

# State of New York Court of Appeals

Summaries of cases before the Court of Appeals are prepared by the Public Information Office for background purposes only. The summaries are based on briefs filed with the Court. For further information contact Gary Spencer at 518-455-7711 or [gspencer@nycourts.gov](mailto:gspencer@nycourts.gov).

To be argued Thursday, May 2, 2019

## No. 42 People v David Mendoza

In November 2014, David Mendoza entered the lobby of a condominium building in Williamsburg, Brooklyn, where he did not reside. Surveillance cameras recorded him as he took two pairs of jeans from a mail order package that had been left in the lobby. Mendoza returned two weeks later and was again recorded as he took a mail order box of 200 "Neat 'n Dry" puppy training pads from the lobby. He was arrested for burglary and petit larceny six days after the second visit and admitted to officers that he took the packages. While in detention at Rikers Island, he called his mother and was recorded telling her that he had taken the packages.

Mendoza's defense counsel pursued a jury nullification defense at trial, telling jurors that his client had been "overcharged." Counsel did not contest the evidence of the thefts; and he did not argue that the lobby was not a dwelling, that Mendoza did not enter the building illegally, or that he did not intend to commit a crime when he entered. In his opening statement, counsel said, "Why are we here? That's a rock solid case. It's on video. There's a phone call. That's what the evidence is going to show. That's a rock solid case.... The reason why we're all here is because ... the evidence will show that these burglary charges do not fit the facts." In summation, defense counsel said, "Fair, that's what this is about, being fair, being fair to David.... The government will have you believe that doggy diapers and a pair of pants ... equal burglary in the second degree.... This case, I submit to you..., is overcharged. We're talking about packages laid out in the open, not going to anyone's apartment.... The man took doggy diapers and pants. He did not commit the crime of the century." He told jurors that "[y]ou're going to have to decide" whether those facts warrant burglary charges. Mendoza was convicted of two counts each of second-degree burglary and petit larceny, and was sentenced to five years in prison.

The Appellate Division, Second Department affirmed, rejecting Mendoza's claim that his attorney's nullification defense deprived him of effective assistance of counsel. "[I]t is incumbent on defendant to demonstrate the absence of strategic or other legitimate explanations for counsel's alleged shortcomings.... As long as the defense reflects a reasonable and legitimate strategy under the circumstances and evidence presented, even if unsuccessful, it will not fall to the level of ineffective assistance," it said, citing People v Benevento (91 NY2d 708). "Here, defense counsel pursued a reasonable strategy and provided meaningful representation."

Mendoza says his attorney "did not advance any legal or factual defense, conceded [his] guilt of all charges, and urged the jury 'only' to 'be fair.'" In light of this Court's clear precedent that defense attorneys may not argue for jury nullification, and the longstanding rule that jurors must apply the law in accordance with the court's instructions, defense counsel's strategy was neither reasonable nor legitimate. Indeed, by failing to advance available legal defenses, including that appellant did not knowingly enter a building unlawfully and did not intend to commit a crime at the moment of entry, counsel all but guaranteed appellant's conviction. This plainly deficient performance deprived appellant of ... the effective assistance of counsel."

For appellant Mendoza: Caitlin Halpern, Manhattan (212) 693-0085

For respondent: Brooklyn Assistant District Attorney Gamaliel Marrero (718) 250-5270

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To be argued Thursday, May 2, 2019

**No. 43 People v Jaime Lopez-Mendoza**

*(papers sealed)*

Jaime Lopez-Mendoza was employed at the Dream Hotel in Manhattan in December 2009, when he was charged with sexually assaulting a guest in her room. The complainant said she and her boyfriend were drunk when they returned to the hotel and Lopez-Mendoza helped them get into their room, where they passed out. She said Lopez-Mendoza returned later and had sex with her while she was unconscious. Lopez-Mendoza told the police and a grand jury that, right after he let them into their room, he had consensual sex with the complainant on the bed next to her sleeping boyfriend.

At trial, defense counsel said in his opening statement that when they entered the room, the complainant "appeared to be in an amorous mood" and induced Lopez-Mendoza to have sex with her an hour before the alleged assault occurred. He told the jury his client would take the stand and testify to those facts. When the prosecutor offered into evidence surveillance video showing that Lopez-Mendoza was in the basement at the time he had said the consensual encounter took place, a colloquy revealed that defense counsel was given a copy of the video before trial and was told that it proved his client's grand jury testimony was false, but apparently did not recognize its significance. Defense counsel said, "I received a hard drive with a huge amount of material equivalent to maybe a hundred movies." In the end, defense counsel did not call his client to testify, and he presented a different theory of the case in his summation. Lopez-Mendoza was convicted of first-degree rape and sentenced to 15 years in prison.

The Appellate Division, First Department affirmed, saying, "Defendant's ineffective assistance of counsel claims are unreviewable on direct appeal because they involve matters not reflected in, or fully explained by, the record.... The brief exchange in which the video surveillance was discussed by trial counsel, the People, and the trial court is insufficient to establish that trial counsel promised defendant's testimony in his opening statement because he did not adequately review the video surveillance before trial."

Lopez-Mendoza argues that he "was denied effective assistance of counsel where his trial attorney failed to properly review the surveillance video provided to him by the prosecution before trial, and then pursued a defense theory, and promised Mr. Lopez-Mendoza's testimony in support of it, that would be shown to be false when the video was later played at trial." He says his claim can be reviewed on direct appeal, without resort to a CPL 440 proceeding, because "the record establishes that defense counsel's uninformed adoption of a provably false defense theory was a major blunder for which there could be no reasonable strategic basis."

For appellant Lopez-Mendoza: Christina Swarns, Manhattan (212) 402-4100

For respondent: Manhattan Assistant District Attorney Susan Axelrod (212) 335-9000

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To be argued Thursday, May 2, 2019

## No. 44 People v Samuel J. Smith

Paris Bullock was wounded by gunfire in May 2013 as she was walking in Rochester with her boyfriend, James Dees. A surveillance camera recorded the gunman as he got out of a car and followed them. Dees called out "he's got a gun" and tried to push Bullock to the ground. Bullock said she turned and saw the gunman smile before he opened fire. She was struck once and Dees was unharmed. Police recovered five bullet casings at the scene. Bullock initially told officers that she did not know the shooter and could not identify him. She later identified Samuel Smith as the gunman after viewing surveillance video taken shortly after the shooting.

Bullock testified at trial, identifying Smith as the shooter. Dees was also on the prosecution's witness list, but he was not called to testify. Smith's attorney asked the court to give a missing witness charge instructing jurors that, based on the prosecution's decision not to put Dees on the witness stand, they could draw an adverse inference that his testimony would not have been favorable to its case. Defense counsel said Bullock "claims it was Mr. Dees who sees the shooter first and turns around and then pushes her and moves and runs around the side of the house. We believe his testimony is not cumulative." The prosecutor replied there was "absolutely no indication that [Dees] would be able to provide anything that wasn't provided by Paris Bullock and it is the People's position he would be cumulative." Supreme Court denied the defense request. Smith was convicted of second-degree attempted murder, first-degree assault and criminal use of a firearm. He was sentenced to an aggregate term of 23 years in prison.

The Appellate Division, Fourth Department affirmed in a 3-2 decision, ruling the trial court did not err in denying Smith's request for a missing witness charge because he did not show that Dees' testimony would not have been cumulative. It said the First, Second, and Third Departments all hold that the party requesting such a charge has the initial burden of proving the missing witness has noncumulative testimony to offer and it adopted an identical rule that, "when seeking a missing witness instruction, the movant has the initial, prima facie burden of showing that the testimony of the uncalled witness would not be cumulative of the testimony already given." It said any "alleged deficiencies" in Bullock's testimony "are not relevant to the question of cumulativeness, which requires a comparison of the uncalled witness's likely testimony against the evidence adduced at trial to determine whether the missing testimony would have "contradicted or added" to the testimony of the other witnesses'...."

The dissenters said the decision conflicts with the "burden-shifting framework set forth in" People v Gonzalez (68 NY2d 424), which requires the party seeking a missing witness charge to show "that an uncalled witness is knowledgeable about a pending material issue and that such witness would be expected to testify favorably to the opposing party." They said the burden then shifts to the opposing party to "demonstrate that the charge would not be appropriate," as by showing the testimony would be cumulative. "Indeed, it would make no sense to require the moving party to establish that the missing witness's testimony is not cumulative in view of the fact that the missing witness, by definition, is not in the control of the moving party, and the moving party cannot be expected to know the substance of the missing witness's testimony...."

For appellant Smith: Drew R. DuBrin, Rochester (585) 753-4947

For respondent: Monroe County Assistant District Attorney Daniel Gross (585) 753-4588