COURT OF APPEALS OF THE STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK, Respondent, -against- JUAN RIVERA, Appellant.	N.Y. County Indictment No. 2497/04 **NOTICE OF MOTION FOR LEAVE TO FILE LETTER BRIEF AS <u>AMICUS CURIAE</u>**

PLEASE TAKE NOTICE that upon the accompanying proposed letter brief and upon all the pleadings and prior proceedings herein, proposed amicus curiae, the Appellate Courts Committee of the New York County Lawyers' Association, will move this Court at the Court of Appeals Hall, 20 Eagle Street, Albany, New York, on September 21, 2009, or as soon thereafter as counsel may be heard, for an order, pursuant to 22 NYCRR § 500.23(a), granting the Appellate Courts Committee permission to appear as amicus curiae and submit the accompanying letter brief, and for such other and further relief as this Court deems just and proper.

Dated: New York, New York
September 10, 2009

APPELLATE COURTS COMMITTEE of the
NEW YORK COUNTY LAWYERS' ASSOCIATION

By: _____
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TO: Hon. Robert Morgenthau
District Attorney, New York County
One Hogan Place
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Attention: ADA Dana Poole, Appeals Bureau

Mr. Juan Rivera
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September 10, 2009

Court of Appeals
Court of Appeals Hall
20 Eagle Street
Albany, New York 12207-1095

Re: People v. Juan Rivera (SSM)
Amicus Curiae Letter

Your Honors:

In this appeal, defendant argues that his appellate counsel provided ineffective representation because she did not seek vacatur of his guilty plea based upon the reasoning of this Court's decision in People v. Catu, 4 N.Y.3d 242 (2005). The Appellate Courts Committee of the New York County Lawyers' Association takes no position with respect to the merits of that claim.[1] We feel, however, that in order to evaluate defendant's arguments, it is important for the Court to understand the standard practices and ethical obligations of appellate counsel in a case, such as this one, where a reading of the record reveals an arguably meritorious appellate argument that, if successful, could result in the vacatur of the client's plea and the reinstatement of the original charges. We write, as amicus curiae, to provide the Court with assistance on this matter of appellate practice and ethics. An original and two copies of this letter are enclosed.

INTEREST OF AMICUS CURIAE

The Appellate Courts Committee of the New York County Lawyers' Association studies the workings of federal and state appellate courts in New York. Its members are recognized as expert appellate practitioners. Because this appeal raises important issues regarding the conduct of defense appellate counsel, we submit this letter brief to provide the Court with guidance, based on our members' practical experience, concerning the standard practices and ethical obligations of defense appellate counsel.

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[1] This appeal has been designated by the Court for examination of the merits pursuant to Section 500.11 of the Court's rules of practice ("SSM" review). The Appellate Courts Committee also takes no position on whether such review is appropriate.

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LEGAL DISCUSSION

When Mr. Rivera pleaded guilty in July 2004, he was not advised that the promised sentence included a period of post-release supervision ("PRS"). At his sentence in December 2004, however, the court imposed on the record a five-year period of PRS. Because the imposition of PRS is reflected in the sentencing minutes and, thus, in the record on appeal, an arguably meritorious appellate plea withdrawal issue would exist if one were to apply this Court's 2007 decision in People v. Louree, 8 N.Y.3d 541 (2007), to the facts of this case.[2]

Upon spotting such an issue, however, an experienced defense appellate advocate would neither raise nor abandon the issue without first consulting the client. That is because plea vacatur based solely upon an involuntary-plea issue would result in reinstatement of the initial charges, and the forfeiture of the client's right to the promised sentence bargain; if convicted after trial, the client could end up with a much higher sentence. The experienced appellate lawyer would thus write to her client, advise him of the existence of the issue, advise him of the risks and consequences of successfully raising such an issue, leave to the client the decision whether to raise the issue, and seek his express consent prior to raising the issue. In common parlance, this is known as a "risk" or "plea" letter. The lawyer would then follow the client's instructions, without regard to the lawyer's personal opinion of the wisdom of plea vacatur.

This common course of action among experienced appellate defense lawyers is compelled by ethical considerations. One of the decisions personal to the defendant is whether to take an appeal in the first instance. People v. Ferguson, 67 N.Y.2d 383, 390 (1986); ABA Standards on Criminal Justice ("ABA Standards"), Control and Direction of the Case, Standard 4-5.2(a)(v). Once the defendant has made that fundamental decision, the tactical decision as to which issues to raise on appeal is one for the attorney to make, albeit after consultation with the defendant. Jones v. Barnes, 463 U.S. 745 (1983). The lawyer need not raise every colorable appellate issue, even if the client so requests. Id. at 751-54; People v. Stultz, 2 N.Y.3d 277, 285 (2004).

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[2] This arguably contrasts with the situation where the imposition of a period of post-release supervision is not reflected in the plea or sentence minutes, or otherwise reflected in the record on appeal. In that situation, a Catu issue arguably could not be raised on direct appeal from the judgment since there is no record evidence that the defendant is indeed serving a period of post-release supervision. See, e.g., People v. Noble, 37 A.D.3d 622 (2d Dep't 2007 (no Catu issue could be raised on direct appeal where imposition of post-release supervision not reflected in record); People v. Bolden, 44 A.D.3d 784 (2d Dep't 2007) (same). Under this scenario, appellate counsel could not be ineffective for not raising a Catu issue.

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A different calculus must come into play, however, where the plea record reveals an arguably meritorious plea withdrawal issue. Since another decision personal to the defendant is whether to plead guilty or go to trial, Ferguson, 67 N.Y.2d at 390; New York Rules of Professional Conduct, Rule 1.2(a); ABA Standards, Standard 4-5.2(a)(i), whether to assert an arguably meritorious appellate plea withdrawal issue is a decision for the appealing defendant, and not his lawyer, to make based upon the lawyer's advice. New York Rules of Professional Conduct, Rule 1.2(a) ("In a criminal case, the lawyer shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered . . ."). [3] Once the client makes an informed decision as to whether the plea withdrawal claim should be raised, it is the lawyer's ethical obligation to honor that decision. New York Rules of Professional Conduct, Rule 1.2(e) (lawyer may exercise professional judgment to waive or fail to assert a right or position of client only "when doing so does not prejudice the rights of the client").

In Mr. Rivera's case, there is apparently no record proof as to whether appellate counsel advised the defendant of a possible Catu issue and what, if anything, was the defendant's response. Nor is there any indication that, prior to deciding the coram nobis petition, the First Department required appellate counsel to submit a response to the petition. Indeed, we could find nothing in the First Department's rules either requiring a coram petitioner to serve former appellate counsel with a copy of the petition, or requiring appellate counsel to respond to such a petition. Absent a requirement that appellate counsel respond to the pro se petition, it is not likely that counsel would put in a response, given the general reluctance of appellate defense lawyers to undercut their former clients' pro se motions to the court.

In the case of most coram nobis petitions, no response from the former appellate lawyer is necessary or desirable, since the appellate court may determine that the motion has no conceivable merit or that, even if the defendant's allegations are true, there can be no ineffectiveness. Nonetheless, "except in highly unusual circumstances," no appellate defense lawyer should be judged remiss, let alone ineffective, in not raising a plea withdrawal issue without the Court first "offer[ing] the assertedly ineffective attorney an opportunity to be heard and to present evidence, in the form of live testimony, affidavits, or briefs." Sparman v. Edwards, 154 F.3d 51, 52 (2d Cir. 1998). See also Ramchair v. Conway, No. 08-2004-pr, 2009 WL 1868031, at *1 (2d Cir. June 30, 2009) (summary order) (before finding ineffective assistance of appellate counsel, federal district court should have conducted evidentiary hearing).

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[3] If the client seeks plea withdrawal and there were a number of plea withdrawal claims, then it would be the lawyer's strategic decision as to which of them should be raised on appeal. Stultz, 2 N.Y.3d at 285.

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As noted above, we take no position as to whether not raising a Catu issue in 2006, prior to the 2007 Louree decison, could ever constitute ineffective assistance of appellate counsel. In deciding that question, however, we respectfully ask the Court to consider the standard practices and ethical obligations of defense appellate counsel that are described in this letter.[4]

Respectfully submitted,

Megan P. Davis
Co-Chair
Appellate Courts Committee[5]

cc (by overnight delivery):

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[4] We also take no position as to whether the hypothetical failure of appellate counsel to adhere to the practices or ethical guidelines described above could in itself constitute ineffective representation or, conversely, as to whether such adherence would in itself establish the effectiveness of appellate counsel.

[5] Jay Weiner, Co-Chair of the Appellate Courts Committee, did not participate in the preparation or approval of this letter. This letter brief is being submitted on behalf of the Appellate Courts Committee and does not necessarily reflect the views of Mr. Weiner or of any member of the Appellate Courts Committee who is employed by the New York County District Attorney's Office or by the Office of the Appellate Defender.