

**Supreme Court of the State of New York**  
**Appellate Division: Second Judicial Department**

D32706  
N/prt

\_\_\_\_\_AD3d\_\_\_\_\_

Submitted - October 11, 2011

WILLIAM F. MASTRO, J.P.  
RANDALL T. ENG  
ARIEL E. BELEN  
L. PRISCILLA HALL, JJ.

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2007-01330

DECISION & ORDER

The People, etc., respondent,  
v Pedro Irizarry, appellant.

(Ind. No. 9397/05)

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Lynn W. L. Fahey, New York, N.Y. (Jonathan M. Kratter of counsel), for appellant.

Charles J. Hynes, District Attorney, Brooklyn, N.Y. (Leonard Joblove and Shulamit Rosenblum Nemeck of counsel), for respondent.

Appeal by the defendant from a judgment of the Supreme Court, Kings County (Tomei, J.), rendered February 1, 2007, convicting him of murder in the second degree and assault in the second degree, upon a jury verdict, and imposing sentence.

ORDERED that the judgment is affirmed.

Where, as here, “a court charges the next lesser included offense of the crime alleged in the indictment, but refuses to charge lesser degrees than that . . . the defendant’s conviction of the crime alleged in the indictment forecloses a challenge to the court’s refusal to charge the remote lesser included offenses” (*People v Boettcher*, 69 NY2d 174, 180; *see People v Green*, 5 NY3d 538, 545; *People v Alston*, 77 AD3d 762, 762). “Thus, review of the defendant’s challenge to the [Supreme] Court’s refusal to charge manslaughter in the second degree as a lesser-included offense of murder in the second degree is foreclosed by the jury verdict finding him guilty of murder in the second degree, the crime alleged in the indictment, and its implicit rejection of the lesser-included offense of manslaughter in the first degree” (*People v Gorham*, 72 AD3d 1108, 1109; *see People v*

October 25, 2011

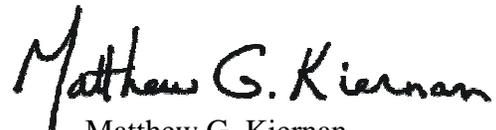
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*Johnson*, 87 NY2d 357, 361; *People v Alston*, 77 AD3d at 762).

MASTRO, J.P., ENG, BELEN and HALL, JJ., concur.

ENTER:

  
Matthew G. Kiernan  
Clerk of the Court