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COURT OF APPEALS

STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

No. 189

MALIK HOWARD,

Appellant.

PEOPLE,

Respondent,

-against-

No. 190

HILBERT STANLEY,

Appellant.

20 Eagle Street
Albany, New York 12207
October 10, 2013

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE VICTORIA A. GRAFFEO
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE ROBERT S. SMITH
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM

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1 CHIEF JUDGE LIPPMAN: 189 and 190.

2 Counsel, do you want any rebuttal time?

3 MS. PAZMINO: Yes, Your Honor, three
4 minutes, please?

5 CHIEF JUDGE LIPPMAN: Three minutes, sure,
6 go ahead.

7 MS. PAZMINO: Thank you. Good afternoon,
8 may it please the court, Rebekah Pazmino for the
9 Office of the Appellate Defender, representing the
10 defendant appellant, Malik Howard.

11 CHIEF JUDGE LIPPMAN: So what happened in
12 Howard's case in this - - -

13 MS. PAZMINO: Well, Your Honor - - -

14 CHIEF JUDGE LIPPMAN: - - - scenario?

15 MS. PAZMINO: - - - it's evident that trial
16 counsel here was wholly unaware that a BB gun cannot,
17 as a matter of law, serve as the basis for the
18 display of a firearm element of first degree robbery.

19 CHIEF JUDGE LIPPMAN: Howard was the
20 defendant who had the - - - the - - -

21 MS. PAZMINO: Who allegedly displayed - - -

22 CHIEF JUDGE LIPPMAN: - - - the BB gun?

23 MS. PAZMINO: - - - the BB gun. That's
24 correct, Your Honor.

25 CHIEF JUDGE LIPPMAN: Right.

1 MS. PAZMINO: And as a result of counsel's
2 misunderstanding or, you know, misunderstanding of
3 the law, he failed to challenge this count on
4 multiple occasions. This was ineffective.

5 JUDGE SMITH: Well, if you fail - - -
6 failure to move to reduce the count is what you're
7 talking about.

8 MS. PAZMINO: Well, fail to move - - - to
9 dismiss the first-degree robbery on legal
10 insufficiency grounds, because - - -

11 JUDGE SMITH: Oh, okay. But even if he's
12 just - - - even if that was just as bad a decision as
13 you say it was, the outcome still turns on whether he
14 would have won the motion.

15 MS. PAZMINO: Well, it's - - - the fact is
16 that there was a very clear basis for a motion to
17 dismiss here.

18 JUDGE SMITH: I mean, I - - - I - - - let's
19 assume we agree with you that - - - we - - - yeah, I
20 would have made the motion; you would have made - - -
21 any sensible lawyer would have made the motion. But
22 if we conclude that he would have lost it, then it
23 doesn't matter that he didn't make it, right?

24 MS. PAZMINO: But it's unlikely that he
25 would have lost it, given the fact that the BB gun is

1 indisputably not a firearm and cannot serve as the
2 basis for the display element.

3 JUDGE SMITH: But what about - - - but what
4 about the - - - the hard object at the - - - at the
5 victim's back?

6 MS. PAZMINO: Well, just to be clear, Your
7 Honor, there was no description of the object as a
8 hard object; it was simply an object. I would like -
9 - -

10 JUDGE SMITH: Well, it was an object that
11 might or might not have been a gun. Can we infer
12 that it was not a soft object?

13 MS. PAZMINO: Well, all the - - - all the
14 victim said was, and I quote, "I felt the other
15 person was touching something to my back. I don't
16 know. I cannot say if it was a gun or something
17 else."

18 JUDGE SMITH: If you're - - - if you were a
19 victim of a crime, and you felt something at your
20 back that you did not know whether it was gun, what
21 assumption would you make?

22 MS. PAZMINO: It's - - - I mean, the fact
23 of the matter is that the complainant here did not
24 state that he perceived this to be any sort of
25 weapon. He was very clear that he didn't know and -

1 - -

2 JUDGE SMITH: And can we infer that he was
3 - - - might have been a little worried about whether
4 it was a gun?

5 MS. PAZMINO: Perhaps, but he was clearly
6 far more concerned with the gun that he perceived
7 being held to his face. That - - - and that is
8 exactly what all of the parties were concerned with
9 during this trial, as well. What is clear from this
10 court's precedent is that there needs to be a
11 reasonable perception of the object - - - of the
12 object as some kind of weapon and that you need some
13 sort of actual perception by the complainant. There
14 was no such perception here.

15 But even if the alternate theory could
16 serve as a basis for the first-degree robbery charge,
17 the fact of the matter is that the jury was never
18 instructed that they were not to consider the BB gun
19 theory as an underpinning to the display element.

20 JUDGE SMITH: So there are two - - - there
21 are two mistakes that you rely on. One was not - - -
22 the failure to move to dismiss, and the second was
23 the failure was to ask for the charge.

24 MS. PAZMINO: That's correct, Your Honor.
25 And it is - - -

1 JUDGE SMITH: Is it conceivable that the
2 failure to ask for this charge could have been
3 strategic?

4 MS. PAZMINO: No, Your Honor, there's no
5 absolutely no strategic reason for failing to move to
6 dismiss the top count of the indictment, especially -
7 - -

8 JUDGE SMITH: No, the charge. I'm talking
9 about the charge. Did - - - yeah. The dismissal, I
10 agree with you; I don't see a strategic reason.

11 MS. PAZMINO: There could be no reason - -
12 - there could be no strategic reason for having the
13 jury rely on a legally insufficient theory. There's
14 absolutely no reason - - - there's no such good
15 reason for having the jury not be properly
16 instructed. The fact of the matter is that they were
17 already being clued in to the - - - technically both
18 display theories and they were not limited to either
19 - - -

20 CHIEF JUDGE LIPPMAN: We don't know what
21 the jury went on?

22 MS. PAZMINO: Exactly, and that's precisely
23 the problem here. Because there's so many - - -
24 there's such serious and significant doubt as to
25 whether this verdict was proper, that indicates that

1 counsel's errors were egregious and he was
2 ineffective.

3 JUDGE GRAFFEO: So what's the procedure
4 that he should have asked for?

5 MS. PAZMINO: Well, Your Honor - - -

6 JUDGE GRAFFEO: Separate charges for the
7 two alleged guns?

8 MS. PAZMINO: Well, what Your Honor - - -
9 Your Honor, what counsel could have done here was ask
10 that the court limit the jury's consideration to the
11 alleged touch to the back, could have asked the judge
12 to instruct the jury that it could not, as a matter
13 of law, rely on the BB gun display to satisfy the
14 first degree robbery charge. There are - - -

15 JUDGE SMITH: But doesn't - - - doesn't
16 that charge highlight the - - - the second possible
17 weapon, which had been very inconspicuous at the
18 trial?

19 MS. PAZMINO: No, Your Honor, because the
20 court had already instructed the jury on this al - -
21 - this other touch, saying that even if this other
22 firearm is not recovered, that doesn't mean that the
23 jury cannot consider it. So the jury was already
24 technically considering it anyway. But the fact is
25 that the BB gun theory was never removed from its

1 consideration, and for that reason, we cannot say
2 that the verdict here was proper. Therefore, it
3 should not stand.

4 JUDGE SMITH: Well, wait, you're - - - the
5 - - - is that because the charge had not explained to
6 them what they were supposed to find?

7 MS. PAZMINO: Yes. The charge - - -

8 JUDGE SMITH: Suppose - - - suppose a
9 properly charged jury, they - - - under those cases -
10 - - I just remember the one I wrote which is being
11 called for this - - - Griffin, in the Supreme Court -
12 - -

13 MS. PAZMINO: Yes, and - - -

14 JUDGE SMITH: - - - under the - - - if the
15 jury is proper - - - had been properly charged that -
16 - - saying essentially that a - - - a gun that can't
17 kill you is not a - - - doesn't count for these
18 purposes, then we would assume that the jury may
19 reach the right conclusion factually, wouldn't we?

20 MS. PAZMINO: Yes. I mean, we could
21 presume they would reach the, you know - - - would
22 reach, you know, a fact - - -

23 JUDGE SMITH: So it comes back to the
24 charge is what I'm saying. There's not really an
25 error independent of the failure to ask for the

1 charge, at least not a reversible error.

2 MS. PAZMINO: No, Your Honor, there's not a
3 preserved error here in this situation of a - - - you
4 know, an improper charge.

5 JUDGE SMITH: I guess - - - I guess what
6 I'm saying is that if - - - if he had asked for the
7 charge and he had - - - and - - - if you assume the
8 motion to dismiss would have been denied anyway, and
9 if he'd ask for the charge, then you would not have
10 an ineffective assistance argument.

11 MS. PAZMINO: No, Your Honor. I don't
12 believe so. But - - -

13 JUDGE SMITH: Too many negatives in the
14 question? You disagree with the premise of my
15 question is what you're saying.

16 MS. PAZMINO: In - - -

17 JUDGE SMITH: Or do - - - or you agree with
18 it?

19 MS. PAZMINO: In some ways, I mean - - - I
20 think what the - - - the real issue here is that
21 counsel was ineffective because he didn't understand
22 the law. That is not something that we say is
23 reasonable. And the failure to not know that a BB
24 gun does not qualify as a firearm for purposes of
25 first degree robbery is egregious, and should not be

1 allowed to stand.

2 JUDGE SMITH: If the - - - if the question
3 is what counsel - - - what was in counsel's head,
4 isn't that usually looked at in a 440?

5 MS. PAZMINO: No, Your Honor, here from the
6 record it's clear that there could be absolutely no
7 reasonable - - - no strategy whatsoever for either
8 failing to move to dismiss, or failing to take any
9 steps to ensure that the jury's verdict was proper.

10 CHIEF JUDGE LIPPMAN: Oh - - -

11 JUDGE ABDUS-SALAAM: Were there - - -

12 CHIEF JUDGE LIPPMAN: I'm sorry, go ahead
13 Judge Abdus-Salaam.

14 JUDGE ABDUS-SALAAM: Just one question - -
15 -

16 MS. PAZMINO: Yes.

17 JUDGE ABDUS-SALAAM: - - - I had actually
18 one question about this and something else, but I'll
19 - - - you have rebuttal time, so I'll come back, but
20 - - - I'll do it on rebuttal.

21 MS. PAZMINO: Okay.

22 CHIEF JUDGE LIPPMAN: Okay. Get ready.
23 Counsel, go ahead. Counsel?

24 MR. AXELROD: Good afternoon, Your Honors.
25 Alan Axelrod, the Legal Aid Society of New York City

1 for appellant Hilbert Stanley. Because my
2 codefendant's attorney has discussed in pretty great
3 detail the ineffective assistance of counsel point, I
4 would like to discuss the other point in our brief,
5 the identification issue.

6 CHIEF JUDGE LIPPMAN: Do you want any
7 rebuttal, counsel?

8 MR. AXELROD: Oh, yes, two minutes, please,
9 Your Honor.

10 CHIEF JUDGE LIPPMAN: Two minutes, go
11 ahead.

12 MR. AXELROD: We believe that it's plain
13 under the - - - this court's jurisprudence and
14 precedent that goes all the way back till 1981 with
15 Adams, and certainly 1991 with Duuvon, and 1993 with
16 Johnson, that this show-up was unlawful.

17 CHIEF JUDGE LIPPMAN: Yeah, yeah, but isn't
18 - - - isn't the - - - the identification issue
19 really, you know, a very difficult one? The one
20 that's - - - when you have the - - - the found
21 wallet?

22 MR. AXELROD: Well, Your Honor, I - - - if
23 you're saying you agree with me that it should have
24 been suppressed, but that it's harmless, no, it's not
25 harmless, if that's your question. No, it's not,

1 because this was - - - this was two hours after the
2 crime, and it just showed that he was in possession
3 of the stolen objects two hours after the crime, and
4 in no way - - -

5 JUDGE SMITH: It's a mixed quest - - - it's
6 a mixed question, isn't it?

7 MR. AXELROD: I don't think so, Your Honor,
8 not at all. This - - -

9 JUDGE SMITH: As a general proposition,
10 whether a show-up was unduly suggested is a mixed
11 question, haven't we said that?

12 MR. AXELROD: There are in most - - - in
13 many, if not most, instances, yes, but there are
14 legal parameters which must be followed. This case
15 was almost on all fours with Johnson. This is even
16 stronger than Johnson.

17 JUDGE SMITH: But - - - but the parameter
18 here is two hours is too long?

19 MR. AXELROD: Well, two hours and five
20 miles apart and no continuous investigation.

21 JUDGE SMITH: Why - - - why does - - - I
22 mean, I understand what you've said about - - - why
23 do the five miles make a difference? I understand
24 why the two hours makes - - -

25 MR. AXELROD: Because this court in Duuvon

1 said, and reaffirmed in Johnson, and every other time
2 you discussed this - - -

3 JUDGE SMITH: Well, I - - - not just - - -
4 not just that we have said it, but is there - - -

5 MR. AXELROD: You have couple temporal with
6 spatial proximity, otherwise there's no reason to - -
7 -

8 JUDGE SMITH: What I'm asking is that - - -
9 I understand we've said it many times. I'm asking
10 why is it spatial? Why not just temporal? Who care
11 - - - if he does it ten minutes after the event, who
12 cares if he's in Chicago?

13 MR. AXELROD: Well, because if they find -
14 - - if they find him - - - if he's somewhere nowhere
15 near the crime, that makes it a lot less likely - - -

16 JUDGE ABDUS-SALAAM: Does it matter how - -
17 -

18 MR. AXELROD: - - - that it's him.

19 JUDGE ABDUS-SALAAM: Does it matter that
20 this was a crime that was committed with a car, and
21 they were able to get further away? The - - - the
22 perpetrators - - -

23 MR. AXELROD: Well, in two hours you can be
24 on foot and get pretty far away. You could get more
25 than five miles away on foot. I think it's

1 irrelevant as to whether it was done in a car or done
2 on foot. The bottom line is that this court has said
3 over and over again, show-ups are strongly
4 disfavored. They are to be an exception. And what's
5 happening now is that exception is eating up the
6 rule.

7 JUDGE SMITH: Isn't - - - isn't there - - -
8 isn't there a common sense - - - when you're - - -
9 when you're two hours after the crime and you've
10 caught someone you think did it, and you've got the
11 victim, isn't there a strong common sense victim to -
12 - - a common sense reason to let the victim see the
13 guy before his memory fades?

14 MR. AXELROD: Well, not under these
15 circumstances, Your Honor, because similar to in
16 Johnson, here the victim had gone home. He
17 ostensibly was sleeping at 4:45 in the morning. And
18 in Johnson, the man had gone to the post office and
19 they brought him back. There was no continuous
20 investigation. And this court - - - this court - - -

21 JUDGE SMITH: But in Johnson, there was - -
22 - there was - - - I mean, it's not clear that we
23 relied on, but there was considerable coaching of the
24 witness in Johnson.

25 MR. AXELROD: Well, that may have been the

1 case, Your Honor, but that's not what the case went
2 off on. The case talked about the spatial and
3 temporal proximity, and the fact that there was no
4 ongoing investigation. The guy had gone somewhere
5 else.

6 JUDGE SMITH: I - - - I think you - - - I
7 think you - - -

8 MR. AXELROD: They had to bring him back.
9 When we should have a show-up - - -

10 JUDGE SMITH: I think you have a fair - - -
11 I mean, I understand the point I think you're making,
12 but I - - - if you look at a blank slate, isn't there
13 a - - - isn't - - - again, doesn't common sense say,
14 if it's going to take you a day to get a - - - to
15 make a lineup and you can show the - - - the suspect
16 to the victim within two hours, isn't that difference
17 in - - - in the fading of recollection and the
18 immediacy of the identification - - - isn't that of
19 great value?

20 MR. AXELROD: I don't think in this case,
21 no, Your Honor, because, in fact, again, it was - - -
22 the whole idea of having show-ups is it happens very
23 quickly. You go to the scene, you talk to the - - -
24 to the victim; he tells you what these people look
25 like. You go out immediately to investigate,

1 continuous investigation. You find them; it doesn't
2 take a long time. It's not very far away. And you
3 meet - - - match them up, and they see what's what.

4 Here, by the way, importantly, our client
5 wasn't going to be let go no matter what.

6 JUDGE SMITH: Because if - - - if by some
7 chance, you've elected - - - you've - - - if by
8 chance you found some - - - you found the wrong guy,
9 you found someone who's innocent, there's - - -
10 there's quite a strong reason to have show-up
11 immediately.

12 MR. AXELROD: Well, that's exactly what I
13 was just going to talk about, Your Honor, because
14 here, our clients were going to be arrested anyway
15 for the possessory offenses. They had open
16 containers, they had marijuana, and they had the
17 stolen property. So it's not a case where they would
18 have come and had them let go.

19 JUDGE SMITH: Assume - - - but assume - - -
20 assume - - -

21 MR. AXELROD: This was - - - they were
22 going to the precinct anyway.

23 JUDGE SMITH: But assume there happened to
24 be somebody other than the two guys who robbed this
25 particular victim, and assume that the victim, two

1 hours after the event, is quite capable of
2 distinguishing between the people who did it and the
3 people who didn't. Wouldn't it be very much to their
4 interest, if they were innocent, to get the victim in
5 there as fast as they could?

6 MR. AXELROD: Again, Your Honor, this is
7 the case when there should be lineup. The - - - if
8 would have taken a couple of hours more to have a
9 lineup, wouldn't have dulled the man's ability to
10 identify any more or less - - -

11 JUDGE SMITH: Do we know it'd been only a
12 couple of hours?

13 MR. AXELROD: Well, our client was going to
14 be taken to the precinct anyway. So it's 5 in the
15 morning; usually they - - -

16 JUDGE SMITH: Don't you think - - - I mean,
17 I would think that I would have a much better chance
18 of recognizing someone two hours after I saw him,
19 then twenty-four hours. Wouldn't you?

20 MR. AXELROD: Possibly, Your Honor, but it
21 wouldn't have been twenty-four hours. Lineups are
22 usually - - - they take a few hours to - - - to put
23 together. They sometimes take people who are in the
24 police station and they set - - - line them up, or
25 they go to the nearest homeless shelter and they get

1 guys to come over. It doesn't take very long.

2 But what's really important is show-ups are
3 inherently suggestive. And so what you're doing here
4 is you're having a very unfair procedure
5 unnecessarily. The client was going to be brought to
6 the precinct anyway. That's where the lineup would
7 have taken place. It would have taken a few hours.

8 And on top of all that, this was one of the
9 most suggestive lineups you could ever imagine.
10 Every single possible, suggestive factor that ever
11 occurs in a lineup, and has been talked about by this
12 and all the appellate courts, happened here. The
13 defendant - - - the victim was told that the people
14 matched the characteristics of the - - - of the
15 perpetrators. They were handcuffed. They were by a
16 car that looked a lot like the car that was - - - was
17 used in the robbery. There were police officers all
18 around them.

19 Every single suggestive feature that could
20 happen, happened here, other than the police officers
21 didn't say, those are the guys; tell me those are the
22 guys. Everything that you could imagine was
23 suggestive. By itself this was a suggestive
24 procedure. But it's certainly exacerbated the
25 violation of Duuvon and Johnson. This is not a mixed

1 question, Your Honor.

2 There are cases where the thing is so
3 egregious and so far apart from the law that this
4 state - - - that this court has established that we
5 cannot allow the lower courts to run roughshod over
6 the precedent of this court, and we have to have
7 fairer procedures. Show-ups are unduly suggestive by
8 themselves. This one was even more so, because of
9 the way it was conducted.

10 There was no way they were going to say my
11 client wasn't the guy, even if he wasn't the guy,
12 which we think he wasn't. There should have been a
13 show-up - - - a lineup, excuse me. There should not
14 have been a show-up; there should have been a lineup.
15 And that's what our position is, and it should be
16 suppressed.

17 Now, I have one minute remaining, and I'd
18 like to make the - - -

19 CHIEF JUDGE LIPPMAN: You do. Go ahead,
20 counsel.

21 MR. AXELROD: Pardon me?

22 CHIEF JUDGE LIPPMAN: You have a minute.

23 MR. AXELROD: Okay. I'd like to make a
24 couple of comments regarding the ineffective
25 assistance of counsel point.

1 There certainly was no reason - - - no
2 strategic reason - - - for the defense attorney not
3 to ask the court to charge that only the touch to the
4 back could be the - - - the theory that would have
5 supported the display element of robbery in the first
6 degree, because what this allowed was, this allowed a
7 nonunanimous verdict. A nonunanimous verdict
8 violates due process.

9 JUDGE SMITH: Wait, wait, wait. You're not
10 saying that there were two - - - that there were two
11 different crimes charged in the same count, are you?

12 MR. AXELROD: What I'm saying is there were
13 two different theories, Your Honor. There was - - -

14 JUDGE SMITH: There are two different theo
15 - - - but are you saying, that if there's one crime
16 charged, and the - - - the jury - - - and there are
17 two witnesses. And six jurors believe one witness,
18 and six jurors believe the other, and twelve vote to
19 convict, is that a problem?

20 MR. AXELROD: If they've described the same
21 crime, it's not a problem, but here you're describing
22 two separate theories.

23 JUDGE SMITH: Two separ - - - wait, but
24 it's only one crime no matter how many guns they
25 used.

1 MR. AXELROD: That's correct, but - - -

2 JUDGE SMITH: They couldn't have - - - they
3 couldn't have put two counts in the indictment.

4 MR. AXELROD: For example, Your Honor, let
5 me - - - let me talk about People v. Grega for a
6 minute, which is a seminal case on this. In Grega,
7 there was one crime; it was a rape. But there were
8 two theories presented to the jury for the rape. One
9 was forcible compulsion, the other one was threat of
10 force.

11 The only reason why that verdict was
12 acceptable and not nonunanimous, this court said, was
13 because there was absolutely no evidence of the
14 threat of force. The only way the jury could have
15 convicted, was based on the actual forcible
16 compulsion. So yes, to have a unanimous verdict, you
17 have to have all twelve jurors agree on the same
18 theory of how the crime was committed.

19 In Grega there was one crime. Same thing
20 in Beacoats, which is relied upon by my adversary.
21 In Beacoats you had the situation where there was a
22 robbery. One view was that they sold (sic) sneakers.
23 The other theory was that they stole a weapon. This
24 court said - - -

25 JUDGE SMITH: But those were, at least,

1 and we hear your point. You'll have your rebuttal.
2 Let's go to your adversary.

3 MR. AXELROD: Thank you.

4 CHIEF JUDGE LIPPMAN: Counsel?

5 MS. RAMISTELLA: Good af - - - good
6 afternoon, Lindsey Ramistella, may it please the
7 court for the People. The only question properly
8 before this court is whether the record below
9 reflects a legitimate str - - - a legitimate strategy
10 pursued by reasonably competent attorneys.

11 CHIEF JUDGE LIPPMAN: Wasn't it an
12 inexcusable error not to - - - to move to dismiss
13 here?

14 MS. RAMISTELLA: It was not an inexcusable
15 error - - -

16 CHIEF JUDGE LIPPMAN: Why not? Why not?

17 MS. RAMISTELLA: Because it is highly
18 unlikely - - -

19 CHIEF JUDGE LIPPMAN: Why wasn't it so
20 obvious that that's what should have been done?

21 MS. RAMISTELLA: Because that motion would
22 not have succeeded.

23 JUDGE SMITH: That's the only answer to the
24 Judge's - - - to the Chief Judge's question, isn't
25 it? I mean, if it would have succeeded, there's no

1 excuse for not making it.

2 MS. RAMISTELLA: Well, not exactly. If - -
3 - a counsel is not ineffective for failing to make a
4 motion that may be plausible, that may have
5 succeeded. The question is whether the entirety of
6 counsel's performance viewed from beginning to end
7 here reflects a legitimate strategy. Counsel does
8 not have to perform flawlessly at trial, make every
9 possible - - -

10 JUDGE SMITH: Okay, let's - - - let's
11 assume we have a defense lawyer who has indeed read
12 the statute and does know that a BB gun isn't assault
13 first. Explain to me how he decides not to make the
14 motion to dismiss.

15 MS. RAMISTELLA: Well, because, first of
16 all, he understands that the BB gun is not the on - -
17 - is not the object being relied upon by itself for
18 the display element. That is obvious. That is
19 because after Mr. Dussek, counsel for Howard, moves
20 to dismiss the weapons counts, the People consent to
21 submit only the - - -

22 JUDGE SMITH: Okay, but again, I see your
23 point, but you're arguing the merits of the motion.
24 If it's a good - - - yeah, if we think - - - I mean,
25 I guess first of all, if it's an argument, I mean,

1 why not try it? What's the reason not to make it,
2 even if you think it might not succeed?

3 MS. RAMISTELLA: There isn't - - -

4 JUDGE RIVERA: Maybe I can ask it another
5 way. What does he gain? What does counsel gain by
6 not arguing it?

7 MS. RAMISTELLA: Well, under his strategy,
8 they are striving for a full acquittal. They want to
9 keep the jury focused on the identification of their
10 clients. They do not want the jury focused on the
11 mechanics of the robbery, the manner in which - - -

12 JUDGE ABDUS-SALAAM: Excuse me, counsel,
13 was this a strategic move by the counsel not to focus
14 on the gun, but to focus on misidentification of the
15 clients?

16 MS. RAMISTELLA: It certainly was. So
17 that's two reasons why - - -

18 JUDGE ABDUS-SALAAM: Is that a 440 motion
19 or can we discern from this record that there was,
20 you know, reason not to ask for - - - either move for
21 - - - move to dismiss or ask for a charge?

22 MS. RAMISTELLA: Well, while ordinarily we
23 would need a 440 proceeding to determine what counsel
24 was thinking when he made this choice, however, the
25 record in front of this court, it is clearly

1 discernible that their strategy from - - - as I said,
2 the - - -

3 CHIEF JUDGE LIPPMAN: You think it's
4 clearly discernible that this was a strategy?

5 MS. RAMISTELLA: It's - - - it's clearly
6 discernible what their strategy was, and that was
7 misidentification.

8 CHIEF JUDGE LIPPMAN: What - - -

9 JUDGE ABDUS-SALAAM: Did they - - -

10 JUDGE RIVERA: But - - - but, again, I'm
11 not - - - I'm not understanding what - - - what trial
12 counsel gains from doing that, rather than attacking
13 both. Couldn't he attack both?

14 MS. RAMISTELLA: He may have chosen to, but
15 he is not required to in order to be effective.

16 CHIEF JUDGE LIPPMAN: Do you think they had
17 a strong argument as to identification?

18 MS. RAMISTELLA: The misidentification? I
19 absolutely do. Well, from counsel's perspective - -
20 -

21 CHIEF JUDGE LIPPMAN: So, yeah.

22 MS. RAMISTELLA: Counsel has - - - he's
23 facing the top count of robbery in the first degree.
24 He - - - both of their clients are second violent
25 felony offenders, so even if they are convicted of

1 the second degree robbery charge, they're going to
2 face significant jail time.

3 They are identified by the complainant,
4 five miles away. I mean, it's unclear in the record;
5 the suppression court found about an hour and a half
6 later. The robbers were identified as four African
7 American males wearing hoodies, two that were armed.
8 These - - - their clients are two males, in a car - -
9 - a Pontiac, not a Honda as was first - - -

10 JUDGE SMITH: With the victim's wallet.

11 MS. RAMISTELLA: Excuse me?

12 JUDGE SMITH: With the victim's wallet.

13 MS. RAMISTELLA: With the victim's wallet.

14 However, the defense attorney elicited from the
15 sergeant who recovered the wallet that, unlike all of
16 the other pieces of evidence in this case that were
17 properly documented, no one documented where this is
18 from.

19 CHIEF JUDGE LIPPMAN: Counsel, would you
20 want to have their argument in this case in
21 identification?

22 MS. RAMISTELLA: I do not - - - there's no
23 way to tell whether this was the best strategy, what
24 is the only strategy, but that is not what - - -

25 CHIEF JUDGE LIPPMAN: But it - - - but

1 wouldn't it appear that - - - that it's a pretty far
2 - - - pretty terrible strategy?

3 MS. RAMISTELLA: Well - - -

4 CHIEF JUDGE LIPPMAN: If that's - - - if
5 that's what you're doing, and avoiding this other
6 issue, which is as clear as day.

7 MS. RAMISTELLA: I - - - I - - -

8 CHIEF JUDGE LIPPMAN: Why would you - - -
9 why would you put your chips on the identification?

10 MS. RAMISTELLA: Well, again, this issue -
11 - -

12 CHIEF JUDGE LIPPMAN: It certainly has its
13 holes, to put it mildly.

14 MS. RAMISTELLA: I want to go to back to
15 the - - - the "clear as day", we disagree with that.
16 With respect to his motion to dismiss the top charge
17 - - -

18 CHIEF JUDGE LIPPMAN: You don't think it's
19 as clear as day?

20 MS. RAMISTELLA: Well, it would depend what
21 - - - what do you mean when you say "clear as day"?
22 That it would have succeeded or that he understood
23 the BB gun was an affirmative defense?

24 CHIEF JUDGE LIPPMAN: That any nor - - -
25 that any competent counsel would've moved to dismiss.

1 MS. RAMISTELLA: No, I disagree that any -
2 - -

3 JUDGE SMITH: Go - - - go back to - - - I
4 think you were answering Judge Rivera. Explain - - -
5 explain what they - - - what he gains by not moving
6 to dismiss?

7 MS. RAMISTELLA: To move to dismiss the
8 first-degree robbery, he has to show by a
9 preponderance of the evidence that the touch to Mr.
10 Lopez's back was not a firearm. He cannot do that.
11 Again, it is clear, as I stated, because of the
12 charge conference - - -

13 JUDGE SMITH: Well, the - - - of course,
14 your adversary's theory is that they - - - that the
15 People have to show that it - - - that it was
16 something that was - - - could reasonably had been
17 perceived as a firearm, and they didn't show it,
18 because the witness didn't say it was.

19 MS. RAMISTELLA: That's not correct. The -
20 - - our adversary is putting forth that the vic - - -
21 it cannot be considered by the jury the fact that
22 what appeared to be a real gun was pointed at the
23 victim's head, and that is not the case. Certainly,
24 when a person is behind you, pushing a hard object in
25 your back, and you see what appears to be a real gun

1 on your face - - -

2 JUDGE ABDUS-SALAAM: Where does the hard
3 object come from? Your adversary says that there was
4 nothing in the record that says the object was hard.

5 MS. RAMISTELLA: You're correct. The
6 victim, I believe, what he says is he said he felt
7 something touching his back; he could not say what it
8 was. However - - -

9 JUDGE RIVERA: Well, it could have been a
10 knife.

11 MS. RAMISTELLA: It could have been a
12 knife, but - - -

13 JUDGE RIVERA: It could have been a
14 screwdriver.

15 MS. RAMISTELLA: But this court has held
16 that if the victim - - - it does not have to be
17 absolutely certain that it was a firearm. The fact
18 that he said - - - that he speculated - - - the
19 victim's statement, I don't know if it was a gun or
20 something else, that alone shows that the evidence is
21 legally sufficient.

22 The defendant cannot prove by a
23 preponderance of the evidence with that statement and
24 with all of the surrounding circumstances that this
25 unrecovered firearm was not, in fact, a firearm. And

1 that's why they're not going to succeed on the
2 affirmative defense. And they don't succeed, because
3 the People are not relying only on the display.

4 JUDGE SMITH: Okay, but you - - - we keep
5 asking you why not make the motion, and you keep
6 saying the motion would not have succeeded.

7 MS. RAMISTELLA: Well, that's one reason.

8 JUDGE SMITH: Even if you're right, why not
9 make the - - - you don't - - - what's the advantage
10 for not making the motion?

11 MS. RAMISTELLA: Well, aside from the fact
12 that it wouldn't have succeeded, because when you
13 make this motion, if we have to present this
14 affirmative defense, and you put this issue before
15 the jury, you are distracting the jury from the
16 issues that you want them to be focused on. That is
17 not an unreasonable strategy as my adversaries think.
18 That is a strategy - - -

19 JUDGE SMITH: So you - - - you - - -
20 essentially, being in the lawyer's mind, you want the
21 lawyer to think these guys are innocent - - - you
22 want the jury to think these guys are innocent, and
23 therefore you aren't going to say to them, you don't
24 like to be in the position of arguing, oh, my guy's
25 innocent anyway; it was only a BB gun.

1 MS. RAMISTELLA: Well, the jury is going to
2 wonder if they're - - - if - - - because of defense -
3 - -

4 JUDGE SMITH: Is that the gist of what
5 you're saying?

6 MS. RAMISTELLA: Well, the gist is that a
7 jury is going to wonder if the defense attorney is
8 putting forth reasons why this is not, in fact, a BB
9 gun, why does he care? If it - - - if your client
10 wasn't there, why are we focusing on whether it was a
11 gun or whether it was a BB gun?

12 CHIEF JUDGE LIPPMAN: Oh, that's a pretty
13 tough - - - tough strategy to implement - - - to stay
14 away from what seems like a pretty obvious winner,
15 and to - - - and to say on the grounds that why are
16 they saying that, if they're totally innocent and not
17 even there? Well, that's some strategy.

18 MS. RAMISTELLA: I don't believe that it
19 was a winner, that they would have moved to dismiss
20 the top count, because the People were not relying
21 only on the BB gun. Again, under the circumstances,
22 it is late at night. These four men in a car, two
23 approach him. They're - - - one is in front, one is
24 in back.

25 CHIEF JUDGE LIPPMAN: I can understand

1 everything you say and understand your argument,
2 other than that there's some downside to their making
3 that motion.

4 MS. RAMISTELLA: Because to succeed - - -

5 CHIEF JUDGE LIPPMAN: I understand all your
6 other arguments. Why wouldn't he - - -

7 MS. RAMISTELLA: To succeed they would have
8 had to argue to the jury as to why - - - what was
9 behind the back was or wasn't a firearm. They don't
10 want to do that because it directly undermines their
11 defense that they were not there.

12 JUDGE RIVERA: You're - - - you're saying
13 that trial counsel thought it would so distract the
14 jury and clutter their minds with so many issues,
15 that they could not focus on this one, because they
16 wouldn't believe them. You're saying, oh, an
17 innocent person would only argue innocence. I think
18 that's what you're trying to argue.

19 MS. RAMISTELLA: Well, again, I think it's
20 perfectly rational for a jury, when a defendant is
21 insisting that he was not there, that he was wrongly
22 identified - - - remember, in their opening
23 statements, what they're telling the jury is, you
24 heard about a robbery; you heard about a gun. Now
25 we're going to talk about the identification. They

1 are, from the beginning, committing to this defense.

2 They decide, you know, to not attack the -
3 - - to the extent that he was a victim of a crime - -
4 - the credibility of this victim. And they are
5 deciding to instead try to convince this Bronx jury
6 that the police committed misconduct and that they
7 were misidentified because the police planted the
8 evidence.

9 JUDGE RIVERA: But as the Chief Judge has
10 already pointed out, that's a very difficult case to
11 make, compared to the other one.

12 MS. RAMISTELLA: I disagree, Your Honor. I
13 think that in their position - - - in counsel's
14 position - - - again, as I said, they're facing - - -
15 even if they are able to dismiss the top count, these
16 are two clients that are considering jail time, and
17 not only that, we don't know from this record - - -

18 JUDGE SMITH: So you're saying even - - -
19 no matter how tough an argument it was, it was a very
20 high reward. It's the only way you get your guys
21 walking out the door.

22 MS. RAMISTELLA: And again, we don't know -
23 - -

24 JUDGE SMITH: And they - - - yeah. They -
25 - - and they sh - - - the one that might or might not

1 have been a clear winner, you can - - -
2 congratulations, you won; you got fifteen years.

3 MS. RAMISTELLA: The other important
4 consideration here is the decision of whether to
5 present an affirmative defense is up to the client,
6 ultimately. These are all off the record
7 discussions. For all we know, both of the defendants
8 could have been absolutely adamant that they
9 presented this all-or-nothing defense. They want a
10 full acquittal.

11 And according - - - and counsel, under
12 those circumstances, they did everything they could
13 to present this all-or-nothing defense.

14 JUDGE RIVERA: Even considering the power
15 of - - - of an eyewitness, the victim's own
16 identification?

17 MS. RAMISTELLA: Well, the victim, again,
18 there - - -

19 JUDGE RIVERA: That strikes me as different
20 from saying, I'm going to argue the
21 misidentification, when I don't have the victim
22 himself - - - I say, these are the - - - these are
23 who did it; I'm absolutely sure.

24 MS. RAMISTELLA: They elicit from the fact
25 that the victim gave a certain description - - -

1 JUDGE RIVERA: Yes.

2 MS. RAMISTELLA: - - - in their case to
3 Officer Moreno, who understands some Spanish. He - -
4 - Mr. Lopez tells Officer Moreno their hairstyle,
5 their clothing, that there were four of them, that
6 they had firearms.

7 The - - - the people that are - - - later,
8 when he goes to the 236 White Plains Road, he becomes
9 animated and says, that's them, that's them. And
10 defense counsel elicits the fact that there are all
11 these discrepancies. We only have one wearing a
12 hoodie. There's no other hoodie found in the car.
13 So there are all these ways that defense counsel
14 skillfully elicited this evidence.

15 JUDGE SMITH: And the wallet - - -

16 JUDGE PIGOTT: The wallet.

17 JUDGE SMITH: - - - you have to persuade
18 the jury was made up?

19 MS. RAMISTELLA: The wallet was not made
20 up, but that it was the officer either planted it, or
21 essentially, what they are capitalizing on is that,
22 oh, conveniently, Sergeant Murphy - - - a sergeant -
23 - - has lost his memo book, and the most important
24 piece of evidence- - -

25 JUDGE SMITH: But the theory - - - the

1 theory - - - the theory, as you said - - - the theory
2 has to be the wallet's planted.

3 MS. RAMISTELLA: It has to be. And again,
4 that's not the only theory. That's - - -

5 JUDGE SMITH: A tough one - - - the tough
6 theory.

7 MS. RAMISTELLA: It is a tough theory,
8 however - - -

9 JUDGE READ: Are you suggesting that the
10 attorney was - - - was relying on or was thinking
11 that maybe Bronx juries are more susceptible to
12 notions that there's police misconduct? Is that what
13 you're trying to say in a roundabout way?

14 MS. RAMISTELLA: It's possible, Your Honor.
15 Again, there are many ways to try a case, as any
16 reasonable criminal practitioner will tell you. That
17 is certainly one strategy that these attorneys
18 thought that they may have been able to - - - to
19 receive an acquittal on. And it is one that has
20 succeeded.

21 JUDGE SMITH: Suppose - - - suppose you
22 win, and they make a 440 motion. And the defense
23 lawyer comes in and testifies, you know, I'm learning
24 for the first time today the existence of this
25 affirmative defense. Do they win the case?

1 MS. RAMISTELLA: Well, again, you'd have to
2 look at the entirety of the record and see if
3 defendant still received a fair trial. Now, if they
4 do not understand the affirmative defense, but yet
5 they know - - - we know that the defendants, no
6 matter what, want a full acquittal, they may not
7 necessarily be ineffective. Again - - -

8 JUDGE ABDUS-SALAAM: Counsel, with the time
9 that you have left, could you comment on the show-up
10 versus the lineup? What was the necessity of the
11 show-up?

12 MS. RAMISTELLA: Well, the show-up was
13 permissible under these circumstances, because the
14 car stops as Of - - - as Sergeant Burns testified, an
15 hour after they had received the radio run. That
16 matched - - - they see the two defendants drinking
17 Heineken bottles. They pull them out; they smell
18 marijuana. They find the wallet belonging to the
19 victim. So under those circumstances, it was
20 reasonable to have the wit - - - witness come in to
21 do a prompt identification.

22 JUDGE ABDUS-SALAAM: But as - - - but as
23 counsel pointed out, there were other reasons for
24 arresting these folks, and they were under arrest,
25 and they were going to be taken back to the precinct

1 anyway. So why not do a lineup, rather than two-and-
2 a-half hours after the crime and several miles away,
3 bring the victim there?

4 MS. RAMISTELLA: Well, it doesn't
5 necessarily have to be first exigent circumstances.
6 This is still a continuing investigation. The
7 robbers are still at large. But also, I mean,
8 there's going to be a difference, if they're arrested
9 for marijuana and, you know, for drinking in public,
10 it's a big difference between being arrested for
11 robbery and so there is a good reason to conduct a
12 show-up.

13 And the facts that the Appellate Division
14 relied on are supported by their record. And
15 therefore, because this is a mixed question - - -

16 CHIEF JUDGE LIPPMAN: Okay, counsel.

17 MS. RAMISTELLA: Thank you.

18 CHIEF JUDGE LIPPMAN: Thank you, counsel.

19 Counsel, Judge Abdus-Salaam was going to
20 follow up with some question.

21 MS. PAZMINO: Yes, Your Honor.

22 JUDGE ABDUS-SALAAM: It was on the stra - -
23 - it was on the show-up, because you didn't really
24 spend any time on that. You were focused on the
25 ineffective assistance of counsel.

1 MS. PAZMINO: Yes, we have been - - - we
2 haven't focused on that, but I'd - - - I'd be happy
3 to address Your Honor's question.

4 JUDGE ABDUS-SALAAM: Yeah, about the show-
5 up. Why was that - - - was not - - -

6 MS. PAZMINO: Well, the show-up was such a
7 problem because there was absolutely no exigency
8 justifying it. There was no reason why they couldn't
9 have conducted a lineup. As pointed out, they - - -

10 JUDGE ABDUS-SALAAM: It doesn't have to be
11 exigent circumstances, does it?

12 MS. PAZMINO: No, Your Honor, but when you
13 have such an extreme spatial and temporal
14 attenuation, you should have some reason for
15 conducting a show-up.

16 JUDGE PIGOTT: Do you balance - - -

17 MS. PAZMINO: There was no reason here.

18 JUDGE PIGOTT: I'm sorry; do you balance
19 that against, as counsel's pointing out, maybe they
20 won't - - - would only have been given an appearance
21 ticket and go home. But they're - - - the police
22 officers are concerned that they're - - - not just
23 drinking and smoking, they're robbers. So why don't
24 we make sure that - - - that we're not getting the
25 wrong guys right away?

1 MS. PAZMINO: Well, the point is if they
2 have them under arrest already, it's - - - it's of no
3 consequence, they may have gotten a desk appearance
4 ticket. The reason for having a show-up in those
5 kinds of situations is to not detain the wrong
6 person. They already had these individuals by right,
7 and therefore, they were simply just - - - frankly,
8 being lazy.

9 JUDGE SMITH: But isn't - - - isn't - - -
10 isn't there a strong interest in getting the most
11 accurate identification possible? And I know you say
12 suggestiveness works against that, because maybe
13 he'll pick the guy whether he's guilty or not, but
14 also, aren't most crime victims, two hours after the
15 event, when they see someone, highly likely to know
16 whether it's the guy who just robbed him or not?

17 MS. PAZMINO: Well, they might be more like
18 - - -

19 JUDGE SMITH: And aren't - - -

20 MS. PAZMINO: - - - you know, it's poss - -
21 -

22 JUDGE SMITH: - - - and aren't they less
23 likely to know that even the next day?

24 MS. PAZMINO: - - - it's possible that the
25 two hours might, you know - - - might be better, but

1 the point is that lineups - - - I mean, show-ups are
2 inherently suggestive, and they are to be strongly
3 disfavored, but the fact is that they're being
4 allowed in routinely. And when you have this kind of
5 situation, with some extreme attenuation, both
6 spatially and temporally, no reason for conducting a
7 show-up, no continuous investigation - - -

8 JUDGE SMITH: But you haven't answered my
9 question. What's the - - - what is spatially - - -
10 what does spatial attenuation do? Who cares where it
11 is? I understand why temporal attenuation - - -

12 MS. PAZMINO: Because the fact is - - - the
13 fact is that this is a situation where you're
14 supposed to be conducting a show-up within a
15 reasonable time after the crime, and within a short
16 distance away. There's no - - - no reason - - -

17 JUDGE SMITH: No, I - - - my question is,
18 why does the short distance or the long distance make
19 a difference?

20 MS. PAZMINO: It makes a difference because
21 of the fact that this is supposed to be a situation
22 where you have, you know, usually an unbroken chain
23 of events or, you know, the individuals are
24 apprehended very close to the scene, which makes it
25 probable that these are the individuals that are

1 actually culpable, but when you have them five miles
2 away, two hours later, and there was - - - you know,
3 no - - - no unbroken chain of events, that makes it
4 far less likely that these are the individuals.

5 JUDGE SMITH: But would it be different if
6 they were a hundred feet away two hours later?

7 MS. PAZMINO: I think - - - yes, it would
8 have made a difference, of course.

9 But if I just may - - - I would like to
10 point out on the ineffective assistance of counsel
11 point: challenging first degree robbery by, for
12 example, making a motion to dismiss outside of the
13 jury's presence, is in no way inconsistent with
14 pursuing a misidentification defense before the jury.
15 Moreover, there can be absolutely no strategic reason
16 for counsel's failures to take steps to ensure that
17 the jury was properly instructed. Respondent cannot
18 rectify all of - - -

19 JUDGE SMITH: Can't you - - - can't you
20 theoretically imagine, as counsel does, a defendant
21 who says, I'm - - - you know, all I care - - - I - -
22 - to me, fifteen years is the same as twenty-five. I
23 don't care whether I get assault one or assault two.
24 If I've got a one-tenth of one percent chance of
25 acquittal, I want you to throw everything else away

1 and go after that? And anything - - - and I don't
2 want the jury distracted with, oh, it was only a BB
3 gun.

4 MS. PAZMINO: But the jury wouldn't have
5 been distracted here, Your Honor. The fact is the
6 motion to dismiss is made outside of the presence - -
7 -

8 JUDGE SMITH: Well, can't you - - - can't
9 you imagine somebody say - - - thinking they would?

10 MS. PAZMINO: No, Your Honor, not in this
11 situation. There's - - - and there's no strategic
12 reason for having the jury - - - having the jury
13 convict on a legally insufficient theory.

14 JUDGE SMITH: It is true, isn't it, as a
15 general proposition, that sometimes lawyers who think
16 they have a good chance at acquittal don't want a
17 compromise theory presented?

18 MS. PAZMINO: But it's not - - - it's not a
19 compromise - - -

20 JUDGE SMITH: That - - - that general
21 proposition is true?

22 MS. PAZMINO: It's not a compromised - - -

23 JUDGE SMITH: Will you admit that the
24 general proposition is true?

25 MS. PAZMINO: Wait, I'm sorry?

1 JUDGE SMITH: It is true that sometimes
2 lawyers don't want to present a compromise theory?

3 MS. PAZMINO: That's true. But it's not a
4 compromise theory here. The jury was never - - - the
5 jury here was presented with two theories. One of
6 them was legally improper. And there's absolutely no
7 way, short of speculation, that we can say they did
8 not rely on that legally improper theory. Especially
9 when the BB gun was, you know, emphasized time and
10 time again, especially in summations.

11 CHIEF JUDGE LIPPMAN: Okay, counsel.

12 MS. PAZMINO: Thank you.

13 CHIEF JUDGE LIPPMAN: Thanks, counsel.

14 Counsel, rebuttal?

15 MR. AXELROD: To, kind of, add to what
16 codefendant's attorney has said, this question would
17 have never gone to the jury, and it absolutely - - -
18 the motion to reduce to rob 2, would have been
19 granted. As a matter of law, the affirmative defense
20 to rob - - - to rob 1, making it rob 2, was made out.
21 This was a BB gun.

22 JUDGE PIGOTT: To put it - - - to put it in
23 a different context that's, I think, easier for me to
24 understand, anyway, if - - - if your client was
25 charged with grand larceny, and they didn't prove

1 that it was over 250 dollars, even though you want to
2 prove that you're innocent, it would better to go to
3 a jury trying to be innocent of petty larceny than
4 grand jury - - - then grand larceny.

5 MR. AXELROD: Absolutely, that's precisely
6 the point, Your Honor. It was completely - - - it
7 was completely meaningless and below the standard of
8 reasonable representation to put extra liability on
9 the table for our clients. They should have only
10 been exposed to rob 2, which by the way, was charged
11 in other counts already anyway, and they should not
12 have been exposed to the possibility of rob 1.

13 And for my adversary to say that the BB gun
14 was not the subject of the display, that's just not
15 so. I ask you to look at - - - at their summations,
16 pages 568 to 573 in the appendix. Over and over
17 again, they focus on the BB gun. They basically say
18 - - - the prosecutor basically says, look at the gun
19 that was pointed at his face. That's all you need to
20 know; convict of robbery in the first degree. Later
21 on, a similar statement. I think there's one on 568,
22 and another one on 572 or 573. But explain - - -

23 JUDGE SMITH: If we - - - if we agree with
24 you, what is the remedy?

25 MR. AXELROD: The remedy is to grant a new

1 trial because of ineffective assistance of counsel.

2 JUDGE SMITH: We can't - - - we can't just
3 knock it down to robbery 2?

4 MR. AXELROD: No, I don't think so, Your
5 Honor, because - - -

6 JUDGE SMITH: Do you get - - - do you get a
7 new trial on the robbery 2 charge?

8 MR. AXELROD: Well, I think because the
9 other problem is we have the possibility of the
10 nonunanimous verdict. And because there was a very
11 likely a nonunanimous verdict, because counsel, once
12 rob 1 was being submitted, didn't ask the court to
13 limit the theory only to the touch to the back, then
14 that as well is ineffective assistance, and that
15 pollutes the entire trial.

16 JUDGE SMITH: Wait, wait. It pollutes the
17 robbery 2. Is there a theory on which - - - is there
18 any way they're not guilty of robbery 2 other than
19 misidentification?

20 MR. AXELROD: Well, that was one of the
21 theories, yes. But the fact is, is this - - -

22 JUDGE SMITH: The misidentification theory,
23 which you don't think was so great.

24 MR. AXELROD: It may - - - yeah, they could
25 have been acquitted. They might have found that they

1 were only guilty of robbery 3. Possibly they would
2 have found - - - the BB gun wasn't - - - was, you
3 know, they claim - - - the BB gun wasn't their - - -
4 wasn't their theory. Maybe they would have argued
5 that to the jury, or maybe the jury would have
6 divined that somehow. And the touch to the back may
7 very well have not been accepted as a display of what
8 appeared to be a weapon.

9 Therefore, they're either convicted of
10 robbery 2, which they never reached, because they
11 were told not to reach it if they convicted of
12 robbery 1 - - - robbery 2, aided by another presence
13 - - - or they would have been found guilty of just
14 forcible stealing from forcing the guy to give up the
15 money with no weapon whatsoever.

16 CHIEF JUDGE LIPPMAN: Okay, counsel.

17 MR. AXELROD: So therefore, we ask for a
18 new trial.

19 CHIEF JUDGE LIPPMAN: Thank you.

20 MR. AXELROD: Thank you, Your Honors.

21 CHIEF JUDGE LIPPMAN: Thank you all,
22 appreciate it.

23 (Court is adjourned)

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

I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Malik Howard, No. 189, and People v. Hilbert Stanley, No. 190 were prepared using the required transcription equipment and is a true and accurate record of the proceedings.



Signature: _____

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