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COURT OF APPEALS

STATE OF NEW YORK

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PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

NO. 76

MANUEL RODRIGUEZ,

Appellant.

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20 Eagle Street  
Albany, New York  
September 11, 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

Appearances:

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Official Court Transcriber



1 CHIEF JUDGE DIFIORE: The next appeal on this  
2 afternoon's calendar is appeal number 76, the People of the  
3 State of New York v. Manuel Rodriguez.

4 MR. STROTHER: Good afternoon, Your Honors. I'd  
5 like - - - sure.

6 CHIEF JUDGE DIFIORE: One moment, please.

7 MR. STROTHER: Yes, of course.

8 CHIEF JUDGE DIFIORE: Good afternoon, sir.

9 MR. STROTHER: I'd like to reserve three minutes  
10 for rebuttal, if that'd be okay?

11 CHIEF JUDGE DIFIORE: You may.

12 MR. STROTHER: Stephen Strother, from the Office  
13 of The Appellate Defender, on behalf of Manuel Rodriguez.

14 Manuel Rodriguez did not engage in a taking in  
15 this case. Instead, he withdrew money from his own bank  
16 account after a taking had already - - -

17 JUDGE GARCIA: But to find that - - - I mean,  
18 this is a sufficiency case, right, so we all know the rules  
19 on a, you know, verdict, sufficiency challenge. They get  
20 every reasonable inference, the People, in the light most  
21 favorable. So to say he just took the money out, I think,  
22 ignores the entire line of conduct up to that point, which  
23 is opening the account, checking the account, somehow  
24 getting a card to the person who actually puts the check  
25 into the account, and then withdrawing all the money.



1 MR. STROTHER: So there's two points to that  
2 answer there, Your Honor. First is that the way the case  
3 is charged to the jury is that it's explicitly limited to  
4 the withdrawals. The court instructs the jury that on the  
5 day and the exact time on the withdrawal slips, he  
6 committed grand larceny. So the theory of the case, as the  
7 People had, you know, assented to it being charged, is  
8 that's about the withdrawal.

9 Secondly, even assuming, you know, taking into  
10 account the facts, the - - - the establishment of the  
11 account, the deposit of the check, at no point did the  
12 People proffer the evidence that Mr. Man - - - Rodriguez  
13 knew that that was a stolen check. They actually conceded  
14 that he didn't know that. They say, we can't prove that he  
15 knew it was forged or stolen. Under those circumstances,  
16 there are many other reasonable inferences. And in a  
17 circumstantial evidence case, they have to exclude the  
18 other reasonable inferences.

19 JUDGE STEIN: Are - - - are you - - - so does  
20 your argument rest on the proposition that we're only  
21 talking about the theft or the taking of the check, not of  
22 the proceeds of the check?

23 MR. STROTHER: No, we actually think that the - -  
24 - the evidence is insufficient whether you call it the  
25 check or the money, as the - - - as the prosecutor says



1 that that was their theory. Certainly, if it's the check,  
2 they have no evidence tying him to the theft of the check.  
3 Actually, they - - -

4 JUDGE STEIN: So let's talk about the proceeds  
5 then. Okay, so - - -

6 MR. STROTHER: So as to the proceeds - - -

7 JUDGE STEIN: So how - - - how - - - when was the  
8 taking of the proceeds complete in your view? When the  
9 check was taken?

10 MR. STROTHER: I think that there is an issue  
11 with saying the proceeds are a separate taking, simply  
12 because there is no requirement under the law that you  
13 convert property into some other form before a taking is  
14 complete, but even assuming for the sake of argument that  
15 it is, the taking is complete at the point in which the  
16 money is in the bank account.

17 JUDGE STEIN: Well - - -

18 JUDGE RIVERA: So you mean when the check clears?

19 MR. STROTHER: When the check clears, because  
20 then you - - - it's your money. You can use it some form.  
21 You can make it - - - you know, use your debit card at a -  
22 - - at a - - -

23 JUDGE STEIN: But it's - - -

24 MR. STROTHER: - - - corner store - - -

25 JUDGE STEIN: - - - sitting there and the owner -



1           - - and - - - and the - - - and the true owner may - - -  
2           may discover this before you withdraw it, right?

3           MR. STROTHER: That - - - that's possible, yes.

4           JUDGE STEIN: Okay, so at that point, they still  
5           have the superior right to possession of that money, even  
6           though it's now being cleared and it's in your account,  
7           right? Su - - - superior to yours?

8           MR. STROTHER: Well, assuming that the property  
9           is stolen, the - - - the owner always has a superior right  
10          to it, no matter who is in actual possession of it. The -  
11          - - the superior right's a legal concept. Whether - - -  
12          the dominion and control is about who is able to use it at  
13          that time. If it's in your account, you have dominion and  
14          control over the money.

15          JUDGE STEIN: What about the bank? Does the bank  
16          have any dominion and control over it?

17          MR. STROTHER: They maybe have a secondary right  
18          to do something with it. Right, if they - - - if they  
19          determine that you're about to overdraft your account, they  
20          can put a freeze on it or something of that form.

21          JUDGE STEIN: So you're saying once it's in your  
22          account now, your - - - your right to possession is greater  
23          than the person whose check was forged?

24          MR. STROTHER: I would say that the - - - the  
25          right to possession under this circumstance is not quite



1 the - - - the proper inquiry. The - - - the question is  
2 whether you've exercised dominion and control over the  
3 property. That is the critical inquiry. Whether - - -  
4 that's what determines - - -

5 JUDGE FAHEY: Well - - -

6 MR. STROTHER: - - - whether there's been a  
7 taking.

8 JUDGE FAHEY: - - - let me take a step back a  
9 second. Was there a charge given by the judge - - - a  
10 circumstantial evidence charge given?

11 MR. STROTHER: Yes.

12 JUDGE FAHEY: Okay. So given that there was a  
13 circumstantial evidence charge given by the judge to the  
14 jury, didn't they evaluate the nature of this proof and  
15 really, aren't we right back where Judge Garcia said once  
16 that charge is given? If the charge wasn't given, I - - -  
17 I can see that argument, at least as I - - - but the fact  
18 that it's given seems pretty dispositive here.

19 MR. STROTHER: Well, it's just - - - that would  
20 only be dispositive of the fact that he was convicted, not  
21 to whether there was sufficient evidence, because the  
22 question still is, was this ever a - - - was this ever  
23 sufficient evidence of a taking. Here, the - - - again, it  
24 was charged to the jury solely that the withdrawal of cash  
25 was the taking.



1 JUDGE WILSON: But there was - - -

2 JUDGE GARCIA: Going to that - - - that point - -  
3 -

4 JUDGE WILSON: There was a general instruction  
5 before that, right? A pattern instruction and then there  
6 was a specific instruction.

7 MR. STROTHER: There was the beginnings of a  
8 pattern instruction on grand larceny, and then he says that  
9 you must find that on or about this day at this time he  
10 committed grand larceny. So it's - - - it's limited to  
11 those acts.

12 JUDGE FAHEY: Yeah, but it was a PJI - - - it's  
13 not - - - it wasn't a PJI - - - it was a CJJ charge on - -  
14 - on circumstantial evidence, I'm assuming.

15 MR. STROTHER: That's correct, yes.

16 JUDGE FAHEY: Okay.

17 MR. STROTHER: Yes.

18 JUDGE GARCIA: And isn't it the Appellate  
19 Division's conclusion that one, they rejected the takings  
20 argument, but then they said, in any event, "there was  
21 ample circumstantial evidence from which a jury could have  
22 reasonably inferred that the defendant participated in a  
23 scheme with at least one other person to steal the check,  
24 deposit it, and withdraw the money."

25 MR. STROTHER: That - - - that - - - I think



1 actually that conclusion is wrong, if for few re - - -  
2 different reasons. The reason why is because, A, they have  
3 no evidence that Mr. Rodriguez ever stole the check.  
4 Again, the - - - the district attorney conceded at trial,  
5 they did not have any proof of that. If he - - -

6 JUDGE WILSON: Why - - - why does that matter?

7 MR. STROTHER: Because if he doesn't know that  
8 it's stolen, then helping him - - -

9 JUDGE WILSON: Why does it mat - - -

10 MR. STROTHER: - - - deposit - - -

11 JUDGE WILSON: Why does - - - what does it matter  
12 that he doesn't know the physical check is stolen?

13 MR. STROTHER: Because that means that when he  
14 helps him have - - - if he - - - if we think he helped him  
15 facilitate this deposit, he could have maybe thought that  
16 something fishy was going on. But that doesn't ever go  
17 down to specific - - -

18 JUDGE WILSON: It's a reason - - -

19 MR. STROTHER: - - - intent to steal.

20 JUDGE WILSON: It's a reasonable inference from  
21 the evidence that he was working with some other person,  
22 gave that person a card and a PIN number, no?

23 MR. STROTHER: That's correct, but even from  
24 there, you can't necessarily draw the inference that he  
25 knew the check was stolen, which is required to establish





1 grand larceny.

2 JUDGE GARCIA: He takes all the money out right  
3 away. I mean, that's some indication he thinks it's  
4 stolen. I mean, as soon as he - - - it possibly will  
5 clear, one accomplice, let's call him, gets a couple of  
6 hundred dollars, but he takes out 11,000 dollars and change  
7 within, what, a day. Isn't that some indication he knew it  
8 was stolen?

9 MR. STROTHER: It is indication that he knew,  
10 more than likely, that something illegal was happening.  
11 However, if that's the case - - -

12 JUDGE RIVERA: The question is why - - - why - -  
13 - why isn't - - - why isn't that enough? Not just that he  
14 took most of it out, not - - - 98.98 percent of it, but  
15 that he did it through these particular withdrawals, in  
16 this particular way, during this particular time frame.

17 MR. STROTHER: Well - - -

18 JUDGE RIVERA: Why doesn't that get you to - - -  
19 that's enough for the jury to infer that, yes, he's part of  
20 a scheme?

21 MR. STROTHER: I would say that - - - a couple of  
22 things. One, it's definitely not charged to the jury as a  
23 scheme. It's not charged in acting in concert. There's  
24 nothing like that presented to the jury. It's charged that  
25 he's the principal and that it's about the withdrawals.



1 But going back to your question, the reason why it's not  
2 enough is because, again, in a circumstantial evidence  
3 case, you have to rule out other reasonable inferences.

4 Here, if they concede they can't prove he knew it  
5 was stolen, then specific intent to steal isn't present in  
6 the record. And the reason why the rule about - - -

7 JUDGE FEINMAN: So that - - - so what's the  
8 reasonable inference? 10,000 dollars just mysteriously  
9 appeared in his account?

10 MR. STROTHER: No, I - - -

11 JUDGE FEINMAN: He knew he didn't put it in.

12 MR. STROTHER: I would not - - - it would not be  
13 a mysterious appearance. I think you can say that - - -

14 JUDGE FAHEY: And see, even on top of that, in  
15 every case, you'd have to rule out reasonable inference.  
16 The standard is the same, beyond a reasonable doubt. What  
17 evidence gets you there, you have to rule out reasonable  
18 inferences of innocence. Of course, you got to rule those  
19 out. I think that's - - - that applies with direct  
20 evidence, circumstantial evidence. It's how you get to  
21 that ultimate conclusion.

22 I - - - I think that - - - you see, when I look  
23 at the case, I'm thinking are you ar - - - in my own head,  
24 I'm saying to myself, is he arguing to me that there should  
25 be a different standard for circumstantial evidence cases



1 than for direct evidence? Are you saying that?

2 MR. STROTHER: I don't think we have to commit  
3 ourselves to that. I think what we're arguing is that - -  
4 -

5 JUDGE FAHEY: Because if it's the same standard,  
6 it's the same standard of proof and burden, then that makes  
7 your case more difficult, doesn't it?

8 MR. STROTHER: It can. I think you - - - I think  
9 if you have - - - you can make a separate standard for  
10 circumstantial evidence cases, solely because in those  
11 cases - - -

12 JUDGE FAHEY: I don't think that's supported in  
13 the law, see, and the - - - the idea of moral certainly and  
14 those concepts have been rejected on circumstantial  
15 evidence, so it's - - - it's a - - - that's my concern with  
16 the case.

17 MR. STROTHER: I understand. I think - - - if I  
18 may say real quickly what I think the reason why it's  
19 important that we cabin the idea of the taking it when the  
20 money goes into the bank account, is because the fact that  
21 any other rule is pretty much unworkable. If his mere  
22 withdrawal of money is enough to establish a taking, if  
23 that's the taking, then a taking could conceivably continue  
24 for the lifetime of a bank account. Or if the funds were  
25 somehow comingled with other funds, then we would never



1 know when they ended.

2 JUDGE GARCIA: But isn't that all factual? Isn't  
3 that all for the next sufficiency case? We don't have that  
4 here. What we have is he opened the account, he gave  
5 somebody the card, he checked to see if there was anything  
6 in there, and then he took all the money out in suspicious  
7 withdrawals the next day. So those may be interesting  
8 facts, but those aren't the facts here, so isn't this just,  
9 again, a legal sufficiency case, based on what the  
10 Government - - - what proof the Government put in here?

11 MR. STROTHER: It is a legal sufficiency case,  
12 but it is also a case in which this court is going to be,  
13 for the very first time, required to consider whether  
14 withdrawal of money from a bank account is a taking. That  
15 is something that has never been considered before.

16 JUDGE GARCIA: Not if we go on the alternate  
17 ground the Appellate Division went on, which is under the  
18 circumstantial proofs submitted in this case, there was a  
19 larceny.

20 MR. STROTHER: The problem with the Appellate  
21 Division's fact - - - prior finding is that it ignores the  
22 fact that the prosecution conceded that they couldn't  
23 establish that he knew the check was stolen, at which  
24 point, you can't prove intent to steal. It's not possible  
25 for them to do that at that point. If you can't prove



1 intent to steal, you don't have grand larceny. The  
2 Appellate Division's decision just ignores those facts.  
3 This court can't do that.

4 JUDGE STEIN: But why can't you prove intent to  
5 steal by showing that you intended to take - - - avail  
6 yourself of that money to the exclusion of its rightful  
7 owner?

8 MR. STROTHER: Because if you can't prove that he  
9 knew the check was stolen, then that means he made - - -  
10 that may - - - the check may have been for a payment of a  
11 debt. There are many other things that check could be for  
12 at the point at which you can't prove he knew it was  
13 stolen. He has to know it's stolen before helping someone  
14 deposit in his account becomes a theft.

15 JUDGE STEIN: But - - - but the manner in which  
16 he made the withdrawals indicate - - - certainly could, I  
17 think, lead to a reasonable inference - - - it - - - it  
18 would not be irrational for a jury to infer that he knew  
19 that that money wasn't properly there.

20 MR. STROTHER: Even if he knows the money is not  
21 properly there, that actually doesn't establish grand  
22 larceny. It establishes something perhaps like criminal  
23 facilitation, where if you know a crime is probably being  
24 committed, and you take action to help them, then you've  
25 committed that crime. I think this is one of our other



1 points, right, that there are multiple other criminal  
2 offenses that this maps onto pretty well. Grand larceny is  
3 a very odd fit for this set of facts, and that's because  
4 this court's never really considered a case like it,  
5 whereas, facilitation or money laundering maps almost  
6 exactly onto these facts.

7 CHIEF JUDGE DIFIORE: Thank you, Counsel.

8 MR. STROTHER: Thank you.

9 CHIEF JUDGE DIFIORE: Counsel?

10 MS. FIGUEREDO: May it please the court, Valerie  
11 Figueredo for the People.

12 JUDGE GARCIA: Counsel, could you start with your  
13 concession that the check wasn't stolen? Where is that?

14 MS. FIGUEREDO: The People below never conceded  
15 that we didn't have to prove defendant's knowledge that the  
16 check was stolen. What we conceded in summation was that  
17 we didn't have to prove that defendant stole the check.  
18 And that's correct, because as the penal - - -

19 JUDGE GARCIA: Physically stole the check.

20 MS. FIGUEREDO: Physically stole the check, and  
21 again, that is correct, because the penal law recognizes a  
22 distinction between money and a check. They're two  
23 separate types of property. And this court in People v.  
24 Geyer recognized that money and a check are distinct forms  
25 of property.



1           The People - - - the jury was instructed that it  
2           had to find the defendant knew the nature of the money in  
3           the account. And the People proved that defendant, in  
4           fact, knew that the check that was deposited into his  
5           account was stolen. Again, you have defendant, a day  
6           before the deposit, creating an account at the exact same  
7           bank that - - - that KWC used. It was reasonable to infer  
8           from that that he wanted the check deposited in the exact  
9           same bank, so that it would clear quickly, so that he could  
10          obtain physical possession of the money before KWC  
11          discovered that the check had been deposited.

12           JUDGE RIVERA: Let - - - let's say - - - let's  
13          say we - - - we don't agree that even with what is  
14          ostensibly a (indiscernible) favorable burden for the  
15          People on - - - on this appellate review, that you couldn't  
16          draw the inference about knowing that - - - that the check  
17          is stolen. What if he just thinks the money comes from  
18          illicit activity or illegal conduct? Would that be enough?

19           MS. FIGUEREDO: Even if you disregard the  
20          evidence we have showing that he knew the check was stolen,  
21          and if you disregard his participation in facilitating - -  
22          -

23           JUDGE RIVERA: No, no, what I'm saying is, let's  
24          say he doesn't know that the deposit is by a check, but he  
25          knows there's money in this account.



1 MS. FIGUEREDO: As long as he knows there's money  
2 in the account - - -

3 JUDGE RIVERA: That's what I'm asking.

4 MS. FIGUEREDO: Right. As long - - -

5 JUDGE RIVERA: Does it - - - does it matter that  
6 he knows it's a check - - -

7 MS. FIGUEREDO: It doesn't matter.

8 JUDGE RIVERA: - - - is the way the money got in  
9 the account?

10 MS. FIGUEREDO: It doesn't matter. All he needs  
11 to know is that the money was obtained unlawfully, and the  
12 unidentified man has to use him to obtain physical  
13 possession of that money. In that sense, this would be no  
14 different than if you were a shoplifter who had removed an  
15 item off the shelf; that's the unidentified man. As the  
16 unidentified man is trying to leave the store, he elicits  
17 defendant's help to get the property out the door. If  
18 defendant knows the property is stolen and still helps in  
19 that, we believe Robinson makes clear that one who  
20 participates in a larceny while the crime is ongoing is  
21 guilty of the larceny.

22 JUDGE RIVERA: So what part of the - - - given  
23 what you've said, what part of the crime is ongoing? Why  
24 isn't he just the person who's got the possession of the  
25 stolen - - -





1 MS. FIGUEREDO: He's not - - -

2 JUDGE RIVERA: - - - goods.

3 MS. FIGUEREDO: Right. He's - - - he's not just  
4 a mere possessor of the stolen goods, because again, he  
5 participated in the deposit, and the deposit was the means  
6 by which the money left KWC and entered defendant's  
7 account. Even if you ignore that, and you focus just on  
8 the withdrawals, that would still be enough, because in  
9 that situation, you have - - -

10 JUDGE WILSON: Why - - - why do the withdrawals  
11 matter at all?

12 MS. FIGUEREDO: The - - - the - - -

13 JUDGE WILSON: And - - - and then in answering  
14 that, think about counsel's argument that the jury  
15 instruction's wrong.

16 MS. FIGUEREDO: The jury instruction was not  
17 wrong.

18 JUDGE WILSON: Well, start with why the  
19 withdrawals matter.

20 MS. FIGUEREDO: The with - - -

21 JUDGE WILSON: Now suppose he had taken the  
22 money, and it sat in his - - - his account and he didn't  
23 withdraw it. Is there a larceny under your theory?

24 MS. FIGUEREDO: There's still - - - there's still  
25 a larceny if defendant - - -



1 JUDGE WILSON: The larceny is completed even  
2 before the withdrawals?

3 MS. FIGUEREDO: The larceny could be deemed  
4 complete even before the withdrawals.

5 JUDGE WILSON: Well, is it or is it not? Could  
6 you prosecute him if he didn't withdraw?

7 MS. FIGUEREDO: We - - - if he had participated  
8 in the deposit, as we proved - - -

9 JUDGE WILSON: Yeah.

10 MS. FIGUEREDO: - - - then he would still be  
11 guilty of a larceny, and we have prosecuted him.

12 JUDGE WILSON: Okay, do the depo - - - do the  
13 withdrawals matter at all?

14 MS. FIGUEREDO: The withdrawals do matter,  
15 because the withdrawals, not only show that defendant knew  
16 the money was unlawful, that was not rightfully his, it  
17 showed his intent to appropriate that money, and it also  
18 was the means by which they physically secured possession  
19 of the money. It was - - - it was then essentially  
20 carrying away the loot.

21 So the withdraw - - -

22 JUDGE WILSON: Well, you're - - - so you're using  
23 the withdrawals essentially as proof of the larceny that  
24 was completed by the deposit, not themselves as larceny?

25 MS. FIGUEREDO: That's - - - that's not correct,



1 Your Honor.

2 JUDGE WILSON: Okay.

3 MS. FIGUEREDO: The larceny certainly could have  
4 been deemed complete with the deposit, and People v.  
5 Robinson makes clear that the fact that the larc - - - that  
6 liability could have attached for the principal at the  
7 point in time the deposit occurs doesn't mean that the  
8 crime is over for all purposes. It - - -

9 JUDGE WILSON: And so you think the jury  
10 instruction is correct?

11 MS. FIGUEREDO: The jury instruction is correct,  
12 because although the jury instruction focused the jury on  
13 the withdrawals, which again is a part of the taking, so it  
14 would be correct, even on its own, nothing in the  
15 instruction precluded the jury from considering defendant's  
16 entire course of conduct over the span of the entire  
17 scheme, including his opening of the account, and his  
18 participation in the deposit.

19 In fact, the jury was instructed as to the  
20 general principles of larceny. It was told that it had to  
21 find that it was a theft from an owner, namely KWC, and it  
22 was told that it had to find the defendant knew the nature  
23 of the money. So nothing in that precluded the jury from  
24 considering the entire course of conduct on the ultimate  
25 issue of defendant's guilt of larceny.



1           Defense counsel acknowledged that the taking was  
2 complete with the deposit. Going back to the facts, we  
3 proved am - - - there was ample evidence that defendant  
4 participated in the deposit. He had to have met the  
5 unidentified man to hand over the debit card, which he  
6 obtained the day before the deposit, and he was the only  
7 person who had the PIN number, so he had to have provided  
8 that. It was certainly reasonable to infer that defendant  
9 did that, because he wanted to distance himself from the  
10 check. He didn't want to have possession of the check, and  
11 he wanted to participate in this scheme to steal the money.

12           If there are no further - - -

13           JUDGE RIVERA: But your position is he doesn't  
14 have to know there's a stolen check, right?

15           MS. FIGUEREDO: He doesn't have to know that - -  
16 - that the money that entered in his account was by means  
17 of a stolen check. The evidence here doesn't rule out the  
18 defendant did, in fact, know that. He must know that the  
19 money was stolen and we did prove that defendant knew the  
20 money was stolen, and in fact, participated in the means by  
21 which the money - - -

22           JUDGE RIVERA: So then - - -

23           MS. FIGUEREDO: - - - entered his account.

24           JUDGE RIVERA: - - - just to clarify. Is - - -  
25 is your argument that the property that's stolen is the



1 money or the money of the proceeds of the check, which is  
2 the property that's stolen?

3 MS. FIGUEREDO: The property that was stolen is  
4 the money. It is no different than if you had stolen a key  
5 to a vault. We could have charged him with theft of - - -  
6 petit larceny for theft of the key. But what we charged  
7 him with was stealing what was inside the vault, which was  
8 the money.

9 JUDGE RIVERA: Right, so - - -

10 JUDGE STEIN: If he had stolen the check, that  
11 would - - - that, too - - - you could have charged him with  
12 - - -

13 MS. FIGUEREDO: That's right.

14 JUDGE STEIN: - - - grand larceny.

15  
16 MS. FIGUEREDO: It could have been overlapping  
17 larcenies. We could have petit larceny for theft of the  
18 check.

19 JUDGE STEIN: So if he stole the check, but he  
20 never - - - never attempted to cash it, would - - - would  
21 that be a taking?

22 MS. FIGUEREDO: It would be a taking of the  
23 check, so - - -

24 JUDGE STEIN: Of the check, but not of the funds  
25 that the check represents? Is that - - -



1 MS. FIGUEREDO: Well, again, this - - - this was  
2 a forged check. So it should - - - it's valueless. It  
3 wouldn't represent any funds. If he had stolen a check  
4 that was actually made out lawfully by the - - - KWC to the  
5 person who was entitled to the debt, then it would be under  
6 the penal law, that check would have the value on its face.

7 But that's not what we have here. In either  
8 case, if he had - - - if we had evidence proving his theft  
9 of the check from KWC, we could have charged that, and we  
10 could have also charged theft of the money once that money  
11 was removed from KWC's account.

12 JUDGE RIVERA: So if - - - I'm sorry; maybe I've  
13 misunderstood what you just said. You're arguing that  
14 there are two separate larcenies?

15 MS. FIGUEREDO: There could be two separate  
16 larcenies - - -

17 JUDGE RIVERA: That's not how you litigated the  
18 case, right? That's not how you prosecuted the case,  
19 excuse me.

20 MS. FIGUEREDO: Our theory below was always  
21 focused solely on - - -

22 JUDGE RIVERA: There's one larceny, correct?

23 MS. FIGUEREDO: That's correct on the theft of  
24 the money, because we didn't have enough evidence linking  
25 him to the theft of the check. Had we had - - -



1 JUDGE RIVERA: So when did he take the money from  
2 the owner?

3 MS. FIGUEREDO: Defendant took the money from the  
4 owner when he - - - when the check was deposited. At that  
5 point - - -

6 JUDGE RIVERA: But he didn't do that - - -

7 MS. FIGUEREDO: He didn't have to - - -

8 JUDGE RIVERA: - - - so your argument for that is  
9 because of what he has done to facilitate that being done  
10 by someone else? That's the scheme argument?

11 MS. FIGUEREDO: That - - - that's right. He  
12 didn't have to physically take the money. He - - - he was  
13 an accomplice to that. And he was an accomplice to that,  
14 because he part - - - he created the account. He gave his  
15 debit card, and he gave the PIN number, and all of that  
16 needed for that money to enter that account.

17 There's no distinction between liability as a  
18 principal or an accomplice - - -

19 JUDGE RIVERA: Right.

20 MS. FIGUEREDO: - - - so even if he was an  
21 accomplice, he would still be guilty.

22 JUDGE RIVERA: It is correct that you prosecuted  
23 this as the defendant as the principal? I know you're  
24 saying there's no distinction, but I just want to know your  
25 position on that.



1 MS. FIGUEREDO: We - - - we did - - - we did  
2 prosecute it as if - - - as if he was the principal working  
3 with the unidentified man, to steal the money.

4 JUDGE RIVERA: Thank you.

5 MS. FIGUEREDO: If there are no further  
6 questions, we ask that you affirm.

7 CHIEF JUDGE DIFIORE: Thank you, Counsel.

8 Counsel?

9 MR. STROTHER: Just getting to Judge Rivera's  
10 recent question there, the reason why it matters whether  
11 it's the money or the check, is because if it's the money,  
12 and the deposit is the point at which the taking is  
13 complete, again, he didn't actually deposit the money, and  
14 the judge did not charge acting in concert. The words were  
15 never actually mentioned during the trial once.

16 And the judge specifically instructed not that  
17 the deposit was the taking, but that the withdrawal of the  
18 money is the taking. That's critical, because at that  
19 point, the evidence only establishes that somebody else  
20 deposited the check, perhaps with Mr. Rodriguez's  
21 assistance. However, the jury would - - -

22 JUDGE WILSON: Well, certainly - - - certainly  
23 with his assistance, no?

24 MR. STROTHER: I think we have - - - I think we -  
25 - - it's - - - it's a fair inference that he assisted in





1 the deposit of the money. However, what - - - the point  
2 being here is that the jury was not asked to determine did  
3 Mr. Rodriguez act in concert to complete a deposit that is  
4 a grand larceny. They were asked to determine did Mr.  
5 Rodriguez, acting as a principal, commit grand larceny when  
6 he withdrew money from his own bank account.

7 If that's what the jury was being asked to  
8 decide, then certainly sufficient evidence wasn't presented  
9 to - - - to - - - to find him guilty of that. That - - -  
10 that is just not in the - - - there's no evidence in the  
11 record about whether A, a with - - - there's no decision  
12 from this court that a withdrawal is a taking. And  
13 secondly, there's no instruction to the jury about acting  
14 in concert. There's nothing that they're deciding about  
15 him working together for a scheme. That's just not how  
16 this case was presented.

17 JUDGE RIVERA: So what - - - why isn't it - - -  
18 going to 155.05, you're focused on the taking - - - why  
19 isn't that he's withholding the property from the owner?

20 MR. STROTHER: Withholding is usually used in  
21 slightly - - - sli - - - just different circumstances than  
22 a trespassory taking, which is what we're talking about  
23 here. You know, their theory is that it is a trespassory  
24 taking, that the withdrawal of the money is - - - is the  
25 trespass. Withholding of money is often used in different



1           circumstances than that. So I don't believe it would be a  
2           withholding crime, simply because withholding - - -

3                   JUDGE RIVERA: Well, he's - - - but certainly, it  
4           could be inferred by the jury that he is making it more and  
5           more difficult for the owner to be able to track this check  
6           and to get the money, right?

7                   MR. STROTHER: One could argue that, although  
8           under those circumstances - - -

9                   JUDGE RIVERA: By the quick turnaround on the  
10          withdrawals, once it clears, using the same bank so that it  
11          will clear quickly.

12                   MR. STROTHER: He - - - yeah, I think there's a  
13          stretch inference that the use of Chase really makes much  
14          of a difference in this case. There's literally a Chase on  
15          every street corner in New York City, so to infer much from  
16          it is, I think, a stretch.

17                   JUDGE RIVERA: But it's not an unreasonable  
18          inference?

19                   MR. STROTHER: I would say it's an unreasonable  
20          inference, to say that someone chose a Chase on purpose  
21          when there's a Chase on every street corner. That is so  
22          much more susceptible to innocent explanation than - - -

23                   JUDGE RIVERA: Why - - - why is he going to Coney  
24          Island then, to that Chase, within about an hour of going  
25          to another Chase?



1 MR. STROTHER: Again, Your Honor, we conceded  
2 that it shows that he likely knew something was fishy about  
3 what was going on here.

4 CHIEF JUDGE DIFIORE: Thank you, Counsel.

5 MR. STROTHER: Thank you.

6 (Court is adjourned)

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

I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of People of the State of New York v. Manuel Rodriguez, No. 76 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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