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COURT OF APPEALS

STATE OF NEW YORK

PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

DAVID MAIRENA,

Appellant.

NO. 102

PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

MAURICIO ALTAMIRANO,

Appellant.

NO. 103

20 Eagle Street
Albany, New York
November 20, 2019

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE PAUL FEINMAN



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Appearances:

MICHAEL ARTHUS, ESQ.
APPELLATE ADVOCATES
Attorney for Appellant Mairena
111 John Street
9th Floor
New York, NY 10038

ANDERS NELSON, ESQ.
APPELLATE ADVOCATES
Attorney for Appellant Altamirano
111 John Street
9th Floor
New York, NY 10038

THOMAS M. ROSS, ADA
KINGS COUNTY DISTRICT ATTORNEY'S OFFICE
Attorney for Respondent
350 Jay Street
Renaissance Plaza
Brooklyn, NY 11201

Penina Wolicki
Official Court Transcriber



1 CHIEF JUDGE DIFIORE: The first two appeals on
2 this afternoon's calendar are 102 and 103, The People of
3 the State of New York v. David Mairena; and The People of
4 the State of New York v. Mauricio Altamirano.

5 Counsel?

6 MR. ARTHUS: Good afternoon. My name is Michael
7 Arthus. I represent the appellant, David Mairena. If I
8 can possibly reserve two minutes for rebuttal?

9 CHIEF JUDGE DIFIORE: You may, of course.

10 MR. ARTHUS: Thank you.

11 CHIEF JUDGE DIFIORE: You're welcome.

12 MR. ARTHUS: In Herring v. New York, the U.S.
13 Supreme Court describes summation as the most important
14 aspect of advocacy. And when preparing a summation, one of
15 the most important things that counsel relies on are the
16 court's charge promises. So - - -

17 CHIEF JUDGE DIFIORE: Counsel, how do you
18 distinguish Smalling here for us?

19 MR. ARTHUS: So I think Smalling - - - I've
20 looked at the briefs in Smalling.

21 CHIEF JUDGE DIFIORE: Um-hum.

22 MR. ARTHUS: I've looked at the oral argument in
23 Smalling. I don't believe that the harmless-error issue is
24 necessarily before the court in Smalling. So to the extent
25 that Smalling is inconsistent with People v. Greene, it's



1 our position that Greene should control.

2 But the error itself is actually very similar
3 between this case and Smalling. And what the error is, is
4 that the court made a charge promise, counsel relied on
5 that promise during his summation, and then after
6 summations, the court reneged on its promise - - - broke
7 its promise, leaving counsel in a position where he was
8 prejudiced in delivering the summation.

9 Now, the rule that we're - - -

10 JUDGE FAHEY: So - - - so let's say you're
11 correct. Let's say - - - assuming that you're correct that
12 there was an error here, it seems the court would have two
13 paths under which it could analyze them: either it would
14 be an error - - - a per se error, which means that once the
15 error is committed we're done. Some of the Appellate
16 Divisions agree with that. The First Department seems to
17 go the other way, and - - - and applies harmless error
18 analysis. Where - - - where are you asking this court to
19 go?

20 MR. ARTHUS: So I don't think the harmless error
21 analysis is applicable to these kind of cases, and that's
22 because the error that exists here, it's just - - - it's
23 not amenable to that type of analysis, so - - -

24 JUDGE STEIN: Well, how is it - - - how is it any
25 more ame - - - or less amenable than, say, the decision to



1 charge a lesser-included offense without notifying counsel?
2 Isn't that something that counsel would very much - - - or
3 might - - - not would, but might very much want to address
4 in summations?

5 MR. ARTHUS: Yes. I think the question then
6 turns on reliance. So I think - - - just to be clear, the
7 rule that we're proposing isn't that once the error occurs
8 it's absolutely irreversible. There would have to be
9 reliance on counsel's part.

10 When we say that there should be no harmless
11 error analysis, we mean that the - - - the analysis
12 shouldn't then turn to: was the evidence overwhelming or
13 would this person have been convicted anyway, but for the -
14 - -

15 JUDGE WILSON: Reliance in any degree of
16 materiality or just reliance?

17 MR. ARTHUS: I'm sorry, I didn't - - -

18 JUDGE WILSON: Materiality, as well as reliance;
19 or just reliance?

20 MR. ARTHUS: I think it would be reliance - - -
21 it would - - - it would be reliance. So in terms of
22 materiality, I think they go hand-in-hand. And I think
23 what you could see is - - -

24 JUDGE FAHEY: Just so - - - just so I'm clear,
25 when you say "reliance", does that equate to a reasonable



1 possibility that you would apply under a harmless-error
2 analysis, that it would affect the outcome?

3 MR. ARTHUS: I don't believe so, because I think
4 applying the reasonable-possibility standard would then be,
5 in a way, looking at the strength of the evidence
6 otherwise.

7 JUDGE FAHEY: Um-hum.

8 MR. ARTHUS: The reason we feel that traditional
9 harmless error is not applicable here is because these type
10 of errors - - - right, when we do traditional harmless-
11 error analysis, as the court knows, we take a trial error
12 and we kind of cabin it off from the rest of the record and
13 then look at the record and say would this person have been
14 convicted.

15 That's not really possible when it comes to a
16 summation, because the summation is really - - - it's a
17 series of strategic choices.

18 JUDGE FAHEY: Um-hum.

19 MR. ARTHUS: We can't look at the summation the
20 way that the Appellate Division really did here, in Mr.
21 Mairena's - - -

22 JUDGE RIVERA: So is - - - is - - - I'm trying to
23 figure out what - - - what your rule is.

24 MR. ARTHUS: Yes.

25 JUDGE RIVERA: Or what's the standard you say



1 should be applied to this kind of error, if there's an
2 error.

3 Is what you're arguing that since effective
4 assistance of counsel, our standard, is meaningful
5 representation, that there can't be meaningful
6 representation if the summation - - - the - - - the
7 strategic choices you're referring to are ones that depend
8 on what the judge says, that the judge will or will not say
9 to the jury? So as long as that - - - those strategic
10 choices that may have some meaning in the presentation to
11 the jury and the way that counsel is saying this is how we
12 marshal these facts, the evidence; this is what it means;
13 this is the outcome that you should come back with - - - is
14 that what you mean, that somehow it affects the
15 representation in a way that's meaningful?

16 MR. ARTHUS: Yes. And I think that's what the
17 court - - - the Supreme Court was getting at in Herring,
18 which is that summation, since it is just a fundamental
19 part of the right to counsel, we use those effective-
20 assistance-of-counsel standards to measure those.

21 JUDGE RIVERA: So - - -

22 JUDGE GARCIA: How can you do that in a - - - in
23 a case like this? I mean, is there another context where
24 we would say it's an ineffective-assistance standard where
25 it wasn't the counsel's decision to do this, it was the



1 court's ruling that led to this action? Is there another
2 ineffective-assistance-of-counsel context where we've done
3 that?

4 MR. ARTHUS: I'm not sure. But I think that what
5 the issue here would be is that counsel's - - - it's not
6 counsel, right, actively being ineffective; what's
7 happening is counsel is making choices that then the court
8 is rendering ineffective by its later decision.

9 JUDGE GARCIA: But that's a very different
10 analysis, though. And even our traditional ineffective
11 assistance of counsel doesn't really fit with that.

12 But I think it goes back - - - and I think Judge
13 Rivera was also getting at this - - - if you look at
14 Herring, and Herring is really the only marker that lays it
15 out, and they say, okay, denied a summation - - - denied a
16 summation; but in Glebe they say well, that's an error, but
17 we never said that was - - - I think they called it - - -
18 structural error. We never said that was proc - - - you -
19 - - you may think that, but we've never said it, really
20 kind of signaling anything less than complete denial isn't
21 structural error, I think. It could be read that way in
22 Glebe.

23 So this court has never really laid out a rule.
24 So if we're getting to a fundamental error versus
25 Constitutional error versus statutory error, which would be

1 the CPL, where do we ground a constitutional or structural
2 error analysis? It seems to me a deprivation of a
3 summation deprives you of that. And that's an assistance
4 of counsel, right? And that's what the Supreme Court said.
5 But less than that, what's the right we're grounding this
6 in, if we're going to - - - going to go constitutional
7 error or structural error?

8 MR. ARTHUS: I think that touches on what Judge
9 Rivera had mentioned before about the meaningful
10 representation standard. We can ask: was it a meaningful
11 summation. And in Ashwal, the court - - - the court said -
12 - - this court said that counsel has a right to comment on
13 every pertinent matter of fact put before the court.

14 And I think I would - - - I would - - -

15 JUDGE GARCIA: So is the same - - -

16 MR. ARTHUS: Yeah.

17 JUDGE GARCIA: - - - standard, then, if a judge
18 is interfering - - - let's call it - - - with counsel's
19 summation, either in limitations of time or in topics or
20 repetitiveness, let's say? Would that have - - - be the
21 same standard, because the court is limiting counsel in
22 that way?

23 MR. ARTHUS: I think that's different, because
24 counsel isn't actually being interfered, necessarily, with
25 the opportunity to comment on something. If it was



1 affecting counsel's ability to comment on a pertinent
2 matter, then yes, I think it would touch on that standard.

3 I would push back a bit, because I think in
4 Greene, I think that this court actually did address this
5 kind of error and did not apply harmless error, just simply
6 said that because counsel had premised his summation on the
7 charge promise, it was prejudicial.

8 JUDGE GARCIA: But isn't it a way to look at
9 Greene because of the nature of the error there, that you
10 effectively denied that party summation, therefore it's
11 Herring, but less than that - - - for example, let's say
12 justification. I tell you you're going to get a
13 justification charge, you only sum up on justification; and
14 I say you know what, you're not getting that, I'm not
15 letting you reopen. Have I effectively denied you a
16 summation in that case, which is Herring?

17 But less than that, is not denial of a summation.
18 You'd have to find a right to an effective summation, which
19 is I think kind of what we're talking about. And that, we
20 have never done, because I think Greene, you could fit into
21 the first category. But this isn't really Greene.

22 So where is it? And - - - and what right is it
23 based on, if we can't anchor it in Herring?

24 MR. ARTHUS: I see that my time - - - can I
25 respond to - - -



1 CHIEF JUDGE DIFIORE: Of course, please.

2 MR. ARTHUS: Thank you. So I think that this is
3 actually a very similar error to Greene in the sense that
4 here Mr. Mairena was effectively denied the opportunity to
5 contest what the element of manslaughter was going to be.
6 And when we really look at what the error is that occurred
7 here, counsel was misled into giving a repres - - - a
8 summation here that was act - - - actively prejudicial.

9 He was led into presenting inconsistent defenses,
10 which may have undercut the self-defense claim. He
11 highlighted the autopsy pictures and graphic testimony.
12 That was all in reliance on the court's promise.

13 JUDGE GARCIA: I read his summation, and I
14 thought - - - this is - - - you know, he does this one
15 thing, but then he says, okay, now I'm going to get to my
16 main summation, which is justification really. And given
17 the proof of this case, I mean, that - - - that made sense.

18 But this is kind of - - - he touches on the
19 bottles and, you know - - - but then he goes on into what
20 he himself characterized a number of times in the summation
21 as "my main point".

22 So how - - - that to me, is very different than
23 Greene?

24 MR. ARTHUS: In - - - in that sense. Except that
25 he devoted about fifteen pages of the summation in this



1 case to that defense. So it was a substantial portion of
2 the summation. It was almost one-third of it. So in this
3 case, what the Appellate Division basically did is rip
4 those pages out of the summation. And the problem is that
5 those pages of the summation were actively prejudicial,
6 when you look at the court's charge, as given.

7 CHIEF JUDGE DIFIORE: Thank you, Counsel.

8 MR. ARTHUS: Thank you.

9 MR. NELSON: Good afternoon. My name is Anders
10 Nelson. I'm here on behalf of appellant Mauricio
11 Altamirano. With the court's permission, I'd like to
12 request - - - to reserve two minutes, please.

13 CHIEF JUDGE DIFIORE: Of course.

14 MR. NELSON: Thank you.

15 This court should apply a prejudice standard to
16 cases in which the trial court's charge infringes the right
17 to an effective summation.

18 JUDGE STEIN: How do - - - hasn't prejudice and
19 harmless error been used pretty much interchangeably?

20 MR. NELSON: Yes.

21 JUDGE STEIN: I mean, are we talking about
22 anything different here, when - - - when you - - - when you
23 say that?

24 MR. NELSON: I think that the - - - they have
25 been used rather loosely in - - - in some of these cases.



1 For instance, Smalling mentions prejudice and harmless
2 error, and seems to do so interchangeably.

3 And I think that the problem with that is that
4 when we typically talk about harmless error, we're thinking
5 of a Crimmins analysis or the analysis of whether the
6 defendant would have been convicted, and the effect of the
7 error on the conviction. So I would - - -

8 JUDGE STEIN: Well but - - - but I - - - again, I
9 - - - you know, I see a lot of similarity here. The - - -
10 the - - - I'm not sure what your proposed rule is, but your
11 - - - your co-counsel here has talked about, you know,
12 whether it can be said that - - - and we've said in some of
13 our cases - - - whether it can be said that the summation
14 would have been affected by the knowledge of the charge, as
15 submitted to the jury.

16 So how is that really different from a reasonable
17 possibility that it affected submission - - - the summation
18 and therefore the verdict?

19 So that's Cr - - - the second is Crimmins, is the
20 fir - - - and the first is what we've talked about in this
21 - - - in this context. And I don't really see any
22 meaningful difference there.

23 MR. NELSON: I think that the difference, Your
24 Honor, is that the - - - the second statement that Your
25 Honor made ha - - - went to the verdict and went to an



1 evaluation of potentially what would the verdict have been?
2 What would counsel have argued in an effective summation?
3 What would the jury have done?

4 And that is a - - - that is a - - - an analysis
5 that I think the lower courts have not been willing to do,
6 the way that I read Greene, saying that this court - - -
7 when this court says in the abstract, we don't have to
8 consider whether the defendant would have been convicted, I
9 read that as - - - as issuing a - - - an analysis of what
10 the verdict would have been.

11 JUDGE STEIN: But can't - - - can't you - - -
12 can't you also see it as sort of a presumption? If it
13 meaningfully affected the summation, then we have to assume
14 that it may have meaningfully affected the verdict, right?

15 MR. NELSON: Yes, if that's the direction, that -
16 - - then yes, I would agree that - - - that this is the
17 rule that we're - - - we're advocating for, that prejudice
18 results when counsel relies on the - - - on the promise
19 made by the court, tailors summation to that, and then - -
20 - and then this - - - the rug is - - - is, you know, drawn
21 out - - -

22 JUDGE RIVERA: Yeah, but you're - - - you're - -
23 - I think you may have misunderstood Judge Stein's final
24 question. I - - - I thought you were not taking the
25 position that the standard is that the - - - the court's



1 charge, whether it's giving a charge that they said they
2 wouldn't give or not giving a charge they said they would
3 give - - - let's just say that - - - affects in a
4 meaningful way the summation choices - - - the strategic
5 choices about how to proceed with summation by defense
6 counsel.

7 But I did not think you were advocating that
8 somehow the standard requires that one connects the
9 summation to the verdict itself.

10 MR. NELSON: No, I think - - - the way I
11 understood Judge - - - Judge Stein's question was then
12 there's - - -

13 JUDGE RIVERA: Maybe I misunderstood her.

14 MR. NELSON: - - - that there was an assumption
15 that the verdict was affected. I believe that was the
16 phrasing. And so that's how I was interpreting, that then
17 - - -

18 JUDGE RIVERA: So - - - so that's the standard -
19 - -

20 MR. NELSON: - - - potentially if - - -

21 JUDGE RIVERA: - - - you think that we would
22 assume that if the summation is materially affected, that
23 that then had an effect on the - - -

24 MR. NELSON: I - - - yes - - -

25 JUDGE RIVERA: - - - out - - - on the - - -



1 MR. NELSON: - - - I would say - - -

2 JUDGE RIVERA: - - - verdict?

3 MR. NELSON: I would say that then we're - - -
4 we're not looking at the effect on the verdict. That's the
5 standard. I'm not - - - we're not - - - I'm not advocating
6 here that this court pronounce a rule where the appellate
7 courts have to consider what the verdict might have been.
8 That is - - - that's - - -

9 JUDGE RIVERA: So then how is prejudice, as you
10 define it, different, if at all, from prejudice under the
11 Strickland standard, for effective assistance?

12 MR. NELSON: Under the federal Strickland
13 standard?

14 JUDGE RIVERA: Correct.

15 MR. NELSON: So the federal Strickland standard,
16 you - - - you, again, are looking at whether the def - - -
17 the likeli - - - the likelihood of the defendant being
18 convicted, but for counsel's ineffectiveness.

19 I would advocate more towards the New York
20 standard for ineffective assistance that your counsel - - -
21 that Your Honor was discussing earlier regarding meaningful
22 assistance, which does have a prejudice component, or this
23 court has at least said that it would be skeptical of an
24 ineffective assistance claim, where there was not any
25 prejudice.



1 JUDGE RIVERA: But we've been clear, you don't -
2 - - it - - - it's different from the federal, otherwise
3 it's exactly the same; because certainly you're prejudiced
4 - - - you are prejudiced if it's not meaningful. I
5 understand your - - - the point you're trying to make with
6 that. But we have said that there is a difference.

7 I'm just trying to see if you can articulate for
8 me what the difference is with respect to your standard.

9 MR. NELSON: So I think - - - I think we are - -
10 - we're - - - I'm not - - - we are using prejudice in a - -
11 - in a way that's different from the way it's used in
12 federal ineffective assistance.

13 JUDGE RIVERA: Um-hum.

14 MR. NELSON: I - - - the prejudice here is
15 fairness, right? There - - - it's unfair for - - - for
16 instance, in this case, for counsel to basically, in
17 reliance on the court's saying it's not going to charge
18 temporary and lawful possession, to give a summation that's
19 tailored to that, then the court gives temporary and lawful
20 possession to the jury - - -

21 JUDGE GARCIA: But isn't the problem really in
22 applying an ineffective assistance standard in a context
23 which we've never applied it before? I mean, you could say
24 where there's an objection, objection, the court sustaining
25 objections to a summation or limiting in time, that it's

1 ineffective. Are we going to apply an ineffective-
2 assistance standard to that summation because the lawyer
3 was unable to complete the summation they would have made?

4 I mean, I don't understand a context where we can
5 look at the performance of the lawyer in that sense of
6 ineffectiveness when it's so in - - - affected by the
7 ruling of a judge. Where would you stop with that?
8 Because any ruling of a judge is, in a way, going to limit
9 the performance of an advocate.

10 MR. NELSON: The ineffective assistance is an
11 analogy that we're making here. It's - - - it's not - - -

12 JUDGE GARCIA: The test doesn't really work,
13 Strickland or our test. So what would the test be? It's
14 assistance of counsel, right? So the argument being, you
15 have assistance of counsel, you have a right to effective
16 assistance of counsel. I understand that.

17 It was an odd context in - - - in Herring when
18 they used it, but it's never been brought to this level
19 before. I don't see any case that's applying it in this
20 way. So we would be doing something different here, and
21 I'm trying to understand how we would do it.

22 MR. NELSON: I - - - Your Honor, I would submit
23 that Greene applies this standard. That - - -

24 JUDGE FAHEY: You see, the question that I had
25 asked counsel on - - - on Mairena is the same question



1 here, which is what is the analytical framework that we
2 should look at this within?

3 And it seems to me that we have two choices: per
4 se reversal, if there's error, if the court makes an error
5 that affects summation; or a harmless-error standard of
6 review, if the court makes an error. Then we look at that
7 error and see if it affects your right to a fair trial, and
8 it includes the summation and the verdict. But ultimately,
9 we - - - I can't think of another way to look at it
10 analytically unless you can articulate one for me clearly.
11 And I'm happy to consider it.

12 MR. NELSON: There - - - there are - - - there
13 are - - - there is support for the notion that deprivation
14 of a right to a fair trial - - -

15 JUDGE FAHEY: Um-hum.

16 MR. NELSON: - - - is not subject to harmless
17 error. So when we have a - - - a framework that requires
18 that counsel be told what the charge is going to be so that
19 counsel can then be effective and give an effective
20 summation on behalf of his or her client - - -

21 JUDGE FAHEY: Well, I get that argument. So - -
22 - so then any mistake in the charge is per se reversible
23 error?

24 MR. NELSON: No, because you have to determine
25 whether there was prejudice in - - - in terms of reliance



1 by counsel on the promise tailoring - - -

2 JUDGE FEINMAN: So - - - so let's talk about that
3 reliance here. What would trial counsel have said
4 differently if the application to reopen his summation had
5 been granted? What would he have said that he didn't
6 really get to say the first time around?

7 MR. NELSON: Trial counsel - - -

8 JUDGE FEINMAN: If I remember that summation, it
9 seemed to me that some of the points that would go to a
10 temporary innocent-possession claim were argued, even
11 though the judge had told him I'm not going to give you
12 that charge.

13 MR. NELSON: Trial counsel never told the jurors
14 that they could acquit his client if the jurors found
15 temporary and lawful possession here. He never mentioned
16 the fact that the - - - the district attorney would have an
17 additional burden to prove beyond a reasonable doubt that
18 the possession was not innocent.

19 He never marshalled the facts - - -

20 JUDGE FEINMAN: I know people do that in their
21 summations, but you know, it's always a fine line of is the
22 lawyer taking over the judge's role of - - -

23 MR. NELSON: Sure.

24 JUDGE FEINMAN: - - - instructing on the law.

25 MR. NELSON: Sure, so he - - - he never



1 marshalled the facts with regard to the factors under the
2 temporary and lawful possession defense. He never - - -

3 CHIEF JUDGE DIFIORE: Well, he did adopt the
4 defendant's statement to the police, no?

5 MR. NELSON: That's correct. But he was never
6 able to point out how those factors would - - - were - - -
7 were supported by the statement. And then you have the
8 district attorney making arguments that really first told
9 the jurors that there was no legal defense to this charge.
10 So you - - - you have summations that are given, and then
11 you have this defense standing out here that the jurors, I
12 would submit, likely didn't know what to do with, because
13 they hadn't been told about it.

14 So that's the fairness aspect of this that I
15 believe our proposed rule takes into account and that I do
16 believe that the court - - - if not under an ineffective-
17 assistance type framework - - - could ground a rule in the
18 ri - - - denial of a right to a fair trial.

19 CHIEF JUDGE DIFIORE: Thank you, Counsel.

20 MR. NELSON: Thank you.

21 CHIEF JUDGE DIFIORE: Counsel?

22 MR. ROSS: May it please the court, my name is
23 Thomas Ross. I re - - - represent the respondents in this
24 case.

25 Whether you call it a prejudice analysis or a



1 harmless-error analysis, when you evaluate these claims of
2 ineffective summation, you should look to the error in
3 light of the entire trial, which includes the evidence and
4 the effect it may have on the verdict.

5 Now, this court has al - - - pretty much already
6 held that in Miller, Smalling, and Greene, when it looked
7 to prejudice or harmless error in these types of an
8 analysis.

9 JUDGE WILSON: Miller and Greene don't seem to
10 have any consideration of the strength of the trial
11 evidence in them.

12 MR. ROSS: Yeah, well, in Miller, they say the
13 summation wasn't effective because they didn't - - - he
14 wasn't apprised of a petit larceny charge that was to be
15 given. And but the evidence was - - - the evidence was
16 still looked at in that though it wasn't contested, what
17 the value of the property was. So you still looked at the
18 evidence. You still looked at the effect that the change
19 might have had on the summation and still found that it was
20 harmless.

21 So you di - - - you didn't just see that there
22 was some sort of something that the summation could have
23 addressed but didn't, and therefore he was prejudiced and
24 it was per se reversal.

25 JUDGE WILSON: But didn't - - - aren't there - -



1 - it didn't really say - - - because the only difference
2 between larceny in the third degree and petit larceny is
3 the amount, and the amount was not at issue in that case,
4 there really was no difference in the charge - - - in the
5 way that the - - - that the lawyer would have - - - the
6 defense counsel would have argued?

7 MR. ROSS: Well, not necessarily, because
8 oftentimes when you know that you're getting a lesser-
9 included offense, you'll argue that, hey, if you're not
10 going to acquit entirely, then you have this lesser-
11 included offense. So in a sen - - - sense he was
12 prejudiced, in that respect, even though it hadn't been in
13 his summation - - - he hadn't like challenged the value of
14 the property, and - - - and it hadn't been an issue at
15 trial.

16 So I - - - I disagree, Your Honor. I think
17 Miller does look at - - - it still looks at the effect. It
18 looked at the harmlessness of this particular type of error
19 in - - - in the context of a summation.

20 JUDGE STEIN: Why - - - why is that - - - that
21 prejudice or any different, depending upon whether the
22 charge was proper in the first instance or not?

23 MR. ROSS: Well, it is a factor. And - - -

24 JUDGE STEIN: Why? I mean, what difference does
25 it make? If we're talking about reliance, if we're talking

1 about how the judge has promised to charge or not charge
2 something, and then reverse without notice, how that
3 affects how the - - - the lawyer argues on behalf of the
4 client, what difference does it make whether that charge -
5 - - especially if it was given and the jury heard it - - -
6 should or shouldn't have been given in the first instance?

7 MR. ROSS: Yeah, you do look at the reliance.
8 But then you look at the reliance in the context of - - of
9 the whole case. And if you look at the Mairena case, what
10 the - - - the reason that the defense sought to include the
11 box cutter in the manslaughter is because they didn't want
12 the prosecutor to argue that if you found that he fell on -
13 - - the broken bottles caused the fatal wound, that they
14 would convict.

15 But if you look at the evidence, and the evidence
16 was overwhelming that broken bottles didn't cause it. And
17 the prosecutor never argued that you could find guilt if
18 you find that a broken bottle. In fact, they call it the
19 "phantom broken bottle theory". There's no evidence. Just
20 don't look at it entirely.

21 JUDGE WILSON: Although there was some - - -
22 there was some evidence from the fir - - - initial trial
23 that some jurors, at least, may have been confused about
24 that, right? That was the basis for defense counsel asking
25 for the sp - - - specific instruction the second time



1 around.

2 MR. ROSS: That was what - - - he had addressed
3 that, itself, in the first trial. As I recall, the
4 confusion was over the justification charge.

5 But in any event, the - - - the first trial was
6 eleven to one for conviction, anyway. So it - - - it sort
7 of shows almost twice that the evidence here was just
8 overwhelming. There was just no way that the jury was
9 going to find that a cut on broken bottles was the cause of
10 death here, because like I said, the evidence was
11 overwhelming.

12 If you look at the testimony of - - - of - - -
13 first you have the testimony of the crime scene detective.
14 He examined the area where - - - where Miguel fell. And
15 there was no glass there. In fact, he - - -

16 JUDGE RIVERA: So if I - - - if I'm understanding
17 your - - - your view - - -

18 MR. ROSS: Yes.

19 JUDGE RIVERA: - - - of the standard, it would be
20 that a - - - a court has to say there's nothing that
21 defense counsel could have said to change the verdict, in
22 summation.

23 MR. ROSS: That's part of it, yes. But also,
24 just the fact that it addresses some minor issue or the
25 evidence is overwhelming that it couldn't have changed the



1 verdict. Or it - - - or like I said, even if the evidence
2 wasn't overwhelming, it was on an issue that wasn't
3 contested or that was just - - -

4 JUDGE RIVERA: That sounds more like perhaps what
5 Judge Wilson was asking before - - -

6 MR. ROSS: Yes.

7 JUDGE RIVERA: - - - about the materiality of - -
8 -

9 MR. ROSS: Yes. Yes, it has to be - - -

10 JUDGE RIVERA: - - - the error.

11 MR. ROSS: - - - material. It has to be - - -
12 there has to be some sort of substantial reliance on - - -
13 on it so that it would - - -

14 JUDGE RIVERA: But - - - but it does seem like
15 your rule boils down to: it doesn't matter what defense
16 counsel could or would have said if they had known what the
17 judge was or was not going to do.

18 MR. ROSS: No, you - - - you do - - -

19 JUDGE RIVERA: That would have affected that
20 jury. They would not have come out any other way?

21 MR. ROSS: No, you do evaluate what the judge
22 could have said. But if you look at these two cases here,
23 what - - - what could defense counsel have said? In the
24 Mairena case, he already argued that if you find that he
25 fell on a broken bottle you have to acquit. So what more



1 was he going to say?

2 And - - - and like I say - - - and like I say,
3 the prosecutor said that if you find that he - - - you
4 know, there was just no evidence that he found.

5 JUDGE RIVERA: Counsel, let me ask you, with
6 respect to our ineffective-assistance-of-counsel - - -

7 MR. ROSS: Yes.

8 JUDGE RIVERA: - - - jurisprudence, does harmless
9 error apply to those cases?

10 MR. ROSS: Under the federal standard, yes,
11 because - - -

12 JUDGE RIVERA: Under our State Constitution?

13 MR. ROSS: The State Constitution? No, it does
14 say that - - - it does talk about prejudice in respect of
15 denial of a fair trial, and they cited Benevento for that.
16 But Benevento also says that the effect on the verdict is
17 still a relevant consideration.

18 And then this court went on to say in People v.
19 Stultz, that it would be very skeptical - - -

20 JUDGE RIVERA: Yeah, but - - -

21 MR. ROSS: - - - of any ineffective assistance -
22 - -

23 JUDGE RIVERA: - - - so then, is your answer that
24 yes, that jurisprudence means that harmless error applies
25 to ineffective-assistance-of-counsel claims?



1 MR. ROSS: Well, yes. Because as Justice Garcia
2 was - - - was mentioning - - -

3 JUDGE RIVERA: Wouldn't we have just used those
4 two words, if that's what we really meant?

5 MR. ROSS: Yeah, just say harmless error.

6 JUDGE RIVERA: As opposed to the kind of dance
7 back and forth in these cases about not adopting the
8 federal standard, our standard is more generous or
9 plaintiff-friendly - - -

10 MR. ROSS: But it's not necessarily - - -

11 JUDGE RIVERA: - - - defendant-friendly; excuse
12 me.

13 MR. ROSS: - - - just tied into ineffective
14 assistance of counsel - - -

15 JUDGE RIVERA: Um-hum.

16 MR. ROSS: - - - because you know, judges make
17 rulings on summations all the time. The defense lawyer
18 might want to make a particular point, and the prosecutor
19 objects. And the - - - the court sustains that objection.
20 The defense can then argue - - -

21 JUDGE RIVERA: But that - - - that is a little
22 bit different, no, than knowing before you begin your
23 summation, and you're crafting - - - right - - -

24 MR. ROSS: That's - - -

25 JUDGE RIVERA: - - - sort of the way you're going



1 to proceed in that summation?

2 MR. ROSS: That's still - - - but if you're still
3 prevented from making a particular point that you want to
4 make and you can on appeal say I wasn't able to make an
5 effective summation because I wasn't able to say this, or I
6 wasn't a - - - or let's say the judge restricts how long a
7 lawyer makes a particular point, because the - - -

8 JUDGE RIVERA: Yeah, but their position - - -

9 MR. ROSS: - - - judge thinks - - -

10 JUDGE RIVERA: - - - is not that it's a per se
11 error. Their position is that it has to result in less
12 than meaningful representation. It has to fit within some
13 framework that we've already identified.

14 MR. ROSS: Right. But it doesn't fit into the
15 context of evaluating a summation very well, because like I
16 said, if you just take out the - - -

17 JUDGE RIVERA: But how does harmless error do it
18 any better?

19 MR. ROSS: Well, you still - - - if - - - if you
20 were just evaluating like a restriction on summation - - -

21 JUDGE RIVERA: Um-hum.

22 MR. ROSS: - - - not dealing with - - - with
23 charges, you would look to see if the trial court abused
24 its discretion in imposing that kind of a restriction. And
25 when you look at the - - - at the abuse of discretion,



1 well, did it make a difference in the outcome of - - - of
2 the case? And that would look at, you know, how strong was
3 the evidence, what was the - - - what issue was that
4 particular point addressed to. You look at it in the - - -
5 in the entire context of the case.

6 And it's just - - -

7 JUDGE WILSON: Can I ask you something specific
8 about Altamirano?

9 MR. ROSS: Yes.

10 JUDGE WILSON: So as I understand it, the
11 Appellate Term said this is an error - - -

12 MR. ROSS: Yes.

13 JUDGE WILSON: - - - but said however, it's not
14 reversible error because he shouldn't have gotten the
15 charge in the first place. Why doesn't that run afoul of
16 LaFontaine?

17 MR. ROSS: LaFontaine? I hadn't thought of it in
18 that - - that regard. But it would - - - well, the - - -
19 how - - - so in other words, the Appellate Term shouldn't
20 have addressed that - - - that particular issue?

21 JUDGE WILSON: Well, they're - - - they're
22 affirming a conviction on a ground that was not decided
23 adverse to the defendant.

24 MR. ROSS: Yeah. Well, it was - - - well, it was
25 - - - they found - - - they still found error in the fact



1 that the - - - the defense attorney wasn't able to reopen
2 the summation.

3 JUDGE WILSON: Correct. Correct. So they found
4 an error, and then they said however, we're not going to
5 reverse because of a different issue, that is, that he
6 shouldn't have gotten the charge in the first place. But
7 did get the charge.

8 MR. ROSS: Right, he did get the charge. But - -
9 - but still - - - but looking at the fact that he wasn't
10 able to - - - wasn't entitled to the charge in the first
11 place goes to harmless error, because you know, he couldn't
12 have been - - - couldn't have been harmed - - -

13 JUDGE WILSON: Yeah, but - - - but it's a legal
14 determination that was not decided adverse to the defendant
15 in the lower court.

16 MR. ROSS: Yes. Well, he had - - - he had asked
17 for the charge, and that was determined adversely to him.

18 JUDGE WILSON: No, it was determined - - -

19 JUDGE STEIN: Well - - -

20 JUDGE WILSON: - - - no, he got it, right?

21 MR. ROSS: Initially, or at least the part where
22 he was - - - to reopen summation was decided adversely to
23 him.

24 JUDGE FEINMAN: So the error that's at issue is
25 the - - - the declination of the request to reopen?



1 MR. ROSS: Yes.

2 JUDGE FEINMAN: Not - - - not the charging issue?

3 MR. ROSS: Yes.

4 JUDGE FEINMAN: All right. Let me - - - because
5 I'm having a little troubling following, Mr. Ross. If you
6 could just articulate the rule that should be applied in
7 analyzing this case, without getting into how that rule
8 then applies in these two different factual scenarios. If
9 you could just give me your version, succinctly, of the
10 rule?

11 MR. ROSS: You should look at what kind of
12 reliance that the defendant had on the particular charge
13 that either was or was not given and determine what the
14 attorney could have said or could - - - or maybe would have
15 refrained from saying, and how that would have affected the
16 verdict, looking at the entire - - -

17 JUDGE STEIN: Isn't that the same as - - - as
18 what has been talked about in terms of a material reliance
19 or - - - isn't that - - -

20 MR. ROSS: Yes.

21 JUDGE STEIN: - - - really what you're saying?

22 MR. ROSS: Yes, the reliance has - - -

23 JUDGE STEIN: You're not saying that any reliance
24 on some trivial matter. You're saying it has to - - -
25 there has to be a determination. I'm going to go back to -



1 - - to the Crimmins standard.

2 MR. ROSS: Yes.

3 JUDGE STEIN: You know, reasonable possibility or
4 probability that - - - that it would have made a
5 difference, essentially.

6 MR. ROSS: Yes, it should be a reasonable
7 probability, because here we're dealing with just, you
8 know, an error - - - a statutory error under 300.10(4),
9 which is what we're dealing with in this case.

10 JUDGE STEIN: Well, but doesn't this all come
11 from Herring that says that the whole problem here is that
12 the - - - that there's a - - - that it affects the right to
13 counsel, which is a Sixth Amendment error?

14 MR. ROSS: Well, Herring just deals with the
15 entire de - - - deprivation of a summation. Here we're
16 dealing with where you have a summation, and what's the
17 effect on - - - on that summation; whereas Herring - - -
18 Herring - - -

19 JUDGE STEIN: How about our cases where we said
20 the failure to notify of a lesser included is - - - is - -
21 - is prejudicial? That - - - that's a statutory error,
22 right?

23 MR. ROSS: Yes.

24 JUDGE STEIN: So what's the difference?

25 MR. ROSS: Well, prejudicial, you still look at -



1 - - at the effect on the verdict. They didn't describe in
2 Smalling whether that was a reasonable possibility or
3 reasonable probability of effect, but nevertheless, you - -
4 - you'd still look at what the effect is on the verdict.
5 And it should be the reasonable probability, because this
6 is a statutory - - - and it's not - - - even though it's
7 related to the effective assistance of counsel, it's still
8 - - - it's not a pure effective assistance - - -

9 JUDGE FAHEY: So you're saying - - -

10 MR. ROSS: - - - claim itself.

11 JUDGE FAHEY: - - - in both of these cases,
12 there's no constitutional deprivation dimension?

13 MR. ROSS: No, it's just statutory error, and it
14 wasn't apprised - - -

15 JUDGE FAHEY: That's your argument?

16 MR. ROSS: - - - a particular charge - - -

17 JUDGE FAHEY: Yeah. Yeah.

18 MR. ROSS: - - - under 3 - - - 300.10(4), yes.

19 JUDGE FAHEY: Um-hum.

20 MR. ROSS: Yes, and in - - - in each of these
21 cases, it was harmless. Turning first to the Mairena case,
22 I've talked about the - - - you know, the primary reason he
23 was prevented from - - - they wanted to prevent the
24 prosecutor from arguing that broken bottles would be a - -
25 - could be a finding - - -

1 JUDGE FAHEY: Let me ask this. If there was - -
2 - if there was a constitutional dimension, would you come
3 out differently on it?

4 MR. ROSS: No, you would still look to the heart
5 - - -

6 JUDGE FAHEY: So you're saying that - - -

7 MR. ROSS: - - - it would just be like a - - -

8 JUDGE FAHEY: Just so I'm clear. I want to be
9 clear about what you're saying. So if there's a harmless
10 error - - - error analysis applied, and if we - - - we
11 apply the reasonable possibility of effect on the verdict,
12 if you've given the wrong charge, that you still come out
13 that there was no error here?

14 MR. ROSS: Yes, there's still be no error even
15 though - - -

16 JUDGE FAHEY: I'm sorry. It's harmless error?

17 MR. ROSS: It would still be harmless under the
18 constitutional reasonable possibility standard.

19 JUDGE FAHEY: I see.

20 CHIEF JUDGE DIFIORE: Counsel, do you care to
21 devote your remaining time to the justification issue or -
22 - - your preference. I'm just reminding you your time is -
23 - -

24 MR. ROSS: Certainly. First of all, the - - -
25 the remarks he made were not necessarily improper, because



1 if you compare the - - - the facts of this case to the
2 facts in Seit, Seit there was a duty to retreat, even
3 though the victim was - - - had actually retreated and come
4 back.

5 So what he said wasn't necessarily error. In any
6 event, the - - - if you'd accept the defense position that
7 harm - - - the duty to retreat wasn't until the imminent -
8 - - the imminent use of deadly physical force. That didn't
9 happen until Miguel was charging at him on the third, all
10 of what he said - - - not all of what he said - - - the
11 following didn't apply to that. But the fact that he could
12 have retreated to Arismendy's help, that he could have
13 retreated into the restaurant, and most importantly, could
14 have retreated to the police car which everybody knew was
15 on the block right then, you know, he could have easily
16 retreated there. So that wasn't improper.

17 The charge itself was unpreserved - - -

18 JUDGE STEIN: Does it matter whether he knew that
19 the victim had or hadn't dropped the machete in between
20 what has been referred to as the second confrontation and
21 the third confrontation?

22 MR. ROSS: Well, you don't know for certain that
23 he dropped it, but he was - - -

24 JUDGE STEIN: But do - - - do - - - does it
25 matter - - - or does it matter if - - - we don't know that



1 it's certain that he dropped it. But does it matter
2 whether he saw that there was a weapon being displayed?

3 MR. ROSS: No, it doesn't matter, because when
4 Miguel charged at him, he had stripped off his jacket, to
5 whereas he didn't do that before. So all he had was just a
6 very thin, short-sleeved shirt on, which he couldn't have
7 used to hide weapons.

8 Plus, he went after him with his fists, so he had
9 no weapons in his hands, and he wasn't reaching for his
10 pants, he wasn't reaching anywhere else for any kind of a
11 weapon. Plus, he had - - - certainly, just apart from
12 that, he had an opportunity to retreat. Because if you
13 look - - - compare the second incident with the third
14 incident, when he did retreat when he was attacked by the
15 machete, they were much closer together. There was - - -
16 Miguel was significantly further away from him on the third
17 one, and yet he - - - he stood his ground and, you know,
18 basically prodded - - - prodded him to come.

19 The fact that - - - that the defendant, you know,
20 prodded him into coming showed that he was not in fear of
21 deadly physical force. And in fact, you don't even get to
22 the - - - whether you know, the duty to retreat under
23 imminent - - -

24 JUDGE RIVERA: So - - - so is that boiling down
25 to if - - - if twice you're attacked, you should leave



1 instead of waiting for the third time to come around?

2 MR. ROSS: Well, he - - - he should have left - -
3 - excuse - - - if you accept the defendant's - - -

4 JUDGE RIVERA: Yes.

5 MR. ROSS: - - - even the defendant was saying it
6 was - - - the second part was over. After Edy Rodriguez
7 dragged - - - it was over. So now we're in a brand new
8 situation. And in this situation, it - - - it's like a - -
9 - it's almost irrelevant, what - - - what happened the
10 first two.

11 He had a chance to retreat and he could have, and
12 he didn't. And like I said, we don't even get to whether
13 he had a duty to retreat unless he had a reasonable fear
14 that he - - - that deadly physical force was going to be
15 used against him. And that just wasn't the case, because
16 at the time - - - even if he didn't see him drop the
17 machete, Miguel didn't have the machete. And mi - - - and
18 Miguel was only attacking him with his fists, which was - -
19 - which is simple physical force, not deadly physical
20 force.

21 And like - - - and like I mentioned, he had a
22 sufficient - - - sufficient enough difference where he
23 could have ran away, particularly since he was able to run
24 away from the - - - the second incident.

25 CHIEF JUDGE DIFIORE: Thank you, Counsel.



1 MR. ROSS: Thank you.

2 CHIEF JUDGE DIFIORE: Counsel?

3 MR. ARTHUS: So not to compare these attorneys to
4 Clarence Darrow, but if you look at the Leopold and Loeb
5 trial, right, and in that case it was the summation that
6 saved Leopold and Loeb's life. You had two completely
7 dead-to-rights child murderers - - - confessed child
8 murderers, and it was a very unconventional summation that
9 really focused on things that we wouldn't normally think of
10 as being the focus of a summation, because weird things
11 happen during summation, and arguments that we don't expect
12 can change people's minds.

13 So to say that there's nothing counsel could have
14 said that would have changed anyone's mind, I don't think
15 that that's the standard that can be applied to summation
16 situations.

17 And you know, I'm thinking about the effect on
18 the verdict. And we're talking about, you know, should we
19 look at whether this affected the verdict - - -

20 JUDGE FAHEY: Well, the consequences would be, if
21 nothing can be said to change anyone's mind, then why have
22 summation?

23 MR. ARTHUS: Exactly - - - at all.

24 JUDGE FAHEY: Why not just present the facts and
25 let the facts speak for themselves?



1 MR. ARTHUS: Exactly. Which is what Herring was
2 getting at.

3 And when you think about the effect on the
4 verdict, I was thinking about baseball. I was thinking
5 about if you get to the end of the game and one team says
6 all those homeruns we hit, all of them are now worth six
7 runs, actually none of them were worth one, we wouldn't
8 say, well, it's okay, because that team would have won
9 anyway. We would say this game is completely unfair, and
10 that's because of something we learn when we're children,
11 which is that you can't change the rules of the game at the
12 end of the game.

13 And that's what happened here. You had the judge
14 here change the rules of how we were operating in this
15 trial after counsel had said his final words. And that's
16 what makes this not a fair trial, and that's what makes
17 this a prejudice standard and not a harmless-error
18 standard, because prejudice looks at the fairness of the
19 process as a whole.

20 And what happened here was not fair, and it's not
21 how we want trials to operate. And the fact is, this is
22 the third time - - - these are the third - - - this is the
23 third - - -

24 JUDGE RIVERA: So - - - so how are we
25 distinguishing between the point when it's not fair and



1 when it's just an interruption, another error, that we
2 might say that's really collateral? It does - - - it has
3 minimal, if any, impact, not just on the verdict but even
4 on what the - - - the counsel would have chosen to do in
5 response.

6 MR. ARTHUS: And that's whether counsel relied on
7 the promise. I think that's the standard. When counsel
8 hears a promise and relies on it, and then that promise is
9 broken, we can infer that counsel would have done something
10 different in making those strategic choices.

11 JUDGE RIVERA: But how do you determine reliance?

12 MR. ARTHUS: You determine reliance based on
13 factors like did counsel request the charge; did he object
14 when the charge was over with; were his summation arguments
15 tied to the charge. I think those are the factors we look
16 at. And the fact that this is the third case that has come
17 before this court in the last two years with this issue,
18 shows that this is contagious in the lower courts and that
19 this needs to be remedied, because it's not a fair thing
20 that's going on. Thank you.

21 CHIEF JUDGE DIFIORE: Thank you, Counsel.

22 Counsel?

23 JUDGE GARCIA: Counsel, could we switch sports
24 analogies for a second? Just recently a commentator
25 described state and federal constitutional law as saying



1 you get two free throws, why would you only take one? Why
2 would you only argue the federal constitution when you
3 could take two throws?

4 Two points: did you argue the State Constitution
5 at all in any of these cases?

6 MR. NELSON: Your Honor, I believe that we've
7 cited the State Constitution. I believe that the - - -
8 those - - - the - - - those aspects of constitutional law
9 that are implicated in the case, you know, are essentially
10 identical, except for the kind of Strickland analysis that
11 we were talking about earlier.

12 JUDGE STEIN: You didn't argue the P.J. Video
13 factors or anything like that; you didn't address those?

14 MR. NELSON: I don't believe so. I don't believe
15 so.

16 JUDGE GARCIA: So our decision here would
17 essentially be under the Herring line of cases, the federal
18 constitutional standard?

19 MR. NELSON: Yes. And - - - and the extent to
20 which, I think, the statute here that's at issue - - -
21 300.10 - - -

22 JUDGE GARCIA: Um-hum.

23 MR. NELSON: - - - implicates the - - - the
24 rights that we've been talking about and the rights that
25 Herring secures.

1 So to cast this as just a statutory error really
2 ignores the fact that the whole purpose of the statute is
3 to ensure that counsel is able to prepare, that - - - to -
4 - - to ensure that the trial court's promise is final, and
5 to ensure that something like what happened in this case,
6 you know, in - - -

7 JUDGE RIVERA: Just to be clear - - - I want to
8 be clear what you're - - - what you're saying now.

9 MR. NELSON: Sure.

10 JUDGE RIVERA: Are - - - are you saying that the
11 argument that is preserved is based solely on the federal
12 Constitution or was a constitutional argument without
13 stating it was federal or state?

14 MR. NELSON: Preserved at the trial court level?

15 JUDGE RIVERA: Yes.

16 MR. NELSON: Is - - - it was - - - was a
17 constitutional error - - - error generally, under federal
18 and state - - -

19 JUDGE RIVERA: With no reference to the federal
20 or the state?

21 MR. NELSON: Correct. The - - - the - - -

22 JUDGE RIVERA: Just a constitutional error?

23 MR. NELSON: The - - - the - - - the manner in
24 which this was preserved was that counsel asked to reargue
25 - - - to reopen his summation to reargue to the jury the



1 defense that was given.

2 So I would submit that that encompassed the - - -
3 you know, both - - - both - - - the error under both
4 constitutions.

5 JUDGE RIVERA: Okay.

6 MR. NELSON: I - - - I just want to again get
7 back to - - - I think that the - - - the District Attorney
8 suggested that Miller and some of this court's cases talk
9 about the effect on the verdict of the - - - of the court's
10 error. Miller does not talk about the effect of the
11 verdict. Miller - - - effect on the verdict of the error.
12 Miller looks at what was - - - what counsel did argue.

13 As - - - as Judge Wilson pointed out, the - - -
14 the charge that was given, the lesser-included, was really
15 - - - ended up being irrelevant. Counsel would not have
16 changed his summation. But that's what Miller looks at:
17 whether or not counsel would have altered his summation
18 knowing what the court's charge was - - - would have been.

19 And so that's - - - I believe it's instructive
20 here. I think that Greene also sets forth a - - - an - - -
21 a harmonious standard where this court again said we don't
22 have to decide in the abstract whether there would have
23 been a conviction, because there was prejudice, because
24 there was unfairness in the process that - - - that - - -
25 that did not - - - was not something that this court wants



1 to endorse and not something that the lower courts should
2 be, you know, incentivized to potentially engage in.

3 CHIEF JUDGE DIFIORE: Thank you, Counsel.

4 MR. NELSON: Thank you.

5 (Court is adjourned)

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

I, Penina Wolicki, certify that the foregoing transcript of proceedings in the Court of Appeals of People of the State of New York v. David Mairena; People of the State of New York v. Mauricio Altamirano, Nos. 102, 103 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Penina Wolicki

Signature: _____

Agency Name: eScribers
Address of Agency: 352 Seventh Avenue
Suite 604
New York, NY 10001
Date: November 24, 2019

