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COURT OF APPEALS  
STATE OF NEW YORK

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PEOPLE,

Respondent,

-against-

NO. 38

MICHAEL SAENGER,

Appellant.

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20 Eagle Street  
Albany, New York  
April 19, 2023

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

Appearances:

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1 CHIEF JUDGE WILSON: Next one is 38, People v.  
2 Michael Saenger. My apologies.

3 I'll give counsel a minute to settle.

4 MR. FELDMAN: I'm sorry?

5 CHIEF JUDGE WILSON: Go ahead. Thank you.

6 MR. FELDMAN: Good afternoon. Sam Feldman for  
7 Appellant, Michael Saenger. I'd like to reserve two  
8 minutes for rebuttal, please.

9 CHIEF JUDGE WILSON: Yes.

10 MR. FELDMAN: This court has laid out three  
11 essential purposes that an indictment serves in People v.  
12 Sanchez and other cases, and the count of indictment in  
13 this case that charged, aggravated family offense, failed  
14 to accomplish any of those purposes.

15 The first purpose is notice. The indictment  
16 provides the defendant with fair notice that the  
17 accusations made against him so that he will be able to  
18 prepare a defense.

19 JUDGE SINGAS: Counsel, I may agree with you if  
20 the indictment had thirty or forty crimes on it, but  
21 looking at the four corners of this indictment and the fact  
22 that only one of the crimes met the specifications, how can  
23 you argue that the defendant didn't have notice?

24 MR. FELDMAN: It's true that one other count of  
25 the indictment was a qualifying offense, but the problem is

1 the qualifying offense did not have to be charged  
2 separately in the indictment. So while that other count  
3 could have been and ultimately turned out to be the  
4 underlying offense, there was no basis for defense counsel  
5 to assume that it was because - - -

6 JUDGE TROUTMAN: And with respect to the CPL, do  
7 you look at each individual count as to its sufficiency, or  
8 do you look at the whole indictment to determine whether or  
9 not that individual count is sufficient?

10 MR. FELDMAN: You can look at the whole  
11 indictment, but each individual account is jurisdictionally  
12 defective or not on - - - on its own.

13 JUDGE TROUTMAN: And one count doesn't mean, of  
14 course, then if it's defective that the whole indictment  
15 would have to be dismissed?

16 MR. FELDMAN: That's correct.

17 JUDGE TROUTMAN: So in this particular instance,  
18 you have a charge that says - - - it refers to a number of  
19 misdemeanors. Is that the issue here?

20 MR. FELDMAN: Yes. Many, many misdemeanors that  
21 are listed in the statute that it could've been, which is  
22 why the mere fact that that count cited the statute did not  
23 actually specify what it was that Mr. Saenger was - - -

24 JUDGE SINGAS: But there was only one - - - one  
25 of those of the fifty that are listed was actually on this

1 indictment. So I understand your argument, and I  
2 sympathize with it if we were talking about an indictment  
3 that, you know, even ten or fifteen counts, several of  
4 which would have fit.

5 You know, my concern here, as you mentioned  
6 correctly, an indictment is to give notice. So I don't  
7 know how not reading the four corners of this indictment  
8 you don't have notice of what the - - - you know, what the  
9 specific crime is. And to your point about it shouldn't be  
10 a - - - it doesn't have to be a charged crime is the fact  
11 that it is a charged crime and the defendant was already  
12 defending against that. Doesn't that also go against your  
13 argument?

14 MR. FELDMAN: Well, let me put it this way.  
15 Let's say that counsel assumed that because second degree  
16 criminal contempt was charged separately that that must be  
17 the underlying offense. Prepared for trial accordingly, he  
18 shows up to trial, and then at trial, perhaps at the charge  
19 conference, which is where it was eventually  
20 specified - - - here the prosecution says the underlying  
21 offense is menacing, third degree menacing, counsel would  
22 have no basis to complain if the indictment is  
23 jurisdictionally sufficient - - -

24 JUDGE CANNATARO: Is that what happened here?

25 MR. FELDMAN: No. Here, as the transcript makes

1 clear, the judge and defense counsel showed to the charge  
2 conference having no idea what the count referred to, and  
3 the prosecutor said - - -

4 JUDGE TROUTMAN: And how many misdemeanors are  
5 referred to in this section?

6 MR. FELDMAN: I believe it depends on how you  
7 count. I think there's fifty - - -

8 JUDGE TROUTMAN: Well, there's fifty-four  
9 offenses, thirty-six felonies and eighteen misdemeanors.

10 MR. FELDMAN: Right. Well, then in that case,  
11 eighteen misdemeanors would be the number.

12 JUDGE TROUTMAN: So if you're the accused, how do  
13 you know which one - - - how do you check to see if the  
14 grand jury indicted the defendant based on what the people  
15 claim they did; or that later on they decide no, we're  
16 going to substitute it for another?

17 MR. FELDMAN: Right. Exactly, Your Honor. And  
18 that goes to the second purpose of an indictment that this  
19 court laid out in People v. Sanchez, which is that it  
20 provides some means of insuring that the crime for which  
21 the defendant is brought to trial is in fact the one for  
22 which he was indicted by the grand jury rather than some  
23 alternative ceased upon by the prosecution. Here, there  
24 was no such constraint.

25 JUDGE TROUTMAN: But about Judge Singas's

1 argument that, well, that one of those misdemeanors was in  
2 fact charged in the indictment and another count?

3 MR. FELDMAN: True. But again, that didn't  
4 constrain the prosecution. Nothing would have stopped the  
5 prosecutor at that charge conference from saying the  
6 underlying account here is criminal obstruction of - - -

7 JUDGE SINGAS: I get that, right, but that's not  
8 what happened here, right? So we're looking at the facts  
9 of this case, and in this case, that scenario didn't  
10 happen. And I believe the defendant did have the  
11 opportunity to review the grand jury minutes as well. So  
12 having reviewed the grand jury minutes and reading the  
13 indictment, I'm having trouble trying to figure out why the  
14 notice requirement wasn't satisfied in this case. I hear  
15 what you're saying generally.

16 MR. FELDMAN: Well, I think there's sort of two  
17 answers I'd make to that.

18 First, I think that would go to a prejudice  
19 analysis, what happened in this case, but there's no  
20 prejudice required for a jurisdictional defect. I mean,  
21 this court has said in *People v. Dreyden*, the test for a  
22 jurisdictional defect in the accusatory instrument is  
23 simply whether the accusatory instrument failed to supply a  
24 defendant with sufficient notice of the charged crime to  
25 satisfy the demands of true process and double jeopardy.

1 So for that, we don't look at what happened at trial; we  
2 just looked at the - - - accusatory instrument itself.

3 And second, just as to the access to grand jury  
4 minutes, because the indictment itself did not specify or  
5 constrain the prosecutor to one particular charge, in a  
6 way, the evidence before the grand jury wasn't really the  
7 relevant - - -

8 JUDGE TROUTMAN: Did the bill of particulars help  
9 clarify things?

10 MR. FELDMAN: It didn't because it didn't specify  
11 which of these many misdemeanors it could have been. It  
12 just basically repeated the allegations again, which could  
13 have supported multiple misdemeanors from that list.

14 And finally, just to - - - for the sake - - -

15 JUDGE RIVERA: But you can see it if had - - - at  
16 that point, because you do actually look, or you can look,  
17 beyond the four corners of the indictment because one can  
18 look at the bill of particulars, correct?

19 MR. FELDMAN: Yes, that's true. The bill of  
20 particulars can cure the defect in the indictment itself.

21 JUDGE RIVERA: But that - - - your position is  
22 that's as far as you can go. You can't - - - if it's  
23 jurisdictionally defective, you can't then look at what may  
24 have gone on at trial or a charged conference or something  
25 else?

1 MR. FELDMAN: Yes, that's right. Exactly, Your  
2 Honor.

3 And for the sake of completeness - - -  
4 completeness, I should mention the third purpose of an  
5 indictment, which wasn't served here, which is the double  
6 jeopardy function. "An indictment protects a criminal  
7 defendant from prosecution at another time for the same  
8 offense". Again, that's quoting from Sanchez.

9 This count of the indictment basically said, you  
10 know, Mr. Saenger did one of many possible things in the  
11 county of Queens on this date. In a future prosecution,  
12 that wouldn't really be enough to point to, to say whether  
13 - - -

14 JUDGE GARCIA: But would the bill of particulars  
15 help you with that? I mean, it does lay out the conduct.  
16 I'm not sure the double jeopardy rules are exactly in that  
17 context, but could you be prosecuted for one of the other  
18 crimes related to the conduct in the bill of particulars?

19 MR. FELDMAN: I would - - - if the future  
20 indictment referred - - -

21 JUDGE GARCIA: Was based on that same conduct,  
22 right? I mean, granted, it could be multiple crimes based  
23 on that conduct that could have been used as the - - - as  
24 the crime here. But let's say there is a conviction, and  
25 they go with the one they picked. Could you then be - - -



1 your client then be charged with another crime based on  
2 that same conduct?

3 MR. FELDMAN: So in other words, could you point  
4 to the bill of particulars to raise a future - - -

5 JUDGE GARCIA: Double jeopardy.

6 MR. FELDMAN: - - - double jeopardy. It's an  
7 interesting question. I don't know that there's a case  
8 that's settled that in one direction or the other about  
9 whether you can use a bill of particulars for that. So I  
10 guess we'd have to say it's an unsettled question as far as  
11 I know.

12 I'm happy to address further questions on that  
13 issue. But actually I see my time is up, so I'll save it  
14 for rebuttal.

15 MS. FENN: From the Office of Melinda Katz,  
16 assistant district attorney Danielle Fenn for respondent.  
17 May it please the court.

18 I would like to address the ineffective  
19 assistance of counsel claim.

20 JUDGE GARCIA: Well, Counsel, could we start with  
21 this issue first?

22 MS. FENN: Yes.

23 JUDGE GARCIA: My question is notice of what do  
24 you have to give them? Because we could parse the  
25 indictment and say, you know, okay, this other count is the

1           one you meant; or we can look at the conduct and say, does  
2           the - - - does this meet the elements of these various  
3           other crimes? But what's to stop the prosecution from  
4           getting to the charging conference and having one idea in  
5           their head; maybe we were going to charge one of these  
6           other things, but hey, we didn't really make that; so no,  
7           we really meant the one we charged in count IV.

8                       MS. FENN: In terms of this case, notice requires  
9           - - - per the statute, notice require that he's charged  
10          with aggravated family offense, and here, there was only  
11          one count in the indictment that would qualify as a specify  
12          offense. So this defendant had - - -

13                      JUDGE GARCIA: Sure, but it doesn't have to be  
14          charged in the indictment, right?

15                      MS. FENN: That's correct. It does not have to  
16          be charged in the indictment, but here it was. So - - -

17                      JUDGE TROUTMAN: So since it doesn't have to be -  
18          - -

19                      JUDGE GARCIA: I'm sorry.

20                      It's charged in the indictment as a separate  
21          crime, and I think in that sense, the defendant certainly  
22          has notice that he's defending against that conduct in that  
23          charge. But there may be other elements to a different  
24          crime that you may have in your head that you're going to  
25          use as the crime in the other count. He doesn't - - - he

1 doesn't know that, right?

2 So it just comes down to me there's two ways you  
3 can do this. You could - - - well, there's three. You  
4 could put what you mean in the indictment; you could do it  
5 in the bill of particulars; or we could do what we're doing  
6 here. And it seems to me that the best way would be 1 or  
7 2, and why would we encourage 3?

8 MS. FENN: 1 and 2 either specifically saying the  
9 specified offense to wit, and fill in the blank - - -

10 JUDGE GARCIA: Right.

11 MS. FENN: - - - or the bill of particulars  
12 sentence may - - -

13 JUDGE GARCIA: And neither of those things - - -

14 MS. FENN: - - -very well be the best practice.

15 JUDGE GARCIA: - - - do that here.

16 MS. FENN: That's correct. That may be the best  
17 practice, but here it wasn't fatal because defendant did  
18 have notice of the crime that he was charged with the  
19 specific offense because it was separately included in the  
20 indictment. So one of the purposes of an indictment is to  
21 provide notice so the defendant has information so he could  
22 defend against the crimes he charged of.

23 JUDGE GARCIA: Maybe you meant something else  
24 originally. Maybe you had a different crime in mind for  
25 that, and then you get to the end of the trial, you realize

1           you haven't proved it, and you're like, no we meant the  
2           charge in the underlying - - - the other count. How do we  
3           know that's not true?

4                       MS. FENN: Well, in this case, it was the  
5           indictment in the separate charge, but it was also the  
6           information in the bill of particulars because that only  
7           supported the criminal contempt. Defendant, when he was  
8           charged with the felony complaint, was charged with  
9           obstruction of breathing, and now defendant posits that  
10          that might have been something that the prosecutor could  
11          have used as a specified offense.

12                      But the information in the bill of particulars  
13          excludes that because the defendant didn't choke the  
14          complainant. Her breathing was never obstructed.

15                      JUDGE TROUTMAN: Well - - -

16                      MS. FENN: So - - - I'm sorry.

17                      JUDGE TROUTMAN: - - - with respect to the CPL,  
18          do you look at the sufficiency of an individual count; and  
19          when you look at an individual count, does it itself have  
20          to be sufficient? Do all the elements making - - - do they  
21          have to make out a crime?

22                      MS. FENN: Yes. I believe every count in an  
23          indictment does have to be sufficient.

24                      But in this case it was because it was  
25          incorporated by reference. The language with all of the

1 fifty odd - - -

2 JUDGE TROUTMAN: How is a defendant to know that,  
3 just because it happened to be there?

4 MS. FENN: No, because this court has held that  
5 incorporation by reference is sufficient - - -

6 JUDGE TROUTMAN: That is when it is clear it's  
7 referring to a more limited indication. You can refer to  
8 the particular section, but it's one crime. Here, there  
9 are a number of misdemeanors that it could have been.

10 MS. FENN: Yes. There are a number of  
11 misdemeanors listed in this statute, sure.

12 JUDGE TROUTMAN: Then why isn't it - - - why  
13 isn't it the People's responsibility to make it clear to  
14 not only the defendant, but also to the grand jury? Here's  
15 the crime.

16 MS. FENN: In this case, it was clear to - - - to  
17 answer that question in reverse - - - in terms of the grand  
18 jury. The grand jury was charged that the specified  
19 offense was criminal contempt in the second degree. And at  
20 the charge conference, the prosecutor did tell the court  
21 the way we charge this in the grand jury is that their - -  
22 - given the charge - - -

23 JUDGE TROUTMAN: The court seemed confused.

24 MS. FENN: The court nearly clarified it, and it  
25 wasn't that the court - - -



1 JUDGE RIVERA: But isn't the notice when you get  
2 the documents, not when you're on the charge conference?  
3 The point of the notice is not at the backend, right?

4 MS. FENN: But in this case, the facts of the  
5 case show the defendant did have notice, because he never  
6 said - - - he had the opportunity to - - -

7 JUDGE RIVERA: Because it's one - - -

8 MS. FENN: - - - raise his - - -

9 JUDGE RIVERA: Because there's only one count  
10 that fits - - -

11 MS. FENN: There's only one count that could - -  
12 -

13 JUDGE RIVERA: - - - the qualifying offenses?

14 MS. FENN: Yes, Your Honor.

15 JUDGE RIVERA: And that is listed.

16 Let me ask you this. Do you agree with what  
17 Judge Singas had mentioned before when she was asking  
18 questions of your adversary that it would be different if  
19 there was more than one count that would've been a  
20 qualifying offense that was charged in the indictment? Do  
21 you agree that that would be different? Because then the  
22 defendant doesn't know which is the - - - which count is  
23 the qualifying count the prosecutor's relying on.

24 MS. FENN: Yes, Your Honor.

25 JUDGE RIVERA: Okay. So then I'm having

1 difficulty seeing the difference between that if you  
2 concede that, and - - - one is listed, but at the charge  
3 conference, they can rely on something else because it  
4 doesn't have to be listed as a separate count?

5 MS. FENN: In that case - - - well, to go back to  
6 the facts of this case, there really - - - it was - - - it  
7 was the fact that it was separately charged, and it was the  
8 only crime in the bill of particulars that would have fit.  
9 Because in a hypothetical situation where there - - - there  
10 are fifty odd crimes that it could be under the statute,  
11 and maybe there were other - - -

12 JUDGE RIVERA: Okay.

13 MS. FENN: - - - options and - - -

14 JUDGE RIVERA: So then - - - so then it is your  
15 position that because it's only that one count, it's the  
16 one that is a qualifying offense, that the prosecutor  
17 couldn't do what counsel is saying, which is rely on  
18 evidence that makes out a difference qualifying offense  
19 that's not anywhere in the indictment or the bill of  
20 particulars?

21 MS. FENN: Yes.

22 JUDGE RIVERA: Does that mean that the prosecutor  
23 would then have been limited to that one count, and that's  
24 why there's notice?

25 MS. FENN: Yes. The prosecutor - - - and that's

1 - - - that's exactly what happened here, where the  
2 prosecutor said it's criminal contempt in the second  
3 degree. The court repeated that. The defendant - - -

4 JUDGE RIVERA: Why is it - - - why are then there  
5 are questions about it?

6 MS. FENN: - - - would - - - never said anything  
7 at the charge conference.

8 I'm sorry?

9 JUDGE RIVERA: If it's the only one that fits,  
10 why is there uncertainty about it?

11 MS. FENN: Well, there wasn't uncertainty.  
12 Because defense counsel could have objected to this and  
13 said, once after he was arraigned on the indictment, he  
14 could've raised this claim, but he didn't. And even at the  
15 charge conference when the court said, so the prosecutor is  
16 saying the specified offense is criminal contempt in the  
17 second degree; defense counsel never object - - -

18 JUDGE TROUTMAN: But you do agree in the first  
19 instance with respect to the jurisdictional sufficiency,  
20 that is the People's responsibility, correct?

21 MS. FENN: Yes. The People have to have a  
22 jurisdictionally sufficient indictment and - - -

23 JUDGE TROUTMAN: And it's not unduly burdensome  
24 to pick from the list and so specify within that particular  
25 account?



1 MS. FENN: That is - - - as Judge Garcia had  
2 said, there's - - - there are several ways of doing it, and  
3 that is certainly one, and that may be the best practice.

4 But here, this was not fatal because it was the  
5 only count on the indictment that could've fit into the  
6 facts of the case that was consistent with - - -

7 JUDGE TROUTMAN: So he couldn't think that maybe  
8 - - - even though - - - the obstruction, because he put his  
9 hands around her throat.

10 MS. FENN: Yes, Your Honor. With that crime, he  
11 was charged with that in the felony complaint, but then he  
12 wasn't indicted for that, and the information in the bill  
13 of particulars shows why: because the complainant pepper  
14 sprayed him before he pressed down - - -

15 JUDGE TROUTMAN: Applied pressure. So he's  
16 supposed to - - - because he has sufficient facts, you're  
17 saying he can just simply eliminate the other crimes and  
18 know for certain that it was the one that appears in a  
19 different count?

20 MS. FENN: Yes. In this case, this was the only  
21 crime that concentrated a qualifying offense that was also  
22 separately charged. And one of the purposes of an  
23 indictment is the defendant has notice of the crimes to  
24 build his defense.

25 JUDGE TROUTMAN: And that's his duty to do, not

1 the People to specifically specify?

2 MS. FENN: But in this case - - - of course the  
3 defendant needs notice. The People have to give the  
4 defendant notice. But in this case, he did have notice.  
5 And that - - - just the facts surrounding, see the charge  
6 conference, or up the pendency of the case till the trial,  
7 which never - - -

8 JUDGE TROUTMAN: He does have notice, I agree  
9 with you, of that charge as to a separate count. But the  
10 question is does he clearly have notice as to the count  
11 where it doesn't specify which misdemeanor.

12 MS. FENN: It's the fact that the incorporation  
13 of reference by the statute in listing 470 - - - sorry,  
14 240.75. And then the information provided in the bill of  
15 particulars and the fact that this the only charge that - -  
16 -

17 JUDGE RIVERA: So your argument really, really is  
18 most persuasive - - - or really works, let me put it that  
19 way, taking the concession you made before, which is that  
20 given that that count that is listed in the indictment is a  
21 qualifying offense; it's the only one there that is a  
22 qualifying offense, that is what the prosecutor would be  
23 limited to? That is to say, they could not have chosen to  
24 argue a different qualifying offense?

25 MS. FENN: That's correct.



1 JUDGE RIVERA: It seems to me that's the only way  
2 your argument makes some logical sense.

3 MS. FENN: That's correct. In this case - - -

4 JUDGE RIVERA: I just don't know that you're  
5 correct, but that's - - -

6 JUDGE CANNATARO: Is that - - - is that the CPL  
7 standard? Is it that the defendant has to engage in some  
8 process of deductive reasoning to say, well, I've  
9 eliminated every other possible predicate offense, and then  
10 all I'm left with is this one that's charged elsewhere in  
11 the indictment, so that must be it? Is that - - - is that  
12 the pleading standard?

13 MS. FENN: No, Your Honor. And in this case, the  
14 People are not asking defendant to make these huge logical  
15 leaps or follow a bread crumb trail. In this case, it was  
16 the only count that was alleged in the indictment that was  
17 separately charged - - -

18 JUDGE CANNATARO: Oh, he has to prepare a  
19 defense, right?

20 MS. FENN: Yes, and he did prepare a defense for  
21 this charge because it was separately charged, the second  
22 degree contempt. So it wasn't a case where he was caught  
23 short and he didn't know, or it was a surprise, he was  
24 always going to prepare for a second degree contempt that  
25 was charged - - - what was charged to the grand jury; it's

1 what the prosecutor maintained and represented to the court  
2 during the charge conference. And defense counsel  
3 apparently understood this because he never said at the  
4 charge conference, wait, this wasn't what I was expecting.

5 JUDGE GARCIA: Counsel, one last thing with the  
6 Chief Judge's permission. I - - - I - - - if there was  
7 another qualifying offense that was - - - that you could  
8 use the facts in your bill of particulars to support, would  
9 you then lose?

10 MS. FENN: In the bill of particulars - - - in -  
11 - -

12 JUDGE GARCIA: You're saying the facts of the  
13 bill of particulars only supported that one charge, which  
14 is laid out in the other count, but if it supported another  
15 qualifying offense, would you then lose?

16 MS. FENN: If there was something - - - if it was  
17 a situation where he was charged with multiple offenses or  
18 - - -

19 JUDGE GARCIA: No, no, no. That's not my  
20 question. My question is I think you've been saying that  
21 if you look at the indictment and there's this other  
22 qualifying offense charge in a separate count, and you look  
23 at your bill of particulars conduct, there is only one  
24 qualifying crime that could be supported by this conduct  
25 you've alleged in your bill of particulars. That - - - am

1 I wrong in that?

2 MS. FENN: Yes, that's correct.

3 JUDGE GARCIA: So if that were not true, if there  
4 was another qualifying offense that you could charge based  
5 on this same conduct, would you lose?

6 MS. FENN: I think that in that situation where  
7 there was an ambiguity in the bill of particulars that  
8 there could be multiple crimes, it would still be based on  
9 what the indictment is. It would still be the qualifying -  
10 - - sorry - - - the specified offense would be criminal  
11 contempt that is in a situation where it - - - in a  
12 hypothetical.

13 JUDGE GARCIA: So it doesn't matter if you had  
14 more than one crime that would be supported by your bill of  
15 particulars?

16 MS. FENN: In this case, it was just only the  
17 second degree, because it wasn't supported by the  
18 information in the bill of particulars, and this was the  
19 only crime that was supported by the bill of particulars  
20 that was separately charged, and the defendant understood  
21 that this was the - - - the specific offense.

22 I would like to note that as the Appellate  
23 Division incorrectly ruled, this claim regarding the  
24 aggravated felony offense is unpreserved, and it was not a  
25 jurisdictional - - - a jurisdictional claim. It does

1 require preservation; and here, defendant failed to raise  
2 it below, and that's - - -

3 JUDGE RIVERA: Can you take thirty seconds to  
4 address the ineffective assistance? I know you wanted to  
5 start with that, so. Here we have your red light, but - -  
6 -

7 MS. FENN: Thank you.

8 In this case, defendant received effective  
9 assistance of counsel. The single error that's alleged is  
10 not so clear cut that it overshadows or taints the entire  
11 representation. In this case, based on the fair reading of  
12 the statute, the legislative history, and also the CJI  
13 instruction, defense counsel fairly understood, along with  
14 the court and the prosecutor, that - - -

15 JUDGE RIVERA: So let me ask you. Do we have to  
16 resolve the statutory interpretation question to rule  
17 against the defendant - - -

18 MS. FENN: I think - - -

19 JUDGE RIVERA: - - - or to rule in your favor, I  
20 should say.

21 MS. FENN: I think if the Court finds that it  
22 wasn't clear cut, then defense counsel would not be  
23 ineffective. Because for a single error Turner case, it  
24 has to be clear cut and dispositive. In this case, if  
25 there was ambiguity, it would not be a clear cut claim that



1 - - -

2 JUDGE RIVERA: It might be better to resolve it,  
3 no?

4 MS. FENN: I'm sorry?

5 JUDGE RIVERA: It might be - - - let's say we  
6 agree with you that there's ambiguity, better to resolve  
7 it, no?

8 MS. FENN: Well, in this case, in turn - - -

9 JUDGE RIVERA: As opposed to just say there's  
10 ambiguity, so yes, it wasn't so clear cut what - - - your  
11 argument - - - I understand your argument.

12 MS. FENN: To the extent that there's a claim  
13 about the legal sufficiency of the - - - of the first  
14 degree contempt case in a case that's not before this court  
15 because it's - - - it's now in the posture of an  
16 ineffective assistance claim, and defendant did not  
17 preserve that legal sufficiency claim below.

18 So this court is really - - - the claim before it  
19 is this ineffective assistance, and this wasn't a clear cut  
20 claim such that counsel was ineffective for failing to  
21 raise the single claim when he received a meaningful  
22 representation. Counsel had a valid strategy that ended in  
23 the acquittal of three of the counts in the single claim  
24 about the first degree contempt count was not - - - was not  
25 clear cut.



1 CHIEF JUDGE WILSON: Thank you, Counsel.

2 MS. FENN: Thank you.

3 MR. FELDMAN: I'd like to address the  
4 ineffectiveness point also, unless of course the court has  
5 further questions about the jurisdictional defect point.

6 So I don't - - - to sort of address Judge  
7 Rivera's question. I don't think the court needs to  
8 resolve the statutory interpretation question here about  
9 whether or not the statute does require a prior violation  
10 of a stay away provision because at the - - - at the time  
11 of trial and since, every court - - - every judge, in fact,  
12 to address this question had down come the same way and had  
13 said that the statute does require that.

14 So whether or not this court would agree with  
15 that de novo, and I'll get into why I think the court  
16 should agree with that consensus, that was certainly enough  
17 for any competent - - -

18 JUDGE RIVERA: Yeah. But the - - - if we  
19 conclude that that's a incorrect reading of the statute,  
20 then it's - - - right? The claim eventually though would  
21 have failed? How are they ineffective?

22 MR. FELDMAN: Well, I mean, I guess what I'd say  
23 is - - -

24 JUDGE RIVERA: Are you realizing the court would  
25 have found it incorrect?



1 MR. FELDMAN: I think that there was certainly  
2 enough here to convince the trial judge, which is what  
3 immediately mattered, that this count needed to be  
4 dismissed based on - - - there was prior Supreme Court  
5 precedent, there was the - - - First Department had  
6 addressed it unanimously, and then of course, since the  
7 trial - - -

8 JUDGE GARCIA: But then it would be ineffective  
9 for not getting it improperly dismissed?

10 MR. FELDMAN: Improperly you mean because - - -

11 JUDGE GARCIA: If we reverse that - - - if we  
12 were to reverse that holding. I mean, and then  
13 subsequently, we would have decided no, that's actually not  
14 the way you read the statute.

15 MR. FELDMAN: Well, it's an interesting question.  
16 Of course, we'd have to consider whether the case would  
17 even have gotten to this court, but it - - - it does seem  
18 like perhaps the court wants to get into the actual  
19 statutory interpretation questions. I'm happy to - - -

20 JUDGE GARCIA: But actually even before you get  
21 to that, I mean, if it's unsettled in some way, maybe  
22 there's a reason why this defense lawyer wouldn't raise it,  
23 right?

24 MR. FELDMAN: Well, I guess I'd say two things.  
25 First of all, I don't think there was any sense in which

1 this was unsettled at the time.

2 Again, every judge who looked at this statute had  
3 said it requires a prior violation of a stay away  
4 provision, and again, every judge since then has also  
5 unanimously agreed with that.

6 CHIEF JUDGE WILSON: You can see, though, an  
7 alternate reading of it, right, that says the order has to  
8 have a stay away provision in it?

9 MR. FELDMAN: Yes. I think - - - so the actual  
10 language of the statute - - - the key words are as  
11 described herein, there is a reading of it, which again, no  
12 - - - no judge who looked at it has endorsed, but there is  
13 a reading of it that it would - - - it would refer to a  
14 different part of that confusing paragraph. But I think  
15 that is where the rule of lenity comes in. If there are  
16 two possible readings of the statute, then of course the  
17 rule of lenity says to construe in the way that's more  
18 favorable to the criminal and defendant.

19 JUDGE RIVERA: Well, and if it's unsettled, what  
20 - - - what's the strategy behind not raising it?

21 MR. FELDMAN: Right, exactly. That's the other  
22 thing. There is absolutely no downside; only upside to  
23 raising this issue. It - - - it required, you know, no  
24 competing - - - no weighing of competing objectives at  
25 trial. It required not even any investigation because the

1 prosecution put it on the record - - -

2 JUDGE GARCIA: You could say that with anything.  
3 Like Sean John, we change the rules on witnesses for DNA.  
4 Trial counsel in that case raised it. I mean, there's no  
5 harm in raising that, right? I mean, even if they would  
6 have lost. So is every counsel that didn't raise the Sean  
7 John issue ineffective?

8 MR. FELDMAN: I would point to - - - I think what  
9 the Supreme Court of the United States has said on  
10 ineffectiveness is that - - - specifically as it regards to  
11 factual investigations is that, you know, counsel should  
12 either do reasonable investigations or refrain from doing  
13 them in a way that's reasonable. So you don't have to, you  
14 know, search every corner of the earth necessarily.

15 I think a similar thing applies to the statutory  
16 arguments like this. Had counsel done the slightest  
17 research on what the elements were of this offense that was  
18 one of the six counts in the indictment, he would have  
19 turned up every case pointing the same way, that it did  
20 have this element that the prosecution had already stated  
21 on the record wasn't met here.

22 So it didn't require a lot of sorting through  
23 case law, it didn't require figuring out what the rule is.  
24 There's no requirement making a novel argument. Not  
25 anything like that, and certainly not with DNA, which

1 requires, you know, a fair amount of study to get your head  
2 around.

3 This was really just a matter of what did the  
4 cases say the elements are? They all say this; that  
5 element isn't met here. I think that's enough that counsel  
6 should raise it in some way as part of the bare minimum of  
7 effective assistance.

8 CHIEF JUDGE WILSON: Thank you.

9 JUDGE RIVERA: I'm sorry. I'm sorry. Can I just  
10 - - -

11 CHIEF JUDGE WILSON: Of course.

12 JUDGE RIVERA: My apologies.

13 Could I - - - I wanted to let you get to the IAC,  
14 but I just had one question to go back on the other issue.  
15 It's the same line of questioning I was asking the  
16 assistant district attorney.

17 So what is your view of this point as to whether  
18 - - - if - - - if indeed this is the sole - - - the sole -  
19 - - this charge is the only qualifying offense that one can  
20 fathom from the indictment and the bill of particulars,  
21 then they couldn't do what you had proposed before, which  
22 is then make some other argument at the charge conference?

23 MR. FELDMAN: Well, so first, let me just wait  
24 sure I'm understanding the question. In other words, if  
25 based on the indictment and the bill of particulars you

1           could only imagine - - -

2                       JUDGE RIVERA: Yes.

3                       MR. FELDMAN: - - - there be one charge that's -  
4                       - -

5                       JUDGE RIVERA: Yes.

6                       MR. FELDMAN: - - - supported by those facts or  
7                       allegations. I guess - - -

8                       JUDGE RIVERA: Which is closer to Judge Garcia's  
9                       question obviously.

10                      MR. FELDMAN: One point I'd make is that even  
11                      looking at the indictment in the bill of particulars here,  
12                      for example, I would say it doesn't seem like they could  
13                      make out third degree assault based on those allegations,  
14                      but maybe the prosecution thinks otherwise; maybe that is  
15                      what that count refers to, and you just have a really good  
16                      defense against it at trial, which is this doesn't amount  
17                      to physical injury.

18                      In other words, the fact that you have a good  
19                      defense against a charge, or that the prosecutor's unlikely  
20                      to be able to prove it based on these allegations, it's - -  
21                      - it doesn't mean that's not what's charged. There are  
22                      charges that get brought and tried that, you know, the  
23                      evidence doesn't end up supporting or even the bill of  
24                      particulars doesn't support.

25                      So that's one answer I would give to that.

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JUDGE RIVERA: Thank you.

CHIEF JUDGE WILSON: Thank you.

(Court is adjourned)

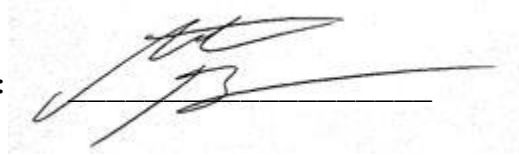


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C E R T I F I C A T I O N

I, Xavier Austin Reyna, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Michael Saenger, No. 38 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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