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COURT OF APPEALS

STATE OF NEW YORK

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PEOPLE,

Respondent,

-against-

No. 39

ANTHONY LEWIS,

Appellant.

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20 Eagle Street  
Albany, New York 12207  
February 12, 2014

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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Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: People v. Lewis.

2 MS. SALOMON: Good afternoon, Your Honors.

3 With the court's permission, I'll - - -

4 CHIEF JUDGE LIPPMAN: One second, counsel.

5 MS. SALOMON: Oh, I'm - - -

6 CHIEF JUDGE LIPPMAN: Wait till your

7 adversary gets up here.

8 MS. SALOMON: I'm sorry; excuse me.

9 CHIEF JUDGE LIPPMAN: That's okay. Go

10 ahead, counsel.

11 MS. SALOMON: I'd like three minutes for

12 rebuttal, please.

13 CHIEF JUDGE LIPPMAN: Three minutes, sure.

14 MS. SALOMON: Yes, and I - - -

15 CHIEF JUDGE LIPPMAN: Go ahead.

16 MS. SALOMON: And to keep with three, I

17 would like, with the court's assent, to focus on

18 three issues: the verdict form, the Weaver

19 ineffectiveness claim, and what we claim is the

20 Appellate Division's wrongful weight-of-evidence

21 review in this case.

22 CHIEF JUDGE LIPPMAN: Okay, start with the

23 verdict sheet.

24 MS. SALOMON: Okay. I know this court is

25 interested in rules, and I think this - - - this case

1           - - - we - - - we would propose a rule for what is a  
2           complainant under the governing statute, 310.20(2),  
3           which is this. A person - - - what is a complainant?  
4           If you - - - if you need to distinguish among many  
5           counts in an indictment that charge the same thing,  
6           the touchstone for that is the indictment.

7                         So we would say, it's a person or thing,  
8           named in the indictment, as the - -- the person or  
9           thing that the crime has been committed against,  
10          typically called the victim, as this court did, for  
11          example, in the Sanchez case, which we discuss in our  
12          reply brief. Or if there isn't anyone who is or  
13          anything that is specifically named, you still need  
14          to look to the definition of the crime charged and  
15          still is rooted in the indictment and the evidence.

16                         We think that that is a workable test and -  
17          - -

18                         JUDGE SMITH: Wouldn't - - - if - - - if -  
19          - - let's say that a representative of one of the - -  
20          - one of the stores that - - - that was listed in the  
21          indictment, Best Buy or whatever, that - - - that a  
22          police officer swearing out a complaint in this case  
23          had listed a representative - - - a representative of  
24          Best Buy as his informant, and referred to that  
25          person as the complainant. Would that be a

1           permissible use of the term?

2                   MS. SALOMON:  No, it would not.  And that  
3           is actually something that - - - that respondent has  
4           argued, because now we - - - we need to get to trial.  
5           And a case is tried by indictment, not by an  
6           accusatory instrument, and not simply by - - - by  
7           informant.

8                   JUDGE SMITH:  Well, when you say, no, it  
9           wouldn't, you're not saying that he couldn't have  
10          been a complainant in a - - - in a felony complaint  
11          that initiates the proceeding.

12                   MS. SALOMON:  Yes.

13                   JUDGE SMITH:  You're saying that it - - -  
14          you can - - - we cannot - - - we're saying that that  
15          use is impermissible in the context that we're  
16          talking about now.

17                   MS. SALOMON:  That is correct, Your Honor,  
18          because by the time we get to trial, we no longer  
19          have hearsay allegations and we have actually grand  
20          jury charges.  So, for example, here and this is our  
21          - - - this is our contention.  We ultimately had  
22          twenty counts of conviction in this case.  As to  
23          fifteen of them, the verdict form, was simply wrong.

24                   Excuse me.  With respect to two of the  
25          larceny counts, they wrongly listed a store, and in

1 fact, the indictment - - -

2 JUDGE GRAFFEO: Wasn't one - - -

3 CHIEF JUDGE LIPPMAN: Why the store can't  
4 effectively be the complainant?

5 MS. SALOMON: Because - - -

6 CHIEF JUDGE LIPPMAN: And be broader than  
7 the victim?

8 MS. SALOMON: It matters - - - it matters,  
9 because, again, we're talking about counts, and the  
10 natural understanding of that - - -

11 CHIEF JUDGE LIPPMAN: But this is a  
12 confusing verdict sheet, isn't it?

13 MS. SALOMON: Excuse me?

14 CHIEF JUDGE LIPPMAN: Isn't this a  
15 confusing verdict - - - verdict sheet - - -

16 MS. SALOMON: Yes.

17 CHIEF JUDGE LIPPMAN: - - - in this case?

18 MS. SALOMON: Yes, it - - -

19 CHIEF JUDGE LIPPMAN: Why wasn't this a  
20 perfectly appropriate thing to do - - -

21 MS. SALOMON: Well - - -

22 CHIEF JUDGE LIPPMAN: - - - and the  
23 complainant is broader than victim?

24 MS. SALOMON: It's - - - well, again, I  
25 would say that this court's actual discussion of - -

1 - of what a complainant is in Sanchez is rather  
2 instructive, because for example - - - and we had  
3 confusion here, by the way. We had confusion  
4 evidenced by the jury, because, with respect to one  
5 of the counts, the indictment actually charged that  
6 the defendant was accused of stealing money from a  
7 bank.

8 And - - - and we know and we've argued, and  
9 this court recognized as much in Sanchez, that the  
10 actual named complainant and the actual property that  
11 has been stolen are - - - are material elements of a  
12 crime, unless they have been waived by the defendant,  
13 for example, as in Spann, where the defendant there  
14 actually testified to having taken different  
15 property. That didn't happen here. So, it matters.  
16 The match-up matters.

17 JUDGE PIGOTT: Well, what is it - - - wait,  
18 I'm sorry. You're saying there was confusion because  
19 it said money from a bank. What - - - what - - - can  
20 you - - - can you explain what you're talking about?

21 MS. SALOMON: Yes, well, for example, two  
22 of the larceny counts that we say were wrongly - - -  
23 that were wrong on the indictment - - - excuse me, on  
24 the verdict form, which are numbers 2 and 3 on the  
25 verdict form. The indictment had said - - - had

1 accused the defendant of stealing money from a bank.

2 JUDGE PIGOTT: And what did the verdict  
3 sheet say?

4 MS. SALOMON: And the verdict form referred  
5 to a store.

6 JUDGE PIGOTT: No, what did it say?

7 JUDGE GRAFFEO: I thought 2 and 3 say - - -

8 MS. SALOMON: I'm sorry. It said - - - the  
9 verdict form - - -

10 JUDGE GRAFFEO: - - - - Best Buy.

11 MS. SALOMON: I'm sorry?

12 JUDGE GRAFFEO: I thought 2 and 3 say Best  
13 Buy.

14 MS. SALOMON: Yes, yes. They just simply  
15 refer to stores. Now the jury - - -

16 JUDGE GRAFFEO: So, why - - - why isn't a  
17 vendor just as harmed in this situation as the  
18 individual whose credit card was - - -

19 MS. SALOMON: Well - - -

20 JUDGE GRAFFEO: - - - misused?

21 MS. SALOMON: - - - there was actually - -  
22 - in fact, I mean, the - - - the factual answer to  
23 that from the testimony in this case is that when  
24 there is a credit card swipe, and it is approved by  
25 the - - - the bank, card creator, if you will, if

1           there is no objection by the bank at that point, when  
2           - - - the merchant then is - - - doesn't suffer any  
3           loss. The merchant gets paid. It's the bank that's  
4           out the money.

5                         Now in some of these counts in the  
6           indictment - - -

7                         JUDGE RIVERA: But - - - but they've been -  
8           - - they've been scammed. Their - - -

9                         MS. SALOMON: Well - - -

10                        JUDGE RIVERA: Their entire system has now  
11           been - - - right, made vulnerable. They may be taken  
12           off the list of vendors who can use the credit card.  
13           Why aren't they harmed in that way?

14                        MS. SALOMON: Well, they may be harmed in a  
15           - - - in a - - -

16                        JUDGE RIVERA: Okay.

17                        MS. SALOMON: - - - general sense, but when  
18           we are talking about counts of an indictment, again,  
19           I would urge that the touchstone for this has to be  
20           the indictment, because the statute refers to  
21           differentiating among counts. And these - - -

22                        JUDGE ABDUS-SALAAM: Ms. Salomon, why is  
23           this substantive? Doesn't the statute require that  
24           there be no substantive changes on the verdict sheet?  
25           Why is the description of the bank or the store - - -

1           why is that considered material or substantive?

2                   MS. SALOMON:  It's material because just,  
3           as for example, in - - - when this court discussed in  
4           Sanchez that it was not clear exactly who the larceny  
5           victims were in the case.  There were a panoply of  
6           witnesses, and there needed to be a match-up.  And  
7           they said that the defense was harmed because they  
8           really couldn't tell.  And it matters.  It matters  
9           under this court's - - - under this state's grand  
10          jury.

11                   JUDGE GRAFFEO:  What's - - - what's  
12          troubling me is that the jurors hear about all this  
13          activity happening in the testimony in certain  
14          stores.  And then, I take it, you want a verdict  
15          sheet with the name of the cardholders on it?

16                   MS. SALOMON:  Well - - -

17                   JUDGE GRAFFEO:  I mean, that's going to be  
18          extremely confusing, I think, to the jurors.  They're  
19          going to know that these people went in and they did  
20          X, Y, Z in Best Buy, and then X, Y, Z in Staples, or  
21          whatever other stores they went to.

22                   MS. SALOMON:  Well, I will - - - I - - - I  
23          understand, Your Honor, that the court here may have  
24          been well intentioned as I - - - because he - - -  
25          because there were so many counts.  But I would say,

1 that if there's that sort of a question, that should  
2 be taken up with the legislature because the - - -

3 JUDGE SMITH: What - - - what would an  
4 acceptable - - - all right, go ahead.

5 MS. SALOMON: Oh, I'm sorry. The - - - the  
6 identity-theft victims, for example - - - and - - -  
7 and again, I would refer this court to the geographic  
8 jurisdiction provision in the CPL which refers to  
9 identity-theft victims as complainants there, and  
10 that's a natural use of the term. That for the  
11 identity-theft crimes, of which we're also  
12 complaining - - - pardon the pun - - - the actual  
13 accountholders were the - - - the complainants in  
14 those cases. And the - - the testimony was replete  
15 with their names.

16 JUDGE PIGOTT: But if somebody steals  
17 something from my house - - -

18 MS. SALOMON: Yes.

19 JUDGE PIGOTT: - - - and I - - - and my  
20 homeowners' pays me for it, does that mean that the -  
21 - - that the victim is - - - is Travelers Insurance  
22 and not me?

23 MS. SALOMON: Well, I think, Your Honor - -  
24 - I think that - - - I'm not saying that there  
25 couldn't be indictment charges that could be brought

1 with respect to, let's say, both sorts of crimes, and  
2 in fact, in this - - -

3 JUDGE PIGOTT: No, but, I - - - that's what  
4 - - - I'm just equating it to Best Buy.

5 MS. SALOMON: Yeah.

6 JUDGE PIGOTT: So that if somebody steals a  
7 sixteen-inch flat-screen TV from Best Buy, I don't  
8 think it's an answer to say, yeah, but - - - but they  
9 got the money from the bank.

10 MS. SALOMON: Well, I - - - but Your Honor,  
11 I would respectfully submit that it is an answer to  
12 say that the indictment charged stealing money from a  
13 bank. It did not talk about stealing a flat-screen  
14 TV from Best Buy.

15 JUDGE SMITH: What - - - what would an  
16 acceptable verdict sheet look like in this case?

17 MS. SALOMON: Well, the - - - the - - - an  
18 acceptable verdict sheet, for example, with respect  
19 to the identity theft victims - - -

20 JUDGE SMITH: Well, start with the grand  
21 larceny - - -

22 MS. SALOMON: Okay.

23 JUDGE SMITH: I'm more - - -

24 MS. SALOMON: Okay. I think it would - - -  
25 it would track the indictment, so where the counts

1 charged as the act - - - the oral charge did,  
2 stealing money from banks - - - the bank, the  
3 indictment - - - excuse me, as - - - as with the  
4 verdict form then, would list the name of the bank.

5 JUDGE SMITH: So - - -

6 JUDGE GRAFFEO: So charge 2 and 3, instead  
7 of Best Buy, should have the name of the bank that  
8 issued the credit card?

9 MS. SALOMON: It would have the name of the  
10 bank that was listed as the victim of the larceny in  
11 the count with which it is associated, the Harris  
12 Bank.

13 JUDGE GRAFFEO: Then how does that help the  
14 jury relate that verdict statement to the testimony  
15 that they've heard?

16 MS. SALOMON: Well - - -

17 JUDGE GRAFFEO: That's where I'm having  
18 great difficulty.

19 MS. SALOMON: I understand, Your Honor, and  
20 I would say, again, in this - - - in this case - - -  
21 and I'm not - - - I'm not saying that this was an  
22 easy case, and I understand what the judge was trying  
23 to do, but I will - - - I would like to remind the  
24 court, though, that the jury was confused at some  
25 point, because it - - - it started to ask questions

1 with respect to one of these larceny counts, that  
2 betrayed its feeling that oh, my goodness, it was a  
3 crime against the store, when it wasn't. It was  
4 against the bank.

5 And so, I think it - - - I think it  
6 matters. I mean, in - - - I think the Milton Jacobs  
7 (sic) case, if I'm getting it right, this court,  
8 again, was wrestling with exactly who the  
9 complainants were in the larceny or identity theft.  
10 But it matters. A defendant needs to know what crime  
11 he's being tried for. Now that brings up Article 1,  
12 Section 6 of the grand jury claim. Now that's  
13 basically, what the - - - what the First Department  
14 held that it really didn't matter, and if you will,  
15 they used the term, proxy complainants, which I  
16 think, is in effect, what some of your questions  
17 suggest.

18 But it matters. A defendant needs to know  
19 I'm going to trial for stealing from - - - money from  
20 a bank. I haven't been going to trial now - - - I'm  
21 not being accused now.

22 CHIEF JUDGE LIPPMAN: Counsel, I - - -

23 MS. SALOMON: And I've got double jeopardy  
24 protections and everything else.

25 CHIEF JUDGE LIPPMAN: I think we understand

1 your arguments on that. Tell us about Weaver and  
2 Jones. Is this - - - is this case controlled by  
3 Weaver and Jones?

4 MS. SALOMON: This case - - -

5 CHIEF JUDGE LIPPMAN: And is it - - - is it  
6 really an ineffective assistance issue?

7 MS. SALOMON: Yes, it is. It's controlled  
8 by - - - by - - -

9 CHIEF JUDGE LIPPMAN: Why is it an  
10 ineffective assistance issue, and why don't we just  
11 go to Weaver and Jones?

12 MS. SALOMON: Well, I would be happy if you  
13 would, because ultimately that's the other argument.

14 JUDGE SMITH: I mean, isn't - - - isn't the  
15 preservation okay, is - - - I think that's the same  
16 question.

17 MS. SALOMON: Excuse me?

18 JUDGE SMITH: Isn't the preservation okay?  
19 I mean, the - - - the defendant himself did a pretty  
20 good job of saying, hey, look at Weaver.

21 MS. SALOMON: That would be - - - you know  
22 what? I didn't make that argument - - -

23 JUDGE SMITH: I deflated you?

24 MS. SALOMON: - - - and I'm - - - I'm happy  
25 if - - - if you make it for me. I would - - - I

1 would certainly accept that, and that would be fine  
2 with me. And if you don't, I'm happy to argue the  
3 ineffectiveness. He - - -

4 CHIEF JUDGE LIPPMAN: Well, argue first the  
5 substance.

6 MS. SALOMON: Okay, on the substance, I  
7 think there's no question that - - - that Weaver  
8 applies. There's been no retroactivity challenge  
9 here, and in fact, I know this court in a case after  
10 Weaver - - - the first case -- - I think it involved  
11 an employee search - - - there is no question while  
12 the search occurred before Weaver was decided that  
13 they looked at Weaver's standing. The defendant  
14 lost, but there was no question it applied.

15 JUDGE SMITH: Aren't you - - - aren't you  
16 stronger, really, on Jones than on Weaver? I mean,  
17 if there's an argument for distinguishing Weaver - -  
18 -

19 MS. SALOMON: Well - - -

20 JUDGE SMITH: - - - but I don't see how  
21 there isn't a violation of Jones here.

22 MS. SALOMON: Yeah. Jones' claim was - - -  
23 Jones was decided somewhat - - - somewhat later,  
24 several years after the case.

25 CHIEF JUDGE LIPPMAN: Yeah, but doesn't

1 Jones seal your - - - your argument?

2 MS. SALOMON: It cer - - - it certainly  
3 does. I mean, it was the trespass.

4 CHIEF JUDGE LIPPMAN: As the judge had just  
5 said, if there was any question - - -

6 MS. SALOMON: Yes. There was a trespass.

7 CHIEF JUDGE LIPPMAN: - - - about Weaver or  
8 Jones - - - Jones - - - is your argument that Jones  
9 really makes crystal clear that - - - that - - -

10 MS. SALOMON: I think they both do. Weaver  
11 - - - Weaver does as well. This court didn't talk  
12 about how - - - for example how come - - -

13 JUDGE SMITH: In the time you don't have  
14 left, tell us why any - - - any Jones or Weaver error  
15 was not harmless.

16 MS. SALOMON: Okay. Well, right now, I - -  
17 - as things currently stand, and I know having a  
18 hearing seems to be on everybody's mind today on all  
19 the cases, and I think we need to have a fruits  
20 hearing here. Right now we've got dueling  
21 submissions between - - - between us and respondent  
22 about exactly how much was produced in consequence of  
23 - - - of the GPS attachment. I think we have some  
24 agreement that at least one day was highly critical  
25 and that one day - - -

1 JUDGE SMITH: You're talking - - -

2 MS. SALOMON: Yeah.

3 JUDGE SMITH: - - - essentially about a  
4 post-trial suppression hearing?

5 MS. SALOMON: Yes. Yes. We need - - - and  
6 I - - - what would - - - what we would like, and I  
7 talked about the three issues, if I might, unless I -  
8 - - just to sum up and I'll be back, I hope - - -  
9 would be we think that we're entitled to a full  
10 reversal, because we believe that the - - - the  
11 verdict form, however well intentioned, and I  
12 understand confusion, but I think under defendant's  
13 right to trial by grand jury, and - - - and knowing  
14 what he's been tried for, this verdict sheet risked  
15 that - - - doesn't tolerate that.

16 So we believe he's entitled to full  
17 reversal under this court's decision in Miller. We  
18 believe, though, that with respect to any charges  
19 that could go and be retried on, that would be  
20 subject to a remand to the Appellate Division for  
21 proper weight of evidence review on the larceny  
22 charges that we've discussed, and maybe I can discuss  
23 that in rebuttal for a moment.

24 And any - - - any new trial should be  
25 preceded by suppression hearing.

1 CHIEF JUDGE LIPPMAN: Okay, counsel. Let's  
2 wait for your rebuttal. In the meantime, let's hear  
3 from your adversary.

4 MR. FONCELLO: Good afternoon, Martin  
5 Foncello on behalf of the People of the State of New  
6 York.

7 CHIEF JUDGE LIPPMAN: Counsel, why doesn't  
8 Weaver and Jones - - - why aren't they dispositive of  
9 the issues here?

10 MR. FONCELLO: Well, I think the question  
11 really is - - -

12 CHIEF JUDGE LIPPMAN: And then if your  
13 answer is they are, tell us about harmless error.

14 MR. FONCELLO: Well, the question that was  
15 brought to the court here is, is the attorney  
16 ineffective for not having filed the motion?

17 CHIEF JUDGE LIPPMAN: Yeah, yeah, but - - -  
18 but putting aside ineffective counsel for that, why  
19 isn't this clear violative of Weaver/Jones?

20 MR. FONCELLO: Well, Jones, of course,  
21 which was decided in May 2012 - - -

22 CHIEF JUDGE LIPPMAN: Yes. Well, yes.

23 MR. FONCELLO: - - - years after the fact,  
24 would require that you at least indicated that it is  
25 a search. Of course, it doesn't - - - the Supreme

1 Court opinion, which is very narrow only in that  
2 ground, does not state whether or not a warrant is  
3 required, or the showing is that it should simply  
4 state - - -

5 CHIEF JUDGE LIPPMAN: You don't think this  
6 situation comes under Jones?

7 MR. FONCELLO: Certainly it is a search.  
8 That is the narrow, full extent of their opinion.  
9 That's - - - it's a very narrow opinion, and they've  
10 left for a future day the litigation of whether you  
11 need a warrant or not.

12 CHIEF JUDGE LIPPMAN: The answer is, no, I  
13 don't think this comes under Jones, or is clearly  
14 under Jones.

15 MR. FONCELLO: Well, the answer is that  
16 under Jones this would be a search. The  
17 surreptitious - - - the placing it on the car would  
18 be a search. The question is whether or not a  
19 warrant is required or probable cause is needed which  
20 the Supreme Court has yet to address.

21 Now our office is considered a law  
22 enforcement agency. We now advise trial attorneys  
23 and investigators just to get warrants to take care  
24 of this problem, and I don't think there's any doubt  
25 in this record we would have done so in this case,

1           considering we went to get eavesdropping warrants and  
2           to get warrants to use the guy's GPS on his cell  
3           phone to follow him, that if this was required at the  
4           time, we would have done so.

5                         JUDGE SMITH:  Are you going to be as easy  
6           to persuade as Ms. Salomon was on the preservation  
7           issue?

8                         MR. FONCELLO:  No.

9                         JUDGE SMITH:  All right.

10                        MR. FONCELLO:  No, I mean, what he does is  
11           - - - basically the attorney suggests to the court or  
12           defendant, would you be willing to consider a motion  
13           at this point with respect to GPS?  He doesn't  
14           articulate actually what the claim is.

15                        JUDGE SMITH:  What about - - - what about  
16           the later discussion in the trial, when he - - - when  
17           he makes his little speech and the judge ignores him.  
18           And then he gets his lawyer to say, Your Honor, are  
19           you aware of the Weaver case?  And the judge says,  
20           yes, I am.  Isn't it implicit in that "yes, I am"  
21           that I'm not suppressing on the basis of that - - -  
22           of those arguments?

23                        MR. FONCELLO:  No, well, at that point in  
24           the - - - remember, a suppression motion has to be  
25           filed within forty-five days after arraignment.  He

1                   certainly had an opportunity to file a motion - - -

2                   JUDGE SMITH: Yeah, but the judge didn't -

3                   - -

4                   MR. FONCELLO: - - - and the judge can  
5                   summarily reject it.

6                   JUDGE SMITH: But the judge didn't - - -  
7                   but the judge at no point said you're too late. On  
8                   the contrary, he said, I think I already decided  
9                   that.

10                  MR. FONCELLO: Well, it's up to the  
11                  defendant or his attorney. It's his obligation to  
12                  make a motion. Not just to say, hey, I think it  
13                  would be nice or would you consider looking into GPS?  
14                  And the judge says I think I ruled on that, because  
15                  the judge had actually ruled on a number of  
16                  applications over the year and a half.

17                  JUDGE SMITH: So you're basically saying  
18                  the burden was on the defendant to - - - to push the  
19                  judge to make a definitive ruling.

20                  MR. FONCELLO: Well, I think the burden is  
21                  on - - - yes, it's on the defendant and defense  
22                  counsel, and that's precisely why he's brought this,  
23                  or characterized it as an ineffective assistance of  
24                  counsel claim. He's saying his attorney knew this  
25                  case existed or at least had gone through the Third

1 Department with the dissent, and leave was granted to  
2 this court.

3 JUDGE SMITH: Assume - - - assume - - -  
4 assume hypothetically that the original motion - - -  
5 the - - - or whatever it was - - - the original  
6 colloquy - - - the pre-trial colloquy was  
7 insufficient to preserve the issue. And then during  
8 the trial, he makes, what looks to me, like a  
9 sufficient motion, and the judge - - - I realize the  
10 judge didn't say "denied", but let's suppose we  
11 translate what he says as denied. Is that - - -  
12 would that be adequate preservation?

13 MR. FONCELLO: We - - - our argument is  
14 that it's not adequate preservation for seeking a  
15 suppression motion.

16 JUDGE SMITH: Why not?

17 MR. FONCELLO: He's not articulating  
18 clearly that's what he wants - - -

19 JUDGE SMITH: Can't the judge forgive that?

20 MR. FONCELLO: - - - is a suppression  
21 motion.

22 JUDGE SMITH: Huh?

23 MR. FONCELLO: He's not - - - he hasn't  
24 clearly articulating that that's what he's seeking.

25 JUDGE SMITH: Okay. Let - - - I'm not sure

1 I'm clear on my hypothetical. Let's suppose we think  
2 - - - we think it's clear enough. That we think he  
3 did clearly articulate, at least, at trial, and that  
4 the judge pretty clearly said denied. I understand  
5 that he didn't say that, and you can argue that he  
6 didn't.

7 But if he does articulate it at trial, and  
8 the judge says denied, even though you're not - - -  
9 you're supposed to make it pre-trial, the judge is  
10 allowed to forgive that, isn't he?

11 MR. FONCELLO: Forgive the lateness?

12 JUDGE SMITH: Yes.

13 MR. FONCELLO: Sure. But I would think - -  
14 - if you want to view his - - - his application as  
15 being adequate, I think then the judge's denial  
16 should be viewed or interpreted as a summary denial  
17 for being untimely, because there was no hearing  
18 here. So the judge obviously wasn't making any  
19 findings with respect to evidence, because there was  
20 no hearing. There was no evidentiary basis that was  
21 laid.

22 And that actually is a point which I wanted  
23 to get back to that opposing counsel brought up, is  
24 that we really need a hearing to determine what  
25 evidence might be fruits of the GPS. The reality is

1           they brought a - - - if they brought a 440, they  
2           could try to establish that to determine prejudice or  
3           how the attorney - - -

4                     JUDGE SMITH:  If there's - - -

5                     MR. FONCELLO:  - - - failed.

6                     JUDGE SMITH:  But if there's - - - I mean,  
7           I understand that especially in an ineffective  
8           assistance context you may have a point, but if  
9           there's error, you - - - you've got to show us that  
10          it's harmless, right?  It's not up to them to show  
11          that it's not.

12                    MR. FONCELLO:  Well, our position is that  
13          there is no error at this point.

14                    CHIEF JUDGE LIPPMAN:  What if - - - what if  
15          there is?

16                    MR. FONCELLO:  Again, because it's not - -  
17          - it's not - - -

18                    CHIEF JUDGE LIPPMAN:  What if there is?

19                    MR. FONCELLO:  Well, if it is, on this  
20          record, our position is that the error would be  
21          harmless, because one - - -

22                    CHIEF JUDGE LIPPMAN:  Why?

23                    MR. FONCELLO:  - - - you know it only - - -  
24          the device only functioned from March 1st to March  
25          14th, so you know that the counts that involved - - -

1 the 15th, 16th, 17th, the later dates, aren't even  
2 implicated. The only date where there was even any  
3 testimony about the GPS was March 5th. And from the  
4 testimony, it was only used as visual - - - as to  
5 augment the officer's visual surveillance of the car.

6 CHIEF JUDGE LIPPMAN: Wasn't it all sort of  
7 mushed together? I mean, how do you distinguish  
8 between the GPS and the different kinds of  
9 surveillance that they had, and they kind of  
10 intertwined? Wouldn't it be better to - - - to go  
11 back and assuming that the - - - that Jones and  
12 Weaver controls, wouldn't it be better to go back and  
13 - - - and hold a hearing as to what you have without  
14 the GPS?

15 MR. FONCELLO: Well, there's never been a  
16 case where - - - and there have been cases where, in  
17 fact, the Supreme Court and this court has had issues  
18 where, let's say, a witness' identity was discovered  
19 through an illegal wiretap, and then that witness  
20 ends up testifying at trial, bringing forward other  
21 evidence. That witness can't be suppressed due to  
22 fruits of the unlawful wiretap. So why would that be  
23 the case here?

24 Even if their position is, well, the People  
25 only knew about Best Buy from trailing the GPS.

1 CHIEF JUDGE LIPPMAN: Yeah, but you're only  
2 - - - you're only able to pinpoint some of this other  
3 information that you get from the GPS. Isn't that  
4 obvious?

5 MR. FONCELLO: Well, that's - - - that's  
6 not true.

7 CHIEF JUDGE LIPPMAN: That would not be  
8 true.

9 MR. FONCELLO: I would respectfully say  
10 that's not true, Your Honor, because the record does  
11 indicate you have wiretap that's going on at the  
12 time, where defendant's talking about going to  
13 different locations. You have the visual  
14 surveillance where they're following him into the  
15 locations or his cohorts, so the GPS is just - - -

16 CHIEF JUDGE LIPPMAN: Do you think you can  
17 separate them out?

18 MR. FONCELLO: Yes. The evidence that's  
19 admitted is not - - -

20 CHIEF JUDGE LIPPMAN: You don't think a  
21 hearing - - -

22 MR. FONCELLO: - - - that they're following  
23 him into stores - - -

24 CHIEF JUDGE LIPPMAN: You don't think a  
25 hearing as to - - - as to what you have without GPS

1 wouldn't really be able to get to the nub of this  
2 thing?

3 MR. FONCELLO: I think if he wants - - - if  
4 the defendant wants a hearing - - - he should file a  
5 440.10, where he can try to document to demonstrate  
6 how he was prejudiced by his attorney's conduct.

7 JUDGE SMITH: So that - - - that - - -

8 MR. FONCELLO: That mechanism's available  
9 to him.

10 JUDGE SMITH: That depends on the  
11 preservation issue being resolved in your favor.

12 MR. FONCELLO: Yes.

13 JUDGE SMITH: If - - - if we find there's  
14 preservation, and we find there's error, do you  
15 acknowledge we have to - - - that we have to order a  
16 hearing?

17 MR. FONCELLO: On this record, a hearing  
18 would not be necessary because there is sufficient  
19 evidence in the record of defendant committing the  
20 crimes or his cohorts. If you look you have  
21 witnesses from, of course, from stores - - -

22 JUDGE SMITH: It would be sufficient to  
23 make any - - - to make the error harmless is what  
24 you're saying?

25 MR. FONCELLO: Yes, because you have

1 witnesses at the stores - - -

2 JUDGE SMITH: By sufficient, you mean  
3 overwhelming.

4 MR. FONCELLO: Overwhelming. You have  
5 witnesses at stores. You have surveillance video  
6 from stores. You have store receipts. You have bank  
7 records. All right. And add to that the  
8 eavesdropping evidence. That makes it overwhelming.  
9 The GPS - - - based on the testimony at the record -  
10 - - at the trial, all you have is, it was just used  
11 to help follow the defendant at certain locations so  
12 they didn't lose him in busy traffic, which by the  
13 way, is precisely what was permissible under Knotts.

14 CHIEF JUDGE LIPPMAN: You have a lot of - -  
15 - you have a lot of evidence without the GPS. Why  
16 wouldn't you have a hearing and then - - - and then,  
17 you can show what you have without the GPS - - -

18 MR. FONCELLO: Well - - -

19 CHIEF JUDGE LIPPMAN: - - - that's  
20 separately what you are able to get. On this record,  
21 I know, that's your conclusion, but I don't think  
22 it's that obvious what you're saying.

23 MR. FONCELLO: Well, of course, there's  
24 always a difficulty if you hadn't had a suppression  
25 hearing to try and make arguments as to what should

1 or should not be suppressed, but that's why it's the  
2 obligation of the attorney to make a motion to seek a  
3 suppression hearing. And again, our position, and  
4 which they've crafted the litigation around, is the  
5 notion that the attorney failed in that regard by not  
6 seeking a suppression hearing.

7 And if they want to try to prove how he was  
8 - - - somehow prejudiced his client, he can do so by  
9 filing a 440.10, and through that litigation, we can  
10 develop the proper evidentiary basis to resolve this.

11 Does the court have any questions with  
12 respect to the verdict sheet annotation issue that I  
13 can address?

14 CHIEF JUDGE LIPPMAN: Anything you want to  
15 tell us about it?

16 MR. FONCELLO: Well, I think the verdict  
17 sheet in this case - - -

18 JUDGE GRAFFEO: Why wasn't the indictment -  
19 - - why didn't you name the stores along with the  
20 banks? Would that have solved this problem under the  
21 statute?

22 MR. FONCELLO: I - - - I can't speak  
23 actually how - - - how the indictment is crafted. I  
24 think the verdict sheet, you know, the judge tried to  
25 do the best, I think, he could, to try and eliminate

1 jury confusion.

2 CHIEF JUDGE LIPPMAN: It was a confusing  
3 case, wasn't it?

4 MR. FONCELLO: It's a very confusing case,  
5 and I think this is a sensible way of doing it. I  
6 mean, even if you just look at, you know, the Plaza  
7 Collectibles, the watch, I mean, that's Counts I, IV,  
8 V, IX, and XI on the verdict sheet relate to that.  
9 IV and V are possession of a forged instrument - - -

10 JUDGE SMITH: I mean, I can - - -

11 MR. FONCELLO: - - - someone other than - -  
12 - so if you list the bank name or the person from  
13 Illinois, it's - - -

14 JUDGE SMITH: I - - - there's a strong  
15 argument - - - there's a very sensible way of doing  
16 it. Don't Damiano and Miller and cases like that,  
17 stand for the proposition, forget about sensible, you  
18 have to do it literally the way the legislature said?

19 MR. FONCELLO: I think that you could read  
20 this court's precedents to read - - - - to read a  
21 rule that is if you're giving any sort of legal  
22 instruction using any legal terminology, if it's  
23 outside the boundaries of 310.20(2), and you don't  
24 have consent of the defense, you have per se  
25 reversible error.

1                   JUDGE SMITH: That's what we meant - - -  
2 when we said, "of substance" in Miller, that's what  
3 we meant?

4                   MR. FONCELLO: I think that's the concern -  
5 - - has absolutely been the concern, because we don't  
6 want juries to be in the backroom to draw inferences  
7 of the law from the verdict sheet, as opposed to  
8 going to ask for reinstruction, but a location  
9 doesn't - - -

10                  JUDGE SMITH: But why does the - - -

11                  MR. FONCELLO: - - - raise that concern.

12                  JUDGE SMITH: But if the legislature meant  
13 - - - I mean, so you're really saying that any  
14 harmless identifying details would be fine, whether  
15 it's a complainant or not? It could be location.

16                  MR. FONCELLO: Well, our position is that  
17 the statute should be read broadly that would  
18 incorporate harmless details such as names, dates,  
19 locations - - -

20                  JUDGE SMITH: Okay, but why - - -

21                  MR. FONCELLO: - - - but that's not  
22 necessary to take such a broad view in this case.

23                  JUDGE SMITH: Then my question is, why did  
24 the leg - - - why didn't the legislature say  
25 identifying details such as names, dates and

1 location? Why did they - - - why were they much more  
2 - - -

3 MR. FONCELLO: I can't speak for the - - -  
4 why the legislature put what they did in the statute,  
5 though it is clear from, at least, the history behind  
6 these amendments - - - '96 and 2002 - - - was, at  
7 least, they wanted to empower courts to give them the  
8 ability to put some details in the statute - - - some  
9 details in a verdict sheet - - -

10 JUDGE SMITH: But they wanted to relax - - -  
11 -

12 MR. FONCELLO: - - - to eliminate jury  
13 confusion.

14 JUDGE SMITH: - - - what we might recognize  
15 to be a very restrictive rule - - -

16 MR. FONCELLO: Yes.

17 JUDGE SMITH: - - - but they only relaxed  
18 it so far, right?

19 MR. FONCELLO: They did. And - - -

20 JUDGE ABDUS-SALAAM: Do we have to adopt  
21 the Appellate Division's characterization of these as  
22 proxies to uphold your position or to uphold that - -  
23 -

24 MR. FONCELLO: I don't think that this  
25 court would be required to adopt that. I'm not

1 entirely clear what they mean when they refer to them  
2 as proxies. I don't know if they're referring to the  
3 - - - the store as the proxy for the witness who  
4 comes in to testify, since our position is that a  
5 complainant actually is anyone that can provide  
6 information.

7 JUDGE ABDUS-SALAAM: Well - - -

8 JUDGE PIGOTT: I think it's like what Ms.  
9 Salomon was saying where the real loser is the bank.  
10 It's not - - - it's not Best Buy - - -

11 JUDGE RIVERA: Well, it - - -

12 JUDGE PIGOTT: - - - and so they were kind  
13 of proxy. I think that's what - - -

14 JUDGE RIVERA: I think one other way of  
15 thinking about it is without the store, the bank  
16 cannot be affected and can't lose. That is to say,  
17 you have to go into the store. The store's got to  
18 allow you to swipe through that card. It's got to  
19 accept you in that process, before the bank ends up  
20 actually being liable and paying. That's the concept  
21 of the proxy.

22 MR. FONCELLO: Yeah, I think - - - I think  
23 the store makes perfect sense, because I could see  
24 how the jury trying to organize it, so do - - - using  
25 the name of the woman from California, or the guy

1 from Washington, isn't going to help them referring  
2 to several cards that all had - - - were - - -  
3 different cards, different users, but all Citibank  
4 doesn't help anyone.

5 JUDGE RIVERA: Yes, but - - - well, but  
6 that's generally true, as I think Judge Smith - - -

7 MR. FONCELLO: Yeah.

8 JUDGE RIVERA: - - - made clear, right.  
9 That's generally true. There certainly could be much  
10 information not specifically identified in the  
11 statute, that would be helpful to a jury, but if the  
12 legislature's been very clear, aren't we stuck with -  
13 - -

14 MR. FONCELLO: Yeah.

15 JUDGE RIVERA: - - - Miller and - - -

16 MR. FONCELLO: I mean, I think our - - -  
17 our position is that - - - which is what the judge  
18 said - - - that this is consistent with the statute,  
19 and we think it is consistent in both the letter and  
20 the spirit of the statute.

21 And - - - because if a complainant is  
22 defined in the CPL as someone who has information to  
23 bear, the stores are, again, providing us with  
24 surveillance video. They're providing us with  
25 receipts. They providing us with, you know, sales

1 clerks that are coming to testify at trial. So it's  
2 not unreasonable to use the store, refer to them as a  
3 complainant in this case.

4 CHIEF JUDGE LIPPMAN: Okay, counsel.

5 Thanks.

6 MR. FONCELLO: Thank you.

7 CHIEF JUDGE LIPPMAN: Counsel, rebuttal?

8 MS. SALOMON: With respect to a hearing on  
9 that - - - I will be brief on.

10 CHIEF JUDGE LIPPMAN: Go ahead, counsel.

11 MS. SALOMON: The - - - the People, at - -  
12 - in response to the 330.30 claim said that it would  
13 have been impossible for - - - for the detectives to  
14 even start to know where he was with - - - without  
15 the GPS.

16 And yes, we acknowledge the Ceccolini rule  
17 that witnesses themselves are not fruits, but the  
18 fact is, that to even get to know where to even look  
19 where the defendant might be, and in fact, he wasn't  
20 even seen actually buying things in some of these  
21 stores. And by the way, his voice was evidently  
22 heard once or twice in consequence of some of these  
23 sightings. This trial was not devoted to - - - to -  
24 - - to, you know, sorting out these matters. A  
25 dedicated fruits hearing would be.

1                   Now, on the matter of the - - - of the  
2                   verdict form. I would submit that if a defendant  
3                   were charged - - - if an indictment - - - a defendant  
4                   goes to trial for stealing money from Susan Salomon,  
5                   and then at - - - then the judge just charges no,  
6                   it's going to be stealing a shovel from Susan's  
7                   friend, the defendant would have the right to object  
8                   that he has been charged, and - - - and - - - and any  
9                   conviction would violate his rights under the state  
10                  right to trial by grand jury indictment.

11                  And again, Sanchez makes that incredibly  
12                  clear. And this - - - and what is taken in a larceny  
13                  case and from whom it is taken are material elements.  
14                  Again, this judge may have been well intentioned, but  
15                  we know - - - we know from the law, that complainants  
16                  in identity-theft cases are the account holders.

17                  We know from this indictment, yes, Plaza  
18                  Collectibles was charged in Count I as - - - as the  
19                  complainant in that case for stealing a watch, a  
20                  thing, from the store. But the other larceny charges  
21                  were all stealing money from banks, not stealing a TV  
22                  from the Best Buy. So that would have been a  
23                  material variance had the defendant been convicted of  
24                  that.

25                  If that is so, if that charge would not be

1 good, then it follows that a verdict form which as  
2 various of you have recognized, rightly or wrongly,  
3 our legislature has said - - - and this court has  
4 recognized - - - can have nothing on it, other than  
5 what has been authorized, unless there's been  
6 consent, which there was not here, that this verdict  
7 form contained - - - most of it, fifteen of these  
8 things, violated that these people - - - these things  
9 were - - -

10 JUDGE RIVERA: Does it matter that the  
11 theft from the bank is - - - is not possible without  
12 stealing from the store? Does that matter in any  
13 way?

14 MS. SALOMON: No, it doesn't. It just - -  
15 - it just doesn't. In other words, you - - - it just  
16 matters what - - - what you're charged with. Again,  
17 I would acknowledge that you can be charged with - -  
18 - with - - - with, let's say, stealing from a store -  
19 - - let's say, larceny by false pretenses, which  
20 brings me also to one of my claims about the  
21 Appellate Division review.

22 But - - - but that could have been done.  
23 But this indictment - - - these indictment counts on  
24 which he was convicted and had a right to know what  
25 he was convicted on for double jeopardy and notice

1 purposes, wasn't about that.

2 CHIEF JUDGE LIPPMAN: Okay, counsel.

3 MS. SALOMON: Thank you.

4 CHIEF JUDGE LIPPMAN: Thanks. Thank you both.

5 (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. Anthony Lewis, No. 39 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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