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COURT OF APPEALS
STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

JAIME LOPEZ-MENDOZA,

Appellant.

NO. 43
(papers sealed)

20 Eagle Street
Albany, New York
May 2, 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 43. It is the People
3 of the State of New York v. Jaime Lopez-Mendoza.

4 Good afternoon, counsel.

5 MS. SWARNS: Good afternoon. With this court's
6 permission, I'd like to reserve two minutes for rebuttal.

7 CHIEF JUDGE DIFIORE: You may have two minutes.

8 MS. SWARNS: Thank you.

9 Christina Swarns for the Office of the Appellate
10 Defender on behalf of Jaime Lopez-Mendoza.

11 This case raises the question of whether
12 Constitutionally effective counsel can pursue a theory of
13 defense that he knew or should have known would be proven
14 false by the prosecution's undisputed physical evidence.

15 JUDGE STEIN: Well, this is a - - - this is - - -
16 this case, to me, is a little different than the previous
17 case, in terms of what we have on the record. We have this
18 sort of, what seems to me, an ambiguous discussion about
19 what trial counsel - - - had done in terms of
20 investigation. What he knew; what he didn't know. What
21 conversations he may have had with his client about it. I
22 - - - how can we decide this one on this record?

23 MS. SWARNS: Sure. So because there are
24 literally only two explanations for what - - - for
25 counsel's decision to pursue a defense that he should have



1 known would be proven false by the prosecution's undisputed
2 video evidence. So we know from the inception of this
3 case, counsel knew that the prosecution in this case had
4 video evidence. As it turned out - - - and the defense
5 counsel pursued a theory of defense which was that Mr.
6 Lopez - - -

7 JUDGE WILSON: I'm sorry, when - - - when you say
8 from the inception of the case, can you give me a date?

9 MS. SWARNS: I don't have a date in front of me,
10 but it was certainly in the V - - - in the VDF, that the
11 prosecution had video evidence.

12 JUDGE WILSON: But it's two days after the
13 incident that the defendant testifies in front of the grand
14 jury, correct?

15 MS. SWARNS: That's right.

16 JUDGE WILSON: Do we know whether counsel had the
17 video at that point?

18 MS. SWARNS: I don't think he had the video; he
19 had notice of the video.

20 JUDGE WILSON: Yeah, before that.

21 MS. SWARNS: Once he - - -

22 JUDGE WILSON: Before that.

23 MS. SWARNS: Right.

24 JUDGE WILSON: You know that?

25 MS. SWARNS: No.



1 JUDGE WILSON: You do know that or you don't know
2 that?

3 MS. SWARNS: I don't - - - do I know whether he
4 had seen the video before that or do I - - -

5 JUDGE WILSON: No, do you know whether he had the
6 video - - -

7 MS. SWARNS: No.

8 JUDGE WILSON: - - - by the 29th of December?

9 MS. SWARNS: I don't know the answer to that, but
10 what I do know is that from early on, let's say then, in
11 the beginning of the case, before this case went to trial,
12 counsel knew that the - - - that the prosecution had video
13 evidence. And counsel made a decision at the outset to go
14 to this trial and present a theory of defense which was
15 that Mr. Lopez-Mendoza engaged in consensual sex with the
16 complainant at 2:38.

17 CHIEF JUDGE DIFIORE: Counsel - - -

18 MS. SWARNS: The video - - -

19 CHIEF JUDGE DIFIORE: - - - how do we analyze
20 defense counsel's attempt to strategically recognize this
21 man's testimony before the grand jury and what he did at
22 trial?

23 MS. SWARNS: So the video, of course, disproved
24 the 2:38 a.m. defense. So counsel's obligation, right,
25 before they went to trial was to, A, have reviewed all of



1 the evidence that was - - - that was that he knew to be in
2 the prosecution's possession, that he knew or should have
3 known that the prosecution was likely to use in its
4 prosecution against Mr. Lopez-Mendoza, and then pursue a
5 theory of defense that reconciled with all of the evidence
6 that was known to him, or should have been known to him.

7 JUDGE WILSON: But how does he reconcile the
8 grand jury testimony with the video?

9 MS. SWARNS: Well, counsel had a bunch of
10 options, right. In this case, counsel opened and said,
11 that his - - - his client was going to testify to this 2:38
12 a.m. consensual defense - - - consensual sex defense. That
13 wasn't an obligation on counsel.

14 JUDGE WILSON: Well - - - I wasn't asking all the
15 different ways that he could not reconcile them. I want to
16 know how he could reconcile them.

17 MS. SWARNS: Well, that assumes that counsel was
18 locked into pursuing a theory of defense which was
19 consensual sex at 2:38.

20 JUDGE WILSON: Well, which was consistent with
21 the grand jury testimony.

22 MS. SWARNS: Right. But this was also a case
23 that was riddled with reasonable doubt. We have a
24 complainant who was unquestionably intoxicated. We have a
25 complainant who, on the evening of the offense, was



1 committed to the idea, inexplicably committed to the idea,
2 that the assailant was in room 206, even after she accused
3 - - -

4 JUDGE WILSON: And he did bring all that out at
5 trial.

6 MS. SWARNS: He did. And so there was - - - this
7 is a case that was riddled with reasonable doubt. So
8 counsel made a choice to pursue a theory of defense that he
9 knew or should have known would have - - - would have
10 absolutely failed in front of this jury, in the face of
11 other alternative defenses, like reasonable doubt, that
12 wouldn't have failed that way.

13 We also know that at the outset of the trial
14 proceedings, the court in this case offered Mr. Lopez-
15 Mendoza - - - a plea, right. There was a plea on the table
16 from the court of five years, plus five years PRS. Counsel
17 could have urged his client to - - - to seriously urge his
18 client to take that plea.

19 JUDGE WILSON: And do we know that he didn't?

20 JUDGE FEINMAN: But you don't know that he didn't
21 do that - - -

22 MS. SWARNS: But what we do know - - -

23 JUDGE FEINMAN: - - - and - - - and that brings
24 me to the same question I asked in the last case is, don't
25 we need a 440 here to flesh out this record?



1 MS. SWARNS: Well, what we know is that what
2 counsel actually did in this case, the decision that
3 counsel actually made, was to pursue a defense that he knew
4 or should have known would absolutely be disproven by the
5 prosecution's evidence. The only way he could have made
6 the decision to pursue that defense was either, A, by
7 failing to - - - to watch the video and recognize that that
8 video ran in complete conflict with the defense that he had
9 chosen, or B, that he did watch the video, and then
10 presented it anyway.

11 Whether you choose route A or you choose route B,
12 counsel's decision here was objectively unreasonable.

13 JUDGE STEIN: But what - - - what, if any, weight
14 is counsel permitted to give what his client tells him
15 about - - - so here he's got the - - - these hundreds of
16 hours of video. And he doesn't know until he's right there
17 at trial that supposedly these particular time frames will
18 show his client in a - - - in another part of the building.

19 So is he - - - is he not permitted to take into
20 account what his client tells him, in terms of the value of
21 his going through those hundreds of hours of video? Is - -
22 - is it ineffective for him to - - - to - - - to take that
23 into consideration?

24 MS. SWARNS: No, he's required to take that into
25 consideration. Counsel, of course, has to consult with his



1 client.

2 JUDGE STEIN: Okay So how do we know that that
3 conversation between him and his client didn't take place?

4 MS. SWARNS: We don't know that.

5 JUDGE STEIN: Okay. So why - - -

6 MS. SWARNS: But even - - -

7 JUDGE STEIN: - - - so even that what a 440
8 hearing is for?

9 MS. SWARNS: No, because even if - - - let's just
10 assume that Mr. Lopez-Mendoza was emphatic about the idea
11 that what he - - - what happened was that he engaged in
12 consensual sex at 2:38 a.m. Counsel's duty was then to
13 effectuate that defense, to push forward that his client's
14 chosen defense in recognition of all of the evidence that
15 was known to him with - - - in recognition of all of the
16 evidence that was going to be presented against his client.

17 You can't blindly accept what your client says
18 and pursue a defense and - - - and close your eyes to the
19 evidence that you know the prosecution is going to present.
20 If he knew that this was the defense that his client was
21 wedded to, and he knew that the prosecution was going to
22 introduce this video, then it was incumbent upon counsel to
23 - - - to aggressively seek to - - - for example, exclude
24 the video, right. Make a challenge on reliability grounds,
25 admissibility grounds. Challenge chain of custody. Make a



1 meaningful effort to effectuate the defense that his client
2 has urged him to pursue. None of that happened here, and
3 none of that happened here in a case that wasn't - - -

4 JUDGE FEINMAN: He's also not required to, you
5 know - - - the - - - the lawyer picks the strategy
6 regardless of what the client says, right, ultimately. We
7 don't know what really happened here, and - - - and he
8 doesn't - - - I mean, he can choose to take a - - - I'm not
9 saying this is a silly defense, but let's say the client
10 wants some silly defense, he or she may choose to pursue
11 that after discussing it with the client or not.

12 MS. SWARNS: That's right, and if - - - whether
13 it's - - -

14 JUDGE FEINMAN: So - - - so - - -

15 MS. SWARNS: So it sort of brings me back to
16 point one, which is whether Mr. Mendoza urged this defense
17 on him or whether the client chose this defense. There are
18 only one of two ways - - - and my red light is on - - -
19 that - - - that they could have gotten to the place where
20 this - - - this defense was presented to this jury. A,
21 they didn't know that the evidence - - - that the
22 prosecution was going to present and that video would
23 completely undermine that defense, or B, they did know that
24 that was going to happen, and they - - - presented it
25 anyway, which is inexcusable and objectively unreasonable.



1 JUDGE GARCIA: He didn't have a lot of choices
2 here, really. I mean, one, he had the grand jury testimony
3 he had to deal with. And two, which we haven't mentioned
4 yet, there was DNA evidence, so he was really limited in -
5 - - it's a consensual encounter and then I have to fit it
6 in a time, and there's all this videotape. So isn't it
7 really, as I think has been suggested, why did you do that?
8 I mean, what other options did he have? What was the
9 client telling him? All of these are hearing issues.

10 MS. SWARNS: Well, again, I think in terms of the
11 question of the impact of the DNA. I just want to take a
12 moment; I know my red light is on - - -

13 CHIEF JUDGE DIFIORE: You may.

14 MS. SWARNS: - - - to flesh this out. So what we
15 know is this case was riddled with reasonable doubt. This
16 jury acquitted Mr. Lopez-Mendoza on the criminal sexual act
17 charge, right. And that, obviously, is a repudiation of
18 the complainant's testimony, because the complainant at
19 trial testified that she was the victim of oral vaginal
20 contact, in combination with - - -

21 JUDGE GARCIA: But he was convicted of first-
22 degree rape.

23 MS. SWARNS: Yes, and in combination - - - I just
24 want to finish my thought - - - in combination with the
25 absence, right, of saliva or DNA. So that's how they get

1 to the acquittal on the criminal sexual act.

2 So then you have rape. And what the jury was
3 confronted with with respect to rape was a complainant,
4 whose credibility they have found to be compromised, and
5 Mr. Lopez-Mendoza, whose defense is perhaps - - - self-
6 serving, right, of consensual sex.

7 But then what happens here is that defense is
8 completely destroyed by the video. As soon as the
9 prosecution presents the video, the defense, right, to
10 counterbalance the questionable complainant's theory,
11 because they've already acquitted on one count, right, is
12 destroyed. So you have defense counsel saying, disregard
13 my - - - my defense.

14 You have the prosecutor, in her closing argument,
15 walking this jury step-by-step through the video, that
16 completely undermines the theory of defense. You have the
17 prosecutor, in her closing argument, spending her time
18 pointing out how the defense was destroyed by this video.
19 And we know, without question, that those things had a
20 profound effect on this jury, because the first note the
21 jury sends out asks for a bunch of things, including the
22 prosecutor's summation and the video.

23 So there's no question in the context of this
24 weak case - - -

25 JUDGE RIVERA: Does - - - does - - - does the



1 grand jury testimony get in, if he doesn't testify?

2 MS. SWARNS: No, I don't believe it does, right.

3 JUDGE RIVERA: So he could have avoided in the
4 opening making any reference to the time frame?

5 MS. SWARNS: Absolutely. He could have presented
6 a reasonable doubt defense, right? This - - - if - - -
7 Constitutionally effective counsel should be making these
8 decisions before the start of trial, right, taking into
9 account the reality of this videotape in the context of
10 this claim of consensual sex immediately after they go in
11 the room. That is the time at which those decisions should
12 have been made.

13 Counsel clearly did not do that. We know that
14 from this record, because again, only one of two things
15 happened. He watched that video and inexcusably presented
16 a defense that he knew or should have known would have
17 blown up in his face in court. Or he didn't watch the
18 video and he presented a strategy that was completely borne
19 in the blind.

20 Thank you.

21 CHIEF JUDGE DIFIORE: Thank you, counsel.

22 Counsel?

23 MS. AXELROD: Good afternoon, Your Honors, may it
24 please the court, my name is Susan Axelrod. I represent
25 the respondent. I just want to set the record straight on



1 a couple of things.

2 At the time that the defendant testified in the
3 grand jury, there had been no indictment, and there had
4 been no VDF. The defense did not know about the videotape.
5 I'm not sure that the People knew about the existence of
6 the videotape. Obviously, it's a hotel and it's likely to
7 - - - to be something that exists. But when the defendant
8 went into the grand jury, he - - - the defense had not seen
9 the videotape.

10 The defendant, however, is an employee of the
11 hotel, and one would have expected that he might have been
12 aware that there were actually cameras all over where the
13 employees worked. This - - -

14 JUDGE FAHEY: We know, though, the opposing
15 counsel closed by positing a - - - a conundrum. Assuming -
16 - - assuming the videotape was not watched in its entirety,
17 you have a choice between an incompetent investigation, or
18 assuming it was watched, then you have a choice with
19 incompetent representation. But it's - - - it's
20 inexplicable not to watch the video, I guess, is the core
21 argument. Otherwise you're on - - - your - - - you, by I
22 mean, your argument is on the horns of that dilemma.

23 MS. AXELROD: Well, first of all, on this record,
24 it's unclear as to whether or not he watched the videotape.
25 And we've - - - we're all drawing inferences from that.



1 One thing that I would like to point out is that at the - -
2 -

3 JUDGE RIVERA: Well, how can that be, given the
4 colloquy? I mean, given the colloquy - - -

5 MS. AXELROD: The colloquy, he never said he
6 didn't watch the videotape.

7 JUDGE RIVERA: But - - - but - - - but the
8 prosecutor insists over and over.

9 MS. AXELROD: Well - - -

10 JUDGE RIVERA: I told him about it. He's had it.
11 I told him a month ago.

12 MS. AXELROD: That doesn't ans - - -

13 JUDGE RIVERA: The judge asked, did you watch it?

14 MS. AXELROD: And he didn't answer.

15 JUDGE RIVERA: And he finesses it.

16 JUDGE WILSON: He says - - -

17 JUDGE RIVERA: Right. And if he had watched it,
18 one would think he would say, of course, I watched it.

19 MS. AXELROD: Well, maybe.

20 JUDGE WILSON: At - - - at 219 - - -

21 MS. AXELROD: But again - - -

22 JUDGE WILSON: Excuse me for a second.

23 MS. AXELROD: I'm sorry.

24 JUDGE WILSON: At 219, the court asks, have you
25 seen the video? And the answer is yes.



1 MS. AXELROD: The - - - the - - -

2 JUDGE WILSON: So I'm - - - I'm confused about
3 what - - - whether he saw it and when he saw it and - - -

4 MS. AXELROD: Well, I - - -

5 JUDGE WILSON: - - - what happened.

6 MS. AXELROD: He - - - it was definitely give it
7 to - - - given to him and - - -

8 JUDGE WILSON: He was asked "seen" which is
9 ambiguous perhaps?

10 MS. AXELROD: The -- - I think the record is a
11 little bit ambiguous, which is one of the reasons we were
12 arguing that you need to set - - - have a 440 to understand
13 it.

14 JUDGE RIVERA: I thought he said that he had
15 received it.

16 MS. AXELROD: Yes, but he - - -

17 JUDGE RIVERA: I thought the question was, do you
18 have it? Have you gotten it? You're not arguing that he
19 didn't get it.

20 MS. AXELROD: I'm not arguing that, Judge.

21 JUDGE RIVERA: No, no, not you. Isn't that what
22 the judge is - - - the colloquy?

23 MS. AXELROD: Yes, but the other part of the
24 colloquy is - - -

25 JUDGE RIVERA: But if he said, I saw it, we



1 wouldn't be in this - - -

2 MS. AXELROD: I don't know.

3 JUDGE RIVERA: - - - kind of an argument.

4 MS. AXELROD: Oh, oh, that, yeah, absolutely not.

5 JUDGE RIVERA: He doesn't expressly say I saw the
6 video.

7 JUDGE STEIN: But what - - - what - - - weren't
8 they - - - weren't they primarily focusing on the - - - the
9 redacted video that the People wanted to offer into
10 evidence?

11 MS. AXELROD: Exactly. This is a truncated
12 conversation, not about what defense counsel did or didn't
13 do, or how he spoke to or didn't speak to his client. It's
14 whether or not he was entitled to see this particular
15 exhibit before it went into evidence. Now - - -

16 JUDGE RIVERA: Yes, but the whole - - - the whole
17 point is that the prosecutor is saying, I told him a month
18 ago that the video does not bear out the grand jury
19 testimony. It's not hours of video. There's only a
20 certain period of time that's at play.

21 MS. AXELROD: Except when you see that videotape
22 from what the - - - Mr. Fong (ph.), who was the one who put
23 that tape together, said there's twenty-six cameras, all
24 running at the same time, and they all pop up at the screen
25 at the same time. Which means you have, even in a short -



1 - - even in an hour's worth of time, you have twenty-six
2 hours right there all popping up at you.

3 Now it is possible, because he was speaking with
4 a hotel employee, who had worked there, who did not have a
5 criminal record, that he actually made the - - - the
6 decision that he was going to believe, or put faith, in
7 what his client was telling him, which was that the video
8 wasn't all that significant. Why he didn't seem to
9 understand what the prosecutor said, we don't know, because
10 there was no - - -

11 JUDGE RIVERA: Oh, I'm sorry. Is this argument
12 now that if your client tells you no, no, no, this is
13 definitely the way this went down, that that excuses - - -
14 that you may not look at the relevant parts of the video or
15 you don't look at the video?

16 MS. AXELROD: Again, Judge, we don't know that he
17 didn't look at the video.

18 JUDGE RIVERA: Twenty-six hours sounds a lot less
19 than hundreds.

20 MS. AXELROD: We don't know that he didn't look
21 at the videotape. What I'm saying is in this circumstance,
22 with this particular defendant, who actually - - -
23 propelled his testimony - - -

24 JUDGE RIVERA: But I'm saying, let's - - - let's
25 even assume - - - let's - - - counsel makes, I think, an



1 interesting point. Assume he did look at it.

2 MS. AXELROD: Did or did not?

3 JUDGE RIVERA: Assume he did look at the video.

4 MS. AXELROD: Did?

5 JUDGE RIVERA: Yes.

6 MS. AXELROD: Okay.

7 JUDGE RIVERA: Then what explains the course that
8 he took?

9 MS. AXELROD: He only had one defense in this
10 case.

11 JUDGE RIVERA: Then why does he switch after this
12 - - - I'm not understanding that.

13 MS. AXELROD: I don't under - - - he doesn't
14 switch defenses. He opens on a consensual sexual act, when
15 the defendant goes into the - - - when the defendant helps
16 the victim and her boyfriend into the hotel. He sums up on
17 a consensual sexual act, when the - - -

18 JUDGE RIVERA: Well, that - - - that aligns with
19 the grand jury testimony. I'm not asking about that. I'm
20 talking about the way of the course of consent - - -

21 MS. AXELROD: But that's his defense throughout
22 the trial. He never deviates from his defense, because - -
23 -

24 JUDGE RIVERA: Why does he say the client's going
25 to testify and then not?



1 MS. AXELROD: That was a - - - that was a
2 misstep, and it was a misstep that attorneys sometimes
3 make.

4 JUDGE RIVERA: All right.

5 MS. AXELROD: But this court has not - - - with
6 very rare exception - - - has this court set aside a
7 conviction, especially without a 440.10, on one misstep
8 without looking at the rest of the record. When you look
9 at this entire record, this defense attorney was very
10 effective. He - - - his objections to the DNA - - -

11 JUDGE WILSON: Could you - - - could you not have
12 - - - could you not have used the grand jury testimony?

13 MS. AXELROD: And that was the other thing I
14 wanted to clear up. We are entitled to use that testimony,
15 even if the defendant does not testify. It's a - - -

16 JUDGE WILSON: So why don't you say it's a
17 misstep? Isn't - - - wouldn't it have been a reasonable -
18 - - I mean, look, if I'm the defense attorney, I don't want
19 my client on the stand, right, because he's going to get
20 brutally cross-examined with the grand jury testimony, and
21 I don't want the grand jury testimony in. And what do you
22 know? Neither of those things happened. Is it possible by
23 saying I'm going to call him, and then having the People
24 rest, and then not calling him, I've accomplished that
25 objective?

1 MS. AXELROD: Well, actually, that was something
2 that we raised in the Appellate Division and did not raise
3 here, but it's true there is - - - there could have been
4 some rolling of the dice gambling on his part, where he
5 ended up exactly where he needed to be, which was the very
6 damning grand jury testimony wasn't introduced into
7 evidence. And I'm sorry.

8 JUDGE WILSON: And don't we need to examine the
9 lawyer to find out if he's a gambler?

10 MS. AXELROD: Well, it's our position that given
11 the fact that there was only one defense to be had, this
12 court can find that no matter what the 440.10 delivered,
13 that the defendant still had meaningful - - - his
14 meaningful right to a fair trial was protected. But - - -

15 JUDGE RIVERA: Can you explain to me why - - -
16 why you say the grand jury testimony could've gotten in,
17 even if he didn't take the stand?

18 MS. AXELROD: Because he - - - it's an admission
19 by the defendant, whose a party opponent - - -

20 JUDGE RIVERA: So why not - - - then why would
21 not - - - why wouldn't the prosecutor use that?

22 MS. AXELROD: At the point where this trial was
23 going - - -

24 JUDGE RIVERA: That and the video?

25 MS. AXELROD: - - - the way it was, there was no



1 need for it. Had the defense switched and said, actually
2 there was a consensual act at 3 - - - 3:30, then the
3 prosecutor would most likely have put that in to show that
4 he was switching horses midstream to show that - - - that
5 this was an eleventh-hour defense, and therefore one that
6 shouldn't be credited.

7 JUDGE RIVERA: It's hard - - - it's hard - - -
8 it's hard to fathom that something that is so devastating,
9 the prosecutor's not going to put it in, even if they think
10 that it's going really well.

11 MS. AXELROD: That was a - - -

12 JUDGE RIVERA: If - - - if you're correct. I'm -
13 - - I'm going with your argument that the grand jury
14 testimony gets in regardless of whether or not the
15 defendant takes the stand.

16 MS. AXELROD: And I'm very - - - confident to
17 stand on that argument.

18 JUDGE RIVERA: No, no, no, I'm just - - - I'm - -
19 - I'm going with that. I'm not - - -

20 MS. AXELROD: Different prosecutors have
21 different ways of trying cases. This particular prosecutor
22 in this case, in the way it unfolded in front of her, made
23 a decision that she did not need to put the grand jury
24 testimony in. And as it turned out, she was right, because
25 she got a conviction.

1 Now I also want to talk about the - - - the fact
 2 that there was an acquittal on one of the charges as if
 3 that suggested that the jury didn't actually believe the -
 4 - - the witness and would've even gone further, if defense
 5 counsel had chosen a different strategy. One thing about -
 6 - - about the - - - that particular sex act was, as she
 7 testified, she was awake for it, and didn't say no, because
 8 she thought it was her boyfriend.

9 Defense counsel argued, on summation, she was not
 10 physically helpless at that point, because she was actually
 11 in a position to say no, and mistaken identity is not the
 12 same as physical - - - helplessness. So there's actually a
 13 legal reason why this jury would've acquitted on one and
 14 convicted on the other, and still very much credited this
 15 particular witness. And in fact, the jury clearly was
 16 listening to and crediting defense counsel in this, because
 17 they considered his arguments very carefully, and they
 18 acted on it very carefully.

19 Getting back to his overall competence, this
 20 attorney, his cross-examination of the - - - of the victim
 21 - - - allowed him to make the - - - the arguments on
 22 summation that he did. He cross-examined her about her
 23 intoxication. He cross-examined her about how her clothes
 24 came off, in order to show the unlikelihood that that could
 25 have happened if she wasn't awake and consenting. He



1 cross-examined her about the positions that she and the
2 defendant must have been in, again, in order to highlight
3 those differences. He called his own witness, the EMT, to
4 come in and say, actually the bed was made, which would
5 have contradicted everything that she said.

6 He called a witness to talk about - - - to - - -
7 who took a photograph of the - - - the rug outside of the
8 garbage area, to show that it had the same colors as the
9 rug inside the hotel room, in order to try to dampen the
10 effect of that. He objected to the DNA in a way that
11 previewed this court's decision in John. He also objected
12 to the introduction of the fiber testimony by arguing
13 foundation.

14 This defense attorney was a thoroughly competent
15 defense attorney.

16 JUDGE FEINMAN: So - - - so you mentioned the
17 DNA. Is there anything you want to say about that point?

18 MS. AXELROD: I think that what we did in - - -
19 in below, in terms of what the - - - the expert testified
20 to was enough for this court to draw the inference that we
21 satisfied John. She clearly had gone back to the raw data
22 and - - -

23 JUDGE STEIN: What - - - what - - - what was that
24 inference based on? That she said "we" or - - -

25 MS. AXELROD: No, it - - - that's part of it, but



1 what - - - what I - - - that's not the inference I'm asking
2 you to draw. There I think we absolutely on the - - - the
3 combined DNA, we absolutely satisfy John. I mean, she
4 talked about how she reviewed everything and she came to a
5 decision on what numbers should be the alleles. Where - -
6 - where there was not as much detail on what she did was
7 the - - - the buccal swabs of the defendant and the victim.
8 And our argument there is, it - - - my light is on; can I
9 just - - -

10 CHIEF JUDGE DIFIORE: You may, of course.

11 MS. AXELROD: It just seems completely
12 inconsistent with the way she behaved, that she would not
13 have gone back, and done the same thing with those alleles,
14 and the only reason that testimony didn't - - - come out,
15 was one, it was before John; we didn't know we had to do
16 it, and two, the defense attorney wasn't really questioning
17 those conclusions.

18 JUDGE STEIN: If we disagree with you on that,
19 how can we find it harmless based on all the - - - cross-
20 examination of the victim, and this - - - all this other
21 testimony that you've just recounted.

22 MS. AXELROD: Because the defendant, when he is
23 arrested by the police, right at the beginning, says that
24 he had consensual relationship - - - he said he had a
25 sexual relationship with her and that it was consensual.



1 So the defendant, out of his own mouth, already took
2 identity and identification out of the equation, and that's
3 all the DNA was - - - was going to. And that's why the
4 Appellate Division also found that to be harmless.

5 I see my time is up. I just ask the court to
6 rely, for the remainder of my arguments, on my brief, and
7 to affirm the judgment. Thank you.

8 CHIEF JUDGE DIFIORE: Thank you.

9 Counsel?

10 MS. SWARNS: So I begin by just - - - making
11 clear that we've raised an ineffective assistance of
12 counsel claim. We have not raised a denial of counsel
13 claim. We are not obligated to prove a complete absence of
14 advocacy on behalf of Mr. Lopez-Mendoza in order to succeed
15 on our claim of ineffective assistance of counsel.

16 And this is a case that was riddled with
17 reasonable doubt. Even if the grand jury minutes came in,
18 what we know is this was an intoxicated complainant, who
19 spent the evening banging on the room next door, declaring
20 that the assailant was in there, even after Mr. Lopez-
21 Mendoza was sent off of the floor by the hotel security.
22 We know that this complainant told EMS right after - - -
23 well, on the evening of the - - - the alleged offense, that
24 the assault occurred right after she was given access to
25 the room.



1 We know that this complainant declared that she
2 saw - - - she testified at trial that she saw the
3 complainant come under the covers of her bed, but EMS, when
4 they went into that room on the night of the alleged
5 assault, said the bedding was not even disturbed. We know
6 that this complainant testified to oral vaginal contact,
7 and there was neither saliva nor DNA found on her.

8 This is a case that was absolutely riddled with
9 reasonable doubt. So this is the - - - so a reasonable
10 doubt defense was available to counsel here, an effective
11 counsel who was aware and working and reconciling his
12 defense with what he knew or should have known to be the
13 reality of the videotape in this case, would have
14 considered pursuing a reasonable doubt defense.

15 Again, there are only one of two things happened
16 here. It is, as aptly put, it's either incompetent
17 representation or incompetent investigation. Those are the
18 only two roads here. There's no reasonable - - -
19 objectively reasonable basis for counsel to pursue a
20 defense that he knew or should have known would be
21 disproven by videotape evidence, of all things, of
22 videotape evidence by - - - presented by the prosecution.
23 That is ineffective assistance of counsel.

24 And for those reasons, we ask that Your Honors
25 reverse Mr. Lopez-Mendoza's conviction.



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CHIEF JUDGE DIFIORE: Thank you.

MS. SWARNS: Thank you.



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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 The People of the State of New York v. Jaime Lopez-Mendoza, No. 43 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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