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COURT OF APPEALS
STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

NO. 61

FERNANDEZ (ANDRE),

Appellant.

20 Eagle Street
Albany, New York
May 21, 2026

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:

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Official Court Transcriber



1 CHIEF JUDGE WILSON: Next case on the calendar is
2 People v. Fernandez.

3 MS. HERBERT: Good afternoon. May it please the
4 court. Rosemary Herbert, Office of the Appellate Defender,
5 on behalf of Andre Fernandez.

6 With the court's permission, I'd like to reserve
7 three minutes for rebuttal.

8 CHIEF JUDGE WILSON: Yes.

9 MS. HERBERT: Andre Fernandez's attorney
10 conducted no investigation into Mr. Fernandez's decades
11 long history of serious mental illness and substance abuse
12 despite being on notice from numerous sources that his
13 client in fact suffered from these conditions.

14 JUDGE TROUTMAN: And what was to be the purpose
15 of the investigation, and how was it going to impact the
16 trial strategy here?

17 MS. HERBERT: Yes, Your Honor. Well, had counsel
18 conducted the investigation that the information that he
19 had in front of him warranted, he would have learned that
20 his client had been committed to psychiatric facilities,
21 had been found, I think, about two years previously in
22 Florida to meet the requirements for not - - -

23 JUDGE TROUTMAN: What about when you look at the
24 video of the interview, what in that interview video
25 suggests that he is suffering mental deficits?

1 MS. HERBERT: Well, in the video Mr. Fernandez
2 says that he has been diagnosed with schizoaffective
3 disorder - - -

4 JUDGE TROUTMAN: So?

5 MS. HERBERT: - - - which is a psychotic
6 condition characterized - - -

7 JUDGE TROUTMAN: Understanding he's talking.
8 He's giving information. What about it - - - did it - - -
9 did the video suggest he was episodic at that particular
10 point? Is that what you're saying?

11 MS. HERBERT: Absolutely, Your Honor. Again - -
12 -

13 JUDGE TROUTMAN: How so?

14 MS. HERBERT: The - - - Mr. - - - I've watched
15 the video many times, as I'm sure the court has as well.
16 The - - - he's sort of, I think demonstrably manic on that.
17 He's speaking extremely fast.

18 JUDGE TROUTMAN: Um-hum.

19 MS. HERBERT: He's acting out. He's - - -

20 JUDGE TROUTMAN: But he also - - -

21 MS. HERBERT: - - - laughing inappropriately.

22 JUDGE TROUTMAN: But he also interrupts the - - -
23 he interrupts the detective. He redirects so that he can
24 answer what he wants to answer. You're suggesting that
25 even watching the video he's on notice and so he's supposed

1 to investigate?

2 MS. HERBERT: Absolutely. And it's worth, I
3 think, pointing out that the substance of the reports the
4 counsel failed to uncover indicated that his client had an
5 inability to distinguish between his delusions and reality.
6 The underlying case in that instance involved the making of
7 a false report to the police, reporting that his brother -
8 - -

9 JUDGE TROUTMAN: His brother?

10 MS. HERBERT: - - - had engaged in conduct that
11 his brother had apparently not engaged in.

12 JUDGE TROUTMAN: And the information that he gave
13 with respect to the crimes that he gave the statements,
14 what evidence is there that he was again delusional as to
15 the - - -

16 MS. HERBERT: Well, there were - - -

17 JUDGE TROUTMAN: - - - those occurrences?

18 MS. HERBERT: - - - there was absolutely no
19 evidence, certainly none presented at trial, that Mr.
20 Fernandez was, in fact, involved in these - - - in these
21 homicides. The homicides occurred. That was not in
22 question. But the information that he supplied was not
23 corroborated by forensic evidence. It was not corroborated
24 by any eyewitnesses. With respect to the 1998 homicide.
25 Mr. Fernandez was initially, I think, approached as a

1 suspect. He was not arrested. And - - -

2 JUDGE RIVERA: Can an - - - can an attorney rely
3 on their own interactions with their client in determining
4 whether or not an investigation into someone's mental
5 health status or their history otherwise, is warranted?

6 MS. HERBERT: To a certain extent, Your Honor. I
7 mean, here, counsel did, in fact. His explanation for why
8 he chose to forego any investigation was that in his
9 interactions with his client, he seemed coherent. However,
10 in those interactions, his client repeatedly told him that
11 he was a longtime heroin addict; that he had in fact
12 ingested heroin on the day he went into the police station;
13 and that he suffered from numerous different psychiatric
14 disorders, which again, he named and provided specific
15 information about.

16 JUDGE CANNATARO: So I gather from that answer
17 that those disclosures triggered an obligation to - - - to
18 dig a little deeper?

19 MS. HERBERT: Absolutely, Your Honor.

20 JUDGE CANNATARO: So expressed as a rule that can
21 be applied in cases like this, what would it be? When - -
22 - when is it not okay simply to rely on what's happening in
23 front of you?

24 MS. HERBERT: Well, certainly, when the
25 information that counsel learns, as he did in this case,



1 reveals serious psychosis. In other words, mental
2 conditions that are consistent with, essentially,
3 delusional behavior, counsel must, I think, under those
4 circumstances - - -

5 JUDGE SINGAS: Well, what if - - -

6 MS. HERBERT: - - - conduct investigation.

7 JUDGE SINGAS: What if that - - - what if that is
8 in contradiction to a defense that they're pursuing? So in
9 other words, here, the - - - the defense was this immunity
10 deal and the lawyer was pursuing that. And there was
11 significant arguments that were made that could have been
12 compelling to a jury. Now, that's in contradiction to then
13 arguing that he suffers from delusions and he's seriously
14 psychotic.

15 So at that point, they're at odds. And defense
16 counsel has chosen one path. What happens then?

17 MS. HERBERT: Well, I have - - - I have two
18 responses to that. First of all, I do not believe that
19 these are in conflict. It is certainly possible to argue
20 that somebody who is suffering from serious mental illness
21 and currently under the influence of heroin, may be much
22 more susceptible to manipulation, coercion, suggestion by
23 the - - -

24 CHIEF JUDGE WILSON: Or - - - or to - - -

25 MS. HERBERT: - - - by law enforcement.

1 CHIEF JUDGE WILSON: - - - but or - - - or to
2 delusion, inventing a deal that never happened, right? I
3 mean, that's sort of what - - -

4 MS. HERBERT: Absolutely.

5 CHIEF JUDGE WILSON: - - - Judge Singas is
6 getting at.

7 MS. HERBERT: So I - - - I do not think that
8 these are in - - - in opposition necessarily. And that
9 they, in fact, could have complemented each other.

10 CHIEF JUDGE WILSON: No. But - - - but I think
11 Judge - - - I think maybe Judge Singas' question is getting
12 at the following: to try and establish that he was
13 promised a deal that would render his consent involuntary,
14 the jury has to believe that he's a credible, reliable
15 witness when he testifies to that. On the other hand, if
16 he's presented as somebody who fabricates all kinds of
17 crazy things because of very serious psychosis, that makes
18 it harder to make that first argument.

19 MS. HERBERT: Well, Your Honor, there was
20 information in the record. In particular, there was a note
21 written in Mr. Fernandez's handwriting that made references
22 to both immunity and compensation that was found - - -

23 CHIEF JUDGE WILSON: Yes.

24 MS. HERBERT: - - - in the possession of the
25 police department.

1 CHIEF JUDGE WILSON: Yes.

2 MS. HERBERT: So it wasn't something that he - -

3 -

4 CHIEF JUDGE WILSON: But that maybe - - -

5 MS. HERBERT: - - - made up after the fact.

6 CHIEF JUDGE WILSON: Right. And so that maybe
7 suggests that - - - that counsel - - - his counsel pursued
8 the better of the two strategies.

9 MS. HERBERT: Your Honor, well, again, I - - - I
10 think that they are not in conflict and could have
11 complimented each other. But in any event, based on
12 decisions from this court and from the United States'
13 Supreme Court, a defense strategy that is arrived at after
14 a failure to investigate, in other words, in ignorance of
15 critical information, cannot be a reasonably competent
16 strategy.

17 CHIEF JUDGE WILSON: Well, but I think, as you
18 pointed out, he knew some information.

19 MS. HERBERT: He did.

20 CHIEF JUDGE WILSON: Right?

21 MS. HERBERT: He knew - - - he knew from his
22 client's statements - - -

23 CHIEF JUDGE WILSON: Yeah.

24 MS. HERBERT: - - - that his clients had - - -
25 client had been diagnosed with schizoaffective disorder.

1 He knew based on grand jury testimony - - - Mr. Fernandez,
2 in that, refers to being committed under the Baker Act,
3 which refers to an involuntary psychiatric commitment. So
4 he knew - - -

5 CHIEF JUDGE WILSON: And he knew when he was
6 admitted to Rikers he was - - -

7 MS. HERBERT: And he also knew - - -

8 CHIEF JUDGE WILSON: - - - he was given mental
9 health treatment and - - - and I think, put on a taper,
10 right? A methadone taper?

11 MS. HERBERT: Correct. He tested positive for
12 opiates when he was admitted to Rikers Island, which
13 occurred some period of time after this. And so he knew
14 that he - - - Mr. - - - counsel knew that his client had
15 been under the influence at the time he was in the police
16 station.

17 JUDGE SINGAS: I know. But he might - - - but
18 defense counsel might have made a decision based on his
19 interaction with him and based on how he viewed him, or how
20 he thought a jury might view him on the videotape, knowing
21 what he knows about his prior history and his mental health
22 issues and saying, you know what? I don't think a jury
23 would - - - I think the better argument is that he was
24 lucid; he knew what he was doing; the police tricked him;
25 they promised him this immunity, and that's the defense I'm

1 going with, based on the totality of what I have in front
2 of me, including this videotape where he doesn't look like
3 he's episodic. He doesn't look like he's suffering from
4 mental illness. Based on my conversations with him, maybe
5 I'll decide to put him on the stand, maybe not. But I'm
6 making this decision with the totality of circumstances and
7 saying, I don't need to pursue this because I'm going a
8 different route.

9 I mean, I think this is a different case than - -
10 - than Olivares, right? Where we were saying, look, if
11 that's going to be your defense, then you better get
12 everything that you need to shore up that defense.

13 But here, they're moving in another direction and
14 - - - and - - - and you're asking us to say that that was
15 ineffective.

16 MS. HERBERT: But again, if counsel had conducted
17 the investigation - - - you know, received all of the
18 information that was gathered in the course of post-
19 conviction proceedings, and based on all of that, had said,
20 you know what, I'm going to go this way. I'm not going to
21 use that information. Under those circumstances, I think
22 this would be a much closer case. I think there still
23 might be concerns, but that is not what counsel did.

24 JUDGE SINGAS: Yeah. But maybe if there wasn't a
25 videotape that - - - your argument would be stronger. But

1 I think once he knows what he knows and he sees what he
2 sees, he's making an intelligent decision based on the
3 videotape, because that is capturing the moment which is
4 going to concern the jury.

5 MS. HERBERT: But counsel's decision in that
6 moment is a decision born in ignorance. In other words, it
7 is a decision that we talk - - - that - - - that the court
8 talked about in Olivares as born in the blind. He did not
9 - - -

10 JUDGE SINGAS: But it may be born in strategy.

11 MS. HERBERT: He had a strategy. It was just not
12 a strategy that was made with critical information that
13 could have supported and complemented the strategy that he
14 had chosen.

15 JUDGE HALLIGAN: So - - - so what exactly are the
16 indicators that - - - that were apparent to him that should
17 have led him to investigate? You mentioned that he says,
18 and I think the video shows that he says he had or - - - I
19 thought it was had. I'm not clear if it's present tense -
20 - - a schizoaffective disorder, the Baker Act, and the
21 Riker's treatment. Is there anything else?

22 MS. HERBERT: Yes. On the videotape, Mr.
23 Fernandez says - - -

24 JUDGE HALLIGAN: The heroin.

25 MS. HERBERT: - - - that he was a - - -

1 JUDGE HALLIGAN: Yes.

2 MS. HERBERT: - - - he was a heroin addict.

3 JUDGE HALLIGAN: Yes.

4 MS. HERBERT: And he is today, too.

5 JUDGE HALLIGAN: Okay. And so - - - so if we are
6 asking what defense counsel understood and - - - and how
7 that should have informed his determination whether to
8 investigate, I assume that we also look at that in light of
9 the way in which the defendant presented to him in the
10 video. Yes?

11 MS. HERBERT: Sure. It - - - it's a part of the
12 information that he had. Absolutely.

13 JUDGE HALLIGAN: Right. And - - - and so why is
14 it that it is - - - I'm not sure if "unreasonable" is the
15 right word - - - but why couldn't defense counsel have
16 lined up those particular indicia as against the way in
17 which the defendant presented in the video and decided,
18 particularly with the existence of the alternative strategy
19 in front of him, which is there was, in fact, an immunity
20 deal offered, decided that an additional investigation was
21 not warranted? Particularly if the defendant did not
22 appear to be in the throes of some behavior that would
23 indicate some serious issue in the moment?

24 MS. HERBERT: Well, again, I - - - I do think
25 that a - - - a reasonable view of the - - - the video is

1 that he is in the throes of a manic episode. But even if
2 counsel didn't view it that way, counsel's - - - what he
3 describes his interactions with Mr. Fernandez go to issues
4 of competency, his ability to understand the proceedings,
5 his ability to engage with defense counsel to assist in his
6 defense. They do not - - -

7 JUDGE HALLIGAN: But they go to coherence and not
8 just competence.

9 MS. HERBERT: Well, again, he - - - his testimony
10 at the - - - at the post-conviction hearing - - -

11 JUDGE HALLIGAN: Um-hum.

12 MS. HERBERT: - - - counsel talked about his
13 interactions subsequent. He was not talking about how he
14 appeared on the video. He said that he appeared agitated
15 on the video, that he was concerned about him based on his
16 appearance on the video. And I think given that
17 information, counsel had an absolute obligation to
18 investigate where he - - - he knew that his client suffered
19 from serious mental illness and had an obligation to
20 discover information that could have informed his strategy.
21 And in the absence of such investigation and such - - - and
22 in making an informed strategy, he did not provide
23 meaningful representation to his client.

24 CHIEF JUDGE WILSON: Thank you.

25 MR. RIVELLESE: May it please the court. My name

1 is Vincent Rivellesse for Darcel Clark, the Bronx County
2 District Attorney.

3 I think everything that my adversary said here
4 about what the defense attorney could have said or done was
5 right. However, this was a matter of strategy, and so
6 everything the defense attorney did say and do was also
7 right, because he was able to chart the course for the
8 defense.

9 JUDGE RIVERA: But I think her - - - her point is
10 sure, of course, you can choose amongst different
11 strategies. But you should know what may or may not
12 support those strategies. And here, once he's on notice
13 about these particular serious mental health issues, he
14 should have explored that before pursuing the strategy that
15 he pursued, which has failed at suppression and failed at
16 trial.

17 MR. RIVELLESE: He definitely knew about the
18 mental illness, and he definitely knew about the drug use.
19 So it wasn't that he had no information. But he had some
20 information about those things. And at the same time, he
21 had the information about the case.

22 He had the information about the video - - -

23 CHIEF JUDGE WILSON: For example, he didn't know
24 he'd been found essentially not - - - not guilty by reason
25 of insanity, essentially in Florida, right?

1 MR. RIVELLESE: He had been, yes, a few years
2 before.

3 CHIEF JUDGE WILSON: But - - - but he didn't
4 know. Lawyer didn't know.

5 MR. RIVELLESE: The lawyer didn't know that.

6 CHIEF JUDGE WILSON: That's a pretty unusual
7 thing, right?

8 MR. RIVELLESE: Well, in fact, his client
9 withheld that from him. He called it an ace in the hole
10 that he thought he could turn over after the - - - the
11 conviction in order to get out of it. He called the prosec
12 - - -

13 CHIEF JUDGE WILSON: No. I'm not sure the fact
14 that his client withheld it from him would excuse a failure
15 to search for it, right?

16 MR. RIVELLESE: Well, I think what it was, was
17 that the defense attorney had seen the video. He had seen
18 the - - - the confession that was on video. He had seen a
19 lot of the specific evidence in this case, which was
20 unusual. There was that note from 4:15 p.m. where the
21 defendant wrote that he - - -

22 CHIEF JUDGE WILSON: No, no. I - - -

23 MR. RIVELLESE: - - - wanted to get
24 consideration.

25 CHIEF JUDGE WILSON: - - - I understand all that.

1 I guess what I'm saying is, yes, let's - - - let's assume
2 that he had two strategies to pick from, and he picked a
3 strategy. But he might have picked a very different
4 strategy if he had known more. And it seems like there was
5 a lot more for him to know that - - - that might have made
6 him have a different choice.

7 And is there some circumstance in which you learn
8 enough about somebody's lack of mental capacity in some
9 way, and you need to do more to investigate it thoroughly
10 so you know the full deck you're dealing with.

11 MR. RIVELLESE: Well, it's a hard question in a
12 way, because there's never going to be a reason not to know
13 more if you can always know more. You - - - you can always
14 gather more information. You can always advise an attorney
15 to do more work.

16 JUDGE RIVERA: Yeah. But that's true in the
17 general sense.

18 MR. RIVELLESE: Yes.

19 JUDGE RIVERA: But you have a client with some
20 serious mental issues, mental illnesses. And you see on
21 the video that there's definitely a problem with this
22 client. It does trigger for - - - for the counsel a duty
23 to investigate, otherwise, you don't know. I mean, counsel
24 does not have, as far as I can tell from this record, any
25 education in being able to determine whether or not

1 someone's mental health condition has affected what they've
2 done or not done.

3 MR. RIVELLESE: Well, he had spent forty years as
4 a defense attorney and hired experts in the past, had said
5 he was never able to get a confession suppressed based on a
6 person having what the defendant had, and he chose not to
7 use that avenue of suppression. And again, this was a 440
8 about whether he was ineffective based on how he handled
9 suppression.

10 So in this case, he didn't choose that - - - that
11 way of arguing suppression. He didn't think it was
12 necessary. It's not that he had no idea he could
13 investigate, it's - - -

14 JUDGE TROUTMAN: Was there an argument that his
15 will was overborne because of his mental illness?

16 MR. RIVELLESE: At the time? I don't think so.
17 That may be part of what the argument now is, but - - -

18 JUDGE TROUTMAN: But at the time? So in other
19 words, if there wasn't an argument or consideration of how
20 it impacted his will, what would the investigation lead to?

21 MR. RIVELLESE: Well, it probably wouldn't have
22 led to anything helpful because in this case, the defendant
23 actually spoke to the police before he was in custody. So
24 what he initially told the police about - - -

25 JUDGE TROUTMAN: And he testified at the grand

1 jury also, right?

2 MR. RIVELLESE: Yes. So he, in a sense, locked
3 himself in. Not that he couldn't have changed his
4 testimony, but that wouldn't have been a very fruitful way
5 to proceed. And so when - - - when he actually gave the
6 statement, the defense attorney saw the statement and
7 thought that he wasn't going to get it suppressed by
8 arguing that it was coerced. And in part, because some of
9 that confession was given before the defendant was in
10 custody, it wouldn't be suppressible on that basis.

11 JUDGE TROUTMAN: So is it enough hindsight to
12 look at things and say, well, it could have been done in a
13 different way, and that's enough to get this reversed?

14 MR. RIVELLESE: Well, right. Because it - - -
15 it's not - - - that - - - that's not the standard. The
16 standard would be that we should defer to the defense
17 attorney's strategy. And the strategy was based on facts
18 from this case; very specific, unusual facts from this case
19 that were almost handed to the defense. There was that
20 strange letter in the file that neither the prosecutor nor
21 the detective recognized.

22 JUDGE TROUTMAN: You would concede the attorney
23 was dealt a difficult hand?

24 MR. RIVELLESE: Yes. He was dealt a difficult -
25 - -

1 JUDGE RIVERA: But to agree with you, we'd have
2 to - - - we'd have to take the position that
3 notwithstanding what he saw on the video, notwithstanding
4 what he knew about the defendant's mental - - - serious
5 mental health issues, that he didn't have to explore any
6 more, and he could reach a conclusion about what's the
7 appropriate strategy without knowing more about this
8 client's particular mental health status. And that - - -
9 that's regardless of whether or not he'd had forty years of
10 experience. I don't even understand the statement he made.

11 But this is the client he's got in front of him
12 who has some serious - - - both substance abuse problems,
13 mental health problems - - - there are longstanding
14 problems.

15 MR. RIVELLESE: Because the most direct evidence
16 of whether the statement was voluntary, which again, we're
17 talking about suppression, right? Is that he saw the
18 statement and to then consult with experts - - -

19 JUDGE RIVERA: That's what I'm saying. What - -
20 - that's a very difficult conclusion to come to when you do
21 not understand the mental health status and the impact of
22 mental health had on that individual in that moment. But
23 without doing appropriate research - - - some research - -
24 - how could he come to a conclusion that that's off the
25 table?

1 MR. RIVELLESE: Because what he was looking at
2 was the motion that he would have to win before the court -
3 - -

4 JUDGE RIVERA: Right.

5 MR. RIVELLESE: - - - and whether he could
6 persuade a court that his client had given an involuntary
7 confession. Based on the things that he knew in the case,
8 asking a mental health expert to testify as to what - - -

9 JUDGE RIVERA: My client has delusions. My
10 client was high as a kite.

11 MR. RIVELLESE: That would be more of a trial
12 defense than telling the court that the police had somehow
13 coerced a confession. That would be - - -

14 JUDGE RIVERA: He's more susceptible to coercive
15 tactics - - -

16 MR. RIVELLESE: But the police didn't - - -

17 JUDGE RIVERA: - - - as a consequence.

18 MR. RIVELLESE: The police didn't know what he
19 was going to tell them. Because in this case, they weren't
20 investigating, as in Olivares, where they were actually
21 investigating that crime.

22 JUDGE RIVERA: But he's saying he has news about
23 murders, so they're obviously interested.

24 MR. RIVELLESE: Sure. They - - - they certainly
25 weren't going to reject his - - - his approach.

1 JUDGE RIVERA: Right.

2 MR. RIVELLESE: But he came to them with
3 information about a case they didn't know they'd be
4 investigating that day.

5 JUDGE RIVERA: How are you going to proceed with
6 a strategy when you have, on the same video, the officer
7 saying I'm making no promises, right? Absolutely none.

8 MR. RIVELLESE: The officer's - - -

9 JUDGE RIVERA: And your strategy is they made
10 promises?

11 MR. RIVELLESE: Because he had that - - -

12 JUDGE RIVERA: And any reasonable person would
13 have understood.

14 MR. RIVELLESE: He had a conversation with a
15 senior assistant district attorney that was off the record,
16 where he smoked cigarettes with her, and she confirmed that
17 she might have done that. So this was an unusual fact.
18 You don't see that in a lot of cases.

19 JUDGE RIVERA: And she gets up and says I had no
20 such statements with him?

21 MR. RIVELLESE: I'm sorry? What, Judge?

22 JUDGE RIVERA: I made no such promises.

23 MR. RIVELLESE: Right. She - - -

24 JUDGE RIVERA: And on the video you have, we're
25 making no such promises.

1 MR. RIVELLESE: But that became a - - - a
2 credibility contest. It wasn't resolved in his favor, but
3 it was a credibility contest because it was strange that
4 that wasn't recorded. It was just a separate conversation
5 for a few minutes in between the - - - the conversation
6 with the detective and the recorded video statement.

7 So there was something there for him to - - - to
8 play with, so to speak. There was the letter or the - - -
9 the note saying that at 4:15 p.m. the defendant had
10 demanded.

11 JUDGE RIVERA: Well, you're right. He might have
12 thought that was a great strategy, even though it failed
13 once and he tried it again and failed twice. But without
14 knowing fully the history of the client he's got in front
15 of him, that - - - that might have provided not only an
16 alternative strategy, but perhaps more fodder for this
17 strategy, it seems that he may have dropped the ball.

18 MR. RIVELLESE: Well, what you can't get me to
19 say is that he shouldn't have investigated, because, of
20 course, he could have investigated.

21 JUDGE RIVERA: I'm not - - - I'm not - - - that
22 was not the nature - - -

23 MR. RIVELLESE: Right.

24 JUDGE RIVERA: - - - of the questions at all.

25 MR. RIVELLESE: Right. I - - - I think that in

1 this case, he had enough evidence about what the statement
2 was, that he didn't see it as fruitful to go and ask an
3 expert to come in and say what the statement probably was.
4 Because he saw what the statement was, and he needed to
5 persuade a court that - - - that it was suppressible. So
6 he chose something - - -

7 JUDGE RIVERA: Well, how could he make such an
8 assessment when we're talking about someone who has mental
9 health issues?

10 MR. RIVELLESE: Well - - -

11 JUDGE RIVERA: Well, I'm going to ask her if her
12 position is you always have to have an expert. Maybe it is
13 - - -

14 MR. RIVELLESE: That's - - -

15 JUDGE RIVERA: - - - maybe it's not.

16 MR. RIVELLESE: - - - that's the thing. Is that
17 you really shouldn't be making a rule that a defense
18 attorney always has to do anything because the cases can be
19 very different from each other.

20 JUDGE RIVERA: Well, we do have a rule that you
21 have to investigate. So we actually do have a rule.

22 MR. RIVELLESE: Yes. And you did.

23 JUDGE RIVERA: There are certain things you must
24 do.

25 MR. RIVELLESE: And - - - and he certainly

1 investigated but not that issue.

2 JUDGE RIVERA: Research. You got to do all that.

3 MR. RIVELLESE: Yes. He - - - he investigated
4 the alibi issue as to one of the crimes, and he
5 investigated by talking to the witnesses. For example, you
6 know, if you have a case where you just don't talk to the
7 witnesses, one of the cases - - -

8 JUDGE RIVERA: Why - - - why - - - why wouldn't
9 you investigate your client's own mental health history?

10 MR. RIVELLESE: Well, he investigated enough
11 because he talked to him - - - he could have investigated
12 it more. But to say he didn't investigate it at all, he
13 was aware of the mental health issues, he was aware of the
14 - - -

15 JUDGE RIVERA: What investigate - - - what
16 investigation did he make?

17 MR. RIVELLESE: Talking to his client, watching
18 the video, watching the grand jury testimony. There - - -
19 there was, you know, reference to the mental illness and
20 the drug use in all of those situations, and it wasn't that
21 he was unaware of it. So to - - -

22 JUDGE RIVERA: But you're saying that's an
23 investigation of the actual mental health history of his
24 client? Asking the client and looking at a video?

25 MR. RIVELLESE: There was no dispute that he had

1 those issues.

2 JUDGE RIVERA: It would highlight or identify
3 that there may be issues, but it doesn't necessarily let
4 you investigate what the nature of them is, correct?

5 MR. RIVELLESE: There was no dispute that he had
6 those issues. Even the prosecution wasn't disputing it.
7 They talked about it in the video with the assistant
8 district attorney where he asked him about it, and the
9 defendant told him that he had diagnoses. So it wasn't a
10 surprise or something that was hidden. Everyone was aware
11 of it, but it wasn't the crux of the case.

12 And the defense attorney said that he didn't
13 think that was the area of - - - of pursuit of the case.
14 He thought that the issue that would have been more
15 fruitful was to proceed with the strange facts of the case.

16 JUDGE RIVERA: As opposed to what impact all of
17 that might have on his susceptibility to coercive tactics?

18 MR. RIVELLESE: Well, again, I - - - I don't
19 think he - - -

20 JUDGE RIVERA: I don't think the prosecutor is
21 going to agree to that one.

22 MR. RIVELLESE: He wouldn't have had a good
23 argument about coercion because of the statements. Some -
24 - -

25 JUDGE RIVERA: How would he know?

1 MR. RIVELLESE: I'm sorry?

2 JUDGE RIVERA: How would he know - - -

3 MR. RIVELLESE: Well, some of the statements - -

4 -

5 JUDGE RIVERA: - - - without doing the research?

6 MR. RIVELLESE: Some of the statements came out

7 before he was Mirandized - - - not before he was

8 Mirandized, but before he was in custody. They actually

9 read him his rights prophylactically before they had to.

10 But some of the statements came out before he was

11 in custody, so they wouldn't be suppressible as coerced by

12 the police conduct. So he wouldn't have been able to get

13 those statements suppressed if only the People's evidence

14 came out and the defense didn't present any kind of an

15 argument about his suppression.

16 And the defendant chose that argument without his

17 attorney's advice. It was actually against advice of

18 counsel to present that in the grand jury, and therefore

19 kind of set up the argument that if he were to say

20 something different, he'd be lying. So he kind of went

21 against counsel's advice in that respect. But that's not

22 counsel being - - -

23 JUDGE RIVERA: My question his judgment given his

24 mental health status, right?

25 MR. RIVELLESE: Well, certainly you could

1 question it. But his attorney had in front of him an
2 uphill battle and he had to try to get suppression. And -
3 - - and he chose one way of doing it, which wasn't the only
4 way. Which is why I started off by saying everything my
5 adversary said is right: what he could have done. But he
6 didn't have to because he did something else that was also
7 based on the evidence in this case.

8 JUDGE RIVERA: Again, her point, as I understand
9 it, is, yes, of course, any lawyer can choose among
10 strategies. They're reasonable strategies. But you should
11 know the basis for each of these strategies and their
12 strengths and weaknesses. And I think that's - - - that
13 was her point.

14 MR. RIVELLESE: If - - - if - - -

15 JUDGE RIVERA: I may have misunderstood her.
16 She'll correct me.

17 MR. RIVELLESE: - - - if you were to take that
18 and - - - and accept that as completely true and every
19 single of Your Honors agreed with that, there's still that
20 question of prejudice, which is not absolutely required,
21 but it's very relevant.

22 It's relevant that there was no harm here because
23 the Appellate Division said there was no likelihood that he
24 would have prevailed on the motion, even if he had chosen
25 the different strategy. So that is another thing to

1 consider.

2 When you talk about the - - - the prejudice in
3 other cases - - -

4 JUDGE RIVERA: But - - - but he might have been
5 denied meaningful representation if the lawyer doesn't do
6 an adequate investigation of the case, right?

7 MR. RIVELLESE: It's possible. But it doesn't
8 mean - - -

9 JUDGE RIVERA: Yes. I think we've said that.

10 MR. RIVELLESE: Yeah. It doesn't mean that it's
11 definitely a denial just because - - - there - - - there
12 still has to be a consideration of what the prejudice is,
13 there should be an inquiry into that. That wouldn't
14 necessarily be determinative because it's not the same
15 standard as Strickland.

16 JUDGE RIVERA: You agree under our state standard
17 that that's not required?

18 MR. RIVELLESE: It's not required - - -

19 JUDGE RIVERA: It's whether or not your
20 meaningful - - -

21 MR. RIVELLESE: Right. It's relevant.

22 JUDGE RIVERA: - - - representation been denied.

23 MR. RIVELLESE: And meaningful representation
24 includes a consideration of prejudice, not a requirement
25 that it be shown. But it should still be considered. It's

1 still relevant. It really hasn't been shown here.

2 JUDGE RIVERA: I - - - I - - - I well, I think
3 when it comes to the - - - the minimum investigation that a
4 lawyer has to make, the prejudice is not the dispositive
5 factor - - -

6 MR. RIVELLESE: Right. But you still - - -

7 JUDGE RIVERA: - - - at all. It's still
8 dispositive in the - - - in the state - - - under the state
9 standard anyway, but - - -

10 MR. RIVELLESE: Right.

11 JUDGE RIVERA: - - - the point is you've got - -
12 - the lawyer has got to do that minimal amount of work.

13 MR. RIVELLESE: And - - - and really, the - - -

14 JUDGE RIVERA: Even if that would not have
15 changed a blessed thing, they've got to do that minimum
16 amount of work.

17 MR. RIVELLESE: He - - - he did quite a lot of
18 work when you look through the entire representation.

19 JUDGE RIVERA: Well, I understand. That's a
20 question in the case. But I'm saying with respect to your
21 point about prejudice. Excuse me.

22 MR. RIVELLESE: But - - - but certainly, we're
23 not saying there shouldn't be investigation, but there was
24 some amount of investigation here. Could have been more,
25 wasn't more. But he did choose a different way of going.

1 And we're arguing that that was a sufficient strategy.
2 That it shouldn't be an ineffective assistance finding.

3 Don't have any other questions? We're going to
4 ask the court to affirm.

5 CHIEF JUDGE WILSON: Thank you.

6 JUDGE RIVERA: Can you address this point about
7 the statements made before the - - - before the defendant's
8 Mirandized?

9 MS. HERBERT: Absolutely, Your Honor. The - - -
10 sort of the conventional, not specifically Miranda type of
11 voluntariness arguments obviously encompass a range of
12 factors. And there's - - - we've laid out the case law in
13 our brief and certainly the - - - the - - - the defendant's
14 mental state and mental competency are a factor to be
15 considered in determining whether statements are voluntary
16 and whether their admission would violate principles of due
17 process. And in - - - in that regard, issues relating to
18 coercion by law enforcement also must take into account the
19 particular vulnerabilities of the defendant at issue. In
20 other words, which obviously would encompass their - - -
21 their - - - their mental state.

22 CHIEF JUDGE WILSON: I - - - I think the
23 statements in question were after he was Mirandized but
24 before he was in custody.

25 MS. HERBERT: Right. Well, there is - - - the

1 record is somewhat confused because there are various
2 different time stamps on things that were contradicted by
3 the testimony - - -

4 CHIEF JUDGE WILSON: Let me - - -

5 MS. HERBERT: - - - of law enforcement.

6 CHIEF JUDGE WILSON: Let me just ask you this.
7 Were there any statements that he made before he was in
8 custody, but after he was Mirandized?

9 MS. HERBERT: Yes. The - - - well, according to
10 the findings made at the Huntley hearing, there were two
11 relatively brief written statements that were made after he
12 was given Miranda but according to the findings at the
13 Huntley hearing, before he was in custody. The lengthy
14 videotaped statement is made after Miranda and after he was
15 found to be in custody.

16 I hope that answered - - -

17 CHIEF JUDGE WILSON: It does.

18 MS. HERBERT: - - - but as I said, with respect
19 to the written statements, there is some confusion on the
20 record about the timing because they have different time
21 stamps on them.

22 But again, to the extent that perhaps the issues
23 of mental illness most directly relate to someone's ability
24 to appreciate and waive your Miranda rights, suppressing
25 the video statement would certainly have made a significant

1 difference in the case, even if other - - - if the - - -
2 the - - - the shorter written statements had not been
3 suppressed. So certainly that is not something that I
4 think counsel could have easily dispensed with.

5 With respect the issues of prejudice, the - - -
6 this court has very clearly said that - - - and this is in
7 Olivares - - - "It simply cannot be said that a total
8 failure to investigate the facts of the case or review
9 pertinent records, constitutes a trial strategy resulting
10 in meaningful representation".

11 JUDGE SINGAS: Yeah. But that's investigation of
12 the defense. I - - - I don't think we've ever held - - -
13 or maybe you can help me out if we have - - - that you have
14 a duty to investigate a defense that you're not pursuing.

15 MS. HERBERT: Well, it - - - it refers to
16 investigation, full stop. In other words, that you cannot
17 formulate a reasonable trial strategy if you are in
18 ignorance of critical information about the case. I don't
19 think anyone would say that Mr. Fernandez's mental state
20 was completely irrelevant to any of the issues that were
21 presented. So - - -

22 JUDGE SINGAS: I think you've misunderstood me.
23 I didn't say that it's irrelevant. I'm saying they chose
24 another defense and Olivares was a mental health defense,
25 and we said that that failure to investigate anything about

1 mental health prejudiced the defendant.

2 MS. HERBERT: Well, again, there - - -

3 JUDGE SINGAS: Stop. Right?

4 MS. HERBERT: - - - there - - -

5 JUDGE SINGAS: And then after that. Now here,
6 I'm saying, have we ever said a failure to investigate an
7 additional defense that you're not pursuing, is ineffective
8 assistance? Is enough for us to say this attorney - - -

9 MS. HERBERT: There - - - there are cases - - -

10 JUDGE SINGAS: - - - was ineffective.

11 MS. HERBERT: - - - I'm thinking particularly of
12 federal cases where they - - - they - - - they say that - -
13 - they emphasize the duty to investigate, and they say that
14 a strategy that is formulated without reasonable
15 investigation is not a reasonably competent strategy. In
16 other words, the - - - the bedrock of a reasonable strategy
17 is appropriate investigation. Which will necessarily - - -

18 JUDGE GARCIA: But counsel, I'm sorry.

19 MS. HERBERT: - - - vary depending on the case.

20 JUDGE GARCIA: Are those cases - - - as I
21 remember some of them - - - are those cases where they
22 pursued a strategy that was a disaster and there was a
23 failure to investigate it so you didn't know that disaster
24 was coming if you pursued this defense?

25 MS. HERBERT: The cases that I'm thinking of are

1 - - - are Wiggins and - - - there's another - - - Williams.

2 JUDGE GARCIA: So they're different?

3 MS. HERBERT: They are different. I mean,
4 they're - - - they're different, but again - - -

5 JUDGE GARCIA: No. I mean, I'm asking. Those
6 are not the types I - - - I described.

7 MS. HERBERT: No. No, they're not, Your Honor.
8 The - - - but - - -

9 JUDGE TROUTMAN: So does - - - so - - - just so
10 I'm clear. So you are saying that the defense has an
11 obligation to investigate all possible strategies before
12 deciding upon which one to pursue?

13 MS. HERBERT: Well, the - - - competent counsel
14 has an obligation to conduct reasonable information, which
15 will vary from case to case. But here where defense
16 counsel was, you know, sort of slapped in the face by these
17 issues relating to his client's impaired mental status - -
18 -

19 JUDGE TROUTMAN: So aware that the client was a
20 drug addict, heroin user - - -

21 MS. HERBERT: Absolutely.

22 JUDGE TROUTMAN: - - - aware that he had a
23 history of mental illness - - -

24 MS. HERBERT: Of psychosis. Yeah.

25 JUDGE TROUTMAN: - - - and - - - and psychosis.

1 Aware - - - and aware of a video showing his behavior, and
2 aware of statements that he made that were consistent or
3 inconsistent with evidence, you say he still needed to go
4 further and - - -

5 MS. HERBERT: And - - -

6 JUDGE TROUTMAN: - - - go to Florida, get those
7 records, and go to California or wherever else he could be,
8 and find every possible - - -

9 MS. HERBERT: Well, again - - -

10 JUDGE TROUTMAN: - - - mental health record?

11 MS. HERBERT: - - - what - - - what he needed to
12 do is speak to his client, find out where his client had
13 been treated, and then make - - - then - - - then pursue -
14 - - try to - - - to - - - to - - - to - - - to find those
15 records. It might - - -

16 JUDGE TROUTMAN: So there is evidence here he
17 never communicated to his client about his - - -

18 MS. HERBERT: He - - - he stated that he - - -
19 that based on - - - well, based on the materials we've been
20 discussing, but also based on conversations with his
21 client, he was aware of these things but took no steps to
22 follow up. Took no steps to contact facilities where his
23 client had been treated to speak to doctors or anything
24 like that. He said that he didn't - - - didn't think it
25 was relevant.

1 JUDGE RIVERA: And is the reason - - - just to
2 clarify what the record is. And is the reason for that his
3 own assessment of the client, or did he say there were
4 other reasons?

5 MS. HERBERT: The only reason - - -

6 JUDGE RIVERA: Because he did say that.

7 MS. HERBERT: The only reason that he offered was
8 his assessment, his lay assessment of his client's mental
9 state. And again, I think this - - - it's - - - it's
10 important to realize that obviously mental illness is a
11 very complex areas, and when attorneys are confronted with
12 a situation such as this, it certainly behooves them to
13 inform themselves to obtain appropriate records that might
14 shed light on their client's condition.

15 JUDGE RIVERA: What - - - what about his point:
16 in all my years of practice, I would - - - I take this
17 point to be that I would never have won with that argument.
18 No court would have suppressed based on that kind of an
19 argument, i.e., the - - - my client's mental health status.

20 MS. HERBERT: Well, again, I - - - I think the -
21 - - I - - - I think that that is not - - - I don't think
22 that that would be a reasonable determination for the
23 attorney to make in this case. And I think that this case
24 was always going to turn on the voluntariness of the
25 statements. The statements were the case. They were the

1 only evidence against Mr. Fernandez.

2 So the attorney was appropriately focused on the
3 admissibility of the statements. He pursued a strategy,
4 however, that relied on the fact that his client had made a
5 rational - - - had a rational belief, a rational - - - he
6 made a rational decision based on his belief that he was
7 offered immunity and payment for his information.

8 It basically pushed to one side the completely
9 bizarre aspects of this case where his client walked into a
10 police station. The police officers testified that he was
11 styling himself as a secret agent. They characterized him
12 as agitated. They said he was rambling on about this,
13 rambling on about that. And all of those were cast aside
14 because counsel depended on his client having a rational
15 belief.

16 If he had pursued an appropriate investigation,
17 learned the information that was readily available out
18 there about the nature of his client's mental illness, he
19 could have incorporated all of the aspects of this into a
20 strategy that would more - - - would - - - had certainly a
21 stronger chance of prevailing.

22 It's worth noting that the prosecutor at the
23 trial level characterized counsel's arguments as wildly
24 absurd. And the suppression judge said that they were, I
25 think, incredible on their face. And so this was not

1 something that was going to succeed in a - - - a more
2 fulsome strategy that incorporated additional information
3 that was available to counsel, might well have fared
4 better. And besides, under this court's meaningful
5 representation standard, a specific demonstration of
6 prejudice was not required, and a trial that - - - where
7 counsel did not understand the nature of his client's
8 impairment was not a fair trial.

9 CHIEF JUDGE WILSON: You were sort of saying that
10 in a big picture way, people in their right minds don't
11 come in and turn themselves in so they can serve the next
12 fifty years in prison?

13 MS. HERBERT: Yes. That - - - that is correct.
14 And yet that is what Mr. Fernandez is doing.

15 CHIEF JUDGE WILSON: Did.

16 MS. HERBERT: And the trial at which he was
17 convicted was not a fair trial because counsel did not have
18 adequate information to formulate a rational strategy.

19 CHIEF JUDGE WILSON: Thank you.


20 (Court is adjourned)

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

I, Chrishanda Sassman-Reynolds, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Fernandez (Andre), 61 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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