then you disagree - - - I'm
17 sorry - - - with counsel, that if indeed the lawyer knew
18 before sentencing, let's say after the colloquy, before
19 sentencing, knew that the judge had made a misstatement.
20 Does the attorney have to correct that, or at least if the
21 - - - as in this case, the judge repeats that at
22 sentencing. Do you agree?

23 MR. HILLERY: I agree. Personally, Judge, I
24 believe the attorney has an obligation to correct the
25 court, even if he's on the side said to the, the defendant,

1 you know, don't - - - don't worry what the court says, this
2 is the fact. I think as an officer of the court, if you
3 know that information is incorrect, you have an obligation
4 to speak up whether you're the prosecutor or the defense.

5 JUDGE RIVERA: And - - - and let's say - - -
6 let's say for one moment he didn't, but nevertheless, the
7 judge says to the defendant, you understand that the
8 exposure is forty-five. You think then - - - and the
9 defendant says yes?

10 MR. HILLERY: Yeah. I - - - I - - -

11 JUDGE RIVERA: Your lawyer would know that that
12 is an incorrect statement, to say the least, to the court,
13 no?

14 MR. HILLERY: Yes, Your Honor. Yes. I think
15 there's clearly an obligation there.

16 JUDGE GARCIA: Counsel, you know, I asked the 440
17 hypothetical before, and there is an appeal to that in the
18 scenario I gave, but part of this is aimed at not having to
19 do a 440, right, and having correct information imparted.
20 And if we just say, okay, you know, you can recreate this
21 in a 440, don't worry about it, does that send the wrong
22 message to a judge in a plea proceeding to say, you know,
23 I'll figure it out later, or you can figure it out later,
24 or your judge - - - your lawyer must have told you?

25 And if that doesn't happen, we're going to all be

1 back here doing a 440, or the message being the court has
2 this obligation to get it right?

3 MR. HILLERY: Well, certainly, Judge, if it's a
4 preserved argument, I mean, the judge who presided over
5 that misinformation is going to presumably be on - - - he's
6 going to get a decision based on his case that points out
7 the flaw. He's going to be aware of it, so I don't - - - I
8 don't see an ineffective claim as bypassing judicial
9 accountability and responsibility in this case.

10 JUDGE TROUTMAN: But what about judicial
11 accountability in the first instance? What kind of a
12 message does it send if judges aren't reminded of the
13 importance of being careful? I'm not talking about a minor
14 mistake. I'm talking about grossly misstating and then
15 doubling down on. What kind of message I believe - - -
16 what does that send?

17 MR. HILLERY: I'm just having a 440 motion,
18 Judge. What - - -

19 JUDGE TROUTMAN: No, with - - - with just saying
20 with it, well, you can check it out later in the 440. What
21 does that send to the court? I don't have to be careful.
22 Isn't that doing the opposite of what should be done?

23 MR. HILLERY: Well, the court might think
24 differently if he succeeds on a 440 and the case is back
25 before that judge, and I'm not saying that at all to be

1 flip. I think a judge - - - I would assume a judge who
2 gets a case back that he or she presided over, whose error
3 is responsible for that case coming back before him, and
4 now all the - - - the exhausting of judicial resources goes
5 on again. I would think that's a severe - - -

6 JUDGE TROUTMAN: You would hope. We would hope.

7 MR. HILLERY: I would hope. I would hope that
8 disincentivizes judges to be lax with that - - -

9 JUDGE RIVERA: That depends on the actual 440,
10 right?

11 MR. HILLERY: It - - - it would. The success of
12 the 440.

13 JUDGE RIVERA: Or it ever gets filed?

14 MR. HILLERY: Yes.

15 CHIEF JUDGE WILSON: Thank you.

16 MR. HILLERY: Thank you.

17 MR. DIFONZO: Just briefly, Your Honors, I would
18 note that Mr. Scott never accepted the offer to cooperate
19 and get three and a half years, and that's in the record,
20 so it was really just a decision about whether to take six
21 to eight, or in his mind, risk being - - - you know,
22 receiving a forty-five year sentence, and I just wanted to
23 to note that when - - - when you stack an extra twenty-five
24 years onto a potential maximum, that just raises the
25 stakes, and you need a correspondingly severe level of risk

1 tolerance to accept that and go to trial.

2 Otherwise, no one is going to accept that - - -
3 that the correct decision for them will be to take the
4 plea, so it does smack of coercion, self-evidently, and I
5 think that in the totality - - - there's no - - - there's
6 no call to change the totality of the circumstances test
7 here, but where the misinformation - - - the inaccurate
8 sentence information is so severe like it is in this case -
9 - -

10 JUDGE SINGAS: Well, is that your limiting
11 principle, that it has to be so severe? If he had
12 misstated it by three years, or if he had said the wrong
13 amount for a fine, or the restitution was wrong, would that
14 excuse preservation in your mind? Like, what - - - how - -
15 - how - - - how are you defining limiting - - -

16 MR. DIFONZO: Well, I'm not talking about
17 preservation right now. I'm talking about whether or not
18 the plea was voluntary, and so - - -

19 JUDGE SINGAS: Okay, so in that circumstance,
20 too. Let's go to the merits and then go to preservation.

21 MR. DIFONZO: Sure.

22 JUDGE SINGAS: So in that case, if it was a three
23 year, which is significant - - -

24 MR. DIFONZO: It'd be a closer - - -

25 JUDGE SINGAS: - - - in anyone's life.

1 MR. DIFONZO: I mean, you'd have to look at the
2 context of the case and the totality of the circumstances,
3 right, and - - - and - - - and the - - - the terms and
4 absolute terms as well, but it would be a closer call. I
5 think I say this in my brief. When you have, you know,
6 differences that are not so stark.

7 JUDGE SINGAS: So would the preservation
8 exception then apply?

9 MR. DIFONZO: Preservation exception would still
10 apply so long as there was - - - you know, under the facts
11 here, yes, but if it was too close to call, so - - - so if
12 you decided that it wasn't involuntary as a matter of law,
13 right, you would - - - you would then step back.

14 JUDGE SINGAS: Well, we would start with
15 preservation first, right, so is this preserved, or is
16 there an exception to the preservation rule, and you're
17 saying here, there's an exception because the judge
18 misstated his potential sentence, correct? And I'm just
19 saying, how far are you extending that preservation
20 exception?

21 MR. DIFONZO: Well, I'm saying that the - - - the
22 preservation exception applies because there's a - - - yes,
23 I mean, you're saying there's an error that's plain on the
24 face of the record and it's fundamental, and there was - -
25 - it was never corrected. It was repeated at sentencing.

1 And so there's never a, you know, what's been referred to
2 in - - - in the caselaw as, like, a reasonable opportunity
3 to discover that error and object to it. So that's why the
4 preservation exception applies.

5 JUDGE SINGAS: Right, so I guess I'm trying to
6 figure out what - - - what you consider fundamental. I
7 mean, I think we see here every day, judges make mistakes
8 about whether to sit jurors, or for cause, or whether to
9 allow in evidence, and we require preservation.

10 MR. DIFONZO: Yes.

11 JUDGE SINGAS: So is it the nature of the
12 sentence? Is it the nature of the error that allows for
13 this exception to preservation?

14 MR. DIFONZO: I think it's a - - - it's an error
15 that could potentially render the plea involuntary, and I
16 think that because of *People v. Peque*, and how the rule
17 there is that well, you know, the - - - this court
18 recognized that it - - - the failure to inform the
19 defendant of the deportation consequences could have
20 rendered the plea involuntary if the defendant would not
21 have pled guilty, had he known about this.

22 JUDGE SINGAS: Right, but do you think *Peque* is
23 different just because a defense attorney - - - it might
24 not be in their wheelhouse about deportation and
25 immigration law, that they'd have to go back and research

1 it, whereas something like mandatory exposure to a sentence
2 is something that we presume is within the job of a defense
3 attorney.

4 MR. DIFONZO: I mean, I don't see how - - - I
5 don't see the connection here. I thought we were talking
6 about - - - we're talking about what kind of error counts
7 as a fundamental error, and under Peque, since the
8 preservation exception, for instance, in Diaz applied, and
9 you didn't know whether or not the - - - the - - - that
10 error rendered his plea involuntary.

11 That means that it - - - like, the - - - the
12 truth of the error to that specific plea is irrelevant as
13 to whether or not the preservation exception applies, sort
14 of like a category of error that counts as fundamental
15 error.

16 CHIEF JUDGE WILSON: Thank you.

17 (Court is adjourned)

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

I, Alexander Reaves, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Marquese Scott, No. 18 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Signature: Alexander Reaves

Agency Name: eScribers
Address of Agency: 7227 North 16th Street
Suite 207
Phoenix, AZ 85020
Date: February 16, 2025