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COURT OF APPEALS
STATE OF NEW YORK

PEOPLE,

Respondent,

v.

NO. 71

JAMES EVERSON,

Appellant.

20 Eagle Street
Albany, New York
September 9, 2025

Before:

CHIEF JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE MADELINE SINGAS
ASSOCIATE JUDGE ANTHONY CANNATARO
ASSOCIATE JUDGE SHIRLEY TROUTMAN
ASSOCIATE JUDGE CAITLIN J. HALLIGAN

Appearances:

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Chrishanda Sassman-Reynolds
Official Court Transcriber



1 CHIEF JUDGE WILSON: Next case on the calendar is
2 People v Everson.

3 MR. KEEM: Good afternoon. May it please the
4 court. My name is Brad Keem. I represent Appellant James
5 Everson. And I'd like to reserve two minutes for rebuttal.

6 CHIEF JUDGE WILSON: Yep.

7 MR. KEEM: I'd like to begin with the sufficiency
8 of the evidence. The People said it best at sentencing.
9 Everson and Bordies didn't care if they struck anyone.
10 They didn't care who they struck, but they struck the
11 alleged victim. Because Everson did not care when he fired
12 a gun out of a window of the car he was driving into a
13 crowd of people, his actions didn't establish an intent to
14 kill.

15 CHIEF JUDGE WILSON: Well, couldn't that be - - -
16 couldn't that statement by the prosecutor, which isn't
17 evidence anyway, be meant to say, I don't care which person
18 I kill?

19 MR. KEEM: So I would say this is - - -

20 CHIEF JUDGE WILSON: I just - - - I care that I
21 killed somebody. It just doesn't matter to me which of the
22 crowd of opposing gang members I kill.

23 MR. KEEM: There was no evidence that it was
24 opposing gang members in the crowd at all.

25 CHIEF JUDGE WILSON: Fine. It was a crowd of

1 people. That doesn't even matter.

2 MR. KEEM: It's not a - - - a typical drive by
3 shooting where there's a target. These are just people
4 that are at the park. Two days prior Bordies is shot and
5 they go into the neighborhood. That's the evidence of any
6 kind of intent to kill.

7 JUDGE SINGAS: Well, the evidence, though, is
8 pointing a gun at a group of people, so it doesn't really
9 get more intentional than that.

10 MR. KEEM: Even the pointing, I would - - - I
11 would quibble with. Because Ellerby says that he does - -
12 - he doesn't do anything but put the gun outside of the
13 window and shoot.

14 JUDGE SINGAS: Pointing in the direction of
15 people.

16 MR. KEEM: I - - - I would say that the
17 projectile - - -

18 JUDGE SINGAS: Well, it didn't go in the air,
19 right? There is no evidence that he was firing in the air?

20 MR. KEEM: The projectile evidence show a spray.

21 JUDGE SINGAS: Yes.

22 MR. KEEM: So I - - - I don't think that there's
23 evidence that there was any aiming. He's driving while
24 he's shooting out of a window.

25 JUDGE GARCIA: But you're - - - again, you can

1 quibble with that, or you can argue with that in summation,
2 but the standard for sufficiency is a difficult one, right?
3 It's - - - they get every inference.

4 MR. KEEM: I understand that. And I wanted to
5 add it, even though the dissenter of the Fourth Department
6 didn't agree with me. I wanted to add it because this
7 court has said a quintessential example of depraved
8 indifference is shooting into a crowd of people.

9 JUDGE HALLIGAN: So - - -

10 MR. KEEM: Yeah.

11 JUDGE HALLIGAN: - - - so prior to the summation,
12 how were the defenses in conflict specifically?

13 MR. KEEM: Yes. So to move to severance. We
14 have in - - - a case where we meet the two-part test. The
15 first part is the core of the defenses are an
16 irreconcilable conflict.

17 JUDGE HALLIGAN: How is that so prior to the
18 comments in summation specifically?

19 MR. KEEM: So prior to summation - - - prior to
20 trial, defense counsel for Everson indicates that defense
21 counsel for Bordies has told him that he is going to put
22 the gun in Everson's hand. So we know it's - - - we know
23 it's coming. The trial court knows it's coming.

24 CHIEF JUDGE WILSON: That's six - - - that's six
25 days before trial?

1 MR. KEEM: Six days before trial. So the - - -

2 CHIEF JUDGE WILSON: So the facts of this case, I
3 think, and I want to ask you when defense counsel would
4 have appreciated this, is that there's a car with three
5 people in it from which the shots are fired, that result in
6 somebody being killed. And that there are two different
7 guns and two different shooters. So two of the three
8 people in the car had a gun and shot; is that right?

9 MR. KEEM: That's correct.

10 CHIEF JUDGE WILSON: So when would defense
11 counsel have understood that?

12 MR. KEEM: I think that from the beginning,
13 defense counsel would understand that that possibility
14 existed. But according to defense counsel Everson, Everson
15 wasn't there. He wasn't a shooter. Okay. That was his
16 defense.

17 CHIEF JUDGE WILSON: He wasn't in the car at all?

18 MR. KEEM: That's right. That was his defense.
19 And there - - - and he supported it through multiple
20 people's DNA being on the steering wheel. His blood wasn't
21 in the car. It was someone else's blood that was in the
22 car. It was a defense. Your Honor may not agree with the
23 defense, but it was the defense.

24 If Bordies also adopted that defense, that he
25 also was not present in the car, then we don't have a

1 problem. But defense counsel for Bordies prior to trial
2 adopts the same position.

3 JUDGE CANNATARO: So what was the evidence that
4 codefendant put in at trial to give weight to that
5 argument?

6 MR. KEEM: I don't think that it's a requirement
7 that actual new evidence be part of a severance
8 determination. That's not what the two-part test - - -

9 JUDGE CANNATARO: How does a lawyer put the gun
10 in the - - - in your client's hand without demonstrating it
11 to the jury?

12 MR. KEEM: There's three people in the car and
13 two guns. It is obvious that based on what defense counsel
14 for Bordies said - - -

15 JUDGE CANNATARO: But that's not - - - that's not
16 - - -

17 MR. KEEM: - - - he's placing - - -

18 JUDGE CANNATARO: - - - not irreconcilable, is
19 it? If - - - if you have two defendants, both arguing that
20 they weren't the one with the gun. That it was - - - you
21 know, it might have been two other people, but it wasn't
22 me. I don't see the - - - the irreconcilability of that.

23 MR. KEEM: Is - - - I mean, I suppose - - -

24 JUDGE CANNATARO: That's definitely not a word,
25 by the way.

1 MR. KEEM: I - - - I mean, there's two guns, two
2 different types of projectiles. I think it's a .9
3 millimeter and a .45 caliber.

4 JUDGE TROUTMAN: How - - - how does your - - -
5 how is your argument impacted by the presumption that
6 they're to be tried jointly in the first instance?

7 MR. KEEM: I'm sorry, Your Honor?

8 JUDGE TROUTMAN: There's a presumption that it's
9 going to be a joint trial.

10 MR. KEEM: Correct.

11 JUDGE TROUTMAN: And some of what you're
12 suggesting sets things up for gamesmanship. You say no
13 evidence is necessary. It's just a strategy that one can
14 assume is being offered. Then, would you ever try anybody
15 jointly together?

16 MR. KEEM: Well, I think when you're talking
17 about an instance where there are three people in a car,
18 two people that are shooting - - -

19 JUDGE TROUTMAN: How - - -

20 MR. KEEM: - - - the - - - when that situation -
21 - -

22 JUDGE TROUTMAN: The codefendants - - -

23 MR. KEEM: - - - arises.

24 JUDGE TROUTMAN: - - - and codefendants, there's
25 always going to be, no, I didn't do it. He did it. But

1 they're tried jointly. What's the line to be crossed so
2 that the trial court is clear? And - - - and that - - -
3 and is there any obligation on the part of the defense, as
4 the Chief Judge noted, to apprise the court as soon as
5 practicable, that there is a desire to severance - - -
6 sever the case?

7 MR. KEEM: So I do think six days prior to trial,
8 that defense counsel should have done - - - could have done
9 it earlier. But I think that once he learned that defense
10 counsel for Bordies was going in this direction, he made
11 sure that the trial - - -

12 JUDGE TROUTMAN: And no evidence need be
13 presented?

14 MR. KEEM: No evidence need be presented. That's
15 not part the two-part test.

16 JUDGE TROUTMAN: And is this closing argument
17 sufficient to have caused this severance here?

18 MR. KEEM: In this case. Absolutely.

19 JUDGE HALLIGAN: Well, what cases can you point
20 us to where comments and summation alone - - - because I
21 don't - - - I don't think you're pointing to any evidence
22 that's actually put on during the trial - - - I understand
23 you're pointing us to what defense counsel says in advance.
24 But where summation comments alone are sufficient to
25 require, I guess, severance at that juncture, which is what

1 you're suggesting should have happened, a mistrial? I
2 don't know exactly what you think the judge should have
3 done at that point.

4 MR. KEEM: So - - -

5 JUDGE HALLIGAN: But what cases have - - - have
6 said that no evidence but summation comments is - - - is
7 enough?

8 MR. KEEM: I - - - I don't think that we have
9 cases like that until hopefully this case, because defense
10 counsel - - -

11 JUDGE HALLIGAN: But isn't the concern that that
12 opens - - - opens the door to - - - you know, no evidence
13 being put in at all? And then counsel making an argument
14 in summation, which I - - - I assume you're arguing or what
15 - - - what should the judge, in your view, have done at
16 that point?

17 MR. KEEM: Well - - -

18 JUDGE HALLIGAN: There was not an objection on it
19 during summation, but - - - but maybe I missed it.

20 MR. KEEM: So I understand the gamesmanship
21 argument, but I think it cuts both ways because - - -

22 JUDGE HALLIGAN: But there was no objection in -
23 - - in - - - during the summation; is that right?

24 MR. KEEM: Correct.

25 JUDGE HALLIGAN: Okay. So - - - so no objection.

1 The summation comes in. What should the judge have done at
2 that point?

3 MR. KEEM: Well, after summation defense counsel
4 requests a - - - a severance again.

5 JUDGE HALLIGAN: Yes.

6 MR. KEEM: And that's when defense counsel should
7 have - - - or the trial court should have ordered a new
8 trial because - - -

9 JUDGE CANNATARO: The - - - the trial court did
10 give a curative, though, didn't it?

11 MR. KEEM: It did. But it - - - it's not enough
12 when you have defense counsel literally pointing - - -

13 JUDGE GARCIA: But Counsel, that - - - I'd - - -
14 I'd like to follow up on that and - - - and on Judge
15 Halligan's question, because this is a bit of a strange
16 case to me. You have an initial severance decision. And
17 let's say, based on what that judge knew at the time and
18 what was presented, they make this decision, and it's
19 supported by the record. It's not abuse of discretion.
20 Something happens in summation.

21 Now, we've said in some of our cases, Cardwell, I
22 think, that we have the benefit of hindsight. So you know,
23 we can look at that. But it seems to me in this particular
24 case, as Judge Halligan was getting at, this isn't so much
25 a severance issue at that point. I mean, there's not going

1 to be a severance. There's going to be a mistrial.

2 And to me, that issue is prejudiced from the
3 summation, like, anything that's said by a lawyer in
4 summation - - - prosecutor or another defense lawyer. It's
5 different in - - - in a way because of who's saying it.
6 But the real issue is, did something that was said in that
7 summation cause this person to be deprived of the right to
8 a fair trial? Not was the severance decision right.
9 Right?

10 It's more to me what was said? How prejudicial
11 was or wasn't it? And what action was taken in response?
12 Do you disagree with that? Is - - - is this some type of
13 severance - - -

14 MR. KEEM: I - - - I can understand Your Honor's
15 point of view. I think that it's couched within severance,
16 just based on the objection, and it can be - - -

17 JUDGE GARCIA: Right.

18 MR. KEEM: - - - viewed in that manner. And when
19 you have - - -

20 JUDGE HALLIGAN: Well, wait. When you say the
21 objection, not a contemporaneous objection?

22 MR. KEEM: No.

23 JUDGE HALLIGAN: You mean the renewed request for
24 severance at - - - at the end, yes?

25 MR. KEEM: Correct. Yes, Your Honor.



1 So when - - - when we have the pointing and we
2 have the actual words which adopt the People's point of
3 view, and when they do that, it changes the credibility
4 calculus - - -

5 JUDGE GARCIA: And your argument is that it's
6 prejudicial to my client. I think, to me, when I think of
7 that, I think of the Bruton case. Right? And - - - and I
8 want to get - - - this confession, and it's - - - you know,
9 it's obvious who it's talking about. It's sanitized.
10 Everything works perfectly. Maybe the prosecutor, someone
11 gets up in summation and makes a mistake, and they comment
12 on that confession in a way they shouldn't have.

13 To me, the analysis at that point is prejudice.
14 action taken, fair trial. Right? It's not, oh, you should
15 have severed because you had a Bruton problem.

16 MR. KEEM: I - - - I - - - again, I understand
17 that - - - that point of view. But I would say that once
18 we have what was said at - - - at summation, and then
19 there's the post - - -

20 JUDGE TROUTMAN: So your position is counsel has
21 no obligation well in advance of trial to seek a severance
22 that at any time, at any point up until - - - up through
23 summation for the - - - can say sever - - - severance? As
24 opposed to, as Judge Garcia was referring, that there was
25 some prejudicial conduct that justifies a mistrial. You

1 are - - - you are insistent that it was proper for
2 severance?

3 MR. KEEM: I - - - I would not insist with this
4 court. I merely expressed that if the court wanted to find
5 what I have on this record is an objection based on
6 severance.

7 JUDGE RIVERA: Well, didn't the judge say it when
8 he made the motion for severance before the trial? And as
9 I recall, the codefendant joined that motion, which is to
10 me, at a minimum, suggestive that counsel is agreeing.
11 That is the defense. That is my strategy at trial.

12 MR. KEEM: Yes.

13 JUDGE RIVERA: It's not speculative.

14 MR. KEEM: Yes.

15 JUDGE RIVERA: But moving on from there for one
16 moment. I thought the judge was saying, we'll have to see
17 what happens at trial.

18 MR. KEEM: Correct. And - - -

19 JUDGE RIVERA: So this is what happened at trial.

20 MR. KEEM: Exactly.

21 JUDGE SINGAS: No. But did it? Is it? What
22 happened at trial? Because are summations part of the
23 evidence, and are we just presuming that the jury is not
24 following the judge's instruction?

25 MR. KEEM: So it's a little bit different, Your

1 Honor, because it is not evidence, but it's a change in the
2 credibility calculus. The jury for the first time is
3 learning that the People are - - - or that defense counsel
4 for Bordies is adopting the People's position on several
5 fronts.

6 JUDGE RIVERA: But summation is not evidence,
7 true? Everybody's agreeing on that. But summation, as the
8 Supreme Court has said over and over, and as law students
9 are taught all the time, is the opportunity to marshal the
10 evidence as presented and persuade the jury of your
11 narrative. I mean, you need not put in affirmative
12 evidence to use what is already in evidence to persuade the
13 jury.

14 MR. KEEM: That's absolutely true. And that goes
15 back to the cross-examination. When defense counsel's
16 cross-examining Ellerbie, he is discrediting him only to
17 the point of Bordies is not a shooter. Not that Everson is
18 not a shooter.

19 JUDGE SINGAS: Right. And there's no - - -
20 there's nothing irreconcilable there. That's my point.
21 Like, a - - - on - - - a statement at summation that's not
22 evidence, in an attempt to marshal your argument, I don't
23 think is the kind of issue that we should be concerned with
24 at - - - at - - - at - - - for severance.

25 Would - - - you know, there - - - there has been

1 nothing irreconcilable with all the presentation of the
2 evidence. And given the court's desire to try these cases
3 together, multiple defendants together at the same time,
4 the entire trial happens. There's nothing irreconcilable
5 about it. And there's this one statement at summation that
6 you're saying should have caused a severance motion to be
7 granted and the entire trial started again, when the jury
8 receives an instruction that says nothing that's said here
9 is evidence.

10 MR. KEEM: Yes. Because you're - - - what you're
11 saying is to the inference of guilt. The irreconcilability
12 - - - I know - - - and there is that word again. It - - -
13 it came out through the - - - through the objection, the
14 initial objection and defense counsel for Bordies adopting
15 that position.

16 JUDGE GARCIA: What if the - - -

17 MR. KEEM: That is where irreconcilability
18 occurred.

19 JUDGE GARCIA: What if the judge gave a
20 supplemental instruction saying - - - you know, obviously
21 reminding them it's not evidence, but going further and
22 saying Mr. So-and-So or Ms. - - - represents only their
23 client, you cannot consider anything that they say against
24 - - - you know, it's not evidence. And further, you have
25 to disregard anything they say with respect to codefendant,

1 something along those lines. Would that be enough?

2 MR. KEEM: It - - - it may be, Your Honor. But
3 that's - - - it's not what happened here.

4 JUDGE HALLIGAN: Would you still have an argument
5 if there had not been the initial severance motion made?
6 Does it hinge on that or no?

7 MR. KEEM: I think it does, because there's - - -
8 to a certain - - -

9 JUDGE HALLIGAN: So why? Why is that? So if - -
10 - if counsel had made the exact same comments in summation,
11 why does the fact that - - - that - - - you know, defense
12 counsel pre-staged it matter? Because it's not obvious to
13 me what the judge should have done differently during the
14 course of the trial - - -

15 MR. KEEM: Because that - - -

16 JUDGE HALLIGAN: - - - in light of that initial
17 motion?

18 MR. KEEM: - - - that's where irreconcilable
19 conflict occurred. Because Bordie's defense counsel adopts
20 the position that - - -

21 JUDGE HALLIGAN: Let's - - - let's say - - -

22 MR. KEEM: - - - she - - - he's going - - - I'm
23 sorry. To - - - he is going to blame Everson for - - - and
24 Ellerbie for shooting. So we know that there's a conflict.

25 JUDGE HALLIGAN: Okay. But that to me, I think,

1 is - - - is an argument that the denial of the initial
2 motion was error. Right? What if we disagree with you on
3 that? I'm - - - I'm trying to understand whether your
4 argument is the denial of the subsequent motion after
5 summation hinges in part on the fact that the motion was
6 made initially?

7 MR. KEEM: So - - -

8 JUDGE HALLIGAN: Would it be the same if there
9 had been no initial motion made?

10 MR. KEEM: I think that it's - - - it's - - - my
11 argument is strengthened by the initial motion. But this
12 court could decide for me either way.

13 JUDGE HALLIGAN: Okay.

14 JUDGE CANNATARO: Are you saying that there could
15 have been a severance motion made at the time that the
16 comment was - - - comment in summation was made? That
17 still would have been okay?

18 MR. KEEM: That - - - that's a tough question. I
19 - - - I just think that that would be post-summation.

20 JUDGE CANNATARO: It does sound a lot like a - -
21 - a mistrial.

22 MR. KEEM: Right. I - - - I understand that - -
23 - that position, but I - - - I still think that when
24 couched under severance, there is a remedy for Mr. Everson
25 here.

1 CHIEF JUDGE WILSON: Thank you.

2 MR. BASSETT: Good afternoon, Your Honors. David
3 Bassett for the People.

4 On the severance issue, it's our position that
5 the trial court did not abuse its discretion because there
6 was no irreconcilable conflict, as this court requires
7 under People v. Mahboubian. And that case says you have to
8 look at the core of the defenses of the codefendants. Look
9 at the opening statements in this case. Everson makes a
10 defense about maybe the shots were coming from outside the
11 car. This is his consistent theme. He says it's probable
12 that - - - improbable that any of the shots that struck
13 Jay'mier Gillard, the victim here, came from inside the
14 car. There's this whole other theory - - -

15 CHIEF JUDGE WILSON: So let me - - - let me ask
16 you this. Suppose that they made a timely pre-trial
17 motion? That both of them - - - both defense counsel came
18 in and said - - - one says, I'm going to - - - there's
19 three people in the car, two of them are shooters. I'm
20 going to say it was the driver and the other - - - and the
21 other - - - my codefendant. And the other one comes in I'm
22 going to say the same thing. It was the driver and my
23 other codefendant, it wasn't me. At that point, is it
24 error not to sever?

25 MR. BASSETT: I still think if - - - even if it's

1 brought pre-trial in such a way to demonstrate that kind of
2 conflict, you still need evidence to support the conflict.

3 This case - - - this court has said in People v.
4 Bornholdt that what is said at pre-trial - - -

5 CHIEF JUDGE WILSON: Well, I mean, the evidence
6 is that there's three people in the car, that there's two
7 different shooters, and that the shots come from the car.
8 And let's say you have that evidence. That's not enough?
9 What more would you want?

10 MR. BASSETT: I think affirmative - - - it's up
11 to the defendant - - - it's his burden to show severance
12 with evidence of conflict. To show what his defense is.
13 It's up to him to introduce testimony in some way, which
14 happened to Mahboubian. They both called witnesses at
15 trial.

16 CHIEF JUDGE WILSON: So if a defendant is simply
17 resting on his right not to testify, he can't ever move to
18 sever?

19 MR. BASSETT: Well, the - - - the court said in
20 People v. Cardwell that they can perhaps show a conflict
21 through the way they cross-examine witnesses. So no, you
22 would not necessarily need to testify or introduce
23 evidence.

24 CHIEF JUDGE WILSON: But how are you going to
25 make - - - how are you going to make a pre-trial severance

1 motion then, that's granted?

2 MR. BASSETT: Well, that's why - - - that's why
3 it was denied in this case. Because it was speculative.

4 CHIEF JUDGE WILSON: Well, I mean, how are you
5 ever going to make it? If you're going to - - -

6 MR. BASSETT: I think you need to proffer - - -

7 CHIEF JUDGE WILSON: - - - if you must wait to
8 see what the trial evidence is?

9 MR. BASSETT: I think you need a proffer of what
10 your evidence is going to be and what the codefendant's
11 evidence is going to be.

12 JUDGE RIVERA: Well, I thought - - - I thought
13 they were saying the - - - I think the proffer was counsel
14 has said he's going to point fingers at my client as - - -
15 as the shooter.

16 MR. BASSETT: In what way, though?

17 JUDGE RIVERA: What does that matter?

18 MR. BASSETT: Because you're essentially just
19 saying, well, my argument is going to be that - - - you
20 know, this guy was a shooter, but - - -

21 JUDGE RIVERA: I thought that's what you were
22 pointing to when you talked about the defendant's opening
23 statements, which is also not evidence.

24 MR. BASSETT: I'm simply pre - - - I'm sorry.

25 Let me back up. When I said that, I'm getting at there was

1 two - - - there was one theme for Everson, and that was
2 that the shots came from outside the car. If you look at
3 what Bordies said on summation, he puts forward three
4 theories. He says Everson and Ellerbie were shooters. He
5 says Everson or Ellerbie were shooters. And he also says
6 maybe the shots came from outside the car. If you look at
7 his cross-examination of Ellerbie, he hammers him again and
8 again and again on didn't you say or hear that the shots
9 came from outside the car? Didn't you tell the police
10 that? And he tries to impeach him with these prior
11 statements. He didn't say anything about Everson being a
12 shooter.

13 JUDGE RIVERA: But - - - but if - - - but if
14 other - - - other possible narratives that that codefendant
15 presents directly conflict with the defendant, isn't that
16 the irreconcilable conflict? The fact that some of it may
17 not be in conflict doesn't somehow diminish or eliminate
18 the other conflict, does it?

19 MR. BASSETT: I don't think it rises to the level
20 of - - - of that being a core conflict under Mahboubian.
21 And this court in - - - in a similar case to ours, I
22 believe - - -

23 JUDGE RIVERA: That's the nature of the defense,
24 right? You - - - you either believe - - -

25 MR. BASSETT: Yes.

1 JUDGE RIVERA: - - - these are the shooters or
2 you don't. That's - - - right? That's the choice given to
3 the jury.

4 MR. BASSETT: I think that is one of the theories
5 that counsel for Bordies made, was that these other two
6 guys are the shooters. But as I said, I think he had two
7 other theories which are not mutually exclusive of
8 Everson's defense.

9 And even if you do think there's a - - - a
10 conflict in their defenses, we still have the problem that
11 there's no evidence. There's no evidence supporting the
12 conflict. As you - - - Your Honors discussed, the only
13 evidence of - - - the only conflict came about on
14 summation. There is nothing in the opening statement, in
15 the cross-examination of any of the - - -

16 JUDGE RIVERA: Well, the opening statement's not
17 evidence either.

18 MR. BASSETT: I know, I know. I'm just saying.
19 Just - - -

20 JUDGE RIVERA: But can't you use what comes out
21 in summation to say this is everything you've heard?
22 Here's a narrative. This is how I encourage you to resolve
23 - - -

24 MR. BASSETT: Right.

25 JUDGE RIVERA: - - - on behalf of my client, find



1 the other guy guilty. What - - - whatever is going to be
2 the argument. No?

3 MR. BASSETT: Of course. The summation is very
4 potent.

5 JUDGE RIVERA: Can I ask you what - - - I think I
6 know what your answer is going to be. But what, if any,
7 significance does it play in - - - for resolution of this
8 appeal that the codefendant joined defendant's motion to
9 sever, when the only grounds for that motion was the
10 irreconcilable conflict because that defendant is going to
11 point the finger at my client?

12 MR. BASSETT: I would say that that doesn't bear
13 on the merits of the suppression - - - of the severance
14 motion, which still has to meet the Mahboubian test.

15 JUDGE RIVERA: But the court said it's
16 speculative. How could it be speculative when the - - -
17 when both counsel are saying that's exactly the way this
18 defense is going to be presented?

19 MR. BASSETT: The court is - - - is thinking,
20 well, I have to see how the evidence comes in. And what
21 you're saying is not evidence. And that's what he instruct
22 - - - the - - - the court instructed the jury after the
23 statement on summation. And that's why, on the record, he
24 denied the renewed motion for severance. He said, that's
25 not evidence. I instructed them that that's not evidence,

1 and therefore - - -

2 JUDGE GARCIA: Isn't that - - - at that point
3 it's a mistrial motion. Right?

4 MR. BASSETT: It could be. I - - - I would say -
5 - -

6 CHIEF JUDGE WILSON: How could there - - -

7 JUDGE HALLIGAN: Well, what other remedy could
8 there have been at that juncture?

9 JUDGE CANNATARO: Could the court have really
10 granted severance at that juncture?

11 JUDGE GARCIA: Seems a hard thing but, since it's
12 in front of a jury - - -

13 MR. BASSETT: No. I - - - I - - - I mean, I
14 would argue it's - - - it's - - - you know, it's way too
15 late in the game to grant severance.

16 JUDGE GARCIA: So it's a mistrial. It's, I was
17 prejudiced by summations, mistrial. And the judge, as I
18 recall, says to the attorney, I instructed them, or I will
19 instruct them that this isn't evidence. But there's no
20 other remedial action requested. Right? At that point?

21 MR. BASSETT: Right. That was the only
22 instruction given and none other was requested.

23 JUDGE RIVERA: What - - - what - - - let's take
24 the hypothetical that counsel says I'm requesting a
25 mistrial on prejudice. My client is prejudiced by this

1 statement, which we warned you was probably going to be
2 made at some point, in any event. And - - - and if we're
3 going to be - - - if my client is going to be retried, we -
4 - - we're renewing that motion to sever.

5 MR. BASSETT: That could be done. The - - -
6 essentially, if it - - - the case was ordered mistrial
7 after the summation, the - - - both defendants with more
8 information could renew their motion to sever. And - - -

9 JUDGE GARCIA: But the only - - -

10 MR. BASSETT: - - - maybe there would be a - - -

11 JUDGE GARCIA: The only - - -

12 JUDGE RIVERA: What would be the judge's basis to
13 grant it? Because if the judge's position the first time
14 around was, we'll have to see how it goes and then decides,
15 well, summation is not evidence, it will just be repeated
16 the second time.

17 MR. BASSETT: I believe that severance would be
18 denied for the same reason, because summation is not
19 evidence. And that's what other federal courts of appeal
20 have said, essentially, that you have to measure conflict
21 with evidence - - - the evidence which is introduced at
22 trial. Here there was no conflicting evidence introduced
23 at trial.

24 JUDGE RIVERA: The - - - the - - - the defendant
25 has no burden. Right?

1 MR. BASSETT: Correct.

2 JUDGE RIVERA: Right. So it could be the
3 evidence the prosecution puts forward, right?

4 MR. BASSETT: Correct.

5 JUDGE RIVERA: So why couldn't counsel have
6 relied on that?

7 JUDGE GARCIA: But they didn't here, did they? I
8 mean, they're not relying on anything in the trial
9 testimony? It's purely the summation as I understand it.

10 MR. BASSETT: Correct.

11 JUDGE GARCIA: Right?

12 JUDGE RIVERA: Well, but they are relying on - -
13 - on the characterization by the prosecutor. These are the
14 three men in the car. These are how many shots. These are
15 the weapons. This - - - right? I mean, there's - - -
16 there is a great deal of evidence that counsel or the
17 codefendant's counsel - - - excuse me - - - is relying on.

18 JUDGE GARCIA: Well, you would hope there would
19 be a lot of evidence against both defendants if they had a
20 case that got to the jury. But I - - - I am struggling
21 with this comes out at the summation only. And at that
22 point, to me, if this had been a theme in the trial and at
23 some point the lawyer stands up and says, look, I told you
24 this would happen. This is what's happening. He crossed
25 this witness on this point. He suggested this in this

1 other cross-examination. He got this witness to say X.
2 That to me is severance. I was right. This is
3 irreconcilable.

4 A juror - - - a - - - a lawyer gets up in
5 summation and says something inappropriate to your client,
6 it's on - - - perfectly fine for the other side's client -
7 - - you're prejudiced by. To me, that is a summation
8 mistrial issue.

9 MR. BASSETT: I think that is a - - - one way it
10 could be argued, which is more apt than severance. I still
11 don't think it would be a successful motion for a mistrial.

12 JUDGE CANNATARO: Yeah. I was going to ask you,
13 would you care to rate the merits of that mistrial motion
14 had it been made on these facts?

15 MR. BASSETT: Very - - - very low to nonexistent,
16 Your Honor. I - - -

17 JUDGE SINGAS: Well, I think that would have been
18 more likely to be granted. A mistrial than a severance at
19 summation. I've never seen that. Have you ever read
20 anything like that?

21 MR. BASSETT: I'm not aware of any case law that
22 supports granting severance based on summation alone. I
23 think it's People v. - - -

24 JUDGE HALLIGAN: What about cases - - - are you
25 aware of any cases granting severance mid-trial?

1 JUDGE CANNATARO: What would the judge - - - what
2 - - - what do - - - what should the judge have done when he
3 said, let's see how the evidence comes in? And if the
4 evidence had come in differently, if there was some of this
5 stuff that you were talking about, affirmative evidence
6 that directly contradicts the defendant, what should the
7 judge have done at that point?

8 MR. BASSETT: If - - - if, for example, one of
9 the codefendants had decided to testify - - -

10 JUDGE CANNATARO: Yeah.

11 MR. BASSETT: - - - then you have to sever. And
12 I know it's midway through the trial, and you want to do
13 this as early as possible, but then the conflict has
14 ripened into irreconcilability.

15 JUDGE HALLIGAN: Right. So - - - so the judge
16 identifies, it seems to me at the outset at least, some
17 possibility that evidence could come in that would at least
18 make him consider seriously severing, maybe warrants
19 severance, right?

20 MR. BASSETT: Correct.

21 JUDGE HALLIGAN: And - - - and so you could, I
22 take it you're agreeing, have evidence come in that would
23 ripen and make irreconcilable the conflict, and at that
24 point, even if it is a lot later in the day than pre-trial,
25 you'd have to do something. And it seems to me severance

1 at that juncture is the only option. Yes? And - - - and
2 this is different because why? Is it because it comes even
3 later or just because it - - - it's coming in summation and
4 is not evidence or both?

5 MR. BASSETT: Although the - - - this came very
6 late, I - - - I - - - if - - - if this had been a
7 consistent theme, perhaps where codefendant had been
8 pointing the finger at Everson throughout this trial, and
9 then the summation was especially egregious, perhaps you
10 could say that it rose to the level.

11 JUDGE HALLIGAN: But is that because it's not
12 irreconcilable enough otherwise, or is it because - - - do
13 you think summation can ever warrant severance?

14 MR. BASSETT: I would argue no.

15 JUDGE HALLIGAN: Okay.

16 MR. BASSETT: Not on its own. As - - -

17 JUDGE RIVERA: So let - - - let's say there's a
18 point during the trial, I'll go even fifty percent - - -
19 halfway through the trial, and it now becomes obvious that
20 there's an irreconcilable conflict. Your view is that the
21 judge grants severance? Isn't that a mistrial? Because
22 you cannot now sever. What would you do?

23 MR. BASSETT: My understanding is that the
24 codefendant who has not been prejudiced would - - - sorry.
25 He would be severed. And then - - - the one - - - the one

1 who has been prejudiced gets a new trial, of course. The
2 one who has not been prejudiced continues.

3 JUDGE RIVERA: I see.

4 MR. BASSETT: And I think that is the way I've
5 seen other cases do it in our department.

6 JUDGE RIVERA: So why - - - why couldn't they do
7 that at the submission stage?

8 MR. BASSETT: I think it's - - -

9 JUDGE RIVERA: Let it go to verdict on the
10 codefendant and the other defendant and not on - - -

11 MR. BASSETT: Again, I don't think it's
12 theoretically impossible, but just not under these
13 circumstances. Not based on summation alone. If this was
14 an aggregation of - - -

15 JUDGE RIVERA: I understand. But let's say we
16 disagree with you. Is there any reason that what you just
17 described as the potential remedy, that that could not
18 happen here?

19 MR. BASSETT: It could be - - -

20 JUDGE RIVERA: That is to say, the - - - the
21 trial wasn't a waste.

22 MR. BASSETT: It could be done if you found that
23 - - - you know, one of the defendants, his - - - his trial
24 was sort of intact and his defense had not been impaired.
25 If he's the one pointing the finger, then that person, you

1 know doesn't have the prejudice in order to him. So he
2 gets the jury verdict. The other prejudiced defendant gets
3 the new trial. It could be done that way. It just flies
4 in the face of judicial economy and all the reasons for
5 joinder based on summation alone, which is not evidence.

6 JUDGE RIVERA: Except that both counsel told the
7 judge way in advance, right? Before trial.

8 MR. BASSETT: But again, I think you need more
9 than that, more than speculation of what you think is going
10 to happen at trial.

11 JUDGE RIVERA: Well - - - well, see, that's my
12 problem about the speculation. How is it speculation when
13 both attorneys are communicating to the judge that one
14 defendant is going to point the finger at the other?

15 MR. BASSETT: I think it's up to them to say how
16 that's going to happen. With what evidence? And if they
17 say, well, we don't have any evidence.

18 JUDGE RIVERA: Show their hand to the prosecutor
19 before they even start? And to the codefendant?

20 MR. BASSETT: I think it - - - if you're going to
21 resolve this pre-trial, you have to identify some
22 conflicting evidence. That's the cleanest rule here.

23 JUDGE RIVERA: Okay.

24 MR. BASSETT: That there should be conflicting
25 evidence and that that would justify severance. And then,

1 of course, you have to show conflicting evidence to show
2 the conflict. And then you also have to show that that
3 conflict alone, under Mahboubian, would lead - - - there's
4 a significant danger that would lead the jury to find
5 guilt.

6 And here I would submit that there was a lot of
7 evidence independent of that summation, of course, that
8 pointed the finger with the People's evidence to Everson's
9 guilt. You've got the ballistics evidence. The video
10 evidence. There is DNA of his in that car. You've got his
11 girlfriend's testimony that he borrowed her car, came back
12 after the shooting, stored two guns there, admitted that he
13 killed somebody. Then he says, psyche, just kidding. And
14 you know, then there's this - - -

15 JUDGE RIVERA: It may be a weak defense.

16 MR. BASSETT: There's this feud going on between
17 the - - - the Valley - - - you know, group and the McKinley
18 Park people where the shooting happens. There's Bordies
19 who shot at two days previous - - - or Bordies and Everson
20 are shot at, same car. They're together. Bordies is
21 wounded.

22 JUDGE RIVERA: Let me say this. If - - - if
23 counsel made this motion, codefendant's counsel joins the
24 motion, and it communicated to the judge that that
25 defendant is going to point the finger at this one and - -

1 - and - - - and counsel for the other defendant said, yes,
2 and I'm going to do that at summation.

3 MR. BASSETT: I don't think that's enough.

4 JUDGE RIVERA: Would that be enough?

5 MR. BASSETT: I - - - I - - - if - - - if - - -
6 if he says, well, I'm going to point the finger on
7 summation. I - - - I think - - -

8 JUDGE RIVERA: I'm not even going to give an
9 opening statement because many defense counsel don't.

10 MR. BASSETT: Right.

11 JUDGE RIVERA: I'm not going to give an opening
12 statement. But at summation, I'm going to - - - I'm going
13 to point to him.

14 MR. BASSETT: I think the court would say that's
15 not enough. That is not an irreconcilable conflict under
16 Mahboubian. And it's not unfairly prejudicial under
17 Mahboubian because what summations - - - what lawyers say
18 on summations are not - - - is not evidence.

19 JUDGE CANNATARO: So it's - - -

20 JUDGE RIVERA: So he asked one question on cross-
21 examination of one witness that might suggest or perhaps be
22 an explicit type of question that it was the other
23 defendant, that would be enough? That one question?

24 MR. BASSETT: This court said in People v.
25 Cardwell, that if you have a question that elicits

1 something damaging against that defendant - - -
2 codefendant, that could be a special factor that would
3 warrant severance. Nothing like that happened here. It's
4 just the summation. And it's just one theory out of three
5 on summation.

6 And I would argue under those circumstances there
7 was no basis for severance. The motion was properly
8 denied. And there was sufficient evidence to sustain these
9 convictions for the reasons I put in my brief. And - - -
10 and as this court said in People v. Ramos, which involved
11 shooting into a crowd, that's not incompatible with a
12 finding of intent. You can intend to kill somebody in a
13 crowd.

14 And based on all the circumstances I identified:
15 this feud, the prior shooting, you can - - - the jury could
16 reasonably infer that there was an intent to kill, an
17 intent to retaliate as payback for that shooting.
18 Therefore, it's our position that the conviction should be
19 upheld. Thank you, Your Honor.

20 CHIEF JUDGE WILSON: Thank you.

21 MR. KEEM: To Justice - - - Judge - - - Justice
22 Garcia - - - Judge Garcia, sorry, to your point. The trial
23 court set this up when he said we'll deal with it later.
24 So that's why the objection is based on severance and not
25 mistrial.

1 JUDGE GARCIA: That's a fair point. My - - - my
2 point wasn't so much, well, it's a mistrial now, and try -
3 - - you could have done something else and got another jury
4 in the room. It's what - - - what are you - - - what is
5 the judge's role at certain stages?

6 So if these defenses are coming in on the
7 evidence. Right? And it's clear now. I think at that
8 point, you make a mistrial motion and you've got evidence
9 in the record - - - in their evidence.

10 But if it's at summation stage and it's only at
11 summation stage, at that point, what is the judge's
12 responsibility with respect to the mistrial? To me, an
13 argument would be at that stage, the judge is looking at
14 prejudice from the summation. Right? And is that enough
15 to declare a mistrial?

16 I don't - - - I didn't see any New York cases,
17 certainly. I did see some federal cases - - - I don't know
18 if they were cited in the opposing brief - - - where they
19 seem to be taking that approach. And I know federal rules
20 are different, but just as an analogy, they seem to be
21 saying, look, this developed in summation. It's not
22 evidence. It's not a conflict based on an evidence that
23 developed in trial. So it's prejudice type of analysis.

24 What was the - - - and why is that not the right
25 approach?

1 MR. KEEM: I think the right approach, based on
2 the objection, would be declaring a mistrial and severance
3 at the same time.

4 JUDGE GARCIA: And the result of a mistrial is
5 you get your severance thing back again and you can go
6 forward. I mean, the key thing that is going to be
7 determined is a mistrial. So I don't want to lock in on
8 just the phrasing of that. Obviously, what you want
9 ultimately is a - - - is a severance and a separate trial,
10 whether that happens in the middle of trial or at
11 summation.

12 My issue is more with if it's purely a summation
13 matter to get that mistrial, which will then lead you to
14 make your summation motion again, it, to me that showing is
15 prejudiced by the attorney's statements in summation.

16 It's not evidence that came out in trial. And
17 you know, the federal cases that we've - - - it's not
18 evidence. It can be powerful, summation, but it's not
19 evidence. So you can counter that prejudice with an
20 instruction. Whereas in the trial - - - you know, here
21 come these lines, the trains are coming together here - - -
22 you know, that's a mistrial based on conflicting
23 development theories in the - - - well, in the courtroom.

24 So I - - - I - - - I have trouble looking at it
25 as this - - - not the result being severance, but as a

1 severance analysis at that summation stage.

2 MR. KEEM: I - - - I understand the point. But
3 what we would just say is that it was the content of what
4 was said at severance that created the necessity.

5 JUDGE GARCIA: But let's say you do those motions
6 and - - - and the opposing counsel, the cocounsel says, you
7 know, this is going great. These witnesses are really
8 getting beat up. No one believes this cooperator - - - and
9 not this trial, I'm saying hypothetically. No one's going
10 to believe this cooperator, it's - - - this is - - - get to
11 summation, and you think, hmm, I'm watching the jury.
12 Maybe that's - - - they - - - they kind of do think it's
13 credible. I'm going to go back now and switch back to it's
14 that guy. May have been there, but - - - you know, he - -
15 - what he did. How does the judge deal with that?

16 MR. KEEM: I absolutely understand that concern.
17 But the distinction is we have a pre-trial motion where the
18 court - - -

19 JUDGE GARCIA: No. But you had a pre-trial
20 motion there.

21 MR. KEEM: We - - - oh.

22 JUDGE GARCIA: Like, in my hypothetical, you had
23 a pre-trial motion, but during the trial cocounsel thinks -
24 - -

25 MR. KEEM: And if the codefendant - - -



1 JUDGE GARCIA: - - - hey, you know, this is going
2 great. My whole theory through the trial is I wasn't
3 there. Your cooperators are incredible as - - - you know.
4 Who would believe this? And then they get to the summation
5 and as they have an obligation to do, I have to make the
6 best argument I can for my client. Hmm, that thing I told
7 the judge I was going to do originally, that was a pretty
8 good idea. So I get up and I go back to that. What
9 happens?

10 MR. KEEM: Yeah. I - - - I believe that if that
11 were to happen and the codefendant makes the pre-trial
12 motion, that in those situations there should be a
13 severance - - -

14 JUDGE GARCIA: Mistrial?

15 MR. KEEM: - - - and a mistrial.

16 CHIEF JUDGE WILSON: Thank you.

17 MR. KEEM: Thank you.

18 (Court is adjourned)

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

I, Chrishanda Sassman-Reynolds, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Everson (James), No. 71 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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