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COURT OF APPEALS
STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

DAVID MENDOZA,

Appellant.

NO. 42

20 Eagle Street
Albany, New York
May 2, 2019

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: On the calendar, first
2 appeal this afternoon is appeal number 42, The People of
3 the State of New York v. David Mendoza.

4 Counsel?

5 MS. HALPERN: Good afternoon, Your Honors. I'd
6 like to request two minutes for rebuttal.

7 CHIEF JUDGE DIFIORE: You may.

8 MS. HALPERN: Good afternoon. My name is Caitlin
9 Halpern of counsel for Appellate Advocates, and I'm here on
10 behalf of David Mendoza.

11 Mr. Mendoza was deprived of meaningful
12 representation when his trial attorney conceded guilt on
13 all counts, abandoned legitimate defenses, and advanced
14 only a jury nullification defense.

15 JUDGE GARCIA: So Counsel, what would - - - if we
16 agree with you here, what would our rule be going forward?
17 How would trial courts deal with this?

18 MS. HALPERN: The rule we're requesting is that
19 nullification defenses constitute ineffective assistance of
20 counsel when there's a legitimate defense available.

21 JUDGE GARCIA: So let's say the circumstances - -
22 - this counsel - - - this defense counsel gets up says, you
23 know, the People's case is airtight or rock solid - - -
24 this is a rock-solid case.

25 MS. HALPERN: Rock-solid case.



1 JUDGE GARCIA: The prosecution now has to object.
2 Objection; they - - - characterized my case as a rock-solid
3 case.

4 MS. HALPERN: And in fact, the prosecutor here
5 did object and - - -

6 JUDGE GARCIA: To a rock-solid case?

7 MS. HALPERN: Not to a rock-solid case
8 specifically, but to some of the other remarks.

9 JUDGE GARCIA: So what happens? Objection; what
10 happens?

11 MS. HALPERN: So there are two different things
12 that could happen. One, as Your Honor points out, the
13 prosecutor could object, and the court should sustain that
14 objection. That's what should happen under this court's
15 case law anyway.

16 But the trial court - - -

17 JUDGE GARCIA: So then the defense lawyer's - - -

18 MS. HALPERN: - - - can also intervene.

19 JUDGE GARCIA: I'm sorry. Defense lawyer then
20 keeps going. Objection again; what happens?

21 MS. HALPERN: The trial court should - - -
22 continue to sustain those objections, because a
23 nullification defense is an illegitimate defense, as
24 clearly established by this court's precedent.

25 JUDGE WILSON: You qualified the rule, as you



1 stated it, by saying "when there is a legitimate defense."

2 MS. HALPERN: Yes, Your Honor.

3 JUDGE WILSON: So what happens when there's not
4 one?

5 MS. HALPERN: First, I would say that that is a
6 much more difficult question that this court does not need
7 to reach today. But - - -

8 JUDGE WILSON: What was the legitimate defense
9 here?

10 MS. HALPERN: There were two possibilities that
11 we discussed in the briefings, and perhaps a creative
12 attorney or judge could come up with something else. But
13 we said that there are two mens rea defenses that the trial
14 attorney could have raised: one, that Mr. Mendoza was not
15 aware that he was not allowed to enter the building; and/or
16 two, that he didn't enter with the intent to steal.

17 And as this court recognized in Duffy, evidence
18 of mens rea is almost never conclusive. There's rarely
19 direct evidence of mens rea. There's usually something
20 that an attorney could say.

21 JUDGE GARCIA: So can the trial judge, then, call
22 a sidebar in the middle of the defendant's summation and
23 say: what else do you have?

24 MS. HALPERN: I suppose it could, Your Honor.
25 But what would be better - - -



1 JUDGE GARCIA: Do you think that's a good rule?

2 MS. HALPERN: I think a better rule is for this
3 court to clearly say that nullification defenses are not
4 permissible, instead of adopting the People's rule that
5 would - - -

6 JUDGE FAHEY: Well, but - - -

7 MS. HALPERN: - - - create that kind of scenario.

8 JUDGE FAHEY: - - - you know, it's - - - one of
9 my favorite court movies is a movie called The Verdict. I
10 don't know if you're familiar with it.

11 MS. HALPERN: I'm not, I apologize.

12 JUDGE FAHEY: Go back and watch it, then - - -

13 JUDGE RIVERA: Oh, my.

14 JUDGE FAHEY: - - - afterwards. All of us here
15 recommended it to you.

16 MS. HALPERN: I'm glad to know that.

17 JUDGE RIVERA: How old are you?

18 JUDGE FAHEY: To all the lawyers in the
19 courtroom, all right?

20 JUDGE RIVERA: How old are you?

21 Don't answer that.

22 JUDGE FAHEY: It was one of Paul Newman's last
23 movies.

24 Anyway, part of the argument in there - - - or
25 the case itself, you could argue, results in nullification.



1 So when I was reading this case, I was thinking about it,
2 and I - - - I thought to myself, the danger in what you're
3 proposing is you're proposing a no-mercy rule. And - - -
4 and that if it isn't objected to, that the court has to
5 make a determination on it.

6 So it scares me a little bit. And I would never
7 want to set up a situation where a jury couldn't exercise
8 the right of mercy.

9 And let me give you two examples in the context
10 of this case. First, here - - - I would find it very
11 difficult to accept an argument of nullification since this
12 person was convicted to the top charge. In other words,
13 nothing was nullified. There was no nullification here.
14 The jury didn't act that way.

15 So there was no actual jury nullification.

16 The second thing is, is when I - - - and I went
17 over and I read the summations again and various parts of
18 the trial testimony, and it strikes me that a fair argument
19 can be - - - could be made that - - - that this attorney
20 was really arguing for the lesser-included offenses. In
21 other words, this is a petit larceny, Your Honor. You
22 know, he's being overcharged. And even the detective
23 himself, Your Honor, thought the case was being
24 overcharged.

25 Those are fair - - - fair arguments to make in



1 this case. But that's not the same as asking for a rule
2 from us which would arguably restrict a jury's right to
3 exercise mercy.

4 MS. HALPERN: So two things, Your Honor. And
5 first, respectfully, counsel was not asking for a
6 compromise verdict. In his own words, he said, "I am not
7 asking you to find my client not guilty of burglary."

8 JUDGE FAHEY: But he - - - but the more important
9 point is do you understand the consequences of such a rule
10 - - - if we should implement such a rule in this case,
11 which is an overcharged petit larceny?

12 MS. HALPERN: That's right, Your Honor. But
13 there's no reason to be afraid. Because we're not asking
14 for anything that this court has not already decided time
15 and again. This court, more than a century ago in Duffy,
16 and more recently in Weinberg and Goetz, held very clearly
17 that nullification defenses are inappropriate because - - -

18 JUDGE GARCIA: No - - - we didn't hold that.
19 What we held was you're not entitled to argue it. So if
20 there is an objection - - - and I think in Weinberg they -
21 - - they got - - - one, they got an instruction, one there
22 was an objection - - - if you're prevented from arguing it,
23 you can't say that's error, because you're not entitled to
24 argue it.

25 But that's a very, very different question. You



1 get the defense by - - - which may be your most effective
2 defense - - - are you going to be held to an ineffective
3 assistance of counsel standard?

4 We have never reversed a conviction based on
5 that.

6 MS. HALPERN: But what you have held in your
7 ineffective assistance of counsel cases is that a defendant
8 is entitled to a well-grounded defense that is accepted by
9 law and a strategy that is legitimate.

10 JUDGE GARCIA: So let's talk about that, though.
11 You seem to be basing your entire argument on a summation.
12 I don't think we've ever said it, but I think Appellate
13 Division courts have said you don't even have to sum up;
14 that's not ineffective.

15 So don't you have to look at this entire record
16 to see what the argument was, not pull one statement out of
17 a summation?

18 MS. HALPERN: Absolutely, Your Honor. And the
19 opening, every cross-examination, and the summation show
20 that the only defense advanced at all was nullification, a
21 defense that was foreclosed by the jury instructions and
22 then left appellant with no defense at all.

23 JUDGE GARCIA: So is your claim of ineffective
24 assistance that they gave up a winning - - - a potentially
25 successful strategy or that they admitted guilt and that



1 wasn't a successful strategy here?

2 MS. HALPERN: Concession of guilt was certainly
3 problematic, because it went against the client's
4 interests. He was advocating against his own client's
5 position.

6 But the other piece of it is that nullification
7 is impermissible because it doesn't provide the jury any
8 way to acquit. Once the jury says you must - - - once the
9 judge says - - - I'm sorry - - - you must take the law
10 whether you agree with it or not, there's no defense.

11 And some defense is better than no defense, even
12 if - - -

13 JUDGE RIVERA: So is this - - -

14 MS. HALPERN: - - - it's not winning.

15 JUDGE RIVERA: - - - is this - - - is this - - -
16 does your rule, as you stated it when you first stood up
17 and opened, apply even if - - - even if the defendant says
18 that they are in agreement with this approach?

19 MS. HALPERN: That's correct, Your Honor.

20 JUDGE RIVERA: That they fully understand the
21 approach, they understand the consequences of it?

22 MS. HALPERN: Under Colville, that's a tactical
23 question for the defense attorney not for the client. And
24 again, the problem - - -

25 JUDGE RIVERA: Well, let's say the defense



1 attorney decides I'm going to present it to my client. If
2 the client doesn't want to do this, I'm not going to move
3 forward with it?

4 MS. HALPERN: We would still maintain that when
5 there's a defense with some basis in law, counsel is
6 obligated to pursue that defense and not abandon those
7 defenses in order to pursue a defense that has no chance -
8 - -

9 JUDGE RIVERA: Well, what does that mean?

10 MS. HALPERN: - - - of success.

11 JUDGE RIVERA: Every potential defense? If you
12 don't pursue every potential defense - - -

13 MS. HALPERN: Any defense that has a - - -

14 JUDGE RIVERA: - - - no matter how marginally
15 colorable, you're ineffective?

16 MS. HALPERN: I would say similar to the - - - to
17 the standard used when deciding whether to submit a lesser-
18 included. If there's a reasonable base in the evidence, if
19 there's some evidence. And that's the standard that the
20 Tenth Circuit applied in Capps and that this court should
21 apply here.

22 CHIEF JUDGE DIFIORE: Thank you, counsel.

23 Counsel?

24 MR. MARRERO: Good afternoon, Your Honors. May
25 it please the court. Gamaliel Marrero for the respondent.



1 Your Honors, the order of the Appellate Division
2 should be affirmed, because here counsel was effective. In
3 the face of overwhelming evidence of guilt, defense counsel
4 pursued a reasonable strategy of conceding guilt on the
5 petit larceny count and seeking to persuade the jury that a
6 conviction on the burglary counts would be unfair in light
7 of the circumstances of the case, such as - - -

8 CHIEF JUDGE DIFIORE: Did he attack the elements
9 of the crime in his summation or in his opening or during
10 cross?

11 MR. MARRERO: In his summation he did make an
12 argument as to the elements of - - - as to the - - - the
13 defendant's knowing - - - knowing unlawful entry into the
14 building. He made an argument that the People failed to
15 show that the "No Trespassing" signs were posted on the
16 front of the building on the two days that the defendant
17 entered and stole the packages. That was the extent of his
18 argument as to the - - -

19 CHIEF JUDGE DIFIORE: That they weren't visible
20 on the videotape?

21 MR. MARRERO: That they weren't visible on the
22 videotape. He suggested that the - - - the signs were not
23 posted.

24 JUDGE GARCIA: Counsel, going back to, I think,
25 something Judge Fahey said, kind of the gist of that, which



1 is this case kind of raises some very troubling issues in
2 ways, you're in a courtroom, the prosecutor is hearing what
3 could arguably be a nullification argument. It seems to me
4 there's always a plea for mercy in most summations that - -
5 - that I've heard or read.

6 Prosecutors generally tend to let a lot of that
7 go, because you don't want to be jumping up in front of a
8 jury and saying "objection" while they're accusing you of
9 being oppressive, right? So it's a very delicate balance,
10 although technically there's no right to argue that.

11 What troubles me, I think, along the lines of
12 this - - - what Judge Fahey was getting at in terms of a
13 mercy defense is, a rule such as the one your opponent is
14 arguing for would make it much more of an - - - give much
15 more of an incentive for a prosecutor to jump up and object
16 when anything is arguably straying into nullification
17 territory.

18 MR. MARRERO: Right. And in this case, defense
19 counsel's summation could reasonably be construed as a
20 challenge to the sufficiency of the People's proof, such as
21 arguing the facts don't fit the charges while in one
22 context his defense counsel was arguing that they don't fit
23 in the sense that there was no break-in, there was no
24 damage to property. He - - - it could also be - - -
25 reasonably be construed that he's arguing that the People



1 failed to present their - - - or meet their burden of
2 proof.

3 So yes, Your Honor, a rule such as the rule that
4 my colleague here suggests - - -

5 JUDGE RIVERA: But how is that, when he starts
6 out saying it's a rock-solid case - - -

7 MR. MARRERO: I'm sorry, Your Honor?

8 JUDGE RIVERA: - - - more than once? How - - -
9 how is that, if he says more than once it's a rock-solid
10 case?

11 MR. MARRERO: Well, he was saying rock - - - he
12 was saying a rock-solid case as to the - - - just to the
13 theft of the packages.

14 You know, when you - - - when you take comments
15 like "it's a rock-solid case; there's no mystery here" out
16 of context, yes, they can be seen as conceding guilt on all
17 - - - on all counts.

18 But viewing the opening and the summation in
19 context, those - - - bringing those - - - those comments in
20 context - - - excuse me - - - defense counsel was clearly
21 arguing that there's no mystery that David Mendoza walked
22 into the lobby those two days and took packages, but that
23 the - - - but that he did not commit a burglary. That was
24 the gist of defense counsel's argument.

25 He was not conceding guilt on all the charges.



1 JUDGE RIVERA: Could - - - could he - - - well,
2 that's interesting, the last point you make.

3 But could he, nevertheless, be arguing as an
4 alternative basis mercy, nullification, whatever you want
5 to call it? Could it be that both things are happening
6 parallel?

7 MR. MARRERO: Oh, sure, definitely, Your Honor.

8 JUDGE RIVERA: Is that what happened here?

9 MR. MARRERO: It appears to be the case, Your
10 Honor.

11 JUDGE RIVERA: Okay. All right. So why isn't he
12 ineffective, if he's then also arguing as this alternative
13 basis one that, as counsel argues, is not permissible?

14 MR. MARRERO: Well, Your Honor, my colleague here
15 relies on Weinberg. Weinberg doesn't stand for the
16 proposition that a - - - that a defense attorney may not,
17 under any circumstances, pursue a nullification argument.
18 Certainly Weinberg says that a trial court can and should
19 preclude nullification arguments. But that does not stop
20 defense counsel from pursuing it where the trial court has
21 permitted it.

22 So defense counsel here was not ineffective for
23 pursuing - - -

24 JUDGE RIVERA: Yes, but if - - - if the directive
25 is to not permit it, isn't the consequence of that that



1 lawyers should not be - - - defense counsel shouldn't be
2 getting up and making that kind of an argument?

3 MR. MARRERO: Well, Your Honor, defense counsel
4 first introduced the argument in opening statement. The
5 court allowed it; the court continued to allow it.

6 I think defense counsel, in weighing the risks
7 and likelihood of success of different strategies should be
8 afforded the latitude to consider one argument or the other
9 and pursue that argument which he thinks would - - - he or
10 she thinks would - - -

11 JUDGE RIVERA: We - - - it's possible for an
12 attorney to be ineffective even though the judge lets you
13 be.

14 MR. MARRERO: Oh, sure - - -

15 JUDGE RIVERA: Right?

16 MR. MARRERO: - - - Your Honor. But under - - -
17 but under the facts of this case, defense counsel was not
18 ineffective. I mean, it depends on the law - - - the facts
19 and circumstances at the - - - at the time of the
20 representation. And here, viewing the record as a whole,
21 counsel was not ineffective for perhaps emphasizing a mercy
22 - - - pursuing a mercy verdict a little more than, you
23 know, pursuing a challenge to the elements of the - - - of
24 the crime.

25 JUDGE GARCIA: It seems to me in - - - in that



1 case, where we were saying you have no right to and you
2 have an instruction, there, the defense counsel was saying
3 I should be able to do this. This is my best shot, and I
4 want to be able to do this, in that case. And we said no,
5 you have no right to do this. The judge can tell you, you
6 have - - - you can't argue that. The judge can give an
7 instruction you have to follow the law. But it was what
8 that defense counsel believed was my best defense.

9 Here it's almost the reverse. It's what this
10 counsel - - - and I think supported somewhat by the record
11 - - - believed was the best defense - - - let's say
12 nullification. They wanted to do it, and they actually got
13 it through when it could have been objected to and it could
14 have been stopped.

15 And I'm having a hard time fitting that within
16 the framework of our ineffective assistance analysis,
17 because there the defense counsel made a decision this was
18 a reasonable defense. The facts were - - - you know, the
19 evidence of guilt was very strong here, videotapes. And
20 they could have been prevented from doing it legally, and
21 the judge would have been sustained or would have been
22 affirmed on appeal perhaps; but they got that defense
23 through, still believing it's the best defense this - - -
24 this defendant had on this record.

25 And now the rule we're being asked to do is to



1 say - - - and this becomes very tricky to me - - - to say
2 you're ineffective for getting through a defense you
3 believed, and others have believed in the past, was the
4 most effective defense you could have, because you
5 shouldn't have been able to argue it - - - I mean, you
6 shouldn't be able to argue, you know, you have to prove my
7 - - - prove my client guilty beyond a shadow of a doubt.
8 But if you get that through, is it really ineffective?

9 So you know, I - - - I have a hard time lining
10 this fact scenario up - - - and it's troubling in ways - -
11 - with our ineffective assistance standard.

12 MR. MARRERO: Well --

13 JUDGE GARCIA: There's no question in there, but
14 you can comment on that statement.

15 MR. MARRERO: Well, I - - - I think the People
16 aren't proposing a general rule. We're simply saying that
17 under the facts and circumstances of this case, it was a
18 reasonable and legitimate strategy to pursue the strategy
19 that counsel ultimately chose.

20 Defense - - - the defendant here cannot establish
21 the total absence of strategic or legitimate explanations
22 for pursuing, in the face of overwhelming evidence, what
23 was arguably defendant's best shot at being acquitted of
24 burglary in the second and the third degree.

25 JUDGE STEIN: Well, that's one of my questions.



1 And - - - and you know, I understand the - - - the quandary
2 it puts the court and counsel in if in making a ruling the
3 trial court has to somehow know what the defense strategy
4 is. That - - - so - - - so is this proposed rule that it
5 may be okay in some circumstances but not others, is that
6 really just for appellate review or - - -

7 MR. MARRERO: Oh, no. I would say the question
8 of whether an argument is okay or permissible or proper is
9 different from whether that argument is ineffective.

10 JUDGE STEIN: Well - - - okay. So - - - so would
11 you agree with me - - - see, I see - - - I see Weinberg a
12 little differently from how some of my colleagues see it.
13 And - - - and I - - - you know, I thought that the court,
14 you know, pretty clearly said that permitting counsel to
15 raise a nullification argument or defense - - - I think the
16 language was, you know, would encourage the - - - you know,
17 "to encourage the jury to abdicate its primary function
18 would directly contravene the trial court's authority to
19 instruct the jury that they must follow and properly apply
20 the law" - - - which the trial court did here.

21 So I - - - I - - - so I see that - - - I read it
22 as saying it's not proper for the court to allow it - - -

23 MR. MARRERO: Sure.

24 JUDGE STEIN: - - - and it's not proper for
25 defense counsel to do it.



1 Your argument is is that doesn't mean that it's
2 ineffective to do it?

3 MR. MARRERO: Well, I would suggest that yes,
4 Weinberg does say that trial courts should preclude - - -
5 should preclude nullification arguments - - - but it
6 doesn't say if defense counsel may never request it or
7 pursue it if the trial court allows.

8 But also, I'm - - - I'm sorry, I kind of lost the
9 question, to be honest with you. But I - - - I would also
10 just - - -

11 JUDGE STEIN: I - - - I was talking about the
12 distinction between what is - - - what we said is improper
13 and - - - and whether that constitutes ineffective
14 assistance.

15 MR. MARRERO: Right. My apologies.

16 If I may, my red light is on, just I'll answer
17 quickly.

18 Frankly, even if - - - even if an argument or
19 strategy is arguably improper, it doesn't make - - - it
20 doesn't make defendant's - - - it doesn't make defense
21 counsel's representation ineffective.

22 For example, if defense counsel argues on
23 summation that - - - if he appeals to the jury's sense of
24 sympathy or appeals to the public's mistrust of government
25 to convince - - - to you know, try to persuade the jury to



1 impute some nefarious intent onto the prosecution, that in
2 itself is arguably improper, but it's not ineffective. It
3 doesn't deprive the defendant of a fair trial. That in
4 itself would not deprive defendant of a fair trial.

5 In other words, even if a defense attorney's
6 argument is considered impermissible or improper, that is
7 not, per se, ineffective assistance. You've got to look at
8 - - - the full circumstances of the case - - -

9 JUDGE FEINMAN: Well, so that actually brings me
10 to the thing that I want to know about, which is, can we
11 really resolve this whole issue on a direct appeal in the
12 absence of a 440 to know whether this lawyer had actually
13 considered whether there were legitimate other defenses,
14 was cognizant of the fact that he could argue, you know,
15 the absence of the requisite mens rea and - - - and
16 whatever else could be explored on a 440?

17 MR. MARRERO: Well, that's an excellent - - -
18 excellent point, Your Honor. And I would say, yes, a 440
19 would flesh it out. For example, a 440 motion would
20 possibly flesh out whether defense - - - the defendant
21 agreed with defense counsel's strategy.

22 On the record, defense counsel says that, you
23 know, my client never really denied what happened here, he
24 just thought he was being singled out and overcharged. A
25 440 might clarify whether that was accurately - - - whether



1 that was defense - - - defendant's position.

2 But again, here, just looking at the facts of the
3 case, what the trial court permitted the defense attorney
4 to do, defense counsel was not ineffective. Defendant
5 cannot establish here the total absence of a strategic or
6 legitimate explanation for defense counsel's strategy.

7 CHIEF JUDGE DIFIORE: Thank you, counsel.

8 Ms. Halpern?

9 MS. HALPERN: I'd like to briefly address two
10 questions; and the first is whether the summation
11 challenged the sufficiency of the evidence. And the answer
12 is that it absolutely did not.

13 As we discussed earlier, trial counsel never
14 asked for a conviction - - - never asked for a conviction
15 on the lesser and an acquittal on the greater. He didn't
16 even ask for the lesser-included offense of trespassing.
17 He never challenged the specific - - - element, either in
18 his presentation to the jury or in his motion to dismiss.

19 Instead he argued only that the jury should be
20 fair, because Mr. Mendoza did not commit the crime of the
21 century.

22 And second, why is this ineffective assistance?
23 The reason is that trial counsel presented only a defense
24 that was foreclosed by the instructions the jury is
25 presumed to follow, therefore leaving Mr. Mendoza with no



1 defense at all, when he could have had a defense with some
2 basis in the evidence.

3 This - - -

4 JUDGE FEINMAN: Okay, so - - -

5 MS. HALPERN: Yes, Your Honor.

6 JUDGE FEINMAN: - - - so that gets to my issue of
7 like how do we know whether that lawyer really evaluated
8 the legitimacy of these alternative defenses in the absence
9 of a 440?

10 MS. HALPERN: Right. And that's an important
11 question, Your Honor, but not one that has to be answered
12 to resolve this case. Because we don't need to know what
13 was in counsel's head. All we need to know was did he
14 choose a defense that is not recognized by law over a
15 defense that is recognized by law.

16 And the crux of the argument is that instead of
17 pursuing a mens rea defense with some basis in the law,
18 that had a hook in the court's instructions, he chose to
19 advance only a nullification defense. And that's clear
20 from the face of the record.

21 JUDGE RIVERA: So given your rule, your position
22 is if indeed there is actually no legitimate defense, no
23 other option, that if a lawyer makes this plea for mercy to
24 the jury, the prosecutor doesn't object, the court doesn't
25 stop the counsel, that then that lawyer is not ineffective?



1 MS. HALPERN: Again, I think what a counsel is to
2 do when there's nothing to say is a hard question that you
3 don't have to answer. But yes, if there's absolutely
4 nothing else to say, I would be hard-pressed to argue that
5 - - -

6 JUDGE GARCIA: It's such a difficult rule - - -

7 MS. HALPERN: - - - it was ineffective
8 assistance.

9 JUDGE GARCIA: - - - to enforce. And going back
10 to Weinberg - - - and Judge Stein was right about that
11 language - - - if we do read that to courts essentially
12 have this affirmative duty not to permit this and the rule
13 is, well, if you have nothing else, it's not ineffective,
14 the court's going to now have to start really cracking down
15 on nullification arguments.

16 So you're making a nullification argument.
17 There's an objection or the court's own objection to that
18 because they can't "permit" it, can you say I've got
19 something else coming later, so let me argue nullification
20 now? I mean, I think it's going to really - - - I mean,
21 careful what you ask for - - - have the effect of forcing
22 judges and prosecutors to take a much harder line on
23 appeals to mercy to a jury.

24 MS. HALPERN: So this court has already very
25 clearly established what a court is allowed to do. We're



1 just asking for a small extension to clarify what counsel
2 is allowed to do. But we know that the court cannot
3 encourage nullification and has to sustain those
4 objections, as it did in many instances here.

5 JUDGE FEINMAN: So - - - so what happens if the
6 lawyer looks at the case, looks at the evidence, and - - -
7 and you know, just - - - and I've had this happen - - - has
8 an obstinate client who just refuses to face the reality of
9 - - - of what the facts and evidence show? Can that lawyer
10 stand up and argue, instead of saying it's a rock-solid
11 case, as happened here - - - say something to the effect of
12 I want you to hold the People to the burden of proof; is -
13 - - is that going to be a veiled attempt at nullification -
14 - -

15 MS. HALPERN: I see that my time has expired.

16 JUDGE FEINMAN: - - - and ineffective?

17 MS. HALPERN: May I briefly?

18 CHIEF JUDGE DIFIORE: You may continue.

19 MS. HALPERN: So I think the defense you're
20 outlining is a classic reasonable doubt defense to
21 challenge the credibility of the witnesses, the sufficiency
22 of the evidence, the quality of the police investigation.
23 Those would all be legitimate defenses that are preferable
24 to a nullification defense, because they give something
25 rather than nothing.

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JUDGE RIVERA: And what - - - what if you only do as I think Judge Feinman's suggesting, you just say - - -

JUDGE FEINMAN: Right.

JUDGE RIVERA: - - - hold - - - hold the People to their burden, and then the rest of your summation is all about nullification and - - - and pleading for mercy?

MS. HALPERN: As one of the judges pointed out earlier, you'd have to look to the rest of the case. So here the cross-examinations were solely directed at interpolating elements that did not exist, establishing no break-in, establishing that the items were cheap.

If other parts of counsel's presentation to the jury, say opening and cross, established some sort of defense, that might not be ineffective. But if everything was about nullification, as it was here, that would have deprived the defendant of any meaningful representation.

CHIEF JUDGE DIFIORE: Thank you, counsel.

MS. HALPERN: Thank you, Your Honors.



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

I, Penina Wolicki, certify that the foregoing transcript of proceedings in the Court of Appeals of The People of the State of New York v. David Mendoza, No. 42 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Penina Wolicki

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