

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

COURT OF APPEALS
STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

NO. 13

OMAR ALVAREZ,

Appellant.

20 Eagle Street
Albany, New York
February 12, 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:

RICHARD M. GREENBERG, ESQ.
OFFICE OF APPELLATE DEFENDER
Attorney for Appellant
11 Park Place
Floor 16
New York, NY 10007

YAN SLAVINSKIY, ADA
NEW YORK COUNTY DISTRICT ATTORNEY'S OFFICE
Attorney for Respondent
One Hogan Place
New York, NY 10013

Penina Wolicki
Official Court Transcriber



1 CHIEF JUDGE DIFIORE: The next appeal on this
2 afternoon's calendar is appeal number 13, The People of the
3 State of New York v. Omar Alvarez.

4 Good afternoon, sir.

5 MR. GREENBERG: Good afternoon. Your Honor,
6 Richard Greenberg for Omar Alvarez. May I reserve three
7 minutes for rebuttal?

8 CHIEF JUDGE DIFIORE: Three, sir?

9 MR. GREENBERG: Yes. Three.

10 CHIEF JUDGE DIFIORE: Yes, you may.

11 MR. GREENBERG: Thank you. Your Honors, Omar
12 Alvarez was sentenced to consecutive terms totaling sixty-
13 six-and-two-thirds years - - -

14 JUDGE FEINMAN: Mr. Greenberg - - -

15 MR. GREENBERG: - - - to life - - -

16 JUDGE FEINMAN: - - - if I may?

17 MR. GREENBERG: I'm sorry?

18 JUDGE FEINMAN: We're familiar with the record.
19 But are you advocating that the failure to brief the
20 excessive sentence point is a single egregious error that
21 warrants coram nobis relief?

22 MR. GREENBERG: In this case it is. But in this
23 case also I ask the court to look at the totality of
24 circumstances and the totality of counsel's performance to
25 determine whether Mr. Alvarez received meaningful



1 representation.

2 JUDGE GARCIA: Back to the first part of Judge
3 Feinman's question. If - - - if failure to raise the
4 excessive sentence point is ineffective, and you said "in
5 this case", what would the rule be why this case and not a
6 case where there's a five-year sentence?

7 MR. GREENBERG: Well, every case has to be
8 determined on its totality of circumstances and the
9 performance by counsel.

10 JUDGE GARCIA: But what's the totality - - - but
11 - - -

12 MR. GREENBERG: In this case - - -

13 JUDGE GARCIA: - - - again, to go back to just
14 the excessive sentence point. And I think your answer to
15 Judge Feinman's question was yes, failure to raise the
16 excessive sentence point standing alone, in this case - - -
17 in this case - - -

18 MR. GREENBERG: Well - - -

19 JUDGE GARCIA: - - - was ineffective. Is - - -

20 MR. GREENBERG: - - - when I say standing alone,
21 I - - - I - - - I should back up and say coupled with the
22 fact that counsel never communicated at all with Mr.
23 Alvarez. He never explained to him that he had a right to
24 that - - -

25 JUDGE FEINMAN: Well - - -



1 MR. GREENBERG: - - - that kind of an argument.

2 JUDGE FEINMAN: - - - to support that point, you
3 have the affidavit of your client and the one letter, but
4 we'll never really know what was in Mr. Franklin's file - -
5 - or Mr. Brown's file, rather, because obviously he's
6 deceased and those files are long gone.

7 MR. GREENBERG: We have a much broader record
8 than that, Judge Feinman. What we have here is not only my
9 client's affidavit but his wife's affidavit.

10 And what we know and is undisputed is that my
11 client was in the dark about his appeal for years. And in
12 fact, when Diana Alvarez contacted him in 2004 and said
13 what happened to your case, Omar; he said I don't know.
14 Can you contact my lawyer and find out?

15 JUDGE STEIN: Well, but - - - but doesn't that
16 all - - - also relate to what arguments were made and what
17 arguments - - - what other arguments might have been made?

18 Now, of course none of us would minimize the
19 importance of - - - of communication between an attorney
20 and a client. But when we are - - - when we are reviewing
21 a coram nobis application, okay, we consider a number of
22 things, one of which is how - - - how might things have
23 turned out better if something had been done differently.

24 So looking at the communication piece, to me that
25 ties in with if he - - - if counsel had communicated with



1 his client that maybe there was something that he might
2 have argued that he didn't or he might have argued better,
3 and I see nothing in this record that suggests that there
4 were other arguments - - - again, aside from the harsh and
5 excessive - - - that could or should have been made, or
6 that the Appellate Division didn't fully consider the
7 arguments that were made.

8 MR. GREENBERG: Judge Stein, I think it's very,
9 very important to - - - for this court to look at the
10 nature of an excessive sentence point in general and look
11 at it in this case. Now - - -

12 JUDGE STEIN: Well - - - well, before you talk
13 about excessive sentence, I think we were talking about the
14 lack of communication and the other pieces, because - - -

15 MR. GREENBERG: Right. And I'm - - - I'm going
16 to tie that together.

17 JUDGE STEIN: Okay.

18 MR. GREENBERG: The - - - the fact is that an
19 individual like Mr. Alvarez, who's convicted, has an
20 absolute right to appeal not only his conviction, but he
21 has an absolute right to have the Appellate Division review
22 the sentence and reduce that sentence in the interest of
23 justice if the Appellate Division finds it unduly harsh.

24 JUDGE STEIN: But the only time we've ever held
25 that that counsel - - - as far as I know - - - that counsel



1 was ineffective for failing to raise a single argument, is
2 when it would have been clear and dispositive - - -

3 MR. GREENBERG: Right, and that would be - - -

4 JUDGE STEIN: - - - dispositive. And how could
5 that be here?

6 MR. GREENBERG: Right. And - - - and clearly
7 it's not. And yet in this - - - in this court's case - - -
8 decision in People against Gonzalez, back in 1979, you
9 granted a reversal and you sent the case back for a new
10 appeal - - -

11 JUDGE FAHEY: Wasn't - - - wasn't Gonzalez - - -

12 MR. GREENBERG: - - - where there was no
13 dispositive issue.

14 JUDGE FAHEY: Mr. Greenberg, wasn't Gonzalez a
15 little different? I thought there he just listed the
16 points, there were no arguments at all.

17 MR. GREENBERG: Correct. There was a little
18 difference. But - - -

19 JUDGE FAHEY: Yeah.

20 MR. GREENBERG: - - - but let me get back to the
21 excessive sentence point of this, because Mr. Alvarez
22 essentially got life without parole: sixty-six-and-two-
23 thirds to life. He could have gotten as low as fifteen to
24 life, which would have been fifty years - - - more than
25 fifty years less than he had.



1 The difference is - - - is really incredibly
2 important because the difference is - - -

3 JUDGE STEIN: Well, can we consider - - -

4 MR. GREENBERG: - - - whether he'd have a chance
5 - - -

6 JUDGE STEIN: - - - on that - - - on that point,
7 can we consider things that happened after his sentencing
8 and appeal - - -

9 MR. GREENBERG: Sure.

10 JUDGE STEIN: - - - in terms of - - -

11 MR. GREENBERG: It's in this record.

12 JUDGE STEIN: How - - - but - - -

13 MR. GREENBERG: It's part of the coram nobis
14 record.

15 JUDGE STEIN: - - - but aren't we reviewing
16 whether he was denied effective assistance at the time of
17 his appeal?

18 MR. GREENBERG: Your Honor, at the time of his
19 appeal - - -

20 JUDGE STEIN: Whether he received meaningful
21 representation.

22 MR. GREENBERG: Correct.

23 JUDGE STEIN: How could counsel, at that time,
24 have known what he would or wouldn't have done years later?

25 MR. GREENBERG: He wouldn't, nor would the



1 sentencing court or the Appellate Division. That's the
2 whole point. You have a nineteen-year-old who had no prior
3 record, who was convicted clearly of very serious crimes,
4 but could have gotten fifteen to life, which would enable
5 him to go to the parole board some day and have parole
6 consideration.

7 JUDGE STEIN: Theoretically yes. But if you read
8 the - - -

9 MR. GREENBERG: Not theoretically - - -

10 JUDGE STEIN: - - -if you read the record, what
11 happened at the sentencing was pretty egregious, and it's
12 hard to imagine that based on what the sentencing court
13 knew at that time and what the Appellate Division knew at
14 the time of the appeal, that - - - you know, that he would
15 have been likely to get fifteen years to life.

16 MR. GREENBERG: I'm not saying he would have - -
17 -

18 JUDGE STEIN: I mean, that just seems - - -

19 MR. GREENBERG: - - - been likely to get fifteen,
20 but he could have gotten anything between fifteen and
21 sixty-six-and-two-thirds. And the difference is if he had
22 gotten a lower sentence, he would be eligible for parole,
23 he would go before the parole board - - -

24 JUDGE GARCIA: Counsel - - - counsel - - -

25 MR. GREENBERG: - - - he might come home some



1 day.

2 JUDGE GARCIA: I understand that. Counsel, we
3 understand that. But - - -

4 MR. GREENBERG: Well, it's a big - - - it's an
5 important point, Judge.

6 JUDGE GARCIA: - - - one - - - it is, and we
7 understand it. But one of the problems I think we're
8 having is, not everyone raises excessive sentence claims on
9 appeal, right?

10 MR. GREENBERG: Correct.

11 JUDGE GARCIA: And they're not ineffective - - -
12 we would say not - - -

13 MR. GREENBERG: Not in every case.

14 JUDGE GARCIA: - - - right.

15 MR. GREENBERG: No.

16 JUDGE GARCIA: So there are strategic reasons - -
17 -

18 MR. GREENBERG: Correct.

19 JUDGE GARCIA: - - - not to raise them. Perhaps
20 because the client was laughing and doing things at the
21 sentencing that the trial just - - - just hypothetically -
22 - - found very offensive.

23 MR. GREENBERG: Judge - - -

24 JUDGE GARCIA: But going back - - - can I speak?
25 Going back to Judge Feinman's point, we don't know now



1 whether there were strategic reasons and we'll never know,
2 for this particular lawyer not to raise an excessive
3 sentence in this case, because he died.

4 And does that go to a due diligence requirement
5 on the part of the client here - - - your client - - - to
6 raise this at some reasonable point of time when the client
7 realizes - - -

8 MR. GREENBERG: He tried to. He tried to. He
9 raised it when - - - as soon as he found out that his
10 appeal had been denied, that his conviction was affirmed,
11 he filed a motion in the Appellate Division to have counsel
12 appointed to file a coram nobis. That was denied.

13 He then filed a 440 motion - - -

14 JUDGE GARCIA: Did he raise the excessive
15 sentence - - -

16 MR. GREENBERG: - - - and he raised - - -

17 JUDGE GARCIA: - - - issue in the initial coram
18 nobis?

19 MR. GREENBERG: No, he didn't know that he was
20 even entitled to excessive sentence, Your Honor. That's
21 the whole point of communication. My client - - - and - -
22 - and just to get to the point of strategic reason. It is
23 inconceivable - - - and I've practiced for over forty years
24 - - - it is inconceivable that any competent attorney would
25 fail to at least discuss with his client and if not raise



1 excessive sentence regardless of the fact that he may have
2 been immature - - -

3 JUDGE FEINMAN: Does that mean - - - does that
4 mean - - -

5 MR. GREENBERG: - - - and laughed at sentencing.

6 JUDGE FEINMAN: - - - per se, then, that the co-
7 defendants' lawyers were also ineffective because - - -

8 MR. GREENBERG: We don't know the circumstances
9 of their case.

10 JUDGE FEINMAN: - - - because they didn't bring
11 the challenge either.

12 MR. GREENBERG: Right. One of those co-
13 defendants committed three - - -

14 JUDGE FEINMAN: Got a hundred to life. And one
15 got sixty-six-and-two-thirds.

16 MR. GREENBERG: - - - one who committed three
17 execution-style murders, the other one actually did raise
18 excessive sentence in an initial brief. That brief was
19 withdrawn and refiled without it. We don't know the
20 circumstances. It would be wrong to speculate.

21 My point is that if Mr. Alvarez's attorney had
22 said to him, by the way, you have an absolute right to ask
23 the Appellate Division to consider reducing your sentence,
24 for any reason that it seems - - - it feels appropriate,
25 would you like me to do that - - - it is inconceivable that

1 Mr. Alvarez would say no, no, no; that's okay, because I
2 laughed at sentencing.

3 JUDGE STEIN: So - - - so - - -

4 MR. GREENBERG: The whole point - - -

5 JUDGE STEIN: No, no, no, no, wait. It wasn't
6 just laughed at sentencing. There was - - - there was a
7 lot more. It was the nature of the crime. There was a
8 failure to take any responsibility. There's a lot that
9 happened at the sentencing.

10 But that aside, you're saying that a re - - -
11 that a competent attorney could not possibly have weighed
12 the danger to his client of bringing all of this up and - -
13 - and - - - and - - - you know, in the judge's - - - in the
14 Appellate Division's face, rather than focusing on what he
15 thought were errors at trial that went to the fairness of
16 the trial itself and that could possibly result in a
17 reversal.

18 MR. GREENBERG: You know - - -

19 JUDGE STEIN: How could that not be a reasonable
20 - - -

21 MR. GREENBERG: Not in this case.

22 JUDGE STEIN: - - - even if in - - - even if an
23 unsuccessful strategy.

24 MR. GREENBERG: Not in this case. Point 1 of the
25 brief, the first point that counsel raised, was the



1 suppression issue that would have had no effect on the
2 conviction or the sentence here. It would have done no
3 good for Mr. Alvarez.

4 What Mr. Alvarez wanted was a chance to come home
5 some day and get - - - get his case before the parole
6 board.

7 JUDGE STEIN: But what if he got a new trial - -
8 -

9 MR. GREENBERG: And the fact that it was - - -

10 JUDGE STEIN: - - - what if he got a new trial
11 because of these other points raised - - -

12 MR. GREENBERG: He wasn't going to get a new
13 trial. Those points were frivolous. They were blown out
14 of the water by the by the DA and by the court. What he
15 needed was - - -

16 JUDGE RIVERA: Counsel, let me ask you this - - -

17 MR. GREENBERG: Yes.

18 JUDGE RIVERA: - - - now that you've said that.
19 From the vantage point and with the benefit of People v.
20 Gonzalez, are you in part arguing that - - - that given the
21 little we've said about ineffective assistance of counsel
22 when it comes to appellate counsel, that the rule needs to
23 be tweaked? Is there something that - - - else that needs
24 to be the consideration and the focus of the bench when
25 it's thinking about appellate counsel's effectiveness



1 that's different from trial counsel's effectiveness?

2 MR. GREENBERG: I think it's critical that
3 counsel communicate with his client. And I - - - I object
4 to any characterization that says that oh, this is all
5 based on my client's self-serving affidavit. The - - - the
6 record is clear; he didn't even know what happened in his
7 appeal. He never saw a copy of the brief.

8 Had he - - - had he had that information, he
9 wouldn't have sent his wife looking for that information.
10 He didn't know anything. His lawyer never contacted him,
11 never told him, you can ask the Appellate Division to
12 reduce your sentence so that you might someday go before
13 the parole board.

14 Judge Stein, I certainly agree that the crimes
15 are very serious crimes. My client's behavior was
16 reprehensible. He did not take responsibility at the time.
17 He laughed, he took - - - he was - - - he was not acting
18 appropriately. He was a nineteen-year-old. He was a
19 teenager.

20 The whole point of getting a sentence that has a
21 minimum where you can go to the parole board someday is to
22 allow time for growth and reflection and rehabilitation and
23 remorse and for someone to take responsibility - - -

24 JUDGE RIVERA: So - - - so is that what you're -
25 - -



1 MR. GREENBERG: - - - as he does now.

2 JUDGE RIVERA: - - - suggesting might make this
3 different from what otherwise sounds like a rule that means
4 every appellate counsel must raise an effect - - - excuse
5 me - - - a request - - -

6 MR. GREENBERG: Excessive sentence?

7 JUDGE RIVERA: - - - thank you - - - a request
8 for reduction of sentence because - - -

9 MR. GREENBERG: No, no.

10 JUDGE RIVERA: - - - it's excessive, unless their
11 client says otherwise?

12 MR. GREENBERG: No, I'm not even asking for that.
13 I could give you a - - - plenty of examples of a strategic
14 basis. Let's take a defendant who has a prior robbery
15 conviction; he's now convicted of three armed robberies.
16 The minimum sentence on each one is ten years, the maximum
17 is twenty-five years. Right?

18 Let's say the judge says, okay, I'm giving you
19 twelve years on each of these three, but I'm running them
20 concurrently. So instead of the possibility of seventy-
21 five years, which he could have got, he's getting twelve
22 years, just two years above the absolute minimum he could
23 get.

24 I could understand in a case like that, a lawyer
25 saying to his client, you know what, if we try to argue



1 that your sentence should be reduced, we are going to upset
2 the Appellate Division. They are going to look at us in a
3 way - - - they're going to think what the heck are you
4 doing. Let's focus on these other issues that we have.

5 However, the client may say you know what, I
6 really - - - those two years are important to me, I want
7 you to raise it. That would be something that the lawyer
8 would explain and - - - and the client would have a right
9 to raise on his own if he wanted to.

10 JUDGE STEIN: So - - -

11 MR. GREENBERG: He has to know he has that right.

12 JUDGE STEIN: If we agree with you - - - and I
13 think what I'm hearing you say is that it - - - when - - -
14 when they receive the absolute maximum, right, then there's
15 no reason not to raise it, right - - - then are - - - are
16 we - - - is every defendant who is serving time now whose
17 appellate counsel did not argue that, who received a
18 maximum sentence, is - - - is every one of those people - -
19 -

20 MR. GREENBERG: No.

21 JUDGE STEIN: - - - entitled to now bring a - - -

22 MR. GREENBERG: No.

23 JUDGE STEIN: - - - error of coram nobis?

24 MR. GREENBERG: No, of course not, Your Honor.

25 JUDGE STEIN: Why not?



1 MR. GREENBERG: Because there are a lot of
2 factors. It's not just getting the maximum. It's a
3 question of what was the minimum? What was the spread?
4 Here the spread was over fifty years. The spread for Mr.
5 Alvarez was the difference between having a shot at parole
6 some day - - -

7 JUDGE FEINMAN: So - - - so - - -

8 MR. GREENBERG: - - - or dying in prison.

9 JUDGE STEIN: Does the nature of the crime - - -

10 JUDGE FEINMAN: - - - I mean, I guess the problem
11 - - -

12 JUDGE STEIN: - - - matter?

13 JUDGE FEINMAN: I'm sorry.

14 MR. GREENBERG: In addition, if I may - - -

15 JUDGE STEIN: Why don't you answer - - - let - -
16 -

17 JUDGE FEINMAN: The problem that I'm having is -
18 - - is what is the rule that is going to get articulated?

19 MR. GREENBERG: Okay. The rule is very simple,
20 Your Honors. I am not asking for any new rule. The rule
21 that this court has maintained for forty years is that in
22 New York, unlike in the federal courts, unlike Strickland,
23 the New York rule for ineffective assistance of counsel is
24 that counsel must provide meaningful representation.

25 And if the case is going to rise or fall on



1 whether we could have won the excessive sentence - - -
2 whether we could show that we would have gotten a better
3 result in the end, obviously that is going to undo that - -
4 - that standard of meaningful representation.

5 I just want to say one more thing. I know the
6 red light is on. But Your Honors, an excessive sentence
7 point is - - - is absolutely qualitatively different from
8 every other appellate argument. You can raise it in every
9 single case. There's no preservation requirement. There's
10 no harmless error. There's no error requirement, in fact.

11 It's - - - it's not a question of whether the
12 sentencing judge made a mistake, broke the law, or abused
13 her discretion. It's a question of whether the Appellate
14 Division thinks that a lesser sentence would be more
15 humane, more appropriate in the case.

16 And so it's really a qualitatively different
17 thing. The Appellate Division, in the First Department,
18 reduces sentences about twice as frequently as it reverses
19 convictions. You have a better chance of getting a
20 sentence reduction on appeal than you have of any other
21 kind of relief.

22 JUDGE STEIN: Is that true - - -

23 JUDGE FEINMAN: It partially depends on what - -
24 - what years you look at. I don't - - -

25 MR. GREENBERG: Well, I would - - - I just



1 checked the other night, Judge Feinman. Between 1995 and
2 2005, that ten-year period, the Appellate Division First
3 Department granted more than 200 discretionary sentence
4 reductions; that's over 20 a year.

5 And that's - - - that's very significant, because
6 what Mr. Alvarez lost here was the opportunity to have the
7 one thing that he needed, a second bite of the apple, some
8 other court to review that sentence and say you know what:
9 that's - - - life without parole is too much for this case.
10 You need to have a shot, whether it's fifteen to life,
11 twenty, twenty-five, thirty to life, something where
12 someday down the road you can go to the parole board and -
13 - - and explain why you have a right to - - -

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

15 MR. GREENBERG: - - - to go home. Thank you so
16 much.

17 CHIEF JUDGE DIFIORE: Counsel.

18 MR. SLAVINSKIY: Good afternoon, Your Honors.
19 Yan Slavinskiy for the People.

20 JUDGE FEINMAN: So what - - - I mean, you
21 concede, if I recall correctly, that the brief that was
22 actually filed had significant problems with it. And I
23 guess putting aside the whole issue of excessive sentence,
24 how does this brief that was filed satisfy the Stultz
25 standard?



1 MR. SLAVINSKIY: Absolutely, Your Honor. The
 2 brief that coun - - - appellate counsel raised, raised four
 3 issues for appellate review: the suppression issue, an
 4 issue that the judge erred in denying an adjournment, a
 5 challenge to the judge's protective order, and a challenge
 6 to the weight of the evidence with respect to the
 7 conspiracy charge.

8 Those four issues were presented in a manner that
 9 was sufficient for appellate review. And we know that
 10 because the Appellate Division addressed each of those
 11 claims, and in fact, it was only appellate - - -

12 JUDGE RIVERA: You mean as long - - - as long as
 13 you raise the issue, regardless of the quality of the
 14 advocacy, regardless of whether or not you failed to cite
 15 appropriate case law, that's good enough, that's the
 16 benchmark?

17 MR. SLAVINSKIY: That's not what I'm saying, Your
 18 Honor. If - - - as counsel characterized it just now - - -
 19 these claims were purely frivolous, then the manner - - -
 20 the thorough manner in which the People responded to those
 21 claims, and the detail with which the Appellate Division
 22 took to address each of them, simply would not have
 23 occurred. And - - -

24 JUDGE WILSON: Would you - - - wouldn't you agree
 25 that most pro se briefs - - - and you have seen more than I



1 have, I'm sure - - - are better than this brief that Mr.
2 Brown submitted?

3 MR. SLAVINSKIY: I - - - Your Honor, this brief
4 identified three legal issues. Each - - -

5 JUDGE WILSON: So do - - - so do pro se - - -

6 MR. SLAVINSKIY: - - - of which - - -

7 JUDGE WILSON: - - - briefs, no?

8 MR. SLAVINSKIY: I - - - I have not seen a pro se
9 brief that's better than this brief. But that is also not
10 the standard, Your Honor, because the reason we know beyond
11 the quality of this brief, is that Mr. Greenberg, after
12 spending months combing this record, the only issue that he
13 could identify that counsel could have raised which he
14 didn't was an excessive sentence claim that absolutely had
15 no chance of success.

16 What Mr. Greenberg's search over the last few
17 days on Westlaw did not find was a case in a homicide of an
18 innocent teenager with two other teenagers - - -

19 JUDGE RIVERA: But I understood his argument to
20 be - - - he's focused on this excessive sentence and - - -
21 and the reality is that I now better understand his
22 argument, which is it meant there was no - - - no
23 possibility of ever getting out. And that's what it turns
24 on. Okay.

25 But he's also raised what he says are other



1 deficiencies of counsel. He's saying we have to look at
2 all of them. And again, from the vantage point and with
3 the benefit of People v. Gonzalez, why isn't he right that
4 it's the - - - the major deficiencies in the brief; it's
5 the failure to communicate with the client; it's not acting
6 expeditiously or in any timely fashion, at least until you
7 hear otherwise, to perfect the appeal, to file papers; and
8 that's just some of it. Why - - - why isn't that - - -
9 when you step back and say this is not what the Court of
10 Appeals should say is good enough for indigent defendants?

11 MR. SLAVINSKIY: Well, if Your Honor puts aside
12 the excessive sentence claim, then all the other claims
13 that Mr. Greenberg raises, which I would love to have an
14 opportunity to address, and in particular the communication
15 claim, all go to the first prong of the Stultz test: did
16 counsel's appellate advocacy fall below an objective
17 standard of reasonableness?

18 Even if you grant - - -

19 JUDGE RIVERA: Um-hum.

20 MR. SLAVINSKIY: - - - that some of those errors
21 may have depr - - - have dropped below that standard - - -

22 JUDGE RIVERA: Um-hum.

23 MR. SLAVINSKIY: - - - which we cannot, as some
24 of Your - - - as some of Your Honors have alluded to,
25 because we have no idea whether the communication



1 allegations are true, then - - -

2 JUDGE RIVERA: I thought counsel admitted that he
3 hadn't talked to his client, when he finally hears from the
4 client, and he says - - -

5 MR. SLAVINSKIY: Your Honor - - -

6 JUDGE RIVERA: - - - what's happening?

7 MR. SLAVINSKIY: Your Honor, I think what you're
8 alluding to is in 1999, the case was placed on the
9 dismissal calendar.

10 JUDGE RIVERA: Yes.

11 MR. SLAVINSKIY: Which prompted defendant to
12 write to - - -

13 JUDGE RIVERA: Yes, and isn't that the problem?
14 It's on the dismissal calendar. So the attorney hadn't
15 done anything.

16 MR. SLAVINSKIY: Your Honor, as Mr. - - - as Mr.
17 Greenberg could tell you, cases end up on the dismissal
18 calendar all the time in appellate courts, but what counsel
19 - - -

20 JUDGE RIVERA: And if that was the only problem,
21 I might not - - - I might see your way. My - - - my
22 difficulty is, as he's already raised, it's not just that
23 one thing; it's several things.

24 And you're right, the People put in a spectacular
25 brief. And when you compare that to what his attorney did,



1 it's - - - it's really troubling.

2 MR. SLAVINSKIY: Your Honors, the co-defendants
3 also presented more polished briefs at the Appellate
4 Division. And those polished briefs accomplished even less
5 for their clients - - -

6 JUDGE RIVERA: Yeah, but the - - - our standard
7 is not that the defendant has to get a reversal. This is
8 not Strickland that you have to show prejudice. We've been
9 very clear about that.

10 MR. SLAVINSKIY: Your Honors have also been very
11 clear that while prejudice is not a required component of
12 the test, the court is extremely clear in Stultz that they
13 would be skeptical of any claim - - -

14 JUDGE RIVERA: No, we've said we would consider
15 it. It's something to consider, because the factor that
16 you're focusing on is did this individual get meaningful
17 representation - - - here's my problem - - - the question I
18 asked him. We've - - - we've talked about a fair trial,
19 but of course now we're talking about appellate
20 representation. Is - - - is it necessary for us to tweak
21 our rule with respect to the standards applied for
22 ineffective assistance of appellate counsel versus trial
23 counsel?

24 MR. SLAVINSKIY: Your Honor, the rule that exists
25 works, and the reason we know it works is by looking at



1 Gonzalez.

2 JUDGE RIVERA: Um-hum.

3 MR. SLAVINSKIY: Which this case is different
4 from in multiple ways. First of all, unlike the lawyer in
5 Gonzalez, that simply identified four point headings and
6 then said these points have absolutely no chance of
7 success, a new attorney looked over the record and
8 identified six issues that should have been raised. Now -
9 - -

10 JUDGE FEINMAN: But let me ask you this. Let's
11 say in - - - instead of filing the brief, the appellate
12 counsel had submitted this as an Andrew Saunders and said
13 these are the four points I looked at and for all the
14 reasons that the People are then going to later put in a
15 response, we can't succeed; but he had failed to mention
16 the excessive sentence. What do you think would have
17 happened when it got to the Appellate Division?

18 MR. SLAVINSKIY: I'm - - - I'm glad you asked
19 that. The same thing that happened here, Your Honor. The
20 case would have - - - I think that claim would have been
21 dismissed, because looking at - - -

22 JUDGE FEINMAN: You don't think they would have
23 denied the motion and reassigned it because there's that -
24 - - that issue that could be raised?

25 MR. SLAVINSKIY: Even in that circumstance, where



1 they were faced with no other issues and wanted to give the
2 defendant an opportunity to appeal, even if they had grant
3 - - - they allowed an attorney to brief that issue, given
4 the circumstances of this crime as well as the egregious
5 information that was revealed at sentencing - - -

6 JUDGE FEINMAN: But - - - but you see, it - - -
7 he doesn't have to have a guarantee of success. I think
8 that's Judge Rivera's point and Mr. Greenberg's point - - -

9 MR. SLAVINSKIY: Ab - - -

10 JUDGE FEINMAN: - - - in order to be afforded
11 meaningful representation, necessarily.

12 MR. SLAVINSKIY: Absolutely, Your Honor. But
13 when counsel did raise four arguments for appellate review
14 and then left out another one that appellant - - - the
15 defendant now claims should have been raised, that changes
16 the inquiry. And you have to look - - - I mean I - - - I
17 wasn't paraphrasing Stultz, Your Honor. Stultz says we
18 would be skeptical of any claim that does not show
19 prejudice.

20 And if you look at the circumstances of this
21 case, when the Appellate Division, in 2000, reviewing an
22 excessive sentence claim, not far removed from the drug and
23 violence epidemic of the 90s, would have looked at the
24 facts of this case, defendant's conduct during sentencing,
25 including the allegations that he set his jail cell on fire



1 and that he threatened to kill witnesses, additionally, not
2 only do you have the murder, but his torture of women who
3 steal from YTC, including an excessive sentence claim in
4 this brief - - -

5 JUDGE RIVERA: But isn't that part of his point
6 that that - - - those are things that get discussed with
7 the client, about whether or not to move forward when - - -
8 when you're talking about a sentence that means no
9 opportunity to ever get out - - - even though it doesn't
10 say life without parole?

11 MR. SLAVINSKIY: Well, and - - - and I think - -
12 - if Your Honor would let me address the communication
13 issue, because I think it goes to that.

14 CHIEF JUDGE DIFIORE: Would you just finish - - -
15 you got interrupted - - - your - - - to include an
16 excessive sentence - - - finish your thought.

17 MR. SLAVINSKIY: Sentence claim would not only
18 have had no chance of success, but it would have completely
19 allowed the court to not look at any of the other issues
20 that counsel has raised.

21 And - - - and in particular, because the - - -

22 JUDGE FEINMAN: Well, that might be true in the
23 context of an oral argument, if an advocate gets up there
24 and starts saying, you know, you gave my client sixty-six-
25 and-two-thirds, the judge - - - and the - - - you know, the



1 members of the Appellate Division panel might, you know,
2 get a little steamed or - - - perhaps that's the wrong
3 word, but - - - and so that you would lose focus on those.
4 But in the written decision, aren't they still going to
5 have to answer all the points?

6 MR. SLAVINSKIY: Of course they're going to
7 answer all the points, Your Honor. But I do believe the
8 judges are human, and that had looking at - - - at all the
9 information that would have been provided, which wasn't,
10 and nothing that happened at sentencing was included in
11 this brief, because an excessive sentence wasn't raised,
12 the judges would certainly have taken note of that, just as
13 Mr. Greenberg would like the judges to take note of all the
14 things that happened in prison to defendant after his
15 acceptance claim was denied.

16 JUDGE GARCIA: Counsel, I'm sorry - - -

17 MR. SLAVINSKIY: His claim was denied. Sorry.

18 JUDGE GARCIA: - - - you were going to go to - -
19 - and I know you're lights on - - - you were going to go to
20 the communication with counsel.

21 MR. SLAVINSKIY: Yeah.

22 JUDGE GARCIA: And while doing that, could you
23 also address the due diligence point?

24 MR. SLAVINSKIY: Absolutely. I'll first talk
25 about communication briefly and then I'll talk about due



1 diligence.

2 JUDGE GARCIA: Thank you.

3 MR. SLAVINSKIY: And - - - and they go together,
4 actually, because nowhere is the prejudice that the People
5 suffered more evident than in the communication point.

6 Defendant - - - the only source that we have for
7 the allegation that defendant and his attorney did not
8 communicate are defendant's and his wives' - - - his wife's
9 allegations. However, not only do we not have the
10 advantage of Mr. Brown refuting those claim, which is what
11 trial counsel did in this case when defendant raised the
12 same exact accusations about communications with his trial
13 attorney, except his trial attorney was alive and filed an
14 affidavit, and that motion was denied.

15 But beyond that, there's also reason to doubt
16 defendant's assertions, because two of the claims that
17 appeared in the brief are things that defendant
18 independently pressed. First of all, defendant filed a
19 civil lawsuit in 2000 claiming that the judge should not
20 have ordered the protective order which was in point 3 of
21 the appellate brief. Second of all, defendant, to this
22 day, denies being a member of YTC, which is what the - - -
23 which was the subject matter of the fourth point raised on
24 appeal.

25 And going quickly to the due diligence element,



1 and counsel may bring - - - stand up and say it's
2 unpreserved, it's the same exact issue we raised in the
3 Appellate Division. In a wide swath of this court's cases,
4 including issues such as this one, it has recognized that
5 defendants must act diligently in - - -

6 JUDGE STEIN: But has it recognized that in any
7 context having to do with error coram nobis other than the
8 Syville situation?

9 MR. SLAVINSKIY: Yes, Your Honor. In
10 D'Alessandro, which was not a Syville type case, it was a
11 coram nobis case, the court said - - - and I'm quoting - -
12 - delay in itself was not enough to deny a coram nobis.
13 What that explicitly leaves room for is delay coupled with
14 a showing of prejudice by the People.

15 And we show that prejudice here, not only with
16 the communication element, but also with the fact that coun
17 - - - we are forced to speculate as to why counsel did not
18 raise an excessive sentence claim. In the brief, counsel
19 even suggested that Mr. Brown did not know that an
20 excessive sentence claim was an option.

21 Luckily, we have evidence from Westlaw cases
22 showing that Mr. Brown did know it was an option and raised
23 it where it was appropriate. But this kind of speculation
24 - - -

25 JUDGE RIVERA: You agree we don't have to



1 speculate about the quality of the briefing, correct?

2 MR. SLAVINSKIY: The brief - - -

3 JUDGE RIVERA: And we don't have to speculate
4 about the fact that this was on the dismissal calendar,
5 correct?

6 MR. SLAVINSKIY: Those two things you - - -

7 JUDGE RIVERA: Or about Brown's letter and the
8 content of that letter, correct?

9 MR. SLAVINSKIY: There are certain things in this
10 record. But looking at just those things along with the
11 fact that counsel raised four issues that were preserved,
12 unlike the other co-defendants, which also did not raise ES
13 claims, and that the court decided those claims, and that
14 an experienced and certainly competent appellate attorney
15 has looked over that record and has identified only one
16 claim that had stood absolutely no chance of success at
17 that time, that does not amount to ineffective assistance
18 of appellate counsel, and we urge Your Honors to affirm
19 defendant's conviction - - -

20 CHIEF JUDGE DIFIORE: Thank you, counsel.

21 MR. SLAVINSKIY: - - - and denial of the coram
22 nobis.

23 CHIEF JUDGE DIFIORE: Thank you.

24 Mr. Greenberg?

25 MR. GREENBERG: Judge Leslie Croker Snyder



1 imposed consecutive sentences totaling sixty-six-and-two-
2 thirds years to life, that is essentially life without
3 parole for a twenty-year-old. He would be eighty-seven
4 when he would be first eligible for parole.

5 Life without parole did not even exist as a - - -
6 as a legal sentence in New York at the time that this
7 sentence was imposed, but yet Judge Snyder took it upon
8 herself to say you are so bad, you are so terrible, you're
9 the worst of the worst and so unredeemable, that I'm
10 sentencing you to die in prison, rather than say you know
11 what, maybe you'll do well in prison, maybe you'll reform
12 yourself, maybe you'll grow up and mature, and - - - and
13 someday you can go before the parole board which will
14 decide that.

15 Because even in the best of circumstances, Omar
16 Alvarez was going to have a life sentence and was facing
17 the possibility of spending his life in prison. All he was
18 asking for and all we're asking for now is a shot at parole
19 someday.

20 With respect to the due diligence claim, it is
21 unreserved, number one. Number two, as Judge Stein said,
22 it has never been applied by this court outside of the
23 Syville line of cases, which are totally different from
24 this situation . And moreover, there was no prejudice to
25 the People. They like to say well, if we had known by the



1 time you filed your coram nobis, we could have gotten
2 counsel to explain what he did or what he didn't do. The
3 fact is, they knew as early as 2006; they knew years before
4 counsel died that this claim was in the works, because Mr.
5 Alvarez asked the Appellate Division to assign counsel for
6 this claim.

7 And when they denied that, he filed a 440 motion
8 in the trial court and said - - - and also raised the claim
9 of ineffectiveness of appellate counsel. The People
10 responded by saying well, you can't do that here; you've
11 got to file coram nobis, and the judge agreed, of course.

12 But they were on notice way back then that this
13 claim was in the works. If they thought there was any
14 reason to speak to Mr. Brown, they had ample opportunity to
15 speak to him.

16 Now, in terms of prejudice, I know we talked
17 about the question - - - you know, the standard, whether
18 we're dealing with Strickland or - - - or meaningful
19 representation. There is prejudice here. I can't say for
20 sure that Mr. Alvarez would have gotten a sentence
21 reduction in the Appellate Division, but the prejudice is,
22 he had an absolute right to have that court review the
23 sentence. And when you're serving essentially life without
24 parole, the fact that the law in New York gives you the
25 absolute right to have the second bite of the apple,



1 another court review that sentence and determine whether -
2 - - you know what - - - we understand why Judge Snyder
3 gave him that sentence, we understand why he was deserving
4 of a very long time in prison, but we think a nineteen-
5 year-old might mature someday and we think that that's just
6 too extreme. Let's - - - let's knock it down to twenty-
7 five to life.

8 That wouldn't have been unreasonable for the
9 Appellate Division to do. It would not have been that out
10 of the ordinary. They do it all the time, as - - - as some
11 of Your Honors know from your experiences on the Appellate
12 Division. And in fact, he was denied his absolute right,
13 Mr. Alvarez, to have that kind of review, that second-
14 chance review in the Appellate Division, and that is
15 prejudicial to him.

16 And all we're asking for now is for this case to
17 be sent back for a de novo appeal so that he can raise that
18 issue before the Appellate Division and say look, I want to
19 have a chance at parole someday.

20 CHIEF JUDGE DIFIORE: Thank you, counsel.

21 MR. GREENBERG: Thank you.

22 (Court is adjourned)

23

24

25



1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

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. Omar Alvarez, No. 13 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Penina Wolicki

Signature: _____

Agency Name: eScribers
Address of Agency: 352 Seventh Avenue
Suite 604
New York, NY 10001

Date: February 15, 2019

