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COURT OF APPEALS
STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

NO. 94

TYRONE PETERS,

Appellant.

20 Eagle Street
Albany, New York
October 15, 2024

Before:

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

Appearances:

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Official Court Transcriber



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

3 When you're ready, Counsel.

4 MR. NELSON: Your Honor, good afternoon. My name
5 is Eric Nelson. May it please the Court. Your Honor, may
6 I reserve five minutes on rebuttal, please?

7 CHIEF JUDGE WILSON: Yes.

8 MR. NELSON: Thank you. Your Honor, this - - -
9 this case is a - - - an appeal of a coram nobis denial by
10 the Second Department. And when - - -

11 JUDGE TROUTMAN: What is - - - is it the denial
12 of the coram nobis petition, or is it re-argument? What's
13 before us?

14 MR. NELSON: Before, Your Honor, is the - - -
15 it's in the - - - this is the appeal of the denial of a
16 coram nobis proceeding - - -

17 JUDGE TROUTMAN: And those claims that were
18 raised in that original coram nobis, is that what is before
19 us?

20 MR. NELSON: The issue before the court, as
21 specified by Chief Judge Wilson, is the issue of
22 ineffective assistance of appellate counsel.

23 JUDGE TROUTMAN: Okay. When you - - - when
24 you're seeking the review of coram nobis, and you're saying
25 the Appellate Division was wrong in the way that they

1 decided it, correct?

2 MR. NELSON: Correct. And this - - -

3 JUDGE TROUTMAN: And we can only review what they
4 reviewed and made a decision on. Would you agree with
5 that?

6 MR. NELSON: Not necessarily, Your Honor. I - -
7 - I know the District determined - - -

8 JUDGE TROUTMAN: We can review things - - - we
9 can consider that which was not considered by the Appellate
10 Division and say they wrongly decided something that they
11 did not, in fact, decide.

12 MR. NELSON: Your Honor - - -

13 JUDGE GARCIA: Counsel, could you move a little
14 to the center here?

15 MR. NELSON: Oh, I'm sorry, Your Honor.

16 JUDGE GARCIA: I think the mic will pick you up
17 better.

18 MR. NELSON: My apologies.

19 JUDGE GARCIA: Acoustics are a little difficult.

20 MR. NELSON: Your Honor, in the People and the
21 prosecution's brief, one of the issues that was raised
22 before getting into the facts of the ineffective assistance
23 of appellate counsel was whether or not this court had
24 jurisdiction to hear the ineffective assistance of
25 appellant counsel claim. The prosecution's claim, if I

1 may, is that the Second Department should have heard the
2 issue of the ineffective assistance of appellate counsel
3 before bringing the proceeding in this court. In this
4 court, Mr. Peters, the defendant, brought a pro se
5 application before this court, and the Chief Judge granted
6 leave.

7 JUDGE TROUTMAN: But what I meant - - - and just
8 for clarification, what's brought here is different from
9 what the Appellate Division heard.

10 MR. NELSON: Yes. Yes, it is, Your Honor.

11 JUDGE TROUTMAN: Okay.

12 MR. NELSON: In the Appellate Division, as Your
13 Honor correctly points out, the claim of ineffective
14 assistance of appellate counsel was not raised.

15 JUDGE TROUTMAN: Okay.

16 MR. NELSON: My contention is, Your Honor, and I
17 respectfully disagree with the - - -

18 CHIEF JUDGE WILSON: Wait, why do you say that
19 his original petition - - - coram nobis petition did not
20 raise an effective assistance of appellate counsel?

21 MR. NELSON: Because I believe, Your Honor, that
22 it raised issues such as ineffective assistance of trial
23 counsel - - -

24 JUDGE CANNATARO: Uh-huh.

25 MR. NELSON: - - - in the Appellate Division.

1 The - - - Mr. Peters, in his pro se application, repeated
2 many of the claims - - -

3 CHIEF JUDGE WILSON: It seemed to me that - - -

4 MR. NELSON: - - - that were denied by the
5 Appellate Division, it.

6 CHIEF JUDGE WILSON: - - - it seemed to me that
7 the first thing - - - did you speak - - - well, were you
8 aware that there was a conference with Mr. Peters and with
9 Mr. Neubort and me?

10 MR. NELSON: Yes, I was, Your Honor. In fact,
11 I've had numerous conversations - - -

12 CHIEF JUDGE WILSON: Okay, good.

13 MR. NELSON: - - - with Mr. Neubort, and when I
14 first was assigned by this court to handle this appeal, Mr.
15 Neubort told me about two particular - - - two attempts at
16 conversations or conferences between Mr. Peters, Your
17 Honor, and Mr. Neubort.

18 CHIEF JUDGE WILSON: Okay. So you were at least
19 then aware of the substance of that.

20 MR. NELSON: Yes.

21 CHIEF JUDGE WILSON: From Mr. Neubort, I assume.

22 MR. NELSON: Yes.

23 CHIEF JUDGE WILSON: And that one of the things
24 presumably you learned was that there was a claim by Mr.
25 Peters that his appellate counsel, Mr. Krinsky, had not

1 actually prepared a brief but had simply taken a little bit
2 that his prior appellate counsel had prepared, and then a
3 large portion that he himself had prepared, and filed that.
4 You were aware of that?

5 MR. NELSON: I was not aware of that. I was
6 informed by Mr. Neubort that Mr. Krinsky did prepare a
7 brief, that Mr. Peters contributed to the brief, and I
8 believe - - - if I'm correct, Your Honor, I believe the
9 question that you had - - -

10 CHIEF JUDGE WILSON: And did you see that in his
11 coram nobis petition, that question?

12 MR. NELSON: Yes, I did.

13 CHIEF JUDGE WILSON: Okay. Then would it be - -
14 - going back to Judge Troutman's question, is it fair to
15 say that the, I think it's seven issues you've raised here,
16 if I've counted them right, none of them is an issue that
17 Mr. Peters raised in his coram nobis petition?

18 MR. NELSON: Your Honor, in my brief and my
19 argument before this court, in terms of the ineffective
20 assistance of appellate counsel, I raised some of the
21 issues that were raised by Mr. Krinsky. However, I believe
22 - - -

23 CHIEF JUDGE WILSON: I'm sorry, I'm not asking
24 you about Mr. Krinsky. We have a - - -

25 MR. NELSON: About Mr. - - - Mr. - - - regarding



1 Mr. Peters. Yes, Your Honor, I have. - - -

2 CHIEF JUDGE WILSON: - - - no, we have a - - - we
3 have a coram nobis petition that Mr. Krinsky had nothing to
4 do with filing that Mr. Peters filed on his own. With me
5 so far?

6 MR. NELSON: Yes, I am.

7 CHIEF JUDGE WILSON: And that has, I think, if
8 I've counted correctly, six issues raised in it. You have,
9 I think, raised seven issues, and I don't see any overlap
10 between those; is that right?

11 MR. NELSON: One of the issues that Mr. Peters
12 raised in his coram nobis dealt with ineffective assistance
13 of trial counsel. That was one issue, and that was the
14 issue I intended on focusing on today was the ineffective
15 assistance of appellate counsel, not fully briefing and
16 dealing with the issue of ineffective assistance of trial
17 counsel - - -

18 JUDGE GARCIA: I'm sorry. Counsel, can I - - - I
19 - - - I'm confused at this point. I guess my question is,
20 in the original coram nobis petition that was decided, did
21 - - - was the issue of ineffective appellate counsel
22 raised?

23 MR. NELSON: I believe so, Your Honor.

24 Your Honor, I expanded on some of the issues, or
25 at least the issue of ineffective assistance of trial

1 counsel, in terms of the ineffective assistance of
2 appellate counsel. And I took the position as follows.
3 Throughout the trial, and I had the opportunity, with the
4 help of Mr. Neubort, to get portions of the trial, as well
5 as the clerk of the court, to review the entire transcript.
6 Throughout the transcript, as was handled by defense
7 counsel at the time of the homicide trial, there were
8 numerous issues that were of a - - - of an evidentiary
9 nature that came up during the trial before Justice Feldman
10 back in 2004. One of the issues dealt with a
11 Molineux issue in which at - - -

12 JUDGE RIVERA: But this - - - it's not a direct
13 appeal now.

14 MR. NELSON: No, it's not a direct appeal, Your
15 Honor - - -

16 JUDGE RIVERA: So you're limited to what's
17 considered on the coram nobis. So we're back to the Chief
18 Judge's question, where is the overlap between what you've
19 briefed and what was actually raised on the coram nobis and
20 decided by the Appellate Division?

21 MR. NELSON: Actually, Your Honor, there's very
22 little that I raised in my brief - - -

23 JUDGE RIVERA: Yes.

24 MR. NELSON: - - - that Mr. Peters raised. Mr.
25 Peters raised different issues under ineffective assistance

1 of trial counsel - - -

2 JUDGE RIVERA: Okay. Is there anything that he
3 raised that you've raised? Let me try it that way.

4 MR. NELSON: I don't believe so, Your Honor.

5 CHIEF JUDGE WILSON: And you read his coram nobis
6 petition - - - Mr. Peters' coram nobis petition not as
7 alleging that his appellate counsel failed to raise
8 deficiencies of his trial counsel, but rather than court -
9 - - on his coram nobis, he was just complaining about trial
10 counsel, not appellate counsel's failure to raise trial
11 counsel's errors.

12 MR. NELSON: Your Honor, I think the simplest way
13 of focusing and answering that question is, Your Honor
14 granted leave on the issue of ineffective assistance of
15 appellate counsel, which is what I focused on. I raised
16 other issues other than what was raised in his direct
17 appeal, and which Mr. Peters himself raised on his pro se
18 coram nobis proceeding. The main issue - - -

19 JUDGE SINGAS: Well, aren't those new issues
20 better resolved in a new coram nobis in front of the
21 Appellate Division?

22 MR. NELSON: No, Your Honor, they were not.

23 JUDGE SINGAS: Oh - - -

24 JUDGE HALLIGAN: Why?

25 JUDGE SINGAS: Why?

1 CHIEF JUDGE WILSON: Why?

2 MR. NELSON: Because there was one, for example,
3 which I think is a glaring omission was the preservation
4 issues. There was the - - - there were the issues of
5 failure to request limiting instructions, which certain
6 pieces - - -

7 JUDGE CANNATARO: No, Counsel, the question
8 wasn't whether they were raised in the prior coram nobis.
9 The question was, wouldn't they be better raised in a new
10 coram nobis application to the Appellate Division, because
11 otherwise - - - and I think there's a sense here - - - that
12 there may not be anything for us to review.

13 MR. NELSON: Your Honor, I agree. And according
14 to the law, and according to the CPL, they can be raised in
15 a new coram nobis proceeding before the Appellate Division.

16 JUDGE CANNATARO: So why wouldn't you do that?
17 Or what allows you to come here and ask us to ignore the
18 fact that that didn't happen?

19 MR. NELSON: Without giving a glib answer, Your
20 Honor, Chief Judge Wilson granted - - - granted leave in
21 this case, and that's why I'm here.

22 JUDGE RIVERA: Yes, but - - - but you're not
23 arguing any of the issues that were actually before the
24 Appellate Division that the Chief Judge granted on.

25 MR. NELSON: No, because the - - - the - - - the

1 issue of - - -

2 JUDGE RIVERA: I think no is kind of the answer,
3 but - - - here.

4 MR. NELSON: - - - the - - - the issue of - - -
5 of - - - before the Appellate Division, there was no issue
6 of ineffective assistance of appellate counsel, which I
7 believe, as the Chief Judge pointed out in his conferences
8 with - - - with Mr. Peters and with Mr. Neubort, those were
9 the issues that were flushed out, and that was the issue
10 that was - - - was flushed out in the order, which - - - in
11 which you granted leave and then subsequently in which I
12 was appointed.

13 So what I decided to do - - - and - - - and based
14 upon my experience in terms of trial work, is to review the
15 entire record in this case and to focus on the issue of the
16 ineffective assistance of trial counsel. Similarly, as you
17 - - - Your Honor pointed out, could be made in the
18 Appellate Division. But again, my marching orders, for
19 lack of a better term, were to file the brief here as I was
20 appointed by the court in terms of - - - of doing that.
21 And the issues, if I may, which I believe are significant,
22 which are compared to other matters and other cases in
23 which this court is - - -

24 JUDGE RIVERA: Well - - - well, you - - - you may
25 - - - may have believed that your client might have done a

1 better job as a pro se and raised some other issues, but
2 the grant is on one coram nobis and what the Appellate
3 Division decides on, right?

4 MR. NELSON: That's true.

5 JUDGE RIVERA: That's the marching orders. I can
6 put it that way.

7 MR. NELSON: That's true. But I also point out,
8 Your Honor, and - - - and I also point out, Judge Rivera,
9 that I believe the CPL and the sections which were cited -
10 - -

11 JUDGE RIVERA: Uh-huh.

12 MR. NELSON: - - - grant the court the authority
13 to hear additional issues. I believe was what was cited in
14 this case, which I certainly think is distinguishable is
15 the Feliciano case in which the court - - - the Appellate
16 Division originally thought that the coram nobis proceeding
17 that was brought before it was a motion to re-argue. This
18 court then stated, after hearing the Feliciano case, that
19 that was actually a coram nobis case, and then sent the
20 case back to the Appellate Division for further proceedings
21 based upon the Appellate Division's erroneous ruling on
22 that case. And I believe it's Section 470 - - - CPL
23 Section 470.05, and then another section of the CPL, which
24 grants this court the appellate authority to hear the
25 ineffective assistance of appellate counsel. And I believe

1 the statute specifically deals with the issue of appellate
2 counsel in - - - in the CPL section dealing with the powers
3 of the Court of Appeals.

4 CHIEF JUDGE WILSON: Thank you.

5 MR. NELSON: Thank you, Judge.

6 MR. NEUBORT: May it please the Court. My name
7 is Solomon Neubort, and I represent the People. I would
8 just like to maybe clarify some facts so to avoid some of
9 the confusion.

10 CHIEF JUDGE WILSON: What happened?

11 MR. NEUBORT: What happened was that perhaps
12 there might have been a little bit of an oversight in my -
13 - - on - - - on my part in my leave letter. What happened
14 was the defendant filed a coram nobis petition raising
15 certain claims of ineffective assistance of appellate
16 counsel, faulting trial counsel on several - - - several
17 grounds, saying that appellate counsel should have raised
18 these other claims. That motion was denied. Then the
19 defendant put in a leave letter, and then the defendant
20 moved to re-argue in the Appellate Division. After he
21 moved to re-argue in the Appellate Division, he raised for
22 the first time a claim that Mr. Krinsky didn't write the
23 brief or that Mr. Krinsky was just doing pro forma work,
24 and he wasn't responding - - -

25 CHIEF JUDGE WILSON: That's in his - - - I think

1 that's in his - - - I think that's in his original
2 petition, I think.

3 MR. NEUBORT: I believe that that was only in the
4 motion to re-argue, and this was a new claim in his motion
5 to re-argue. That's my recollection of what happened. And
6 so when Your Honor granted leave to appeal, Your Honor, you
7 granted leave to appeal from the original coram nobis
8 application, but not from the motion to re-argue, and the
9 motion to re-argue, the Appellate Division denied, didn't
10 grant, but then on re-argument, deny it - - - just denied
11 re-argument, which was an unappealable decision, and so
12 leave couldn't even be granted from that decision. And so
13 it was just an unappealable decision. And I think in - - -
14 because there was a stay and everything got very confusing
15 - - -

16 JUDGE GARCIA: Can they bring a new coram nobis
17 on the issues that were raised in the re-argument motion?

18 MR. NEUBORT: In the motion to re-argue, the
19 defendant raised all the claims that he raised in his
20 initial coram nobis application, plus this new claim that
21 Mr. Krinsky wasn't the - - -

22 JUDGE GARCIA: But the new claim, could that be
23 raised in a new coram nobis petition - - -

24 MR. NEUBORT: That new claim could be raised in a
25 new coram nobis. He can raise all his claims. He can

1 raise the claims that he raised on this appeal in a new
2 coram nobis - - -

3 JUDGE CANNATARO: But there's nothing to prevent
4 him from bringing that to the court of first instance,
5 where the alleged ineffective assistance of appellate
6 counsel occurred, i.e., the Appellate Division.

7 MR. NEUBORT: Correct. And the Appellate
8 Division allows it all the time. I have defendants who - -
9 - who have filed five, six, seven petitions for coram
10 nobis. They just keep bringing it. Then the Appellate
11 Division entertains them all. They deny them all, but they
12 entertain every one of them. There's nothing preventing a
13 defendant from bringing seriatim petitions for coram nobis.

14 JUDGE CANNATARO: And he could bring seriatim
15 requests for leave to appeal to this court, right?

16 MR. NEUBORT: That's correct, Your Honor. And so
17 he can bring all of these claims again in the Appellate
18 Division, the court of first instance, as this court in
19 D'Alessandro actually did this - - - we - - - we're the - -
20 -

21 JUDGE RIVERA: So I - - - I just want to be clear
22 on this, what he can do. So he gets a CLA grant on the
23 issues raised in his coram. Those issues are not briefed
24 to us.

25 MR. NEUBORT: Correct.

1 JUDGE RIVERA: Let's just hypothetically say we
2 find nothing persuasive. You're saying he could then file
3 another coram raising the exact same issues that he was
4 granted on and seek another CLA - - -

5 MR. NEUBORT: Correct. And there's three
6 reasons. This court in D'Alessandro gave - - -

7 JUDGE RIVERA: And another lawyer would brief
8 again?

9 MR. NEUBORT: Well, he - - - he brought it pro se
10 the first time, and so he could bring a pro se again - - -

11 JUDGE RIVERA: No, I'm talking - - - well, he has
12 a lawyer now. I'm talking about if he got granted again.

13 MR. NEUBORT: Okay. So - - -

14 JUDGE RIVERA: How many times can I keep trying
15 to get a CLA on the same thing that's going nowhere?

16 MR. NEUBORT: He - - - he - - - he can bring the
17 same - - - he can file a the brief that he got in the
18 appellate - - - in this court, in the Appellate Division,
19 and that will be the court of first instance, and that
20 ways, he would - - -

21 UNIDENTIFIED SPEAKER: But - - -

22 JUDGE RIVERA: That would not be the same issues.
23 I'm talking about the issues that were granted - - - that
24 were - - - excuse me - - - raised on the seat - - - the
25 coram - - -

1 MR. NEUBORT: I - - - I - - - I'm sorry. I'm - -
2 -

3 JUDGE RIVERA: I'm sorry. My apologies. Let me
4 try it again. I'm talking about the issues that were
5 raised in the coram that he then sought a CLA on, which the
6 Chief Judge granted, which are not - - - counsel said - - -
7 he didn't brief in his brief. You're saying he could go
8 get another coram on those exact same issues that the CLA
9 was already granted on but were not briefed.

10 MR. NEUBORT: So he - - - he can bring another
11 coram nobis on what he raised in the motion to re-argue,
12 what he raised in this court for the first time. And he
13 actually has the benefit of counsel now because he's - - -

14 CHIEF JUDGE WILSON: Not - - - not whatever - - -
15 yeah, not what he raised in this court for the first time,
16 the issues that he raised in the coram that were not
17 briefed to us at all this time.

18 MR. NEUBORT: Right. So he - - - so as I was
19 saying, in - - - in D'Alessandro, the - - - this court gave
20 three reasons for why that shouldn't be permitted. And
21 they said, we - - - this court said, "We note that a claim
22 of ineffective assistance of counsel should be heard and
23 decided in the court where the allegedly deficient
24 representation occurred." So it should go there first.
25 Then this court said a second reason, further, the

1 proffered - - - proffered approach would deprive defendants
2 - - - the defendant in this case wanted to have this court
3 decide issues that weren't raised in the coram nobis - - -
4 or that were raised in the coram nobis, but were dismissed
5 and so were never decided by the Appellate Division - - -
6 saying it would - - - it would deprive the defendants of
7 the potential to have the merits of their claims addressed
8 twice, once by the Appellate Division, and if unsuccessful,
9 once by this court, and a motion to leave - - -

10 CHIEF JUDGE WILSON: Uh-huh.

11 MR. NEUBORT: - - - to appeal. Then this court
12 gave a third reason. Finally, we are not in the habit of
13 reviewing the merits of an argument in the first instance
14 without the benefit of the lower court's recent analysis.
15 So that's not - - -

16 JUDGE HALLIGAN: So - - - so the - - - so in a
17 new coram nobis he could raise, as I understand you, both
18 the arguments that were initially before the Appellate
19 Division, but not briefed to us, as well as the arguments
20 that he raised in the motion to re-argue that re-argument
21 was denied.

22 MR. NEUBORT: Correct. And he can even raise the
23 original claims that he raised in his first coram nobis
24 that he raised initially. There's nothing preventing a
25 defendant from bringing the same claims again and again.

1 JUDGE GARCIA: I mean, you can raise whatever you
2 want in a coram nobis. You can put whatever you want in a
3 coram nobis. But it seems to me it's unusual to have a
4 case come up to our court where we grant leave on an issue.
5 The party doesn't brief it. We decide against that party
6 then, and then they can come back and litigate that same
7 issue again. That doesn't seem like a good system to me.

8 MR. NEUBORT: Well, this court wouldn't be
9 actually reaching the decision. That would be just saying
10 that we're not going to reach the - - - this court would
11 say the defendant is not raising the claims that he raised
12 below, and so we're not going to reach it because it would
13 be better for the defendant to raise it in the court of
14 first instance.

15 JUDGE GARCIA: They were - - - he raised them
16 already. He's just not raising them here. Some issues he
17 did raise, just not being argued here.

18 MR. NEUBORT: There - - - there's no overlap in
19 any of the arguments that the defendant raised in his
20 initial coram nobis application, where he claimed
21 ineffective assistance of appellate counsel, and the claims
22 that it - - - the arguments that he's raising in this court
23 on in support of his claim of ineffective assistance of
24 appellate counsel.

25 CHIEF JUDGE WILSON: But - - - but Counsel - - -

1 JUDGE RIVERA: No. No. That's right. The - - -
2 the point is, whether or not the grant - - - the CLA grant
3 on the issues that were raised in the coram nobis that are
4 now not presented to us, he should be able to go and just
5 do another coram nobis because his lawyer didn't raise it
6 to us? I'm not understanding the argument is my problem.

7 MR. NEUBORT: Well, the claims that he raised in
8 his initial coram nobis - - -

9 JUDGE RIVERA: Yeah.

10 MR. NEUBORT: - - - that for which there was a
11 leave grant - - -

12 JUDGE RIVERA: Yes.

13 MR. NEUBORT: - - - this court could reach it.
14 But the defendant has abandoned those claims, and so for
15 that reason, this court shouldn't reach those claims. That
16 - - -

17 JUDGE RIVERA: So if it's abandoned, can he then
18 file another coram nobis on those same issues? Because I
19 thought that's what you were saying. I may have
20 misunderstood you.

21 MR. NEUBORT: He - - - in theory - - - again,
22 there's - - - there's no - - - there's no statutory - - -

23 JUDGE RIVERA: Okay.

24 JUDGE GARCIA: Well, would he be - - - would he
25 be a - - -

1 MR. NEUBORT: - - - prohibition of - - - of a
2 defendant raising the same claim twice on a coram nobis - -
3 -

4 JUDGE HALLIGAN: So there's - - - there's no
5 consequence that flows from the abandonment, you're saying?

6 MR. NEUBORT: There is no adverse consequence - -
7 -

8 JUDGE HALLIGAN: In the coram nobis, not - - -

9 MR. NEUBORT: - - - from the abandonment. He can
10 raise the claims again in the Appellate Division. The
11 Appellate Division might say, just like we - - - we - - -
12 we - - - we rejected those claims the first time on their
13 merits, we'll reject them again on their merits. At some
14 point, if a defendant keeps bringing a coram nobis
15 application, the court might say there's an abuse of - - -
16 of - - - of process and might bar the defendant from
17 bringing any further ones without an attorney, which
18 sometimes happens where a defendant brings seven, eight,
19 nine, ten 440 - - -

20 JUDGE TROUTMAN: Counsel?

21 MR. NEUBORT: - - - motions or coram nobis
22 applications.

23 JUDGE TROUTMAN: Counsel, here there was an
24 initial coram nobis, wherein the defendant made - - - made
25 certain claims with respect to how his case was handled.

1 The Appellate Division reviewed, correct - - -

2 MR. NEUBORT: Correct.

3 JUDGE TROUTMAN: - - - as to those claims?

4 MR. NEUBORT: Correct.

5 JUDGE TROUTMAN: Then he - - - when they denied,
6 he sought re-argument.

7 MR. NEUBORT: Correct.

8 JUDGE TROUTMAN: On re-argument, he raised
9 something different from that which was put in the original
10 coram nobis - - -

11 MR. NEUBORT: Correct.

12 JUDGE TROUTMAN: - - - is that correct?

13 MR. NEUBORT: Correct.

14 JUDGE TROUTMAN: But the - - - that which was
15 denied, the merits of that had never been reviewed by the
16 Appellate Division.

17 MR. NEUBORT: That's correct because they denied
18 - - -

19 JUDGE GARCIA: Re-argument - - -

20 JUDGE TROUTMAN: And was - - -

21 MR. NEUBORT: - - - the defendant's motion to re-
22 argue.

23 JUDGE TROUTMAN: And the denial of re-argument
24 was not appealed?

25 MR. NEUBORT: That was - - - the defendant did

1 seek leave to appeal, but there was no leave grant from
2 that motion to re-argue.

3 JUDGE TROUTMAN: But there are two separate
4 avenues that were going on.

5 MR. NEUBORT: There was - - -

6 JUDGE TROUTMAN: With respect to reviews.

7 MR. NEUBORT: Correct. So there - - - so - - -
8 so the defendant was simultaneously seeking motion to re-
9 argue - - -

10 JUDGE TROUTMAN: Correct.

11 MR. NEUBORT: - - - and the Appellate Division,
12 while he had a leave application pending before this court.
13 Then he supplemented his leave application after the motion
14 to re-argue was denied, asking this court to consider also
15 the claims raised in the motion to re-argue, but that
16 wasn't properly before this court because it was a motion
17 to re-argue that was denied, and that's not an appealable
18 decision. But that, again, the defendant could, in theory,
19 go back to the Appellate Division and bring a new coram
20 nobis. He can raise whatever claims he wants - - -

21 JUDGE TROUTMAN: Based on the issues that he
22 raised in the re-argument that were never arguably - - -

23 MR. NEUBORT: Correct. It - - -

24 JUDGE TROUTMAN: - - - reviewed by the Appellate
25 Division. And then, if his claim is that the Appellate

1 Division improperly denied that, he could then perhaps seek
2 leave.

3 MR. NEUBORT: That's correct, Your Honor.

4 JUDGE RIVERA: I guess, my question was why, on
5 the issues raised in the coram nobis that the grant is on,
6 that the lawyer has decided not to raise, why should that
7 fall - - - are you - - - are you saying that's the client
8 who has waived them?

9 MR. NEUBORT: Well, I - - - I - - - if a
10 defendant raised the claim in the Appellate Division and
11 then his attorney didn't raise it in the Court of Appeals -
12 - -

13 JUDGE RIVERA: Yeah.

14 MR. NEUBORT: - - - and so it's abandoned, the
15 Appellate Division - - -

16 JUDGE RIVERA: So that all falls on the client
17 because this is their representative? Am I - - - am I just
18 understanding you correctly?

19 MR. NEUBORT: Again, all I can say is that the
20 Appellate Division is - - - is - - - is not limited to
21 hearing new claims on - - - on a coram nobis - - -

22 JUDGE RIVERA: No, I'm talking about in this
23 court - - - in this court.

24 MR. NEUBORT: I'm - - - I'm sorry - - - in this
25 court?



1 JUDGE RIVERA: In this court? Yes.

2 MR. NEUBORT: Well - - - well - - - well, the
3 defendant didn't raise them in this court, so this court
4 doesn't have it - - - before he's abandoned it, then this
5 court is not - - - I - - - I believe that there are
6 decisions from this court that this court is not going to
7 review a claim that's been abandoned in this court.

8 JUDGE RIVERA: Uh-huh.

9 MR. NEUBORT: But that, again, doesn't prevent
10 him from raising it in the Appellate Division. He just
11 can't raise it in this - - -

12 JUDGE RIVERA: Let me ask you this. Let - - -
13 let's - - - let's say that the defendant wishes to raise an
14 ineffective assistance of counsel claim regarding the
15 lawyer who was briefed to us on the coram. Where will he
16 file that?

17 MR. NEUBORT: In the Appellate Division.

18 JUDGE RIVERA: And the Appellate Division will
19 determine whether or not they were ineffective in their
20 appearance before us, correct?

21 MR. NEUBORT: If there was an ineffective
22 assistance of appellate counsel in the Appellate Division -
23 - -

24 JUDGE RIVERA: Is that a fair argument?

25 MR. NEUBORT: - - - not in this court. Of course

1 there's not a court - - -

2 JUDGE RIVERA: No - - - well, that's what I'm
3 asking about. That's my question. If he raises the claim
4 that counsel was ineffective before us for failing to raise
5 all any of his claims that he was granted leave on, where
6 would that be considered? Is that - - - where is that
7 going?

8 MR. NEUBORT: There - - - there is no such claim
9 because the defendant is not entitled to counsel on a coram
10 nobis application at all. So it's - - - it's - - - it's
11 only - - - a defendant cannot - - - can have a claim of
12 ineffective assistance of counsel where he's entitled to
13 counsel, but he's not entitled to counsel on a coram nobis
14 application, and so the mere fact that this court granted
15 the defendant counsel be - - -

16 JUDGE RIVERA: So we may grant - - - or we may
17 appoint counsel who conducts themselves in a manner that's
18 ineffective.

19 MR. NEUBORT: In this court?

20 JUDGE RIVERA: Yes. And the individual has no
21 recourse?

22 MR. NEUBORT: Correct because he wasn't entitled
23 to counsel in the first place. You can only - - - you - -
24 - a defendant is entitled to effective counsel - - -

25 JUDGE RIVERA: Not entitled to any counsel, so he



1 can get one that's completely deficient - - - I'm not
2 ruling on you, sir, but I'm just theoretically, please - -
3 - deficient, and they have no recourse. I just want to be
4 clear about that. Your position is they could raise the
5 issue again. I understand that.

6 MR. NEUBORT: A claim of ineffective assistance
7 of counsel presupposes a right to have counsel in the first
8 place. If the defendant doesn't have a right to counsel,
9 he can't complain about counsel that he didn't have a right
10 to have.

11 JUDGE RIVERA: So - - - so this - - -

12 MR. NEUBORT: So on 440 motion, a defendant
13 doesn't have a right to counsel, so if he had ineffective
14 assistance on a 440 - - -

15 JUDGE RIVERA: So - - - so - - - yes.

16 MR. NEUBORT: - - - he's out of luck. It's as if
17 you brought a pro se - - -

18 JUDGE RIVERA: So this court appointed
19 gratuitously?

20 MR. NEUBORT: Well - - - well, not gratuitously.
21 It's - - - it's - - - it's - - - hopefully a counsel is
22 going to be more effective than - - -

23 CHIEF JUDGE WILSON: But when we say no - - -
24 when we say no - - - when we say no - - -

25 MR. NEUBORT: - - - than - - - than a lay person,

1 but that doesn't mean that if the attorney - - -

2 CHIEF JUDGE WILSON: Sorry. When you - - - when
3 you say no right to counsel on a coram nobis, do you mean
4 no right to have counsel appointed for you, or do you mean
5 that if you have your own paid counsel - - - hold on - - -
6 if you have your own paid counsel, the court can say, no,
7 we're not letting that person appear. Which of those do
8 you mean?

9 MR. NEUBORT: I meant the former. The defendant
10 is not entitled to have counsel appointed on - - - on his
11 or her behalf to represent him on a coram nobis
12 application. Surely a defer - - - an attorney can file a
13 coram nobis application. They do it all the time, and the
14 courts entertain it all the time. But that's very
15 different from saying that the defendant has a
16 constitutional right - - -

17 CHIEF JUDGE WILSON: Well, you have - - -

18 MR. NEUBORT: - - - or even a statutory right to
19 have counsel represent him or her on a coram nobis
20 application. If you don't have that right, you don't have
21 the right to claim that you had deficient counsel. You - -
22 - you can have somebody come on your behalf, but then you -
23 - - you just don't have a right to complain about what they
24 did or didn't do on that procedure or - - - or proceeding.

25 JUDGE SINGAS: So is it your position that

1 there's nothing reviewable for us here?

2 MR. NEUBORT: Well, when I say - - - when - - -
3 let me qualify that. There's - - - there's no statute - -
4 - there's no statute on - - - on what the parameters are
5 for review on a - - - of a coram nobis application. The -
6 - - all that the CPL says is that the Court of Appeals may
7 review a denial of a coram nobis application. But unlike
8 direct appeals, there's no statutory framework. However,
9 this court in D'Alessandro laid out its own framework,
10 saying it's not appropriate for this court to review claims
11 that weren't raised in the Appellate Division, and that's
12 better - - - if it would be better to send it back to the
13 Appellate Division for them to review whatever claims. And
14 in this case - - - that was a case where there was a
15 wrongful denial of - - - of a coram nobis application. In
16 this case, the defendant would just have to bring a new
17 coram nobis application. So it wouldn't be remittal, it
18 would just be a new coram nobis application.

19 Thank you.

20 CHIEF JUDGE WILSON: Thank you.

21 MR. NELSON: One of the sections that I was
22 referring to is CPL Section 450.90 and CPL Section
23 470.35(1), and it states that upon an appeal to the Court
24 of Appeals from an order of an intermediate appellate court
25 affirming a judgment sentence or order of a criminal court,

1 the Court of Appeals may consider any questions of law,
2 including alleged error or a defect in the criminal court
3 proceedings, whether such issue was raised or not. In
4 response to the inquiries of the court, I don't think it's
5 that clear that this court cannot entertain the - - -

6 JUDGE TROUTMAN: So we can say that the Appellate
7 Division was wrong to deny a coram nobis application based
8 on claims that they did not review. Is that what you're
9 saying?

10 MR. NELSON: No, I'm not, Your Honor. What I'm
11 saying is that this court can, on its own, review a
12 question of law, which is the ineffective assistance of
13 appellate counsel, whether or not the Appellate Division
14 has decided or not the issue of ineffective assistance of
15 appellate counsel.

16 And in response to Judge Rivera's question about
17 abandonment - - -

18 JUDGE RIVERA: Uh-huh.

19 MR. NELSON: - - - if I could - - - if I may
20 address those very briefly. The question presented in this
21 particular case dealt with ineffective assistance of
22 appellate counsel. It did not deal with singular issues of
23 what took place during the trial.

24 For example, a suppression hearing in which the
25 gun that was ultimately recovered from a vehicle accident

1 was introduced against Mr. Peters at trial. Those issues
2 are - - - are not part of the ineffective assistance of
3 appellate counsel because the - - - the trial court and the
4 hearing court in this case ruled that it was a close call
5 in terms of the - - - the admission of the gun. The - - -
6 the court had some issues with the testimony of the police
7 officer, for example, but the court did not find that - - -
8 that the officer was incredible.

9 So raising issues such as that, singularly, is
10 not what the - - - this court was looking for. Everything
11 was raised under a rubric - - - under a cosmopolitan
12 approach of the ineffective assistance of counsel.

13 JUDGE CANNATARO: Of appellate counsel.

14 MR. NELSON: Of appellate counsel. Excuse me.

15 JUDGE CANNATARO: But Counsel, if - - - if what
16 you're saying is true, isn't that the functional equivalent
17 of saying you can bring a coram nobis application in the
18 Court of Appeals for ineffective assistance of appellate
19 counsel in the first instance, since it doesn't require
20 review by any lower court?

21 MR. NELSON: I'd submit that the statutes are
22 unclear on that. The statute - - - there's no grounded
23 decision one way or the other in terms of that issue.

24 JUDGE CANNATARO: Well, what I can tell you for a
25 fact is we don't get any that I'm aware of direct coram

1 nobis applications to the Court of Appeals. So something
2 sounds amiss in all of this - - -

3 MR. NELSON: I'm not saying direct coram nobis,
4 this is a denial of a coram nobis. And my - - - my
5 submission to the court, Your Honor, is the fact that this
6 court on its own can decide the ineffective assistance of
7 appellate counsel. I'm not saying that an individual has a
8 right to just petition the court without - - - while
9 bypassing the Appellate Division - - -

10 JUDGE GARCIA: But you could raise whatever
11 issues you want once you get leave granted on the issues
12 you raise below?

13 MR. NELSON: Not - - - not issues - - - whatever
14 you want, Your Honor. I respectfully disagree. It's
15 issues that is - - - is presented. In this particular case
16 - - -

17 JUDGE GARCIA: Presented where?

18 MR. NELSON: It was presented by the Chief Judge
19 in terms of the question of ineffective assistance of
20 appellate counsel.

21 CHIEF JUDGE WILSON: I don't - - - I don't get to
22 present issues.

23 MR. NELSON: That was the - - - the - - - the - -
24 - the - - - excuse me, Your Honor - - - the - - - the gist
25 of the conferences, I believe, that Your Honor alluded to



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between Mr. Neubort and Mr. Peters. Again, I was not privy to that, and it was upon my conversations with Mr. Neubort that - - -

CHIEF JUDGE WILSON: Did you talk to Mr. Peters about the substance of the conference?

MR. NELSON: I - - - I - - - I did, Your Honor. It was - - - he was incarcerated at the time.

CHIEF JUDGE WILSON: Uh-huh.

MR. NELSON: It - - - it was somewhat difficult. I did discuss with Mr. Peters throughout - - -

CHIEF JUDGE WILSON: I'm not asking the substance of what you discussed.

MR. NELSON: No. No. Of course, but I have been in constant written and oral communication with Mr. Peters and with his family, who's in the court today to observe the oral arguments.

CHIEF JUDGE WILSON: Thank you.

MR. NELSON: Thank you, Judge.

Thank you.

(Court is adjourned)

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

I, Christian C. Amis, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Tyrone Peters, No. 94 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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