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COURT OF APPEALS
STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK

Respondent,

-against-

NO. 14

ANGELO BURGOS,

Appellant.

20 Eagle Street
Albany, New York
February 9, 2022

Before:

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

Appearances:

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Official Court Transcriber



1 CHIEF JUDGE DIFIORE: Number 14, the People of
2 the State of New York v. Angelo Burgos.

3 We'll wait a moment, Counsel, before you start.
4 We'll allow your colleague to leave the courtroom.

5 MR. GOSNELL: Thank you, Your Honor.

6 MR. LEVINSTEIN: Apologies, Your Honor. Thank
7 you.

8 CHIEF JUDGE DIFIORE: You're welcome.
9 Counsel?

10 MR. GOSNELL: Wayne Gosnell for appellant, Angelo
11 Burgos. I'd like to reserve three minutes for rebuttal
12 time.

13 CHIEF JUDGE DIFIORE: You may, sir.

14 MR. GOSNELL: Thank you, Your Honor. May it
15 please the court, throughout his career, Andres Aranda
16 neglected vulnerable clients, lied to courts, and lied to
17 disciplinary bodies when he wasn't simply ignoring them.
18 Ten weeks before appellant's trial, Aranda's pervasive and
19 lengthy history of serious misconduct led the Second
20 Circuit to suspend him for reasons that bore upon his
21 qualification, competence, and moral character.

22 After considering Aranda's serious misconduct, it
23 concluded there was little assurance that Aranda could
24 conform his conduct to expected professional norms.

25 JUDGE RIVERA: So Counsel, I'm - - - I'm on the



1 screen. Hello.

2 MR. GOSNELL: Yes, Your Honor.

3 JUDGE RIVERA: Good afternoon, yes. So I don't
4 think there's a dispute about the content and the intent of
5 the Second Circuit's determination and discipline. So the
6 question is - - - as I view it, the question is whether or
7 not, since during the trial, the - - - the trial counsel
8 was still admitted in New York, whether that, as you argue
9 in the first instance, that's now a - - - a constructive
10 suspension; he's per se unable to actually represent him.
11 If you could address that, because he is still admitted in
12 New York during the trial.

13 MR. GOSNELL: He - - - his license is on the
14 wall, yes, that is true. But the defect in his character
15 and his qualifications and his competency existed and had
16 been adjudicated by the Second Circuit, which is different
17 from - - -

18 JUDGE RIVERA: But - - - but - - - but it has no
19 application to - - - until the Appellate Division renders a
20 decision, right, the Grievance Committee. Until that
21 moment, he - - - he's still licensed to practice in New
22 York.

23 MR. GOSNELL: Well, there are two responses to
24 that. First, the First Department, when they imposed
25 reciprocal discipline, they imposed that reciprocal



1 discipline for the exact same serious and substantive
2 reasons that the Second Circuit did. And they also made a
3 considered decision about when the effective date of that
4 reciprocal discipline would take effect.

5 JUDGE TROUTMAN: But Counselor, they made that
6 determination after the attorney was afforded due process.

7 MR. GOSNELL: Well, the attorney had been
8 afforded due process on multiple occasions. First, he had
9 been afforded due process in - - - by the Second Circuit,
10 and there had been - - -

11 JUDGE TROUTMAN: Right, but he is - - -

12 MR. GOSNELL: - - - an actual adjudication.

13 JUDGE TROUTMAN: - - - entitled to due process in
14 New York, correct?

15 MR. GOSNELL: He is also entitled to due process.
16 But if you look at the disciplinary rules, and if you look
17 at where the disciplinary rules flow from, which is from a
18 case that's more than a century - - - year - - - old by the
19 Supreme Court, *Selling v. Radford*, where the Supreme Court
20 talks about when there is a defect in an attorney's
21 personal and professional conduct, wherever committed, that
22 operates everywhere and must furnish adequate reason in
23 every jurisdiction for taking away the right to continue to
24 be a lawyer.

25 JUDGE GARCIA: So - - - so Counsel, what - - -



1 what would this attorney do during this interim? It may
2 take the First Department - - - busy department, it may
3 take them a while to adjudicate. So they can't practice?

4 MR. GOSNELL: That - - - that's not exactly what
5 would happen. In terms of - - -

6 JUDGE GARCIA: What, exactly?

7 MR. GOSNELL: For criminal cases, because you
8 have a Constitutional right as a criminal defendant, that -
9 - - in that instance, you cannot be counsel under the
10 meaning of the Sixth Amendment and the New York State
11 Constitution.

12 JUDGE GARCIA: So they can take no criminal
13 cases, even if later they're exonerated and there turns out
14 to be some procedural defect, whatever it is. They say no,
15 we're not suspending you. For that period, as long as it
16 takes them to adjudicate that grievance, that allegation,
17 this attorney cannot practice criminal law in the State of
18 New York?

19 MR. GOSNELL: Well, I think the facts that you're
20 - - - as you're sort of describing them are different than
21 the case we have here, because what we have here - - - and
22 going back to the prior question, there was additional due
23 process given the attorney, where he was then adjudicated
24 by the First Department as being suspended. But the date
25 of the suspension, the effective date of the suspension - -



1 -

2 JUDGE GARCIA: But you're not going to know that.

3 MR. GOSNELL: - - - was back to May '15.

4 JUDGE GARCIA: The attorney's not going to know
5 that at the time. So what I'm asking about is before that
6 happens - - - that may take a while - - - that attorney
7 cannot practice on the fear that they may impose
8 discipline, and they may impose discipline nunc pro tunc;
9 they may do it effective earlier. So you're, I think,
10 saying that as a matter of ethics, that attorney is unable
11 to practice criminal law in the State of New York until the
12 Appellate Division determines what sanction and whether
13 it's going to be retroactive?

14 MR. GOSNELL: Well, in that - - - in the instance
15 that - - - that you're describing, where there has not - -
16 - where we're - - - we're putting aside what the First
17 Department or what an Appellate Division does, the
18 obligation on the attorney is to inform his client.

19 JUDGE GARCIA: That's a different issue. That's
20 your second issue, I think.

21 MR. GOSNELL: It is, but the - - - the two of
22 them are related because what we're dealing with under the
23 facts of this case for the right to counsel, per se, is
24 that you have a decision by an Appellate Division, imposing
25 reciprocal discipline that relates back to a time that was



1 before the trial, so - - -

2 JUDGE GARCIA: You're not going to know that is -
3 - - which is - - -

4 MR. GOSNELL: Correct.

5 JUDGE GARCIA: - - - my concern here. You're not
6 going to know that at the time. So you're going to have
7 to, in an excess of caution, on the potential that they're
8 going to do this, suspend your practice pending imposition
9 of the discipline?

10 CHIEF JUDGE DIFIORE: And to Judge Garcia's
11 point, perhaps the First Department decides it's not a
12 disciplinable offense. What - - - where would the due
13 process be?

14 MR. GOSNELL: Well, it - - - first off, the - - -
15 the due process that is - - - that is actually at issue
16 here and the Constitutional right, the Constitutional
17 obligations, relate solely to Mr. Burgos, not to Mr.
18 Aranda.

19 CHIEF JUDGE DIFIORE: Well, just get - - - um-
20 hum.

21 MR. GOSNELL: But - - - but to your point, Your
22 Honor, the - - - the fact of the matter is - - - is that
23 what could have happened here, what should have happened
24 here is that Mr. Aranda should have made a disclosure to
25 his client and to the court because - - -



1 JUDGE CANNATARO: And Counsel, the - - - the - -
2 -

3 CHIEF JUDGE DIFIORE: Where is that obligation?

4 MR. GOSNELL: That obligation flows from the
5 Constitution, and it flows from the ethics rules.

6 JUDGE CANNATARO: But it doesn't flow from the
7 Second Circuit's decision because the Second Circuit
8 specified who needed to be notified of their suspension.
9 And your client was not included in that group of people,
10 was he?

11 MR. GOSNELL: He was not, Your Honor. And - - -
12 and in fact - - - but the Second Circuit, when they are
13 imposing discipline, their concern and their obligation is
14 to impose discipline upon the attorney. They are not
15 concerned with and shouldn't be - - - and it wasn't before
16 them - - - about what Constitutional rights others may have
17 who may be represented by Mr. Aranda.

18 JUDGE CANNATARO: I understand that you are
19 concerned with your client's rights, as you should be. But
20 I think what you're hearing from the bench is that there's
21 a balancing. Mr. Aranda had some due process rights here
22 too. And it seems as if we're testing the limits of what
23 those rights are by, say, suggesting that he needs to
24 withdraw from all criminal representations, while he still
25 has a valid New York license, because he's been subject to



1 discipline in another jurisdiction.

2 MR. GOSNELL: Well, but that gets into - - - and
3 respectfully, that gets into the right to counsel of choice
4 issue, that he has an obligation to inform his client.
5 What he did here, by hiding the fact that he had been
6 suspended from his client, is he was the one who made the
7 decision about who Mr. Burgos would have represent him.

8 JUDGE RIVERA: Well, so Counsel - - - I'm on the
9 screen. So if I'm understanding this part of the argument,
10 just to clarify, unlike the first part of your argument,
11 which is right per se, he cannot represent him, the - - -
12 you have to stop the process, and a new trial - - - and a
13 new attorney is either retained or assigned, period.

14 As I understand this argument, this argument is
15 he had - - - the attorney had a duty to disclose this
16 disciplinary action because there might be reciprocal
17 action, and he might be then suspended in New York State,
18 so that the defendant could decide whether or not to move
19 forward - - - I just want to be clear - - - with this
20 lawyer? Is that your - - - is that the argument?

21 MR. GOSNELL: Yes. So - - -

22 JUDGE RIVERA: You're not saying it's per se.
23 The - - - the - - - the - - -

24 MR. GOSNELL: So - - -

25 JUDGE RIVERA: - - - the defendant could choose,



1 with this knowledge, to proceed with this person as his
2 lawyer; is that your argument?

3 MR. GOSNELL: The - - - I believe that what - - -
4 what we've talked about in our brief and - - - and what I'm
5 saying here is that it - - - the first thing that needs to
6 happen is Mr. Aranda needs to tell his client. And then
7 the client needs to make an informed decision, a knowing
8 and intelligent and voluntary decision about whether to
9 continue with Mr. Aranda as his attorney, which is done in
10 - - -

11 JUDGE RIVERA: Okay. Let's say - - -

12 MR. GOSNELL: - - - nearly every other
13 constitution - - -

14 JUDGE RIVERA: Let's say we - - - let's say we
15 agreed with you. Did - - - did the lawyer have to disclose
16 to the court, which I thought was your position? And if
17 so, does that mean that regardless of what the defendant
18 would do, if the court decides that this lawyer simply
19 cannot proceed in the case, then defendant loses his right
20 to choice if he wanted to proceed with this lawyer?

21 MR. GOSNELL: Well, it wouldn't be that he loses
22 his right to counsel of choice. The right to counsel of
23 choice has always been viewed by this court and other
24 courts as a qualified right. So for example, in this
25 particular instance, because of the fact that no one knows



1 when the First Department is going to impose reciprocal
2 discipline - - - it could happen on the first day of trial
3 - - -

4 JUDGE TROUTMAN: But Counselor, you said the - -
5 - the truth of the matter is no one knows that the - - -
6 the First Department or any Appellate Division will
7 actually impose reciprocal discipline until they do or if
8 they don't.

9 MR. GOSNELL: Respectfully, I don't think that's
10 actually true in this case because you had, in this case,
11 the only - - -

12 JUDGE TROUTMAN: No.

13 MR. GOSNELL: - - - defense is - - -

14 JUDGE TROUTMAN: Counselor, you - - - with
15 respect to reciprocal discipline, are you saying that the
16 Appellate Division must impose reciprocal discipline, or do
17 they have the right to make that decision for themselves
18 after their process is completed?

19 MR. GOSNELL: Well, there's sort - - - there's
20 two pieces of an answer here. Is first, the - - - the
21 first - - - the - - - the Appellate Division has to follow
22 the disciplinary rules - - -

23 JUDGE TROUTMAN: Correct.

24 MR. GOSNELL: - - - about what are defenses. And
25 so the only defenses that are available to a person who has



1 been disciplined by a foreign jurisdiction are that they
2 didn't receive due process there, that the evidence was
3 insufficient, or that the conduct that was being
4 disciplined is not disciplinable in New York.

5 JUDGE TROUTMAN: And New York also - - -

6 MR. GOSNELL: There was no question that - - -

7 JUDGE TROUTMAN: There is also mitigation that
8 can be offered to determine what actual discipline is
9 imposed.

10 MR. GOSNELL: Yes, but - - - but what we - - -
11 what we're dealing with here on the per se argument is that
12 it doesn't matter what could have happened or what may have
13 happened. What actually happened is the fact that the
14 First Department suspended him, and they made its effect
15 retroactive.

16 JUDGE TROUTMAN: So your rule is if a - - - if a
17 foreign jurisdiction disciplines an attorney in a - - - a
18 criminal attorney, he cannot - - - as it was stated earlier
19 by one of my colleagues, he can't practice criminal law?

20 MR. GOSNELL: Well, so I think what you need to
21 look at is - - - first off, is what's the suspension for,
22 if it's a substance - - - serious and substantive
23 suspension, as opposed to a technical suspension.

24 JUDGE TROUTMAN: Who determines that?

25 MR. GOSNELL: Well, this court in - - - in the



1 Kieser case, this court cited to a lower court case that
2 sort of sets out what that is, which is the Chin Min Foo
3 case, where if you have a technical violation, such as
4 failure to pay bar dues or things like that, it's not
5 something - - - it's not a situation where you need to
6 reapply to the bar to then be allowed to practice. You pay
7 your fine. You pay your - - - your dues or whatever it is.
8 You update your address. And you're back to practicing
9 law.

10 When you have a serious and substantive
11 suspension, that's a suspension that goes directly to the
12 core of what it means to be a lawyer, that you don't have
13 the competence to be a lawyer or the qualifications or the
14 moral character. And in order to have that license back,
15 you have to go back through the - - - essentially, the
16 admissions process and be adjudicated by that body as now
17 being - - -

18 JUDGE RIVERA: Counsel, I'm sorry. Counsel, if I
19 can just interrupt you on - - - on this analysis of Kieser.
20 It does strike me that - - - that there is a difference
21 between saying we're going to look at the nature of the
22 suspension and make a decision what its impact might have,
23 and this case, where - - - excuse me - - - and in Kieser,
24 where that is - - - that jurisdiction, where there's the
25 temporary suspension, is the only jurisdiction in which the



1 person is barred.

2 Here, this individual's actually barred in New
3 York State. So regardless of the way one identifies the
4 Second Circuit's discipline, the fact of the matter is the
5 counsel during the trial was indeed still barred in New
6 York State. He had not yet been disciplined. So I - - - I
7 - - - I understand what you're trying to do with Kieser,
8 but it doesn't seem to me to work.

9 MR. GOSNELL: But Your - - - Your Honor, if
10 you're - - - if you're going to read - - - if you're going
11 to read every word and give effect to every word of the
12 First Department's suspension of Andres Aranda, you have to
13 give effect to the fact that they made the - - - the
14 suspension effective nunc pro tunc. They made the
15 suspension effective as of May of 2015, which is ten weeks
16 prior to Mr. Aranda representing appellant at trial. So -
17 - -

18 JUDGE CANNATARO: But no - - - nobody knew that
19 during the trial. That had not happened during the
20 pendency of the trial. So you know, you - - - you just
21 proposed a - - - a process with a hearing to determine the
22 nature of the violation. But none of that had happened, at
23 least as far as the First Department was concerned, until -
24 - - I think it was a week or two after the trial had
25 concluded, right?



1 MR. GOSNELL: Yes. But that goes to the right to
2 counsel of choice issue, of whether there should be a
3 hearing, whether or not Mr. Burgos should have been
4 informed of those facts so that he - - -

5 JUDGE GARCIA: Counsel, I'm sorry.

6 MR. GOSNELL: - - - could make an informed
7 decision.

8 JUDGE GARCIA: One - - - one last thing.

9 MR. GOSNELL: Yes.

10 JUDGE GARCIA: It seems like your two points are
11 somewhat in tension because let's say there's a disclosure,
12 full disclosure to the client, and the client's - - - and
13 both your rules are true; both points you want to make are
14 - - - we accept. Client says, you know what? You've
15 gotten me great deals. You're going to get me a great deal
16 here. I'm confident. I want you. And then, you know,
17 say, you can't have me because I can't practice criminal
18 law in this state because I might get suspended nunc pro
19 tunc.

20 So which one do you want? Do you want a per se
21 bar, where the client can't choose and you can't practice,
22 or do you want a full and fair disclosure of the facts and
23 circumstances, and the client has the right to choose?
24 Because I fear the next case, then, would be I wanted that
25 lawyer; he was barred in New York; he hadn't been



1 suspended, but you wouldn't let me have him.

2 MR. GOSNELL: Well, I - - - I think that Your
3 Honors can - - - can resolve this case under the per se
4 rule because the specific facts of this case, you have an
5 adjudication by the First Department that was made
6 retroactive to a date that preceded the trial, just as if
7 at that moment in time Mr. Aranda had not been admitted,
8 had never been admitted, just like in Felder or - - - or
9 some other cases of this court or the Novak case, where the
10 defects - - - the adjudication occurred before and was
11 given effect before.

12 JUDGE TROUTMAN: But Counsel, what about the fact
13 that a - - - quite frankly, applying it nunc pro tunc, the
14 Appellate Division is taking into consideration mitigation,
15 whether they want the time to count or add to that which
16 was originally imposed by the other jurisdiction? So in
17 other words, as opposed to saying, I'm going to suspend you
18 eighteen months from the date of this order, they're simply
19 giving him credit for time that he was suspended in the
20 other jurisdiction.

21 MR. GOSNELL: Well, in doing that, again, you're
22 - - - you're - - - you would have to add words and subtract
23 words from the First Department decision. The First
24 Department decision didn't say, we'll run the time in which
25 we're counting for the eighteen months back there. What it



1 said was, the suspension is nunc pro tunc to May of 2015.

2 CHIEF JUDGE DIFIORE: So the suspension, in your
3 mind, is not just a timing back. It's a substantive
4 suspension during that period, correct?

5 MR. GOSNELL: Well, yes, because if - - - even
6 if, under this court's prior jurisprudence, if it had been
7 a technical violation, that wouldn't qualify. But here,
8 you have a serious and substantive violation or a - - - a
9 discipline.

10 JUDGE WILSON: So the - - - so the rule - - - the
11 rule you want, then, if I - - - the per se rule - - - let's
12 just stick with that - - -

13 MR. GOSNELL: Yes.

14 JUDGE WILSON: - - - that you want is for what
15 you're calling a substantive violation. If a foreign
16 jurisdiction has suspended someone from practice for that
17 reason, representation of a criminal defendant in New York
18 State by that person is ineffective, per se; is that the
19 rule you want?

20 MR. GOSNELL: No. It's - - - it has nothing to
21 do with ineffective assistance of counsel, Your Honor.

22 JUDGE WILSON: Well, then what's - - - why does
23 the convert - - - conviction get reversed?

24 MR. GOSNELL: The conviction gets reversed
25 because he was without counsel within the meanings of the



1 Constitution.

2 JUDGE WILSON: Okay. Well, all right. As you -
3 - -

4 MR. GOSNELL: But - - - but - - - so - - -

5 JUDGE WILSON: Fine. So then it's a reversal in
6 that circumstance. Then I don't - - -

7 MR. GOSNELL: Yes.

8 JUDGE WILSON: - - - have Judge Garcia's concern
9 that that guy's not going to be able to make a whole lot of
10 money. If I were a criminal defendant, I would seek - - -
11 I would look at the - - - at the foreign jurisdiction's
12 suspension and hire somebody because if I'm acquitted,
13 double jeopardy prevents my reconviction. And if I'm found
14 guilty, I get a reversal because I had no counsel.

15 MR. GOSNELL: Well, this - - - this court's
16 jurisprudence is also - - - it - - - it has not resolved
17 the question of what occurs if - - - for example, in Felder
18 or other cases, what occurs if you're represented by
19 someone who you are aware of and you're sort of setting the
20 trap for the courts, to - - - to set a trap for a
21 deprivation of counsel issue.

22 And I think that this court has dealt with those
23 issues in the context of conflict of interest cases, where
24 you've talked about the fact that, you know, right before
25 trial, you can't sort of put the - - - the trial court in a



1 position where either choice that they go with, there's
2 going to be an appeal. The - - - the trial courts are
3 given great discretion in those instances. And I think in
4 this instance, you would have - - - first off, you would
5 have great discretion to deny that if that were the case -
6 - -

7 JUDGE WILSON: What - - - what you really want -
8 - -

9 MR. GOSNELL: - - - but that's not this case.

10 JUDGE WILSON: What you really want is an ethical
11 rule, I think, requiring disclosure. That sounds like what
12 you want.

13 MR. GOSNELL: I certainly think that that would
14 be helpful. But the - - - the rule, the obligation flows
15 from the Constitution. If you look at the - - - the ethics
16 rules when it comes to conflict of interest, that's - - -
17 those are there so that the client is informed of it. And
18 it's to avoid issues of unwaived conflicts of interest,
19 which don't - - - don't have an - - - well, they - - - they
20 impact the ethical rules, but they're a Constitutional
21 violation for the defendant.

22 And so what the court has tried to do and what
23 the - - - the Appellate Divisions have tried to do with the
24 ethics rules is to try to avoid situations where there is
25 an unwaived conflict in which the standard is much lower



1 for a reversal. If somebody discloses it, and then the
2 court has a hearing and the - - - the issue is waived, and
3 it was a waivable issue, then there would be no issue on
4 appeal, no reversible issue on appeal, with respect to
5 that.

6 But respectfully, if a court was faced with these
7 facts, the - - - the language of the Second Circuit opinion
8 and Mr. Burgos saying - - - which would be contrary to the
9 actual evidence here - - - Mr. Burgos saying, I want him to
10 be my attorney, I don't think any judge, any trial judge
11 would - - - would be exercising appropriate discretion to
12 allow Mr. Aranda to do that when they have no idea when - -
13 - when discipline is going to be imposed, but everybody
14 knows it's coming. It could happen before the verdict; it
15 could happen in the middle of jury selection.

16 JUDGE SINGAS: Counsel, that's not necessarily
17 true. The - - - the First Department might say, we're not
18 going to discipline him. So then what?

19 MR. GOSNELL: Well, in that instance, that would
20 be like the - - - the conflict cases that we cite to, where
21 in - - - you know, if the conflict never actually arises
22 during trial, so long as the court looked - - - the trial
23 court, in that instance, looks at the totality of the
24 circumstances and makes a reasoned decision - - - it
25 doesn't just make an arbitrary decision - - - that decision



1 by the court will be upheld, because again, the right to
2 counsel of choice is a qualified right.

3 You don't get to, you know, demand a new attorney
4 the night before trial just to delay the trial. You don't
5 get to demand con - - - conflicted counsel. And the courts
6 have to - - - trial courts regularly make these decisions
7 in determining how to do this.

8 JUDGE RIVERA: So Counsel - - - Counsel, I'm on -
9 - - I'm on the screen. Let me - - - it'll be my last
10 question. It sounds to me like in - - - let's say - - -
11 let's say we adopt, in terms of your second argument, this
12 - - - this rule that it - - - it's a rule of disclosure.
13 I'm not sure about whether or not it's the Constitution. I
14 know you argued Professional Rule 1.4. But in any event,
15 let's say we agreed with that, disclosure to the client but
16 also disclosure to the court.

17 It seems to me, based on what you're saying now,
18 that, you know, the discipline could come at any time. It
19 might throw the entire criminal proceedings into chaos as a
20 consequence, that this would, in - - - in effect,
21 encourage, incentivize trial judges to remove counsel, play
22 it on the safe side. You know, why - - - why am I going to
23 move forward, and then this person's going to get
24 discipline, or we're going to be back, perhaps, months
25 later doing this, right?



1 MR. GOSNELL: Absolutely. And that is, in fact -
2 - - those are the considerations that the trial court
3 discussed in the Hersh case. And in fact, the trial court
4 there deemed that the failure of the lawyer to disclose
5 this impending discipline, reciprocal discipline, was akin
6 to a misrepresentation to the court because the court was
7 trying to set a trial schedule.

8 And just like here, there was no indication as to
9 when discipline may be imposed. And there were multiple
10 instances where Mr. Aranda could have disclosed it. He was
11 suspended in May of 2015. There were ten weeks that went
12 by before the trial began. He could have disclosed it
13 then. He submitted his paperwork to the First Department.
14 He could have disclosed it then.

15 The petition by the Grievance Committee to impose
16 reciprocal discipline, where they made clear they're
17 looking for an eighteen-month suspension, is filed and
18 served on him two weeks before the verdict. He could have
19 disclosed it then. He could have disclosed it at the time
20 of the verdict. He could have disclosed it in any time in
21 the five months that went on between there - - -

22 CHIEF JUDGE DIFIORE: Thank you, Counsel. We
23 understand the point.

24 MR. GOSNELL: Thank you.

25 CHIEF JUDGE DIFIORE: You'll have your rebuttal



1 time.

2 MR. GOSNELL: Thank you.

3 CHIEF JUDGE DIFIORE: Counsel?

4 MS. BAUTISTA: Good afternoon, Your Honors. May
5 it please the court, my name is Sheila Bautista, and I
6 represent the People in this case.

7 Your Honors, defendant's Sixth Amendment rights
8 were satisfied in this case when he received meaningful
9 representation from his attorney. Based on his inability
10 to demonstrate that he received ineffective assistance
11 below, in the lower courts below, he is now claiming his
12 attorney violated his rights under novel theories that
13 would not require a showing of prejudice.

14 But no legal or professional requirements - - -
15 with no legal or professional requirements to disclose
16 suspension, defendant - - -

17 JUDGE RIVERA: Counsel? Counsel, I'm on the
18 screen. Why - - - why doesn't Rule 1.4 apply, right, that
19 it's material? Don't you think it's material to know that
20 the attorney's been suspended in another jurisdiction, and
21 as a consequence, he is subject to reciprocal discipline?
22 May not occur, but it might occur, and that would mean that
23 the criminal proceedings are going to be thrown off course.

24 MS. BAUTISTA: Your Honor, that rule doesn't - -
25 - doesn't impose a duty because suspension on its own



1 doesn't impact the - - - doesn't - - - pending suspension
2 doesn't impact the ability of an attorney to represent the
3 client, as was demonstrated here. This attorney provided -
4 - -

5 JUDGE RIVERA: Yeah, but I - - - I - - - I
6 understand your point. In fact, I don't disagree with that
7 at all. That was where I started with - - - with - - -
8 with your adversary. The point is the potential for the
9 discipline to occur during the trial, doesn't that require
10 some duty to the client or at - - - at least to the court?

11 I mean, the attorney is an officer of the court.
12 Don't you have to tell the court, look, this is - - - this
13 might be coming. It's - - - look. If I'm on a trial,
14 don't I have to tell the court, Your Honor, I - - - I've
15 got surgery in three days that I cannot - - - I cannot
16 postpone; it's a - - - I have to do this surgery, so I'm
17 not going to be available? I mean, we - - - we do that all
18 the time. Why wouldn't you do this? Why wouldn't you
19 disclose this?

20 MS. BAUTISTA: Well, in this situation, there was
21 no requirement for the disclosure. The Second Circuit
22 order did not require it. The court's rules did not
23 require it. So the defendant's claiming that his attorney
24 violated - - -

25 JUDGE RIVERA: But my point - - - my point on



1 this is I - - - it's a little circular what you're saying.
2 My point on this is, don't you have to disclose that
3 because it may impact the criminal proceedings? You know
4 that for a fact that it may. You don't know that it will,
5 but you know that it may because the Appellate Division may
6 indeed impose reciprocal discipline while the - - - the
7 case is ongoing.

8 MS. BAUTISTA: Respectfully, Your Honor, in this
9 case, that's not necessarily certain because the discipline
10 that might be - - - that might be imposed in this case
11 might not necessarily be a suspension. The rule is whether
12 or not the attorney should be disciplined in the Appellate
13 Division, but it's - - - it's not a foregone conclusion
14 that suspension would actually be the result.

15 JUDGE RIVERA: Well, again, I don't think anyone
16 is disagreeing with this point about we don't know what the
17 Appellate Division would do; it might do something else.
18 The - - - the point is, shouldn't the court at least - - -
19 and - - - and perhaps the client - - - I understand these
20 arguments are slightly different - - - be informed of
21 something that may indeed have impact on the criminal
22 proceedings, to try and take some preventative measures?

23 MS. BAUTISTA: Your Honor, it sounds like a
24 reasonable requirement. I have three reasons why this
25 court should not create such a require - - - or find such a



1 requirement in this case, and this case would be an
2 improper vehicle to create such a requirement.

3 At the time of the trial, the defense attorney
4 had no legal or professional duty to disclose. And so
5 defendant's trying to show that his attorney violated his
6 rights. But absent that duty, this defense attorney did
7 not violate anything.

8 Also on the record, defendant can't show that he
9 actually would not have chosen this - - - this attorney.
10 The record demonstrates that this defendant, he - - - he
11 hired this attorney twice before and received favorable
12 outcomes in those cases and received meaningful
13 representation in this case.

14 So based on that, number one, this would be an
15 improper vehicle for such a rule. Number two, the proper
16 vehicle for such a rule would be the court system, which
17 promulgates the rules of professional conduct and attorney
18 discipline. Such a new rule would raise a lot of
19 questions, and these deliberative bodies could debate and
20 discuss those questions, such as what should the scope of
21 attorney disclosure be; what situations trigger disclosure;
22 and should there be any limitations.

23 As this court recognizes, the right to choice of
24 counsel is a qualified right. These issues and these
25 questions weren't - - - weren't properly raised in the



1 440.10 below - - - 10 court below, so they - - - they
2 weren't properly explored by the judge.

3 And number three, another reason why such a rule
4 isn't required in this case is because the defendant has
5 existing protections. Interim suspension is available.
6 It's - - - it's available form of relief if the attorney -
7 - - based on a suspension in the foreign jurisdiction, if
8 his conduct rises to the level that he really shouldn't be
9 representing this client in state court, interim suspension
10 is something that can be sought - - - sought by the
11 Attorney Grievance Committee.

12 And of course, defendant could also seek relief
13 under ineffective assistance of counsel claims. If his
14 attorney is truly not able to represent the defendant
15 below, he can - - - he can show that there was an actual
16 impact on the quality and the ability of his attorney to
17 represent him at trial, which this attorney wasn't - - -
18 which this - - - which this defendant is - - - was not able
19 to show below.

20 JUDGE TROUTMAN: And so do you argue that the
21 ineffective assistance of counsel route is the better route
22 if there was an actual impact on the ability to represent?

23 MS. BAUTISTA: Yes, Your Honor. That's the
24 proper - - - that's the proper course for this court to
25 examine this issue because the defendant is talking about



1 something his attorney didn't do. He's talking about his
2 attorney's conduct. And that is more - - - most properly
3 assessed under ineffective assistance of counsel, where an
4 - - - where defendant has to show there was some
5 detrimental impact to his attorney's ability to try this
6 case or the quality of his representation. And he can't
7 show either things under existing law. This defense
8 attorney provided - - -

9 JUDGE WILSON: Suppose the - - -

10 MS. BAUTISTA: - - - meaningful representation.

11 JUDGE WILSON: Suppose the Appellate Division had
12 suspended Mr. Aranda right in the middle of the trial. How
13 would you - - - how would you propose that would be
14 handled?

15 MS. BAUTISTA: Well, in that case, the rules
16 require the attorney to inform his client. So in that case
17 - - - in that case - - -

18 JUDGE WILSON: Well, at that point, he can't
19 continue, can he? He's suspended from practice in New
20 York.

21 MS. BAUTISTA: Under - - - under the rules, the
22 attorney would be required to tell his client that he's
23 been suspended and advise his client to seek substitute
24 counsel. In this case, he was still licensed when he
25 represented his client.



1 So - - - so - - - so yes, so we - - - we - - - we
 2 - - - we urge this court to find it under ineffective
 3 assistance. This attorney provided deficient performance -
 4 - - sorry, provided effective performance. He was licensed
 5 to practice at the time that he represented the defendant
 6 in this case.

7 As the Appellate Division found - - - the
 8 Appellate Division was the court that issued the
 9 suspension, and the Appellate Division ruled in this case
 10 that at the time of the trial, this attorney was still
 11 licensed to practice in New York. And as - - - as - - - as
 12 this court has been pointing out in some of its questions,
 13 at the time of the trial, nobody knew what, exactly, the
 14 suspension would be in - - - in this case.

15 And finally, with respect to the right to choice
 16 of counsel claim, we argue that this would not be the
 17 proper vehicle for it, based on the defendant's inability
 18 to show that his attorney violated anything in this case.

19 JUDGE WILSON: I'm not sure - - -

20 JUDGE RIVERA: So Counsel, if - - - if - - - I'm
 21 sorry. If we disagreed with you on that point - - -

22 MS. BAUTISTA: Yes.

23 JUDGE RIVERA: - - - that there was no ethical
 24 violation - - -

25 MS. BAUTISTA: Right.



1 JUDGE RIVERA: - - - do you - - - does - - - does
2 the defendant then get a new trial? Is he right - - -

3 MS. BAUTISTA: Well, he would still have - - -

4 JUDGE RIVERA: - - - Counsel?

5 MS. BAUTISTA: He would still have to show that
6 he actually would not have chosen this attorney. And on
7 this record - - - on the existing record, he can't show
8 that. This - - -

9 JUDGE RIVERA: Well, how - - - how, other than
10 saying if I knew that, I would certainly have never gone
11 forward with this individual, given - - - given the nature
12 of what the Second Circuit concluded, what - - - what else
13 would he - - - what else could he possibly have said?

14 MS. BAUTISTA: He made that - - -

15 JUDGE RIVERA: What else could he do?

16 MS. BAUTISTA: He made that claim, but it was
17 undermined by the longstanding relationship he had with
18 this same attorney. This same attorney represented him
19 twice before and received favorable outcomes for this same
20 defendant.

21 JUDGE RIVERA: Oh. So you mean it's - - - it's
22 one rule if it's an attorney that just got assigned to me;
23 I don't know anything about them, and then there - - -
24 there's this pending discipline, versus someone who I've
25 had for a long time, and you know, perhaps my trust has



1 been betrayed because they've been not complying with the
2 professional standards?

3 MS. BAUTISTA: These are just the facts of the
4 case. The facts of this - - -

5 JUDGE RIVERA: I know they're the facts of the
6 case.

7 MS. BAUTISTA: Right.

8 JUDGE RIVERA: My question is how it impacts on
9 the legal conclusions we're - - - we're asked to decide
10 here to resolve the issue before us.

11 MS. BAUTISTA: And these facts show that this
12 particular defendant didn't - - - his rights to choice were
13 not violated. The - - - the attorney that he chose was an
14 attorney who had performed well for him before and
15 performed well for him in this case. So - - -

16 JUDGE RIVERA: Yes, I understand. But one would
17 - - - one would assume that a client would not choose a
18 attorney who they thought was deficient. One would choose
19 an attorney who you thought is going to represent me well,
20 especially if they had a track record in the past. But
21 this is not about his past. It's about the lawyer's past.

22 JUDGE WILSON: Let me try Judge Rivera's question
23 a little bit differently. Suppose he could prove to your
24 satisfaction that he would not have continued with Mr.
25 Aranda had that been disclosed. Has he then been denied



1 his Constitutional right to counsel? And if not, why not?

2 MS. BAUTISTA: Well, in this case - - -

3 JUDGE WILSON: No, no. Suppose he could prove
4 that, hypothetically. Forget him for the moment.

5 MS. BAUTISTA: Okay. Okay.

6 JUDGE WILSON: Suppose a defendant could prove,
7 if I had known that this lawyer was suspended, I never
8 would have continued with this. Take that as a given. I
9 know that's not this case. Take that as a given. In that
10 circumstance, has that person been denied his
11 Constitutional right to choose counsel?

12 MS. BAUTISTA: Without a legal or professional
13 requirement for the attorney to make the disclosure, no, he
14 has not shown it because he has to show two things. He has
15 to show that his attorney violated something. He'd have to
16 show that his attorney violated a legal or professional
17 duty, one. And two, he'd have to show that he actually
18 would not have chosen this attorney. This defendant can't
19 show either of those things, so he would not prevail on his
20 right to choice of counsel claim in this case.

21 CHIEF JUDGE DIFIORE: Thank you, Counsel.

22 MS. BAUTISTA: Thank you.

23 CHIEF JUDGE DIFIORE: Counsel, your rebuttal?

24 MR. GOSNELL: Yes. And getting back to the - - -
25 the court's inquiry that was just posed to my adversary, on



1 page 408 of the record, the facts are crystal clear that
2 Mr. Burgos would not have allowed Mr. Aranda to continue as
3 his attorney, had he known about it. What he says is, in
4 his affidavit, "Had I known what I know now," referring to
5 the suspension, "I would not have agreed to have my case
6 tried by the court without a jury. I would also not have
7 permitted Mr. Aranda to remain as my attorney."

8 JUDGE TROUTMAN: So your argument is his word
9 alone is sufficient to establish that he would have chosen
10 a new attorney?

11 MR. GOSNELL: Yes. That is the only evidence
12 that's before the court. That's the only evidence that
13 would be pertinent to that issue.

14 And getting back to Judge Rivera's question posed
15 earlier, her statement earlier that we don't know about
16 what the Appellate Division would have done, that applies
17 in an instance where there has been counsel removed;
18 there's a - - a choice of counsel sort of proceeding
19 that's occurred. And at the time of the removal of the
20 attorney, the trial court doesn't know what's going to
21 happen.

22 That's not this case. We know exactly what the
23 Appellate Division would have done because they did it.
24 They suspended Mr. Aranda. They made that suspension
25 retroactive to a date that preceded appellant's trial, that



1 flowed throughout the trial, throughout his sentencing,
2 throughout the verdict. He did not have counsel, with - -
3 - within the meaning of the Constitution, based upon that.

4 CHIEF JUDGE DIFIORE: Thank you, Counsel.

5 MR. GOSNELL: Thank you, Your Honors.

6 (Court is adjourned)

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

I, Cheryl Odom, certify that the foregoing transcript of proceedings in the Court of Appeals of the People of the State of New York v. Angelo Burgos, No. 14 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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