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COURT OF APPEALS

STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

No. 147

CHADON MORRIS,

Appellant.

20 Eagle Street
Albany, New York 12207
September 4, 2013

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

Appearances:

BARRY STENDIG, ESQ.
APPELLATE ADVOCATES
Attorneys for Appellant
2 Rector Street
10th Floor
New York, NY 10006

REBECCA HEIGHT, ADA
QUEENS COUNTY DISTRICT ATTORNEY'S OFFICE
Attorneys for Respondent
125-01 Queens Boulevard
Kew Gardens, NY 11415

Sharona Shapiro
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: 147?

2 Counselor, would you like any rebuttal
3 time?

4 MR. STENDIG: Yes, two minutes, please.
5 Good afternoon. I'm - - -

6 CHIEF JUDGE LIPPMAN: Go ahead, counselor.

7 MR. STENDIG: - - - I'm Barry Stendig,
8 appearing for appellant Chadon Morris.

9 This case sets the limit - - - tests
10 whether or not there are any limits on the background
11 exception to the Molineux rule. Although appellant
12 didn't challenge the propriety of the police con - -
13 -

14 CHIEF JUDGE LIPPMAN: They say that they
15 want to let this in, that the 911 call really gives
16 the context for the police conduct, that it gives a
17 total picture of what went on here, and that
18 sometimes, you know, there are real issues, as we
19 know if you read the newspapers every day, with, you
20 know, the interaction between law enforcement and
21 people on the street. What - - - why isn't that a
22 reasonable or legal approach to say that we need this
23 to get the context of what happened there? What's
24 wrong with that?

25 MR. STENDIG: It would be reasonable if the

1 defense challenged the propriety of the police
2 conduct and if appellant did not concede possession
3 of the gun that the police recovered from him.

4 JUDGE READ: So are you relying on the
5 stipulation you offered?

6 MR. STENDIG: It's not a stipulation.

7 JUDGE READ: It wasn't a stipulation? It
8 was to a charge? Is that what it was, a - - -

9 MR. STENDIG: Appellate counsel, in
10 response to the People's motion in limine to
11 introduce the 911 call and the police testimony that
12 appellant fit the description of the robber, said to
13 the judge we're not challenging the propriety of the
14 stop. We're conceding that appellant had the gun.
15 We're presenting a temporary innocent possession
16 defense. Therefore, the reasons why the police
17 stopped appellant on the street are not relevant;
18 they're not an issue in this case.

19 JUDGE GRAFFEO: But how would any of that
20 tell the jury why the police immediately focused on
21 your defendant as opposed to his two companions?

22 MR. STENDIG: Because there was no evidence
23 that - - - without the - - -

24 JUDGE GRAFFEO: Because they immediately
25 focused on your - - - on your client. He's the one

1 that they addressed and put against the car and then,
2 you know, the scuffle - - -

3 MR. STENDIG: That's - - - I think - - -

4 JUDGE GRAFFEO: - - - the scuffle - - -

5 MR. STENDIG: I think - - -

6 JUDGE GRAFFEO: - - - ensued.

7 MR. STENDIG: With all due resp - - -

8 JUDGE GRAFFEO: So why wouldn't the jury
9 wonder why was this young man singled out, as opposed
10 to the other two?

11 MR. STENDIG: The jury only wonders that if
12 the reasons for the stop are introduced into
13 evidence.

14 JUDGE SMITH: Your answer is the jury
15 doesn't have to know?

16 MR. STENDIG: That's exactly it; the jury
17 does not have to know. It only has to know when the
18 police conduct leading up to the arrest is an issue
19 at trial. The police conduct leading up to the
20 arrest was not an issue at this trial.

21 JUDGE ABDUS-SALAAM: But wasn't the
22 prosecution's point here that if we don't give them
23 this background, they will speculate? They don't
24 need to know, but when they get back there in that
25 jury room, they're going to be saying why did they

1 focus on this guy? We didn't hear anything about
2 that. Why this man? There were three of them
3 standing there.

4 MR. STENDIG: This court, in Resek,
5 proposed a solution to that. All the court has to do
6 in that situation is charge the jury that in this
7 case, the stop-and-frisk was lawful and the jury
8 should not speculate as to the reasons for the
9 stop-and-frisk. If the court - - - if this court is
10 concerned about the efficacy of that instruction,
11 then that - - - that could be addressed during voir
12 dire. Just like the court asks jurors during voir
13 dire whether they could follow the presumption of
14 innocence, whether they believe police officers are
15 more credible than citizens, the judge could tell the
16 prospective jurors, this case is not about the
17 propriety of the stop-and-frisk - - -

18 JUDGE ABDUS-SALAAM: So counsel, if we rule
19 in - - -

20 MR. STENDIG: - - - can you follow that?

21 JUDGE ABDUS-SALAAM: If we rule in your
22 client's favor - - - and I guess what you're saying
23 about Resek is that that's the least presidi - - -
24 prejudicial means, that the judge has to accept the
25 least prejudicial means for presenting that evidence.

1 Where do we draw the line? Where do we decide what's
2 the least prejudicial as opposed to something else?

3 MR. STENDIG: I'm not sure I understand - -
4 -

5 JUDGE ABDUS-SALAAM: Or measure.

6 MR. STENDIG: - - - but what - - - my
7 understanding is that evidence of uncharged crimes is
8 presumptively inadmissible. When the People want to
9 put in evidence of uncharged crimes, the judge has to
10 make a balance between the probative value and the
11 prejudicial impact. Here there was no probative
12 value. There is no probative value as to the events
13 leading up to our client's arrest, because our client
14 is not litigating either the propriety of that arrest
15 or the credibility of the police officers concerning
16 that arrest.

17 JUDGE READ: Doesn't it take something more
18 than that to stop the jury from speculating, as Judge
19 Abdus-Salaam said?

20 MR. STENDIG: Well, then what - - - then
21 what's going to happen is that in every case where
22 contraband is discovered pursuant to a stop-and-frisk
23 or an arrest on the street, or even pursuant to a
24 search warrant - - -

25 JUDGE READ: Maybe you could agree to

1 stipulate to the jury that the arrest was legal - - -
2 or that the stop was legal.

3 MR. STENDIG: The appellant - - - well,
4 defense counsel didn't do that, but he essentially
5 was saying that that's - - - that's what I'm doing.

6 JUDGE SMITH: He told the judge - - - he
7 consented to a charge to the effect that there was no
8 illegal stop; is that right?

9 MR. STENDIG: Yes. He essentially
10 consented to the charge that the majority in Resek
11 suggested that the court in Resek should have given
12 to the jury.

13 JUDGE SMITH: What about Tosca?

14 MR. STENDIG: I - - - Tosca is different
15 than this case, Your Honor, because in Tosca, at
16 least according to the decision in the Appellate
17 Division, the police credibility was an issue in that
18 case. The police credibility concerning the events
19 leading up to the arrest and the discovery of the gun
20 on my client was not an issue in this case.

21 JUDGE PIGOTT: Would this have taken away
22 the intent to use against another charge? I mean, if
23 this didn't come in?

24 MR. STENDIG: I'm sorry, I don't - - -

25 JUDGE PIGOTT: One of the charges was that

1 he intended to use the gun against somebody else,
2 right?

3 MR. STENDIG: That's correct.

4 JUDGE PIGOTT: All right. And didn't this
5 kind of complete that narrative? Wasn't that the
6 deal here?

7 MR. STENDIG: That was not the reason why
8 the court let it in.

9 JUDGE PIGOTT: Because - - -

10 MR. STENDIG: The court let it in under a
11 global reason. The court specifically said that
12 police conduct is always an issue in every single
13 case. And because police conduct is an issue in
14 every single case, the court was concerned that the
15 jury might speculate as to why the police stopped Mr.
16 Morris.

17 JUDGE PIGOTT: But if this didn't come in,
18 would there have been any proof as to the intent to
19 use it against another in the case?

20 MR. STENDIG: Yeah, because the gun was
21 loaded, and there's a presumption under statute that
22 if a gun is loaded, it's presumptive evidence of an
23 intent to use unlawfully.

24 JUDGE SMITH: But since it didn't - - -
25 since it didn't come in for its truth, presumably,

1 this wouldn't have - - - this theoretically could not
2 legitimately have helped the People on the - - - on
3 the intent to use, right?

4 MR. STENDIG: That's correct. But it did -
5 - - according to the judge's - - -

6 JUDGE SMITH: Well, let me ask - - -

7 MR. STENDIG: - - - instructions, I think -
8 - -

9 JUDGE SMITH: - - - let me ask a different
10 question. Wasn't the prejudice that - - - yeah, I'll
11 rephrase it. Doesn't the jury's verdict rejecting
12 the intent-to-use count suggest that they were not
13 prejudiced by the introduction of the evidence?

14 MR. STENDIG: I don't - - - I think in this
15 - - - this case was about whether or not my client
16 temporarily and innocently possessed a gun and
17 whether he resisted arrest. The People presented - -
18 - the bulk of the People's proof was about an
19 uncharged gunpoint robbery. They presented the radio
20 run. They presented the transcript of the radio run.
21 They presented two police officers' testimony
22 concerning the contents of the radio run. They
23 presented two police officers' testimony that my
24 client fit the description - - -

25 JUDGE ABDUS-SALAAM: Is your point,

1 counsel, that - - -

2 MR. STENDIG: - - - of one of the robbers.

3 JUDGE ABDUS-SALAAM: Is your point that
4 limiting - - - appropriate limiting instructions
5 given by the judge doesn't cure that? That - - -

6 MR. STENDIG: In this case they didn't cure
7 that. In some case they can cure that. But when the
8 bulk of the evidence in a case in which the issue
9 primarily was whether or not my client temporarily
10 and innocently possessed this gun, the bulk of the
11 evidence is about an uncharged gunpoint robbery, then
12 in this case, the instruction didn't dispel - - -

13 JUDGE SMITH: The 911 call itself got in,
14 didn't it?

15 MR. STENDIG: The 911 call and the
16 transcript of the call got in.

17 JUDGE SMITH: And then they played - - - as
18 I read it, the prosecutor actually played the 911
19 call to the jury - - -

20 MR. STENDIG: That's correct.

21 JUDGE SMITH: - - - in summation?

22 MR. STENDIG: That's correct. And the
23 transcript came in, and the two police officers'
24 testimony - - -

25 JUDGE RIVERA: Why isn't that part of the

1 narrative around resisting arrest?

2 MR. STENDIG: Because the resisting arrest
3 concerns evidence subsequent to the discovery of the
4 gun.

5 JUDGE SMITH: Did the - - - was it argued
6 below that it was admissible on the resisting arrest
7 point?

8 MR. STENDIG: No, it wasn't.

9 JUDGE SMITH: So presumably, we're barred
10 by LaFontaine from affirming on that ground?

11 MR. STENDIG: They're barred on general
12 preservation grounds, yes.

13 CHIEF JUDGE LIPPMAN: Okay, counselor.
14 Thanks. You'll have rebuttal.

15 MS. HEIGHT: May it please the court. My
16 name is Rebecca Height. I'm here on behalf of the
17 Office of Richard A. Brown.

18 CHIEF JUDGE LIPPMAN: Counselor, why wasn't
19 what was let in here really highly prejudicial in
20 terms of - - - and weighed against the probative
21 value in relation to the charge against defendant?
22 Why isn't there an imbalance here in what happened?

23 MS. HEIGHT: Well, in this case, the - - -

24 CHIEF JUDGE LIPPMAN: Isn't it prejudicial
25 to let the 911 call come in, actually play it?

1 MS. HEIGHT: This court's recognized in the
2 admission of uncharged crime evidence, there's always
3 going to be some prejudice to the defendant.

4 CHIEF JUDGE LIPPMAN: No, no, but I'm
5 saying in this case, why isn't it that the
6 prejudicial effect is far greater than any probative
7 value when there's a charge here that has nothing to
8 do - - - where the call isn't about an element of
9 this crime?

10 MS. HEIGHT: Well, in evaluating the
11 potential prejudice to the defendant, the court can
12 consider the trial court's instructions in the
13 conduct of the trial. And in this case, the trial
14 court was very thorough in its instructions to the
15 jury on four separate occasions, instructing the jury
16 that the 911 call was not admitted for - - -

17 CHIEF JUDGE LIPPMAN: And can that cure - -
18 -

19 MS. HEIGHT: - - - the truth of the matter
20 - - -

21 CHIEF JUDGE LIPPMAN: Do you think it can
22 cure?

23 MS. HEIGHT: Well, I think this case
24 presents the very good demonstration of how that was
25 cured, insofar as the jury did render what could be

1 described as a discrete and discerning verdict in
2 that - - -

3 CHIEF JUDGE LIPPMAN: Yeah, but didn't - -
4 - wasn't their whole defense to this charge totally
5 undermined by allowing that in?

6 MS. HEIGHT: No, Your Honor, because in
7 this case - - -

8 CHIEF JUDGE LIPPMAN: No?

9 MS. HEIGHT: - - - again, the jury
10 acquitted the defendant on the intent to use
11 unlawfully against another. Were the jury to have
12 considered the 911 call as substantive evidence
13 against the defendant, in conjunction with the
14 presumption, it's very likely - - -

15 CHIEF JUDGE LIPPMAN: But his whole defense
16 - - -

17 MS. HEIGHT: - - - that they would have - -
18 -

19 CHIEF JUDGE LIPPMAN: - - - is based on
20 temporary possession. Isn't it - - - isn't it
21 undermined by this?

22 MS. HEIGHT: Well, the fact of the matter
23 is, is that the defendant's account of the temporary
24 and lawful possession was really incredible on its
25 face. The defendant told a story in which he was out

1 to buy cigarettes and he found a loaded firearm
2 underneath and - - - between and really underneath
3 two dumpsters.

4 JUDGE SMITH: I mean, it may be the most
5 ridiculous story in the world, but then you didn't
6 need the - - - I mean, you didn't need the 911 call,
7 then. You didn't need all this stuff. You had a
8 great case. Why do you - - - why do you have to play
9 a tape of a man saying somebody just - - - somebody
10 meeting the description of this defendant just held
11 me up at gunpoint, and then tell the jury, but don't
12 think about whether he held anyone up at gunpoint.
13 Isn't that kind of a tough situation?

14 MS. HEIGHT: Well, I'm not - - - I'm not
15 sure the prosecution knew about the defendant's
16 account at the time of the Molineux application. And
17 I would also argue that in this case, the proba - - -
18 the information contained in the - - -

19 JUDGE SMITH: Yeah, the - - -

20 MS. HEIGHT: - - - 911 - - -

21 JUDGE SMITH: - - - the defen - - - the
22 prosecution didn't realize what a good case they had,
23 so they had to bolster it with some inadmissible
24 evidence?

25 MS. HEIGHT: The prosecution recognized

1 that the police conduct could always be at issue in
2 this case; that that 911 call contained information
3 that was necessary for the - - -

4 JUDGE SMITH: So I mean, is it true that
5 police conduct is always admissible - - - is al - - -
6 no, not admissible, is always at issue? That's what
7 the judge said. So the police are going to be on
8 trial in every case?

9 MS. HEIGHT: It's true that in this case
10 the police conduct - - -

11 JUDGE SMITH: I mean, the logic of that is
12 that you can always put in whatever prompted the
13 police to investigate and then tell the jury, oh,
14 don't worry, that's not for the truth of the matter
15 stated.

16 MS. HEIGHT: There would still be the
17 requirement that the court balance the probative
18 value versus the potential prejudice to the
19 defendant.

20 JUDGE SMITH: So do the balancing here.
21 How - - - yeah, why is this so much more probative
22 than it is prejudicial?

23 MS. HEIGHT: Because in order for the jury
24 to fairly and accurately and honestly assess the
25 police officers' actions throughout the entire

1 incident - - -

2 JUDGE SMITH: Which they were not supposed
3 to do at all, right? I mean, the police officers'
4 actions are completely - - - are completely
5 irrelevant to the case. You're just worried that
6 they - - - that the jury will speculate about it and
7 - - - and reach - - - and do some jury nullification
8 because they're mad at the police officers.

9 MS. HEIGHT: The police officers' conduct
10 was highly relevant to this case. This really was a
11 case about the police officers' credibility. There
12 were numerous contested points between - - -

13 JUDGE SMITH: Well, on - - - I can see that
14 on the resisting arrest point, but you did - - - but
15 I think he's probably right that you didn't put this
16 in on the resisting arrest point. Apart from
17 resisting arrest, how could the police officers'
18 conduct be logically relevant?

19 MS. HEIGHT: Because the jury's assessment
20 of the police officers' conduct from the beginning of
21 this incident to the end was relevant to their
22 judgment of the police officers' testimony in this
23 case whether - - -

24 JUDGE SMITH: The only issue before them
25 was transitory possession. What does the police

1 officers' credibility have to do with that?

2 MS. HEIGHT: Well, there was a - - - there
3 was a conflict between the police officers' testimony
4 as well and the defendant's testimony insofar as a
5 number of things: Which direction was the defendant
6 walking when he was stopped? Did he have a bandage
7 on his chin when he was stopped? Was the gun in fact
8 in the defendant's waistband when he was stopped by
9 the police officers or was it, as the police officers
10 have testified - - -

11 CHIEF JUDGE LIPPMAN: But they concede the
12 stop is good. They say it's okay, not a problem,
13 right? Isn't that - - -

14 MS. HEIGHT: But the stop wasn't the only
15 thing that the 911 call and the information it
16 contained was admitted in order to establish.

17 JUDGE SMITH: So your argument is that if
18 the jury concludes or speculates that the police
19 arbitrarily picked on this defendant for no good
20 reason, just a racial prejudice or whatever, that
21 that would lead them to resolve credibility issues
22 against the officers?

23 MS. HEIGHT: That's part of the argument.
24 The other part of the argument, though, is that it's
25 necessary to analyze how the police officers even

1 stopped this defendant. Even were the jury to follow
2 an instruction not to speculate at all about the
3 reasons for the police officers stopping the
4 defendant, they would still be perplexed as to why
5 the police officers, virtually upon sight of the
6 defendant, told him to stop and then immediately
7 placed him against the trunk of their car with one
8 officer's hand against his back while the other
9 officer simultaneously conducted a frisk in which - -
10 -

11 JUDGE ABDUS-SALAAM: Counsel, you don't
12 think that would be cured by the judge saying to the
13 jury, there's no issue here about whether the stop
14 was lawful?

15 MS. HEIGHT: I don't think that that
16 instruction would convey to the jury that the police
17 officers' urgent and aggressive response was
18 appropriate, entirely appropriate under the
19 circumstances.

20 CHIEF JUDGE LIPPMAN: But that's not at
21 issue, is it?

22 MS. HEIGHT: Of - - - I do believe that is
23 at issue because the jury's - - -

24 CHIEF JUDGE LIPPMAN: On a temporary
25 possession of a gun defense, that's at issue?

1 MS. HEIGHT: Because the jury's evaluation
2 of the police officers' conduct and credibility would
3 necessarily affect their evaluation of the entire
4 case. And there were numerous points of dispute
5 between the police officers - - -

6 CHIEF JUDGE LIPPMAN: Don't you think this
7 is a form of bolstering, though? You don't think
8 this is just tota - - - unnecessary?

9 MS. HEIGHT: I think that this is part of
10 the prosecution.

11 CHIEF JUDGE LIPPMAN: Isn't it a better
12 context to convict the defendant because we know
13 about this 911 call, which has nothing to do with the
14 particular issue, with the particular crime charged?
15 Isn't that what bolstering is?

16 MS. HEIGHT: I think that this - - - in
17 this case it was admitted in order to explain the
18 police actions and the jury having the proper
19 information to analyze - - -

20 CHIEF JUDGE LIPPMAN: But no one's
21 questioning the police actions.

22 MS. HEIGHT: But the defendant was
23 questioning the police actions, and it was actually
24 telegraphed by the defendant, even at the time of the
25 Molineux application, that he would contest the

1 police conduct in this case. During the Molineux
2 application, the defendant did not offer to stipulate
3 that the police officers' actions were entirely
4 appropriate throughout the - - -

5 JUDGE SMITH: Well, but you said he
6 telegraphed that he was contesting it by not offering
7 to stipulate?

8 MS. HEIGHT: Your Honor - - -

9 JUDGE SMITH: I mean, I can - - - you don't
10 open a door by not offering a stipulation.

11 MS. HEIGHT: Well, the prosecution did
12 mention that it was concerned that the 911 call was
13 necessary to explain the police actions. And part of
14 explaining the - - - and in response, the defense
15 counsel only offered to stipulate or perhaps - - -

16 JUDGE SMITH: Okay. But that's not the way
17 - - - I mean, I could understand that if the police -
18 - - that if the defense counsel, even subtly or
19 indirectly, tried to take advantage of - - - or to
20 suggest that the police stop was improper, that the
21 door is opened. But he doesn't open the door by
22 silence.

23 MS. HEIGHT: But he didn't remove the - - -
24 he didn't remove the issue of police conduct from - -
25 -

1 JUDGE SMITH: Is it - - - you're saying
2 that the defense lawyer has an obligation,
3 affirmatively, to remove an irrelevant issue from the
4 case, and otherwise, prejudicial stuff comes in to
5 prove this irrelevant point?

6 MS. HEIGHT: No, I'm arguing that it's
7 relevant for the prosecution to attempt to establish
8 the context for the police conduct, and it was
9 relevant in this case, and in this case the probative
10 value outweighed the prejudice to the defendant.

11 CHIEF JUDGE LIPPMAN: Okay, counsel.

12 MS. HEIGHT: Thank you.

13 CHIEF JUDGE LIPPMAN: Thanks.

14 Counselor, rebuttal?

15 MR. STENDIG: Yes, just briefly. Opposing
16 counsel said that defense counsel didn't alert the
17 court that it was going to rely on a temporary
18 innocent possession defense at the time of the motion
19 in limine. But at Appendix 38 to 39, defense counsel
20 specifically mentioned that to the court.

21 JUDGE SMITH: What - - -

22 CHIEF JUDGE LIPPMAN: All right.

23 JUDGE SMITH: What about the point that
24 there was a conflict in the officers' and the
25 defendant's testimony? There was - - - although it

1 didn't go directly to the transitory possession
2 issue, they told different stories of the encounter.

3 MR. STENDIG: They told different stories
4 concerning what happened after the police officer - -
5 -

6 JUDGE SMITH: Right.

7 MR. STENDIG: - - - recovered - - -

8 JUDGE SMITH: Right.

9 MR. STENDIG: - - - the gun.

10 JUDGE SMITH: In evaluating that, couldn't
11 the jury - - - isn't it likely that the jury would be
12 prejudiced by the apparent fact that the officers
13 rushed at this one guy for no reason? In other
14 words, if the officers appear to be bad cops or
15 untrustworthy, doesn't that taint the jury's
16 consideration of the credibility issue?

17 MR. STENDIG: I think - - - with all due
18 respect, I think that's reasoning backwards. If the
19 evidence concerning the events leading up to the
20 arrest, the 911 call and the testimony that my client
21 fit the description of the robber, never are
22 introduced, then the narrative of the police officers
23 starts with: we saw my client on a particular
24 street; we recovered a gun from him. Then the issue
25 becomes whether my client - - - whether the - - -

1 whether the police are credible or my client's
2 credible as to the events subsequent to that.

3 JUDGE SMITH: Can you - - - is there any
4 merit to the idea that they should be allowed to
5 explain why they picked on him and not the other two
6 guys?

7 MR. STENDIG: There aren't any other two
8 guys if - - - if the radio run doesn't come into
9 evidence. The only way the jury knows about the - -
10 -

11 JUDGE SMITH: Weren't there - - - there
12 were two men present with him when the police - - -

13 MR. STENDIG: I don't think so, Your Honor,
14 no. He was alone.

15 JUDGE SMITH: I remember differently.

16 MR. STENDIG: So - - -

17 CHIEF JUDGE LIPPMAN: Okay.

18 MR. STENDIG: So - - -

19 CHIEF JUDGE LIPPMAN: Go ahead.

20 MR. STENDIG: - - - he's not singled out.

21 JUDGE ABDUS-SALAAM: Well, even if that's
22 true, counsel, the police - - - how did they know he
23 had a gun? I mean, you know, they have X-ray vision,
24 they can see that the gun was in his waist? Was it
25 obvious? You know - - -

1 MR. STENDIG: That's specifically - - -

2 JUDGE ABDUS-SALAAM: - - - would the jury
3 be asking - - -

4 MR. STENDIG: - - - the purpose of the - -
5 -

6 JUDGE ABDUS-SALAAM: - - - things like
7 that?

8 MR. STENDIG: - - - of the instruction
9 suggested by the court in Resek, that this is not of
10 the jury's concern.

11 JUDGE READ: Well - - -

12 MR. STENDIG: This is not for the jury to
13 speculate to.

14 JUDGE READ: So you say Resek - - - Resek
15 controls this?

16 MR. STENDIG: Absolutely; Resek controls
17 this.

18 JUDGE READ: What about Tosca? Resek
19 limited Tosca? Resek overruled Tosca?

20 MR. STENDIG: Tosca and Resek are
21 different, because in Tosca, at least according to
22 the Appellate Division decision in Tosca, the police
23 credibility, concerning the events leading up to the
24 arrest, was an issue. The police credibility
25 concerning the events here was not an issue.

1 JUDGE SMITH: I looked at the Appellate
2 Division decision in Tosca; I'm having trouble seeing
3 that.

4 MR. STENDIG: It - - - well, if I may, Your
5 Honor - - -

6 JUDGE SMITH: Well, we shouldn't take
7 everyone's time to - - - I mean, we can - - -

8 MR. STENDIG: Okay. I - - -

9 CHIEF JUDGE LIPPMAN: Well - - -

10 JUDGE RIVERA: Counsel - - -

11 CHIEF JUDGE LIPPMAN: Well - - -

12 JUDGE RIVERA: If I can ask you counsel - -
13 -

14 MR. STENDIG: Yes.

15 JUDGE RIVERA: - - - just on a different
16 matter, is there any concern about the instructions
17 that the judge actually gave and the number of times
18 the judge actually gave them?

19 MR. STENDIG: Well, I think - - - I'm not
20 trying to be flippant - - - if someone tells you over
21 and over not to consider something or not to think
22 about something, you're probably going to start
23 thinking about it. To use the loss - - -

24 JUDGE RIVERA: So the combination of the
25 911 tape and the other material that - - -

1 MR. STENDIG: Yes.

2 JUDGE RIVERA: - - - you're talking about,
3 and these four, at least four that your opponent
4 conceded to - - -

5 MR. STENDIG: Right.

6 JUDGE RIVERA: - - - you say that went over
7 the line?

8 MR. STENDIG: Yeah. I'm not trying to be
9 flippant. If I tell you four times not to think
10 about a pink elephant, you're going to probably start
11 thinking about - - -

12 CHIEF JUDGE LIPPMAN: Okay.

13 MR. STENDIG: - - - a pink elephant.

14 CHIEF JUDGE LIPPMAN: Okay. Okay,
15 counselor, thanks. Thank you both. Appreciate it.

16 (Court is adjourned)

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

I, Sharona Shapiro, certify that the foregoing transcript of proceedings in the Court of Appeals of The People of the State of New York v. Chadon Morris, No. 147 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Sharona Shapiro

Signature: _____

Agency Name: eScribers

Address of Agency: 700 West 192nd Street
Suite # 607
New York, NY 10040

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