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COURT OF APPEALS

STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

IMMANUEL FLOWERS,

NO. 197
(Papers sealed)

Appellant.

20 Eagle Street
Albany, New York
November 15, 2016

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA

Appearances:

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1 CHIEF JUDGE DIFIORE: The next matter on the
2 calendar is appeal number 197, the People of the State of
3 New York v. Immanuel Flowers.

4 Counsel?

5 MR. HAUSMAN: Good afternoon, Your Honors.
6 Lawrence Hausman for the appellant, Immanuel Flowers. I
7 would like to reserve two minutes for rebuttal.

8 CHIEF JUDGE DIFIORE: You may, sir.

9 MR. HAUSMAN: Your Honors, on the first appeal in
10 this case, the Appellate Division concluded that the
11 sentencing court had improperly relied on dismissed
12 conduct, the shooting of the complainant, in imposing
13 sentence. And so the - - - the central question on this
14 appeal is whether, at the resentencing, the court continued
15 to rely on the dismissed conduct, and we think there are
16 two compelling reasons in the record for - - -

17 JUDGE STEIN: What about - - -

18 MR. HAUSMAN: - - - concluding that the court - -
19 -

20 JUDGE STEIN: How - - - how - - - I'll - - - I'm
21 sorry. I should have let you get to your two reasons, but
22 what - - - what stops me at the get-go, is that the
23 Appellate Division disagreed with you. Isn't - - - isn't
24 that, you know, like end game there?

25 MR. HAUSMAN: I don't think so, Your Honor. I

1 don't think this is a mixed question. I - - - I mean, I
2 think - - - and I think record strongly supports - - -

3 JUDGE STEIN: Well, but your argument is, is that
4 the trial court disobeyed the mandate of the Appellate
5 Division.

6 MR. HAUSMAN: Right.

7 JUDGE STEIN: And the Appellate Division itself,
8 when that question was brought up to it, said, no, it
9 didn't; it didn't do anything wrong.

10 MR. HAUSMAN: But I - - -

11 JUDGE STEIN: So - - -

12 MR. HAUSMAN: But I think, Your Honor, that the
13 Appellate Division was wrong the second time around,
14 because I think the court did exactly the same thing it did
15 the first time. It was a little more careful the second
16 time, and so, I mean, I think it's a good segue to the two
17 reasons. And one is, you know, I think it was - - - is - -
18 -

19 JUDGE ABDUS-SALAAM: Counsel, did - - - did the
20 Appellate Division have to remit or remand the case to the
21 Supreme Court to resentence after it found that initially
22 that the court had used an improper basis for the sentence?

23 MR. HAUSMAN: Was it obligated to?

24 JUDGE ABDUS-SALAAM: Yeah.

25 MR. HAUSMAN: I think it could have exercised its

1 discretion as an - - - and through a successive sentence
2 power and reduce it, but typically, in this situation where
3 an appellate court finds that a court relied on an improper
4 factor, the typical remedy, at least, is to remand to give
5 the resentencing another opportunity to do - - - to
6 resentence with - - -

7 JUDGE ABDUS-SALAAM: So picking up on what Judge
8 Stein said, if - - - if the Appellate Division had believed
9 that the - - - the trial court didn't follow its mandate on
10 remand, it could have, at least, exercised its interest-of-
11 justice jurisdiction the second time around and reduced the
12 sentence, right?

13 MR. HAUSMAN: It could have and it didn't, but -
14 - - but I still think that the - - - just like the trial
15 court is capable of making errors, I think in this case the
16 Appellate Division error the second time around - - -
17 excuse me, the Appellate Division the second time around
18 did make an error. And just to go - - - to get to those
19 two reasons I'm - - -

20 JUDGE GARCIA: I'm sorry. It's not preserved,
21 right, this objection?

22 MR. HAUSMAN: Your Honor, it was not preserved by
23 defense counsel, and that's why we argue that there are two
24 ways to review this claim. First of all, we argue that
25 this court should recognize a narrow exception to

1 preservation when an issue is explicitly remanded for - - -
2 to a trial court for a specific reason. We feel that under
3 those circumstances, the trial court is completely alerted
4 to what the issue is, and so it - - - it knows what it's
5 supposed to follow.

6 JUDGE RIVERA: But this is the same defense
7 counsel, right?

8 MR. HAUSMAN: Yes, Your Honor.

9 JUDGE RIVERA: I mean, it's the exact same lawyer
10 - - -

11 MR. HAUSMAN: It was, Your Honor.

12 JUDGE RIVERA: - - - making these arguments,
13 understands why it's being sent back and the lawyer doesn't
14 raise this issue?

15 MR. HAUSMAN: Well, that's why we alternatively
16 think the court could review the merits through the lens of
17 ineffective assistance of counsel. And in fact, on appeal,
18 on the first appeal, the - - - I mean, on the second
19 appeal, the counsel that - - - who we're saying is
20 ineffective was - - - was going to raise this issue in the
21 interest of justice, and then the client asked to be relea
22 - - - asked to have counsel relieved because the issue
23 wasn't preserved.

24 But to - - -

25 JUDGE GARCIA: But to go into Judge Stein's point

1 on the ineffective assistance claim, you have an Appellate
2 Division that says you would have lost on the merits
3 anyway.

4 MR. HAUSMAN: Right.

5 JUDGE GARCIA: So it's like - - - seems hard to
6 fault a trial lawyer as ineffective when the law, at least
7 as the Appellate Division takes it in that department, is
8 exactly what he thought. He wouldn't have won.

9 MR. HAUSMAN: And I think my answer to that is to
10 go back to the two reasons that - - - that I just wanted to
11 try to get out there as to why we think the record strongly
12 supports the notion that the court continued to rely on
13 this improper conduct.

14 One is, and we think there shouldn't even be a
15 presumption to this effect, that it's a court having been
16 found to rely on improper conduct imposes the same sentence
17 again without any new bad facts in the record, we should
18 presume that the court is again relying on the improper
19 conduct. And the reason is, is because I think it's
20 reasonable to assume that when a court imposes a sentence,
21 and articulates an aggravating factor, that that
22 aggravating factor affected the length of the sentence.
23 And so if we subtract that aggravated factor - - -

24 JUDGE STEIN: Isn't it - - - isn't it just as
25 reasonable to assume that this particular - - - if - - - if

1 that was the only factor the court had given in its
2 explanation for how it was sentenced - - - that would - - -
3 I - - - you know, I think you would have a much stronger
4 argument. Here, the - - - the court enumerated several
5 factors, and isn't it just as reasonable to assume that any
6 one of those factors might have resulted in - - - in the
7 same sentence?

8 MR. HAUSMAN: I - - - I think not, Your Honor,
9 because I think that each aggravating - - - it's reasonable
10 to assume that each aggravating sac - - - factor relates to
11 the length of the sentence. It's like a scale - - - I
12 mean, I think when you do sentencing you have a bunch of
13 aggravating factors and a bunch of mitigating factors. If
14 one of the aggravating factors, one apple is, you know,
15 rotten and you take it off the scale, it should - - - it
16 should affect the weight. It should affect the length of
17 the sentence. And I think - - -

18 JUDGE RIVERA: But you're assuming that - - -
19 that when you're doing this weighting you're talking about,
20 you get just to the point where it justifies the sentence,
21 as opposed to it may indeed be more than was ever necessary
22 to justify that sentence and the judge is running through
23 sort of the history and - - - and - - - and what's being
24 weighed, but it may not be that not focusing on what the
25 judge shouldn't have focusing on as the AD made clear,

1 still doesn't get you past the point where the sentence is
2 justified.

3 MR. HAUSMAN: Well, a couple of points. I think
4 that if you're looking at the integrity of the sentencing
5 process, and you - - - and you have a court reaching a
6 certain sentence and relying on an improper criteria, when
7 the court is no longer allowed to do so and reaches the
8 same result, I think the perception is, that the court is -
9 - - is continuing to rely on that, because I think - - -

10 JUDGE PIGOTT: So what - - - what should have
11 happened then in your view?

12 MR. HAUSMAN: I think the court should have
13 imposed a lesser sentence, ab - - - absent - - -

14 JUDGE PIGOTT: Well, that - - - that I - - - that
15 I was willing to bet you would say - - -

16 MR. HAUSMAN: Yeah.

17 JUDGE PIGOTT: - - - but I mean you - - - now - - -
18 - let's assume the Appellate Division says what it says.
19 It says, all right, we're sending it back.

20 MR. HAUSMAN: Yeah. I think you should send it
21 back for resentencing so that the court - - - I - - -
22 preferably at this point in front of - - -

23 JUDGE PIGOTT: No, no, I'm - - - I'm back to what
24 you're complaining about. So the - - - the Appellate
25 Division says we're going to send it back for a

1 resentencing. Do you need a new judge, because you - - -
2 you've now aggravated the judge who sentenced him by saying
3 he was wrong? Do you - - - do you - - - I mean, what - - -
4 what - - - what do we do in the future when something like
5 this happens?

6 MR. HAUSMAN: Ca - - - courts' cases are often
7 sent back to the same judge, even when they make mistakes.

8 JUDGE PIGOTT: Right.

9 MR. HAUSMAN: Sometimes the mistake is so sort of
10 out - - egregious in certain circumstances. A court will
11 conclude that a judge is so vested in the mistake that they
12 will send it to another court. That's a discretionary
13 matter. I don't think it's required in this context,
14 although perhaps on the third time around it would be the
15 best - - -

16 JUDGE PIGOTT: But I'm - - - I'm just trying to
17 figure it out, because as Judge Rivera says, he may have
18 wanted to give you even more, but, you know, the - - - the
19 sentencing guidelines don't allow him to do more, so - - -

20 MR. HAUSMAN: Well, he didn't give the maximum,
21 Your Honor, so he didn't want to give more or he would have
22 given more the first time.

23 JUDGE PIGOTT: All right. But - - - all right,
24 then let's make it the next case. So do the - - - does the
25 Appellate Division then say you - - - you have to give less

1 time than you gave the first time because the first time
2 you used factors that shouldn't be considered?

3 MR. HAUSMAN: I think that should be - - - I
4 don't know that the court has to articulate it that way,
5 but I think this court should articulate that absent new
6 bad facts there should be - - - an improper fact should be,
7 in essence, subtracted from the length of the sentence. A
8 judge - - - a trial judge gets to decide what that length
9 is. But I don't think you can say it's zero. I don't
10 think you can - - -

11 CHIEF JUDGE DIFIORE: Counsel, you - - - so is
12 your argument - - -

13 JUDGE RIVERA: So - - -

14 CHIEF JUDGE DIFIORE: Just to be clear, is your
15 argument that every time - - - or whenever a judge mentions
16 a fact during sentencing that should not have been
17 mentioned, that on resentencing that defendant is
18 automatically entitled to a lesser sentence, is that your
19 argument?

20 MR. HAUSMAN: Absent new bad facts, and I'm not
21 saying it's a significant reduction, but I think it's - - -
22 it's a prophylactic protection against the resentencing
23 court ignoring the appellate court, and it's also a
24 recognition that when a court - - - in this case, the court
25 said I'm sentencing the defendant to X because of, and he

1 listed four or five reasons. And I think each reason, it's
2 reasonable to assume, correlated with some increase in the
3 length of the sentence.

4 JUDGE ABDUS-SALAAM: So your assumption is that
5 the court listed every reason that could possibly be listed
6 for the sentence initially given.

7 MR. HAUSMAN: Another - - - I'm sorry.

8 JUDGE ABDUS-SALAAM: The court - - -

9 MR. HAUSMAN: There may have been other reasons
10 too, but what I'm saying is once a court - - -

11 JUDGE ABDUS-SALAAM: Right, so if you - - - if -
12 - - if on the resentencing, the court then comes up with a
13 new - - - according to you, the court has to come up with
14 another reason, but that has to be new bad facts.

15 MR. HAUSMAN: The reason it has to be new bad
16 facts is because I want the - - - I think it's fair - - -
17 the concepts of due process and fundamental fairness for
18 the resentencing to reflect the fact that the court is no
19 longer relying on an aggravating factor that's improper and
20 that it pointed to as being part of the reason it gave the
21 sentence it did.

22 CHIEF JUDGE DIFIORE: So to that point, that - -
23 - that sentencing proceeding, isn't - - - the judge is
24 entitled to a de novo review of all the facts and come up
25 with his or her determination, correct?

1 MR. HAUSMAN: Yes. But - - -

2 CHIEF JUDGE DIFIORE: Isn't that entitled to a
3 fresh look and a fresh perspective?

4 MR. HAUSMAN: Well, I think it's - - - I think -
5 - - just like in Van Pelt when a case comes back after - -
6 - after a new - - - after a reversal, and you - - - the
7 judge isn't allowed to penalize the defendant, you could
8 say, well, it's a de novo resentencing, the court can do
9 whatever it wants, but nonetheless, we say, well, yeah, but
10 we - - - if the sentence goes up, we're going to presume
11 it's because the court is punishing the defendant. Maybe
12 the court's not; maybe the court is taking a fresh look,
13 but I think there's a significant enough risk there that
14 the court is punishing the defendant.

15 Here when there's no new bad facts and you arrive
16 at the same sentence, and - - - but you're no longer
17 allowed to rely on this improper criteria, I think there's
18 too great a risk that the court - - -

19 JUDGE RIVERA: So - - - so - - -

20 MR. HAUSMAN: - - - is continuing - - -

21 JUDGE RIVERA: - - - so would - - - would the
22 court on resentencing have also - - - in your - - - in your
23 opinion, under your analysis, have made an error if the
24 court had said, pursuant to the Appellate Division's
25 decision, I am not taking X facts into consideration, but

1 based on the other facts and the other issues that I
2 recognized at the prior sentencing, I sentence the
3 defendant to - - - and he sentences him again to the same
4 sentence. Would that - - -

5 MR. HAUSMAN: The real - - -

6 JUDGE RIVERA: - - - be a violation of your
7 client's rights?

8 MR. HAUSMAN: I believe it would, although one
9 thing I've never gotten to yet, is the fact that there - -
10 - and I guess I'll get to that on my rebuttal - - -

11 CHIEF JUDGE DIFIORE: Why don't you save that for
12 rebuttal?

13 MR. HAUSMAN: - - - is that there were other - -
14 - there was another reason in this record to conclude that
15 the judge was continuing to rely on improper conduct, but I
16 think the reason in Judge Rivera - - - answer to Judge
17 Rivera's hypothetical is that in that situation we're - - -
18 we're - - - we're assuming that the judge - - - that the
19 reliance on an aggravating factor didn't contribute to the
20 length of the sentence, because the judge already had all
21 those other facts.

22 CHIEF JUDGE DIFIORE: Thank you, sir.

23 MR. HAUSMAN: Thank you.

24 CHIEF JUDGE DIFIORE: Counsel?

25 MR. YOTAM: May it please the court, Avshalom

1 Yotam for the respondent. The defense claim here is - - -
2 is ineffective assistance. Defendant did not object at the
3 resentencing. An objection was required. And - - - and
4 the rule that is now being proposed to get around the
5 preservation requirement is ultimately unworkable. It - -
6 - it can't be that it - - - every time a - - - a party
7 thinks that a remittal order has not been complied with,
8 that nonetheless, it doesn't need to - - - to - - - to
9 bring that objection to the - - - the court's attention,
10 because, I mean, that sort of defeats the purpose of the
11 preservation requirement.

12 JUDGE STEIN: Could - - - could the Appellate
13 Division have remitted and said that you improperly
14 considered this factor, and we're sending it back and you
15 must sentence the defendant to a - - - a lesser sentence?

16 MR. YOTAM: Well, I - - - I think - - - I guess
17 I'm interpreting your question in two ways. If - - - if
18 the question is about exercising its power to reduce a
19 sentence, we would be, I guess, in a different situation.
20 I don't - - - I don't think by the way it was inappropriate
21 for the Appellate Division to - - - even - - - even if it
22 suspected it might to reduce a sentence to forebear and not
23 to do that, because in fact, it - - - it was protecting
24 defendant's rights. I mean as soon as the Appellate
25 Division decided, you know, we're concerned about how the

1 sentence was - - - was determined, defendant got a right to
2 - - -

3 JUDGE STEIN: But - - - but you're - - - you're
4 not questioning whether the Appellate Division could have
5 done that. And then - - - and then if it had done that and
6 the trial court persisted in - - -

7 MR. YOTAM: Oh - - -

8 JUDGE STEIN: - - - in sentencing him to the same
9 sentence, then it would be clear, right?

10 MR. YOTAM: It - - - it - - - you mean being - -
11 - instead of exercising its power to - - - to say this the
12 sentence, if it had said - - -

13 JUDGE STEIN: You - - - you - - - you do it - - -

14 MR. YOTAM: - - - reduce the sentence - - - you
15 reduce sentence.

16 JUDGE STEIN: But you - - - you decide what it
17 is, but it has to be less than what you did the first time,
18 right?

19 MR. YOTAM: Yeah, that would be a different
20 situation.

21 JUDGE STEIN: Okay, but it didn't do that.

22 MR. YOTAM: No, it didn't do that.

23 JUDGE STEIN: Okay, so does that tell us that it
24 was - - - it was telling the - - - the trial court that it
25 could exercise its discretion without that limitation?

1 MR. YOTAM: Yeah, that's certainly our - - - our
2 approach, and in fact, as you're suggesting, it is sort of
3 an unusual - - - unusual situation where you - - - where we
4 want - - - we kind of want to rely or - - - on the order
5 that you're reviewing as, you know - - - you're sort of
6 reviewing something about how the Appellate Division is
7 approaching these cases in general. What - - - whether it
8 thought its authority was being defied, what - - - what
9 defense lawyers think. I mean, if the Appellate Division
10 is - - - wasn't - - - wasn't seeing anything wrong here, it
11 was, so, you know, a reasonable defense attorney would not
12 have - - - you know, hearing everything she - - - this
13 attorney heard at the resentencing, would not have - - -

14 JUDGE PIGOTT: Do you see the logic, though, of
15 what the appellant's saying? I get - - - I get twenty
16 years and they say I'm giving you the twenty years, not
17 only because of what you did, but because of what - - -
18 even though the jury acquitted you of this, I think you did
19 it, and I'm going to give you twenty years. I know I'm not
20 saying it exactly. So it goes up to the Appellate
21 Division. The Appellate Division says, you can't do that,
22 sends it back, and he says I'm giving you twenty years.

23 MR. YOTAM: Yeah, well, so, I - - - I mean, I
24 think the - - - ultimately the answer to that is - - - is
25 Young and the - - - and the cases that follow Young, which

1 explain, you know, even - - - even where a - - - a
2 conviction has been reduced, counts have been taken out,
3 the case comes back for resentencing, the - - - the same
4 sentence can be - - - can be handed down. The way - - -
5 and - - - and those - - -

6 JUDGE PIGOTT: But shouldn't - - - shouldn't the
7 judge say I - - - I'm aware of what the Appellate Division
8 said, I'm not going to take into consideration those other
9 factors, however, my review is, and then he brings out the
10 three or four that he did this time, so at least there's
11 some record showing, you know, that - - - that he's
12 correcting whatever the Appellate Division suggested.

13 MR. YOTAM: Yeah, no, you know, our - - - our - -
14 - it's - - - it's interesting, that it sounds like the
15 defendant is reading the record and saying, Judge Marrus
16 knew what he was doing and he was thumbing his nose at the
17 - - - at the Appellate Division - - -

18 JUDGE PIGOTT: Well, then because - - -

19 MR. YOTAM: - - - we also say - - -

20 JUDGE PIGOTT: - - - because the follow up to
21 that is, if that's true, then counsel is ineffective for
22 just standing there while the judge gave him the exact same
23 sentence he gave him before with three or four of these
24 things that may or may not have been part of the record in
25 the original sentence, right?

1 MR. YOTAM: Right, so - - - right, and - - - but
2 we - - - we read the record and we think a reasonable
3 defense attorney could read the record - - - the - - - or
4 hear what - - - Judge Marrus' comments and say oh, he knows
5 what he's doing, and he's actually clarifying what his
6 thinking was. He's - - - he's addressing the Appellate
7 Division's concerns. He's saying, you know, you were
8 worried that I'm considering facts relating to the - - -
9 this miscount improperly. No, no, there's a certain proper
10 way, even under New - - - New York law to - - - to consider
11 these facts. There's no blanket prohibition on - - - on
12 considering facts that relate to - - -

13 JUDGE RIVERA: You're saying that on - - - on the
14 record, that - - - that counsel - - -

15 MR. YOTAM: But, no, he - - -

16 JUDGE RIVERA: - - - counsel could have, during
17 this resentencing, have interpreted the judge to do exactly
18 what the Appellate Department had directed the judge to do.
19 That there's a way to read that record and that the counsel
20 read that record in that way and was going about the
21 business of trying to persuade the judge that a lower
22 sentence was appropriate - - -

23 MR. YOTAM: Right, so - - -

24 JUDGE RIVERA: - - - given the history of this
25 defendant.

1 MR. YOTAM: Right, I - - - yeah, meaning, from an
2 objective point of view, a - - - a def - - - a reasonable
3 defense attorney could ignore all the cla - - - you know,
4 both claims that are being proposed now and just focus on
5 what this defense attorney focused on, which - - - and she
6 did very good a job at it - - - ar - - - argue for a lower
7 sentence, which is what she had achieved for this - - - for
8 - - - for her client on the first appeal.

9 And I - - - I just for - - - you know, for this
10 idea that facts relating to dismissed or acquitted counts
11 can be considered at - - - at sentencing, we're - - - we're
12 relying very much on this court's decision in Horne. We
13 cited Horne in our brief for the - - - for the easy
14 proposition that the - - - the facts that relate to the,
15 let's say, an acquitted count, are not exclusive to that
16 count. They can also actually prove - - - they can, you
17 know, prove a - - - the - - - the count in which the
18 defendant is - - - is - - - is convicted in, and so the
19 sentencing - - - sentencing court is actually explaining
20 its reasoning or commenting on the strength of the
21 evidence.

22 But beyond that, these - - - these facts can also
23 be relative circumstances of the crime, and they're also in
24 - - - informative to the sentencing court about the
25 defendant in front of it. And we - - - Horne is 97 N.Y.

1 404, and the discussion we're - - - I'm referring to is at
2 413, where - - - where this court explains, you know, the -
3 - - just because there's been an acquittal on a count,
4 doesn't mean that the facts that are relevant to that count
5 disappear.

6 And then as - - - as for just the - - - the idea
7 in general of a presumption of vindictiveness or anything
8 like a presumption of vindictiveness, I mean, any - - - any
9 kind of imputation of a - - - of a - - - an improper
10 motive, you know, at least with the actual pre - - -
11 presumption of vindictiveness, there's a - - - a kind of
12 intuitively remarkable fact that there's been a - - - you
13 know, defendant has appealed - - - had a successful appeal,
14 and then he's resentenced and gets a higher sentence. I
15 mean, there's - - - there's something, you know, remarkable
16 about it, at least intuitively.

17 But I mean, what - - - what exactly are the
18 circumstances here that suggest any kind of likelihood of,
19 you know, vindictiveness, retaliation, self-implication - -
20 -

21 JUDGE FAHEY: Well - - - well, but when you send
22 it back - - - when you sent it back, you assume that you'll
23 get a fresh evaluation, but if there's no real evaluation
24 and you get the same time, then that be that. I thought
25 that they were backing off a little on a presumption of in

1 - - - vindictiveness, but at least alleging a presumption
2 of impropriety of some kind.

3 MR. YOTAM: The - - - the defendant?

4 JUDGE FAHEY: Yes.

5 MR. YOTAM: Yeah, well, I mean, what - - -

6 JUDGE FAHEY: You know, normally what would
7 happen is quite often the Appellate Division - - - you'd
8 send it to a different judge and that would solve the
9 problem usually, yeah.

10 JUDGE ABDUS-SALAAM: Well, even in this case,
11 though, given this - - - this was the judge who dismissed
12 several counts of the indictment and only left one count.
13 In the context of vindictiveness, would that be some factor
14 that should be considered about whether the judge was
15 vindictive or not or whether there was some kind of
16 vindictive institutional position here?

17 MR. YOTAM: Right, I mean, there - - - there are
18 several circumstances that sort of argue against any kind
19 of, you know, worry about an improper motive. It's - - -
20 the conviction hadn't changed and the judge didn't change
21 the sentence. And then the - - - the judge was very much
22 aware - - - as - - - as Your Honor's suggesting - - - was
23 very much awa - - -aware of what facts could be considered
24 because - - - related to the dismissed counts, because he
25 himself had dismissed that count and - - - and he - - -

1 when he did so, he explained explicitly - - - and the
2 People's case does prove - - - does establish that a gun
3 had been fired. It's just I'm worried about intent. I'm
4 going to dismiss those counts for that reason alone.

5 And - - - and then if - - - you know, if we're -
6 - - if we're right that there is no blanket prohibition on
7 - - - on - - - on considering facts relating to dismissed
8 or acquitted counts, that - - - that's also relevant to the
9 - - - the - - - this question of improper motive, because,
10 you know, Judge - - - Judge Marrus was, as we read it, was
11 clarifying, look, if you were concerned that I was
12 considering something improperly, I - - - I'm - - - you
13 know, the first thing he says, look, this is the evidence;
14 the - - - a gun was fired. There is a proper way to
15 consider these facts, and that's what I'm doing.

16 CHIEF JUDGE DIFIORE: Thank you, counsel.

17 MR. YOTAM: Thank you very much.

18 CHIEF JUDGE DIFIORE: Mr. Hausman?

19 MR. HAUSMAN: Yes, Your Honor. I - - - the other
20 thing I wanted to point to, other than the reimposition of
21 the same sentence, which I - - - which I never got to was
22 the fact that the judge referenced the shell casings, which
23 were recovered from the scene of the shooting. And I think
24 in context - - -

25 JUDGE STEIN: Wasn't that relevant to the

1 criminal possession charge he said?

2 MR. HAUSMAN: Only in the most abstract way, and
3 Your Honor, it was superfluous to the - - - to the issue of
4 criminal pos - - - simple criminal possession of a weapon,
5 but it was highly relevant to - - - as a way of suggesting
6 that the defendant was involved in the shooting. I mean,
7 if the judge wanted to - - -

8 JUDGE STEIN: Well, yeah, but the court dismissed
9 the - - - the other charges based on a lack of intent, not
10 on lack of proof that - - - that, in fact, the gun was
11 fired and hit - - -

12 MR. HAUSMAN: Your - - - Your Honor - - -

13 JUDGE STEIN: - - - hit the victim.

14 MR. HAUSMAN: Right, well, what the - - - what
15 the judge says specifically, the judge said a couple of
16 things. The judge said that - - - because don't forget,
17 the judge dismissed a range of charges, ranging from
18 misdemeanor assault all the way through felony assault, and
19 if the judge had thought the charges supported a reckless
20 conduct under the dismissal statute in the CPL, he would
21 have reduced it to the lesser offense, because that's what
22 a legal sufficiency determination involves.

23 But what the judge said was that the
24 circumstances - - - this is on A-231 of the record - - -
25 excuse me, A-281 of the record - - - the circumstances of

1 the actual shooting are subject to speculation here. So in
2 other words, what the judge is saying, we have no witness
3 to the shooting. We don't know what the circumstances of
4 that shooting were. And so the shooting of a gun can range
5 from the most culpable act imaginable to a justified act or
6 a - - - or an accidental act. And without knowing what
7 that is, there's no basis for assigning culpability.

8 And so that's why we think the reference to the
9 shell casings is critical in this case. Shell casings that
10 are recovered from the scene in the shooting are highly
11 relevant to connecting the defendant to the shooting.
12 They're - - - they're entirely superfluous on the issue of
13 simple possession, particularly in the case where, you
14 know, you had a - - - you had a witness who had testified
15 entirely about the operability of the weapon. If the - - -
16 if the judge was concerned about the operability of the
17 weapon, that's what the judge would have talked about. To
18 talk about the shell casings at this new - - -

19 JUDGE GARCIA: But he could be concerned that the
20 weapon's loaded, right? If you have a possession count and
21 the weapon's loaded, that's a legitimate factor in
22 sentencing, right?

23 MR. HAUSMAN: And the judge - - - and - - - and
24 the judge was entitled to rely on that.

25 JUDGE GARCIA: And what about, it's been recently

1 fired? You're walking down the street, you have a loaded
2 gun, and that gun's been recently fired, can they rely on
3 that?

4 MR. HAUSMAN: The re - - - the reason I would say
5 not is because then you have to speculate about whether the
6 conduct was - - - you - - - to - - - to affix culpability,
7 you have to speculate. Was it fired justifiably,
8 accidentally, or was it fired in - - - with intent? And if
9 you don't know that, I don't think it provides the basis
10 for affixing culpability.

11 JUDGE ABDUS-SALAAM: Were the shell casings
12 coupled with the Department of Probation's report saying
13 that your client was a danger to society? Could that be
14 considered? Could it be considered in connection with
15 that?

16 MR. HAUSMAN: Not in connection - - - the pro - -
17 - the pre-sentence report could be considered, but - - -
18 but what we're saying is that in this case, as the
19 Appellate Division held the first time around, and as is
20 the law of this case and not reviewable, the shooting of
21 the victim was not a proper criterion for sentencing in
22 this case. And what we're saying is that not only - - -

23 JUDGE ABDUS-SALAAM: But what I'm - - - I'm - - -

24 MR. HAUSMAN: Sorry.

25 JUDGE ABDUS-SALAAM: - - - asking counsel is, the

1 probation or, you know, the pre-sentencing report,
2 indicating that your client was a danger to society, could
3 that be considered in connection with a gun recently fired
4 for whatever reason?

5 MR. HAUSMAN: I think that the - - - no, because
6 I think that ultimately tying it to the recent shooting of
7 the gun, without knowing the circumstances of the shooting,
8 and whether or not, the fact that the gun was fired, is
9 related to any culpability, doesn't provide a basis for - -
10 -

11 JUDGE STEIN: Well, even it was accidental,
12 wouldn't that be related to a possible danger to society,
13 if this guy's running around and - - - maybe it's not
14 criminal culpability, maybe it was negligent. I mean, you
15 know, any - - - any circumstance in which a loaded gun is
16 being carried and is fired, regardless of the level of
17 culpability is, wouldn't that be relevant?

18 MR. HAUSMAN: I think you'd be right as to the
19 carrying around the loaded gun, but that was - - - and - -
20 - but - - - but that - - - but not as to it being fired,
21 because without knowing the circumstances of it being
22 fired, because it could be that it's not related to any
23 culpability regarding sentence, and we just don't know
24 here. That's the Appellate Division found the first time.

25 CHIEF JUDGE DIFIORE: Except that it's an illegal

1 weapon. Except that it's - - -

2 MR. HAUSMAN: Well - - -

3 CHIEF JUDGE DIFIORE: - - - possession of an il -
4 - - illegal weapon on a public street.

5 MR. HAUSMAN: And absolutely, the fact that he
6 possessed a loaded, illegal weapon on the street is
7 completely relevant to sentencing, but I think our ultimate
8 point is that the judge knew that at the first sentence,
9 knew that at the second sentence, no other facts changed,
10 and yet we had the same sentence, but that sentence
11 continued to rely on - - - we believe, on the dismissed
12 conduct and that's shown not only by the fact that the same
13 sentence was imposed, so there's no accounting for that
14 impropriety, but also the fact that the judge expressly re
15 - - - you know, references these shell casings, which
16 really - - - the only meaningful impact relevance to
17 sentencing it had was to connect Mr. Flowers to the
18 shooting of the complainant, something the Appellate
19 Division had said was expressly prohibited.

20 CHIEF JUDGE DIFIORE: Thank you, Mr. Hausman.

21 MR. HAUSMAN: Thank you, Your Honors.

22 CHIEF JUDGE DIFIORE: Thank you.

23 (Court is adjourned)

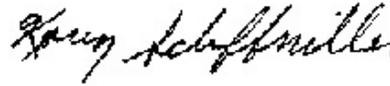
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C E R T I F I C A T I O N

I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Immanuel Flowers, No. 197 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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