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COURT OF APPEALS

STATE OF NEW YORK

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PEOPLE,

Respondent,

-against-

No. 55

SERGIO RODRIGUEZ,

Appellant.

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20 Eagle Street  
Albany, New York 12207  
March 23, 2015

Before:

CHIEF JUDGE JONATHAN LIPPMAN  
ASSOCIATE JUDGE SUSAN PHILLIPS READ  
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM  
ASSOCIATE JUDGE LESLIE E. STEIN  
ASSOCIATE JUDGE EUGENE M. FAHEY

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1  
2 CHIEF JUDGE LIPPMAN: Matter of People v.  
3 Rodriguez, number 55. Counselor, you want any  
4 rebuttal time?

5 MS. SALOMON: Yes, if I might have two  
6 minutes, please.

7 CHIEF JUDGE LIPPMAN: Yeah, sure.

8 MS. SALOMON: Thank you.

9 CHIEF JUDGE LIPPMAN: Good. Go ahead,  
10 counsel. You have it. I think you can start now.  
11 They're just about - - -

12 MS. SALOMON: In what I might call  
13 Rodriguez I, this court said that it would be  
14 premature for it to take a position as to whether, on  
15 the remand for resentencing that it allowed, that any  
16 sentences other than concurrent could be imposed.  
17 Well, as we're here now, the time is - - -

18 CHIEF JUDGE LIPPMAN: Now we have the issue  
19 in front of us?

20 MS. SALOMON: It's ripe. Yes. We argued  
21 in our brief, of course - - -

22 CHIEF JUDGE LIPPMAN: And many of us  
23 remember that first case. Go ahead.

24 MS. SALOMON: Well, some of you do. And  
25 the court is rather is different now. But with

1 respect to the 430.10 issue, we actually argued in  
2 our brief extensively, that - - - we took a crack at  
3 actually divining what we thought the court was doing  
4 - - -

5 CHIEF JUDGE LIPPMAN: Right.

6 MS. SALOMON: - - - in - - - in its  
7 opinion. The court obviously knows best. But we  
8 took the position - - - and we still would ask the  
9 court to consider it, that it did not speak to the  
10 issue of what a trial court could actually do - - -

11 CHIEF JUDGE LIPPMAN: Right.

12 MS. SALOMON: - - - on remand. However,  
13 today I would like to focus on the - - - on issues 2  
14 and 3 of our brief unless the court has any  
15 questions.

16 CHIEF JUDGE LIPPMAN: No, go ahead. What  
17 can the trial court do on remand?

18 MS. SALOMON: Okay. Our position is that  
19 under 70.25 of the Penal Law, that no consecutive  
20 sentencing was permitted at all in this case. This  
21 is, we believe, a classic case of a single act  
22 robbery. We believe the case is controlled by People  
23 v. Ramirez, discussed extensively in our brief, and  
24 in particular, that one footnote in Ramirez  
25 concerning the robbery of the single guard, where

1           there were three types of first-degree robbery  
2           committed against him, and the court said that was  
3           all a single act.  Notably, one of the robbery  
4           charges was robbery and causing serious physical  
5           injury in the course of the robbery.

6                         JUDGE READ:  Does it make a difference, as  
7           I understand the sequence of events, the gun was  
8           displayed, the victim started to remove his jewelry,  
9           and then the defendant shot him a couple of times.  
10          Does that - - - that sequence of factual events, does  
11          that make a difference in whether we're talking about  
12          a single act or not?

13                        MS. SALOMON:  Yes, it does.  And - - - and  
14          - - - and we say that because the defendant was  
15          charged with and convicted of a completed robbery,  
16          that the fact that - - - and it is not disputed, that  
17          the chain was not taken, the robbery was not  
18          completed until after the shot was fired.  And, in  
19          fact, that was what was charged to the jury.  That  
20          was the actus reus for the serious physical injury  
21          robbery.  It was robbery in the course of which  
22          physical - - - serious physical injury was caused.  
23          The actual - - - the other part of that statute,  
24          Robbery One, in flight therefrom or - - - or  
25          afterwards, was not charged.



1 JUDGE READ: You thinks that's the - - -  
2 that's the - - -

3 MS. SALOMON: It's the actus reus that - -  
4 - that - - - that - - - I - - -

5 JUDGE READ: I'm sorry to interrupt.

6 MS. SALOMON: I'm sorry.

7 JUDGE READ: But you think Grey is the  
8 decision you think we should look to for most  
9 guidance?

10 MS. SALOMON: Well, when I say - - - no, I  
11 - - - no, what I mean is that Grey has taken this  
12 court's decision in Tanner. And all of - - - all I'm  
13 saying is that it's - - - that it's really cataloged  
14 all of the separate and distinct act cases in - - -  
15 involving robbery and shooting. So I think it's  
16 useful in that regard. But, obviously, this court's  
17 case law - - - and I, you know - - -

18 JUDGE RIVERA: So you're saying because  
19 it's not obvious - - -

20 MS. SALOMON: Yes.

21 JUDGE RIVERA: - - - from the facts as  
22 presented, that the shooting is in furtherance, is to  
23 ensure the completion - - -

24 MS. SALOMON: Well, it - - -

25 JUDGE RIVERA: - - - of the robbery, that

1 it can't be separate acts.

2 MS. SALOMON: But - - -

3 JUDGE RIVERA: Is that - - - is that what  
4 you're arguing?

5 MS. SALOMON: We are not arguing - - - what  
6 - - - what we are arguing is that under this court's  
7 case law it is the actus reus - - -

8 JUDGE RIVERA: Um-hum.

9 MS. SALOMON: - - - and the instructions  
10 that are given to the jury on the crime as charged,  
11 that controls. Here we have robbery with shooting in  
12 the course of. Not in furtherance of or anything  
13 else. And so you simply have - - - it's a temporal  
14 actus reus analysis with the - - - the - - - the  
15 robbery with the mens reus for the robbery.

16 JUDGE ABDUS-SALAAM: So only if the - - -

17 MS. SALOMON: Yes.

18 JUDGE ABDUS-SALAAM: - - - facts had been  
19 different, Ms. Salomon. If - - - if the chain had  
20 been turned over and then the shooting you would say  
21 they were - - -

22 MS. SALOMON: Yes.

23 JUDGE ABDUS-SALAAM: - - - they were two  
24 separate acts?

25 MS. SALOMON: Yes, because - - -

1 JUDGE ABDUS-SALAAM: But - - - but the way  
2 the sequence occurred here, they can't be?

3 MS. SALOMON: That's correct. And, in  
4 fact, the People leveraged that sequence, if you  
5 will, in order to charge the serious physical injury  
6 robbery. In other words, they got another charge,  
7 another conviction of first-degree robbery, serious  
8 physical injury robbery, based on the completed  
9 robbery. In other words, it wasn't an attempted  
10 robbery but the completed robbery with, on these  
11 undisputed facts, the shooting in the course of it,  
12 and causing serious physical injury in the course of  
13 - - - of it, after which - - - after which the - - -  
14 the robbery is completed. So given - - -

15 JUDGE RIVERA: It's that language in the  
16 course of it - - -

17 MS. SALOMON: In the - - -

18 JUDGE RIVERA: - - - that you're saying  
19 makes all the difference in this case.

20 MS. SALOMON: Yes, it's - - -

21 JUDGE RIVERA: Obviously in the underlying  
22 facts. I get - - - I understand that.

23 MS. SALOMON: Yes. Yes, it does. Because  
24 - - - because Battle, McKnight, all of these cases  
25 talk about the instructions. What were the



1 instructions that were given to the jury and what was  
2 the actus reus? And again - - - again, starting with  
3 Ramirez, which talks about a shooting robbery, in  
4 other words, a robb - - - a shooting in the course of  
5 the robbery, not afterwards, that that is a single-  
6 act crime. I'm not saying that you can't have other  
7 crimes, but when you've got other - - - a single act  
8 can spawn other crimes but it cannot spawn double  
9 punishment. And that's what you have here.

10 Now if the court should agree with our  
11 analysis in that regard, we would - - - we would  
12 still say that with respect to how sentencing was  
13 achieved in this case - - - and actually, if this  
14 court should, for some reason, disagree - - -  
15 disagree with our analysis that the imposition of  
16 consecutive sentencing was improper - - -

17 JUDGE FAHEY: Yeah, I was going to say.  
18 Really, 430.10, you still have an argument there.

19 MS. SALOMON: We - - - we still have an  
20 argument under 430.10. But we also have an argument  
21 concerning the judge's remarks at sentencing and how  
22 this sentencing was achieved. We think that the - -  
23 -

24 JUDGE FAHEY: Well, would you - - - before  
25 you go to that - - -

1 MS. SALOMON: Yes.

2 JUDGE FAHEY: - - - argue your 430.10,  
3 because I - - - I don't want you to run out of time.  
4 I want to hear what you have to say about that.

5 MS. SALOMON: Okay. As - - - it's a little  
6 awkward, I guess, because, you know, the - - - the  
7 court wrote - - -

8 JUDGE FAHEY: Right. They wrote that they  
9 didn't - - -

10 MS. SALOMON: - - - what we thought was  
11 that - - - that the rea - - -

12 JUDGE FAHEY: I - - - I - - - hold on.

13 MS. SALOMON: I'm sorry.

14 JUDGE FAHEY: I think they didn't  
15 explicitly decide it. They might have implicitly  
16 said something.

17 MS. SALOMON: Right.

18 JUDGE FAHEY: But that isn't quite the same  
19 in this instance as explicitly saying it.

20 MS. SALOMON: That's our position. And - -  
21 - and we're not - - - and we believe that there is  
22 still an argument that when you actually get to what  
23 a trial court's powers are - - - and 430.10 speaks to  
24 the power of a trial court, of changing lawful  
25 sentences when a defendant has begun to serve them.

1                   JUDGE FAHEY: Well, one of the things, you  
2 know, you'd have to say, what if the question were  
3 different? Could the court extend the term of a  
4 sentence as opposed to the structuring of the new  
5 sentences on resentencing? Or how - - - how do we  
6 get around the fact that the sentence has clearly  
7 already begun to be served? Would time then stop and  
8 start again? I don't see how these things are  
9 contemplated within the CPL for the process. So  
10 there's difficulties in the process - - - if I - - -  
11 I wasn't here for Rodriguez, following it all the way  
12 through.

13                   MS. SALOMON: Um-hum. Well, for - - - I'm  
14 not sure I'm - - - so please stop me, because I'm not  
15 sure I'm - - -

16                   JUDGE FAHEY: Yes.

17                   MS. SALOMON: - - - following your  
18 questions all the way. But our position is that  
19 changing - - - if - - - if you're asking about  
20 changing sentences from concurrent to consecutive, we  
21 think that that - - -

22                   JUDGE FAHEY: Right. That's the first  
23 problem.

24                   MS. SALOMON: Okay. We think that is  
25 forbidden by 430.10. Once a defendant has - - - has

1 under the plain reading of this statute, "When the  
2 court has imposed a sentence, such sentence may not  
3 be suspended once the term of the sentence has  
4 commenced." So my - - - my client had started  
5 serving his sentence in prison by the time we did the  
6 appeal. So the sentence had commenced. There were  
7 certain lawful sentences. No question about it.  
8 Obviously, we've - - - we've - - - you know, apart  
9 from the ones that we said should not have been  
10 imposed consecutively.

11 Once that happens, our argument has been  
12 that the sentences for each of those crimes that was  
13 given was a discrete sentence. Given the statutory  
14 construction elsewhere in our law about what a  
15 sentence is, defendants have to be sentenced  
16 individually on - - - on each crime.

17 JUDGE RIVERA: So - - - so then what's the  
18 point of the remand?

19 MS. SALOMON: I'm sorry?

20 JUDGE RIVERA: What's the point of sending  
21 it back?

22 MS. SALOMON: Well - - - okay.

23 JUDGE RIVERA: If you are correct, if we  
24 were to agree with you, what would have been the  
25 point in Rodriguez I of sending - - -

1 MS. SALOMON: Okay, well - - -

2 JUDGE RIVERA: - - - of - - - of saying the  
3 AD can send it back?

4 MS. SALOMON: If - - - if it could - - - if  
5 it could be - - - if - - - if this court were to  
6 agree that no consecutive sentence is possible, well,  
7 we - - - as the court ordered, actually, plenary  
8 resentencing in Rodriguez I.

9 JUDGE RIVERA: Um-hum.

10 MS. SALOMON: If that is true, then that  
11 then allowed us to argue for even less than - - -  
12 than - - - than - - - than the twenty-five that we  
13 originally had. Now I know maybe you're saying, you  
14 know, suggest that - - -

15 JUDGE FAHEY: Well, I - - - I don't know if  
16 we could do that.

17 JUDGE RIVERA: Well, on - - - on the counts  
18 dealing with the unlawful sentences.

19 MS. SALOMON: Exactly. In other words,  
20 because we - - - we present - - -

21 JUDGE RIVERA: That that's what could be -  
22 - -

23 MS. SALOMON: Yeah.

24 JUDGE RIVERA: - - - reconsidered.

25 MS. SALOMON: Yeah. In other words,

1           twenty-five - - - if this court should - - - should  
2           agree with us that twenty-five is the maximum he  
3           could get, that there could be no arrangement of any  
4           of these cases because they were a single act, a  
5           robbery in the course of which there was a shooting  
6           and then the robbery was completed, if this court  
7           were to agree with that, therefore barring any  
8           consecutive sentencing, the court having ordered  
9           plenary resentencing and our having presented an - -  
10          - a factually - - -

11                   JUDGE RIVERA:  Regardless of the obvious  
12           intent of the AD - - -

13                   MS. SALOMON:  Yes.

14                   JUDGE RIVERA:  - - - it didn't sound to me  
15           like that's what they were hoping would happen.

16                   MS. SALOMON:  Well, that - - -

17                   JUDGE RIVERA:  But because it was sent back  
18           that the trial court could - - - as you say, could  
19           have listened to your arguments - - -

20                   MS. SALOMON:  Yes.

21                   JUDGE RIVERA:  - - - and have been  
22           persuaded the second time around.

23                   MS. SALOMON:  Yes, but - - - but not this  
24           trial court.  And that's our - - - and that's our  
25           argument.

1 CHIEF JUDGE LIPPMAN: Okay, counsel.

2 MS. SALOMON: Okay.

3 CHIEF JUDGE LIPPMAN: Let's - - - you'll  
4 have your rebuttal. Let's - - - let's hear from your  
5 adversary.

6 MS. SALOMON: Thank you.

7 MS. OSTROW: May it please the court my  
8 name is Eleanor Ostrow, and I represent the People on  
9 this appeal. Your Honors, there was one ripe issue  
10 before this court on the first appeal. And that is  
11 whether or not the Appellate Division's corrective  
12 action was barred by 430.10. And that corrective  
13 action - - - there's no dispute about what it was.  
14 As my - - - as defense counsel has said, it was a  
15 essentially a re - - - a remand or a remittal for a  
16 plenary resentencing and very specifically, for the  
17 purpose of giving the trial court the opportunity to  
18 decide whether it wanted to restructure the  
19 sentences, the remaining sentences, to arrive again  
20 at the original aggregate sentence.

21 When this court - - - I don't - - - Judge  
22 Fahey, I don't think it was implicit. I think when  
23 this court affirmed the remittal for resentencing, I  
24 think it was affirming the corrective action of the  
25 Appellate Division. If it wasn't doing that, I don't

1 know what it was doing. If you were to remit the  
2 case and say that the court did not have the power to  
3 restructure, there was no purpose to the re - - - the  
4 remittal. As I think Your Honor has - - -

5 JUDGE FAHEY: But, you know, the thing is  
6 it's not - - -

7 JUDGE RIVERA: She's arguing that they  
8 could have given less time.

9 JUDGE FAHEY: - - - it's really - - - it's  
10 really not unusual for an Appellate Division to - - -  
11 to either redo - - - redo the sentence themselves or  
12 send it back to the trial court even though the trial  
13 court doesn't have discretion. Basically say you  
14 made the mistake, you do the sentencing. And that -  
15 - - that happens quite often.

16 MS. OSTROW: But, actually, here, Your  
17 Honor, and I know that - - -

18 JUDGE RIVERA: But that's not what the AD  
19 was intending here?

20 MS. OSTROW: Yes. And I think that - - -  
21 well, I think what the - - - my defense counsel had  
22 argued in the past and I think what you can see from  
23 the decision of the Appellate Division is the  
24 Appellate Division said it was modifying the  
25 sentences to run concurrently, the assault and the



1 attempted murder counts. They actually corrected the  
2 defect. But then it went on and took another step,  
3 which it could do under CPL 470.20. I think that's  
4 clear. And the next step was to remand the case or  
5 remit the case to the trial court to give it the  
6 opportunity to see if it wanted to exercise its  
7 discretion to restructure the sentences. And - - -

8 JUDGE STEIN: So do - - - do you agree that  
9 there was a question as to whether consecutive  
10 sentences were even proper here.

11 MS. OSTROW: Under 70.25.

12 JUDGE STEIN: Under 70.25. So what - - -  
13 what this court may have been saying is we're not - -  
14 - we're not going to speak to that.

15 MS. OSTROW: It - - -

16 JUDGE STEIN: We're - - - we're going to  
17 wait until we see what the trial court does.

18 MS. OSTROW: That's exactly right, Judge  
19 Stein. And it wasn't even - - - they said that  
20 explicitly. The second-to-last paragraph of the  
21 majority decision says that it was - - - the 70.25  
22 issue was premature and it was not reaching it  
23 because it did not believe that it was right. It  
24 doesn't say anything - - -

25 JUDGE READ: And that's all we have now is

1 what you're saying?

2 MS. OSTROW: Excuse me, Judge?

3 JUDGE READ: And that's all - - - that's  
4 the issue we have now?

5 MS. OSTROW: I believe that is the only  
6 issue that's here except for the other claim that the  
7 defendant raises. Although, we - - - we take the  
8 position that that wasn't preserved. So - - -

9 JUDGE ABDUS-SALAAM: If that is the issue,  
10 counsel, is there a difference between the trial  
11 court sentencing consecutively or concurrently and  
12 the Appellate Division or an appeals court ordering  
13 the court to look at that sentence again?

14 MS. OSTROW: I'm not sure, Your Honor - - -

15 JUDGE ABDUS-SALAAM: In other words, if - -  
16 - if the statute says that these sentences can run a  
17 certain way, and if it's already started to run then  
18 you can't change it, essentially.

19 MS. OSTROW: You mean the - - - you're - -  
20 - you're talking about 430.10?

21 JUDGE ABDUS-SALAAM: 430.10.

22 MS. OSTROW: Yeah, but 430.10 speaks to,  
23 first of all, the powers of the trial court when the  
24 trial court acts on its own. And it also only speaks  
25 to cases where there is going to be a change to a

1 lawful sentence, not to a sentence that has an  
2 unlawful legal defect.

3 JUDGE ABDUS-SALAAM: So if - - - if - - -

4 MS. OSTROW: And one more thing, Your  
5 Honor. I'm sorry. But the - - - 430.10 also says,  
6 and the majority specifically stated this and it's  
7 very critical, except as other - - - otherwise  
8 specifically authorized by law, a trial court can't  
9 do X, Y, Z. Well, CPL 470.20 gave the Appellate  
10 Division very broad remedial powers. And not only  
11 gave it to them, mandated that when it was modifying  
12 or reversing a - - - a conviction on a defect that it  
13 should not only rectify injustice to the appellant,  
14 but it should protect the rights of the respondent.  
15 That's a very broad mandate. And - - -

16 JUDGE STEIN: What rights of respondent are  
17 we talking about?

18 MS. OSTROW: Well, in this case it was the  
19 People.

20 JUDGE STEIN: Yeah, I know.

21 MS. OSTROW: Oh, I'm sorry.

22 JUDGE STEIN: But what - - - what - - -  
23 what rights are we trying to protect?

24 MS. OSTROW: Well, the - - - the right that  
25 I think that the People had, Your Honor, and it

1 wasn't that they had a right to a forty-year  
2 sentence. I know the - - - the dissenters thought  
3 that that was the right that we were protecting, but  
4 that's not the right we were protecting. We wanted a  
5 forty-year sentence. I'm not disagreeing.

6 The right we had was to have a court at a  
7 plenary sentencing make the determination for itself,  
8 based on all the factors that one should consider and  
9 a judge should consider at sentencing, to come up  
10 with a just and proper sentence given - - - that fits  
11 the defendant's crime and his background. What's odd  
12 about the - - - the - - - the - - - my - - - or  
13 defense counsel's view of this would be if, in fact,  
14 430.10 had barred the trial court here on the  
15 resentencing from restructuring the sentence, you'd  
16 have a situation where at a trial where a judge makes  
17 a mistake the trial's re - - - the conviction's  
18 reversed and it's sent back for a new trial. You do  
19 a do-over. You go back to the pretrial statute. You  
20 don't give the defendant some kind of extra benefit  
21 or windfall because of it. You have a do-over.

22 JUDGE PIGOTT: Could the judge in this case  
23 have reduced - - -

24 MS. OSTROW: All we're asking is for a do-  
25 over.

1 JUDGE PIGOTT: I'm sorry.

2 MS. OSTROW: I'm sorry?

3 JUDGE PIGOTT: Could the judge in this case  
4 have reduced the sentence? In other words, I noticed  
5 in his - - - when he was resentencing he said, you  
6 know, you've had five years now and he - - - he  
7 alluded to what had transpired between the time of  
8 the original sentence and the - - - when he was about  
9 to resentence. Was that proper in your view, such  
10 that if he said, well, he's a model prisoner, you  
11 know, I gave him forty before. My aim now is to give  
12 him twenty-five?

13 MS. OSTROW: Well, Your Honor, I think - -  
14 - I'm - - - I'm pausing for a minute because when the  
15 Appellate Division sent it back it clearly was  
16 sending it back with authorization to restructure the  
17 sentences of the consecutive/concurrent relationship.  
18 It didn't say whether or not it was permitting it to  
19 change the terms and it might be - - -

20 JUDGE FAHEY: But it's the same principle.  
21 It - - - it's the same principle.

22 MS. OSTROW: Well, I think it could have  
23 told - - - I think it could have sent it back.

24 JUDGE FAHEY: But you're saying they could  
25 change the length of the term of the sentence?

1 MS. OSTROW: I think that they could. I  
2 don't know if in this case - - - in this case,  
3 another one just like - - -

4 JUDGE FAHEY: Now let me ask you this then.  
5 Let's take it the next step.

6 MS. OSTROW: Okay.

7 JUDGE FAHEY: What if you've already begun  
8 to serve the sentence and it's sent back not for a  
9 new trial - - - which I - - - I would say is a  
10 totally different situation, but for a resentencing?  
11 What would happen then, well, if you've already begun  
12 to serve? Say you're serving the assault one, which  
13 I think he's already begun to serve time under the -  
14 - - under the assault one here, because it's  
15 concurrent. So therefore, does - - - does - - -  
16 would the time stop? Would he then complete the  
17 robbery one sentence and then start serving time  
18 again for the assault one? Is that what you're  
19 arguing for? That's how the system would work?

20 MS. OSTROW: Well, Your Honor, if you're  
21 asking - - -

22 JUDGE FAHEY: Because I - - - because I - -  
23 -

24 MS. OSTROW: I'm sorry.

25 JUDGE FAHEY: - - - see that as directly

1           contrary to what 430.10 requires.

2                   MS. OSTROW: 430.10 doesn't apply here.

3                   JUDGE FAHEY: Yeah.

4                   MS. OSTROW: I think it's just that - - -

5           that clear. If - - - unless it - - -

6                   JUDGE FAHEY: I'm not so sure I agree with

7           that, but I understand what you're saying. Yeah.

8                   MS. OSTROW: Okay. And the only reason why

9           it might apply in this case for that - - - this is -

10          - - that's what I thought - - - wanted to say, is the

11          Appellate Division when it sent it back did say that

12          it was sending it back for restructuring. I think

13          that there's an argument that in this case it was

14          limiting the resentencing to that purpose, just like

15          Yannicelli when it sent the - - - in Yannicelli the

16          court sent it back just for a fixing of the fine, not

17          the - - - the prison sentences. I think it is

18          possible that that's what the Appellate Division's

19          decision was. And so I think there's an argument

20          that the judge could not have changed the individual

21          terms.

22                   JUDGE READ: Could you - - - could you

23          address the second issue? Why isn't this a single

24          act?

25                   MS. OSTROW: This isn't a single act, Your

1 Honor, because of the - - - of what Your Honor  
2 started with, the sequence of events here. And - - -  
3 and let me first say that the two crimes that are at  
4 issue are the robbery in the first-degree count based  
5 on a display of a - - - what appeared to be a weapon  
6 and then - - - and then first-degree assault. The  
7 robbery count that had serious physical injury as an  
8 aggravating factor was not run consecutively. That  
9 was run concurrently.

10 So the question is whether the robbery by  
11 display was effectuated through separate acts from  
12 the assault. And I think when you look at the  
13 sequence of events it's clear that it was. The  
14 defendants - - - the defendant and two accomplices  
15 rode up to the victim. The defendant pointed a gun  
16 at him, actually said see this, wanted him to see the  
17 gun, and said - - - demanded his chain. The  
18 immediate response of the - - - of the victim was to  
19 comply. He didn't try to run. He didn't try to  
20 resist. He didn't even just freeze. He was pulling  
21 the chain up to try to take it off of his neck. The  
22 defendant, instead of allowing him to either  
23 surrender the chain or even have Perez go over and  
24 take the chain, shot him three times.

25 JUDGE RIVERA: What about this argument



1 that the language of "in the course of" is what makes  
2 a difference in this case?

3 MS. OSTROW: In the course of? Well, that  
4 - - - you mean, Your Honor, you're talking about the  
5 - - -

6 JUDGE RIVERA: Robbery.

7 MS. OSTROW: The robbery in the first  
8 degree based on - - -

9 JUDGE RIVERA: Yeah, the shooting in the  
10 course of the robbery, right.

11 MS. OSTROW: - - - serious physical injury?

12 JUDGE RIVERA: Yes.

13 MS. OSTROW: But that's not the count that  
14 was run consecutively. But - - -

15 JUDGE RIVERA: I see.

16 MS. OSTROW: And - - - and it doesn't - - -  
17 and the reason why it doesn't signify anything that  
18 might have some sign of indirect impact would because  
19 - - - exactly because the way that the statute's  
20 written and the way that the judge charged it with  
21 serious physical injury is it's a rob - - - a robbery  
22 during which a participant causes serious physical  
23 injury to a victim in the course of the robbery. It  
24 does not - - - there - - - the language of the  
25 statute does not say that the serious physical injury

1 has to further the robbery or advance the robbery.

2 It's just the fact that it occurs.

3 And it did not advance the robbery here.

4 The victim was complying. He was trying to turn over  
5 his chain. And it was after the defendant shot him  
6 three times in his leg, in his torso, doing damage to  
7 his bowels, and then in his - - - his back. And he  
8 severed his spine - - - his spinal cord, and the  
9 victim is a permanent paraplegic, paralyzed from the  
10 waist down. For what? It didn't do anything to  
11 advance the robbery. If there was any reason for it  
12 it was just sort out of sheer cruelty and grat - - -  
13 gratuitously.

14 It was - - - after that, Perez did what he  
15 could have done anyway. He took the property. I  
16 think it's also imp - - - important to note the jury,  
17 I think, saw it the same way. Perez was actually  
18 charged with all the same crimes, but the jury  
19 acquitted Perez of the attempted murder and of the  
20 assault and only convicted the defendant of all those  
21 crimes. And I think it's clear because they saw the  
22 shooting as just sort of a lone act of the defendant  
23 that he did out of sheer cruelty. I think from here  
24 - - -

25 CHIEF JUDGE LIPPMAN: Okay, counsel.

1 Thanks, counsel. You want to finish your thought?

2 MS. OSTROW: If I could just say on Ramirez  
3 just one - - - two sentences. And to the extent that  
4 the court in Ramirez ran three robbery counts  
5 concurrently as to Bailey, the wounded victim, that  
6 has - - - does no way mean the consecutive sentences  
7 are not proper here. The - - - in Bailey the three  
8 counts that ran, again, concurrently were all  
9 literally based on the same act, shooting the guard  
10 and taking his property.

11 CHIEF JUDGE LIPPMAN: Okay, counsel.

12 MS. OSTROW: All three counts.

13 CHIEF JUDGE LIPPMAN: Okay. Thanks,  
14 counsel.

15 Counselor, rebuttal.

16 MS. SALOMON: First, this court ordered  
17 plenary resentencing, so we believe that the trial  
18 court did have the power to consider something even  
19 less than twenty-five years. Second, Ramirez does  
20 control this case along with Tanner, this court's  
21 decision. Tanner is the afterthought case or the  
22 separate acts case. Actually, I - - - I - - - I  
23 really think that the 70.25, the first part  
24 discussing about how you can only give concurrent  
25 sentences when you have a single act that can give

1 rise to - - - to various charges, that and the  
2 separate and distinct act case law that Tanner  
3 started, that's the Tanner theory of separate and  
4 distinct acts, which is also recognized in this  
5 court's case law, is really the same thing.

6 And it does occur frequently,  
7 unfortunately, in robbery cases. We're not saying  
8 this wasn't a serious robbery. But the People got  
9 the benefit of that severity by charging the  
10 defendant with serious physical injury robbery in the  
11 course of the robbery. He was not convicted of an  
12 attempted robbery. That would be a lesser degree of  
13 crime. He was convicted of the completed crime.  
14 There is no dispute that the crime was not completed  
15 until after this shooting. Yes. It was a nasty  
16 robbery, but it was a single-act robbery.

17 And as Tanner says, Tanner was involv - - -  
18 Tanner, I'm sure this court is well aware, was the -  
19 - - was the robbery of the taxicab driver. The  
20 taxicab driver gave over his money. After that  
21 robbery was completed the defendant then went back  
22 and gratuitously shot him. That was an afterthought.  
23 That was your classic afterthought. And so we don't  
24 have that here.

25 CHIEF JUDGE LIPPMAN: Okay, counsel.

1 MS. SALOMON: With respect to what the  
2 judge - - -

3 CHIEF JUDGE LIPPMAN: Finish, counsel. Go  
4 ahead.

5 MS. SALOMON: I'm sorry. With respect to  
6 what the judge said, we think it's a very serious  
7 matter that a judge basically is saying that how a  
8 defendant comports himself in prison doesn't matter.  
9 Let's say, for example, that the defendant did do it  
10 thinking he might win the appellate review and remand  
11 lottery, as we put it. So what? Prison management,  
12 prison authorities, certainly want defendants, for  
13 whatever reason that might be lodged in their hearts,  
14 to actually do something constructive with themselves  
15 - - -

16 CHIEF JUDGE LIPPMAN: Okay, counsel.

17 MS. SALOMON: Not to have it used against  
18 them.

19 CHIEF JUDGE LIPPMAN: Thank you. Thank you  
20 both. Appreciate it.

21 (Court is adjourned)

22

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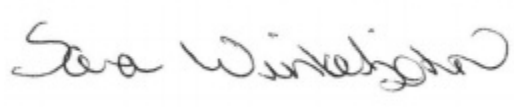
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