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COURT OF APPEALS
STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

NO. 31

WOODS (TRAVIS),

Appellant

265 East 161st Street
Bronx, New York
March 11, 2026

Before:

CHIEF JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ANTHONY CANNATARO
ASSOCIATE JUDGE SHIRLEY TROUTMAN
ASSOCIATE JUDGE CAITLIN J. HALLIGAN

Appearances:

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1 CHIEF JUDGE WILSON: Next case on the calendar is
2 People v. Woods.

3 MR. BOVA: May it please the court. Matthew Bova
4 for Mr. Woods. I'd request three minutes for rebuttal,
5 please.

6 CHIEF JUDGE WILSON: Yes.

7 MR. BOVA: Having a series of meetings for
8 thirty-two months to decide whether to retry someone a
9 third time is too long and is unreasonable. That delay
10 violates the speedy trial clause, but at a minimum, a
11 hearing is required to hash out any issues of fact as to
12 the critical good cause factor.

13 Now, this court has - - -

14 CHIEF JUDGE WILSON: Do you know of any speedy
15 trial case, constitutional speedy trial case, in which we
16 have, or - - - or the Appellate Division has sent a case
17 back for a hearing?

18 MR. BOVA: Yes, Your Honor. Singer. I mean
19 Singer - - - Singer is the basic rule that where there's an
20 issue of fact as to any material fact bearing on a speedy
21 trial issue, then a hearing would be required. And that's
22 also the mandate of CPL 210.45.

23 JUDGE TROUTMAN: But here, why would you have a
24 hearing when during the course of the proceedings, there
25 were a number of court appearances where no one from the

1 People appeared, where varying excuses were given? So when
2 they did appear, what is the hearing going to give them?
3 An opportunity to present new ideas?

4 MR. BOVA: No. We agree. I mean, we agree that
5 this record does conclusively establish that there was no
6 good cause, because all we have to do is look at the
7 prosecution - - - prosecutor's opposition to the motion.

8 The - - - the defense counsel explicitly laid out
9 there was no good cause for the delay. I've been trying to
10 figure out what the basis for this delay is. I actually
11 believe that they're intentionally delaying - - -

12 JUDGE TROUTMAN: You started out with meetings.
13 If there were meetings, who bears the responsibility to
14 make sure the case proceeds pursuant to constitutional
15 speedy trial requirements?

16 MR. BOVA: The state does. The state bears the
17 constitutional obligation to move the case forward. If
18 there's plea bargaining going on, if there's a
19 determination of whether the case will move forward, the
20 state can take a reasonable amount of time - - -

21 JUDGE RIVERA: Did - - -

22 MR. BOVA: - - - but they cannot take - - -

23 JUDGE RIVERA: - - - did the prosecution at any
24 point, as - - - according to the record set forth for the
25 court, whatever these - - - when these meetings were held,

1 how long they lasted?

2 MR. BOVA: No.

3 JUDGE RIVERA: Whether or not there was progress
4 in the meetings, whether or not they had reached an
5 impasse?

6 MR. BOVA: No. The only thing the prosecutor
7 said in the affirmation was that a series of meetings had
8 been conducted at the request of defense counsel, to decide
9 whether to dismiss the case in the interest of justice.

10 JUDGE TROUTMAN: And was that - - -

11 JUDGE RIVERA: Did that - - -

12 JUDGE TROUTMAN: - - - with a person of actual
13 knowledge as to what did or did not take place?

14 MR. BOVA: Well, that's also unclear, because the
15 DA that puts in that motion is the new prosecutor that
16 enters the case two and a half years after. So we don't
17 even know who's involved in these meetings.

18 JUDGE RIVERA: They - - - they didn't set forth
19 the time frame?

20 MR. BOVA: No. They just said a series of
21 meetings. And they were also - - -

22 JUDGE RIVERA: And did defense counsel ever refer
23 to a series of meetings?

24 MR. BOVA: No. Defense counsel said I've been
25 trying to figure out what's going on and I can't get an

1 update.

2 JUDGE RIVERA: But the defense counsel did
3 acknowledge that - - - certainly, an interest in dismissal
4 of the counts?

5 MR. BOVA: Sure. That's going to be - - -

6 JUDGE RIVERA: And that there was some
7 conversation, correct?

8 MR. BOVA: Oh, oh, I mean, that's going to be the
9 case - - - that's going to be true in every case. There's
10 never been a case in the history of criminal litigation
11 where there's a mistrial and the lawyer doesn't approach
12 the DA and say - - -

13 JUDGE HALLIGAN: You know, I'm - - - I'm
14 struggling - - -

15 MR. BOVA: - - - I think you should give up.

16 JUDGE HALLIGAN: - - - I'm struggling to see how
17 a hearing is appropriate. I mean, why wouldn't we be
18 resolving this one way or the other on the record that's
19 before us? It seems to me the usual context in which we
20 would send something back for a hearing is if the legal
21 standard is clarified so then there's an opportunity to
22 apply it, develop facts. But is - - - is a hearing
23 something other than a second bite at the apple?

24 MR. BOVA: We're - - - we're more - - - we're - -
25 - to be very clear, the hearing's just our backup argument.

1 We believe that this record - - -

2 JUDGE HALLIGAN: Well, no, I'm asking a different
3 question, I think, which is why shouldn't this rise or
4 fall? I'm not asking you, you know, do you want a hearing,
5 or would you like to prevail? I'm asking a different
6 question, which is rise or fall on the record that we have
7 in front of us?

8 MR. BOVA: Yes. And I - - - I think that that's
9 right. The papers the prosecution has - - -

10 JUDGE HALLIGAN: So what is your argument that a
11 - - - why a hearing would be a backup?

12 JUDGE GARCIA: Is it hearing - - - I'd rather
13 take a hearing than lose?

14 MR. BOVA: Well, of course, but - - -

15 JUDGE HALLIGAN: Yeah. Like that.

16 MR. BOVA: - - - but all I mean - - - all - - -
17 so the - - - the record shows the prosecution bears the
18 burden of justifying the delay. The prosecution's motion
19 papers - - -

20 JUDGE HALLIGAN: Generally, on the record - - -
21 as to both sides, on the record that's made at the - - - at
22 the time. Yes?

23 MR. BOVA: Well, more specifically in response to
24 the motion to dismiss.

25 JUDGE HALLIGAN: Yes, that's what I mean.



1 MR. BOVA: Yes. And at A-67 through 68, the
2 prosecution doesn't meet that burden because all they do is
3 they say that they were having a series of meetings to
4 decide whether to move forward or not. They were thinking
5 about whether a fourth trial was a good idea for their
6 office and the interest of justice.

7 JUDGE RIVERA: Did - - - did they also argue they
8 were reinvestigating?

9 MR. BOVA: They did not. No, they did not argue
10 that. The prosecutor did not say that they were
11 reinvesting any - - - anything. And we can know for
12 certain that the prosecutor would have done that, and if
13 that were in fact happening, because that is a classic
14 justification for delaying a retrial.

15 JUDGE RIVERA: Doesn't the fact that they had a
16 witness that they didn't have it the other trials tells you
17 that maybe they were reinvestigating?

18 MR. BOVA: Actually, no, Your Honor. I think
19 it's actually the opposite. Because the prosecutor - - -
20 we all know that Lindo is called - - -

21 JUDGE RIVERA: Yes.

22 MR. BOVA: - - - for the first time at the fourth
23 trial. But the prosecution does not put that in their
24 affirmation in opposition as a basis for the delay. So
25 that silence is critical because it shows that that was not

1 the basis for the delay. Had Lindo been the reason why
2 they were spinning their wheels for almost three years, the
3 prosecutor would have unquestionably said that. The only
4 inference is that Lindo only entered the picture after this
5 almost three - - - three-year long series of meetings had
6 occurred.

7 JUDGE TROUTMAN: What about - - -

8 JUDGE RIVERA: Can - - - can the inference be
9 drawn even though that inference is going to be based on
10 the post denial of the motion? I think that I'm right
11 about that.

12 I'm just asking whether - - - first, whether or
13 not such an inference could be drawn, and second, could it
14 be drawn if it's post the denial of the motion?

15 MR. BOVA: Well, no. So the inference - - -

16 JUDGE RIVERA: Both?

17 MR. BOVA: I - - - I think so Your Honor.

18 JUDGE RIVERA: Okay.

19 MR. BOVA: The inference - - - the only
20 inferences that can be drawn are the inferences that you
21 can - - - that are based on the facts offered by the state
22 in opposition to the motion. And the - - - the opposition
23 to the motion - - -

24 JUDGE RIVERA: That's what I'm saying. Then the
25 post denial could not?

1 MR. BOVA: No. No.

2 JUDGE RIVERA: Okay.

3 MR. BOVA: But - - - but I actually think give -
4 - - the post-denial record actually just shores that up.

5 JUDGE RIVERA: Okay.

6 MR. BOVA: Because if there's a new witness that
7 comes in for the fourth trial, and that new witness is not
8 articulated as a basis for the delay in that motion in
9 opposition, it's pretty - - - it's almost a conclusive
10 inference that that's not - - -

11 JUDGE TROUTMAN: What do you say about the
12 people's argument, these are serious charges, murder?

13 MR. BOVA: Yes, Your Honor. But that can't - - -
14 that can't overcome the entire analysis. And I think Regan
15 and Wiggins control that issue. Regan was a serious crime.
16 Wiggins was a serious crime. But the state has an
17 obligation to move serious crimes forward. And here this
18 is unreasonable delay for an unreasonable amount of time.
19 This case has already been tried three times. They're
20 ready to go, and they sit on the case for almost two and a
21 half years.

22 JUDGE HALLIGAN: Can I ask you to shift gears for
23 a minute on the ineffective assistance claim? It seems to
24 me this procedural posture is really unusual, right? So I
25 think, correct me if I am misunderstanding the record,

1 there was a - - - a 440 hearing that has actually taken
2 place and that motion was denied, right?

3 And - - - and I - - - I'm not sure I've come
4 across a case where you're - - - where we're being asked to
5 hold that there was ineffective assistance without a 440
6 hearing. I also - - - I think that probably whatever
7 record is developed at that hearing would not be properly
8 before us.

9 So how are we supposed to think about the
10 procedural posture?

11 MR. BOVA: So Evans is a good example of that,
12 Your Honor. In - - - in Evans, the 460.15 motion for leave
13 to appeal was denied. And then this court reviewed whether
14 the direct appellate record - - -

15 JUDGE HALLIGAN: Uh-huh.

16 MR. BOVA: - - - conclusively established
17 ineffective assistance.

18 So the analysis is the same currently before this
19 court as if no 440 motion had been filed at all. So the
20 question then becomes on this record, can we establish if
21 there's - - -

22 JUDGE HALLIGAN: This record? Not the 440 record
23 - - -

24 MR. BOVA: Correct.

25 JUDGE HALLIGAN: - - - but simply the direct

1 appellate record?

2 MR. BOVA: Yes. Does this - - - does the direct
3 appellate record establish that there was no reasonable
4 strategic justification for counsel's very serious errors
5 here? And this record overwhelmingly shows that.

6 JUDGE RIVERA: Regardless if that's already been
7 rejected?

8 MR. BOVA: Well, it hasn't already been rejected
9 because the - - - I mean, the 440 court does not say
10 anywhere in its decision that there is a reasonable
11 strategy here for what counsel was doing. But - - -

12 JUDGE RIVERA: But - - -

13 MR. BOVA: - - - no, the 440 - - - the 440
14 litigation would not bind this court when a 460.15 is
15 denied. The question then becomes - - - I mean, to the
16 extent the 440 court had said that - - -

17 JUDGE RIVERA: Why not? Isn't that - - - isn't
18 that the defendant's opportunity? Now you're sounding like
19 you want a couple of bites at the apple, maybe three or
20 four of them.

21 MR. BOVA: No. We - - - we - - - we pursued 440
22 relief to develop the record.

23 JUDGE RIVERA: Right.

24 MR. BOVA: That doesn't establish that we had to
25 do that. That could have been just done out of an

1 abundance of caution, because you can always raise an
2 ineffective assistance claim - - -

3 JUDGE RIVERA: Okay.

4 MR. BOVA: - - - on direct appeal where the record
5 - - -

6 JUDGE RIVERA: But the Appellate Division, here,
7 on direct appeal, said it would not even consider what went
8 on with the 440 because, of course, an Appellate Division
9 justice had denied right - - - leave to appeal to the
10 Appellate Division.

11 MR. BOVA: Well, to the extent the - - -

12 JUDGE RIVERA: So how could we even get to it in
13 this case?

14 MR. BOVA: Well, so I think those are two
15 different arguments. I mean - - -

16 JUDGE RIVERA: Well, yes.

17 MR. BOVA: Yeah. To the - - - to the extent that
18 the Appellate Division is saying that they effectively lack
19 jurisdiction - - -

20 JUDGE RIVERA: Yeah.

21 MR. BOVA: - - - because a 440 motion has been
22 filed and then a 460.15 is denied. That's simply wrong.
23 There's no basis for that. That just changes the analysis.
24 The analysis becomes, does the direct appellate record
25 conclusively establish that there's no reasonable strategy?

1 And here - - -

2 JUDGE HALLIGAN: I thought Evans came out against
3 the defendant; is that right?

4 MR. BOVA: I'm sorry, Your Honor?

5 JUDGE HALLIGAN: I thought Evans - - -

6 MR. BOVA: Yes.

7 JUDGE HALLIGAN: I think it does, as you're
8 suggesting, indicate that - - - that the question before us
9 is what does the direct appellate record show?

10 But my recollection is it came out against the
11 defendant, right?

12 MR. BOVA: Yes, Your Honor.

13 JUDGE HALLIGAN: So are there any cases - - - I
14 looked, I didn't see any, but maybe - - - maybe you can
15 identify some from this court - - - in which we have this
16 procedural posture where there is a 440 motion that's
17 litigated and denied, and nonetheless, we hold that there's
18 ineffective assistance on the direct appellate record?

19 MR. BOVA: I - - - I don't think so, Your Honor.
20 And I think that's a pretty rare occurrence because, as
21 Evans directed. Evans said the way to solve this problem
22 is to have the Appellate Division actually be granting the
23 460.15, especially before the direct appeal is heard.

24 But again, that doesn't mean that we lose. That
25 just changes the analysis.

1 JUDGE TROUTMAN: And interestingly enough, this
2 is the - - - the same attorney who successfully got three
3 hung juries, is the same lawyer that you're saying was
4 ineffective, correct?

5 MR. BOVA: Yes, Your Honor. Because - - -
6 because at that fourth trial, he - - - at that fourth
7 trial, he fails to object to the only new evidence and the
8 only inadmissible evidence that is critical to the - - -

9 JUDGE TROUTMAN: And that one error, you're
10 arguing, is sufficient to make him ineffective? Because
11 you're not - - - you would agree you're not entitled to a
12 perfect trial?

13 MR. BOVA: No. But you're - - - you're entitled
14 to an attorney that takes advantage of the rules of
15 evidence when they conclusively apply in favor of the
16 defendant.

17 And here it's not just one error, it's multiple
18 errors. The first error is that Lindo's identification,
19 which he does not offer when he takes the stand, is
20 introduced into evidence after he fails to articulate that
21 testimony at trial without objection. Counsel says no
22 objection. Everyone before this court agrees that Lindo's
23 identification is inadmissible under about sixteen common
24 law rules of evidence, and yet there was no objection.

25 That's not - - - so that was the only new

1 identification offered before that fourth jury. But for
2 the first three juries, they hear two IDs - - - hung jury,
3 hung jury, hung jury. Down the middle every time.

4 Lindo turns the tide. Lindo is that new witness
5 who they offer at the fourth trial, and they bring in his
6 photo array and his written statement identifying Mr.
7 Woods.

8 JUDGE RIVERA: Just to go back. That's not
9 raised in the 440?

10 MR. BOVA: That is raised in the 440. And - - -
11 and all the 440 court says, to be - - - to be clear too - -
12 -

13 JUDGE RIVERA: Yeah.

14 MR. BOVA: - - - I mean, not - - - I don't - - -
15 I don't really think it's relevant what the 440 court says.

16 JUDGE RIVERA: Okay.

17 MR. BOVA: But if we look at what the 440 court
18 says, it - - - it doesn't say that there's any reasonable
19 strategy here. It just says counsel tried to deal with
20 Lindo's damaging identification after it was introduced.
21 But that doesn't justify failing to object to its
22 introduction in the first place.

23 JUDGE RIVERA: But isn't that a rejection of the
24 ineffective assistance of counsel claim?

25 MR. BOVA: Well, yes. And - - - and - - -

1 JUDGE RIVERA: That's the court's grounds? They
2 tried - - - defendant tried to appeal it. Couldn't get
3 leave to appeal. Isn't that the end of that story - - -

4 MR. BOVA: No.

5 JUDGE RIVERA: - - - because that's the path they
6 have?

7 MR. BOVA: No. Because now that question is
8 before this - - - is before this court.

9 That's not based on any new evidence. That's
10 just a legal theory based on the record. Everyone agrees,
11 and I agree too, that, on this direct appellate record, he
12 does in fact try to handle Lindo's ID.

13 But reasonable lawyers knock out devastating
14 evidence in the first place. They don't consciously allow
15 it to come in and then hope that they can battle with it
16 later.

17 But that's not the only error that counsel - - -

18 JUDGE TROUTMAN: And his overall trial efforts
19 you're saying were not sufficient?

20 MR. BOVA: No. No. And because it's not just
21 the ID, it's also that in the written statement that
22 counsel fails to object to, and this was not a claim raised
23 in the 440 litigation, that the - - - that in the written
24 statement that Lindo makes, he not only identifies Mr.
25 Woods, but he says that he knows he carries a gun as he's

1 been involved in other shootings in the past.

2 This is devastating prior bad act propensity
3 evidence. Comes in with no limiting instructions at all.
4 There's no objection. So not only are there
5 identifications that are coming in without objection for
6 the first time - - -

7 JUDGE CANNATARO: So - - -

8 MR. BOVA: - - - but then we have prior bad act
9 evidence.

10 JUDGE CANNATARO: --- why is it overall and not
11 single error ineffective assistance, just letting it in?

12 MR. BOVA: Our - - - our - - - so our position
13 would be that each one of these errors individually
14 constitutes ineffective assistance, but collectively
15 they're also constituting ineffective assistance.

16 So I don't - - - this is not a single error case.

17 JUDGE CANNATARO: Well, you might allege that
18 there wasn't a single error. But I'm asking why isn't this
19 an error of such magnitude is the only person who can, you
20 know, directly connect the defendant to the crime and he
21 lets the written statement in?

22 MR. BOVA: Yes. I mean, we agree. I mean, I
23 think also this track record of the three trials confirms
24 that. Because rarely will this court see a record which -
25 - - which so conclusively proves how significant that

1 single witness is because of the three hung juries. And
2 it's not just juries are hanging, they're down the middle.
3 This is a very close case. The government cannot prove its
4 case to a unanimous jury three times. Lindo turns the
5 tide.

6 And - - - and finally, I just add too, this - - -

7 JUDGE TROUTMAN: But isn't there also a witness
8 that dies in between, so his live testimony is not offered?

9 MR. BOVA: Yes. So they bring it - - - they
10 bring in his transcript.

11 JUDGE TROUTMAN: And previously, that testimony
12 wasn't arguably persuasive, which caused the juries to
13 hang?

14 MR. BOVA: Yes. Yes. I mean, that also bears on
15 the speedy trial claim, too, because - - -

16 JUDGE TROUTMAN: But the point is, it's not just
17 the - - - it's not just Lindo, there are other things they
18 reinvestigated, they offered evidence anew on the fourth
19 trial.

20 MR. BOVA: Well, the only thing they offered new,
21 though, was the - - - was the Lindo ID. Because in the
22 first three juries heard Glover's testimony. What changed
23 between the first - - -

24 JUDGE RIVERA: Well, but they didn't observe his
25 testimony.

1 MR. BOVA: That's correct.

2 JUDGE RIVERA: Which - - - which is a factor in
3 determining credibility of the witness. But since you're
4 running out of time and there are several other grounds.

5 First off, we don't have to get to this issue,
6 just to be clear, if we agree with you on the
7 constitutional claim?

8 MR. BOVA: If - - - if the court orders dismissal
9 of the indictment, then yes. If a hearing were to be
10 ordered, then - - - then the - - - the court should also
11 reach the ineffective assistance.

12 JUDGE RIVERA: Fair enough. You want to get to
13 O'Rama issues?

14 MR. BOVA: Yes. So exhibit requests are covered
15 by the plain text of 310.30. 310.30 is crystal clear that
16 the statute covers any request for information relating to
17 exhibits and any other information relating to the case.
18 That - - -

19 JUDGE RIVERA: Well, substantive notes?

20 MR. BOVA: Yes.

21 JUDGE RIVERA: Okay.

22 MR. BOVA: And nothing - - - nothing is more
23 substantive than an exhibit. That is important evidence in
24 a criminal case. I mean, just to take an example, the
25 government's theory would be that you do not have a right

1 to notice under 310.30 if the entire - - -

2 JUDGE RIVERA: But counsel can agree in advance,
3 right - - -

4 MR. BOVA: And - - - and that - - -

5 JUDGE RIVERA: - - - as they go in to deliberate
6 with the court if they request exhibits. I don't need any
7 notification of that. You can just present the exhibits.

8 MR. BOVA: Yes, Your Honor. But that didn't
9 happen here. In fact, the opposite happened here. The
10 judge - - - the judge told the parties, I don't like to do
11 that. I like to give - - - I like to give notice even
12 when it's a request for exhibits.

13 So there is no - - - there's no - - -

14 JUDGE RIVERA: Well, they may like it, but it may
15 not be required under the statute, so.

16 MR. BOVA: Right. But there's - - - the point is
17 there's no waiver here. There's no - - - there's no
18 disavowal of the right to notice as - - -

19 JUDGE RIVERA: No, no. We have to start with
20 whether or not even the statute - - -

21 MR. BOVA: Yes.

22 JUDGE RIVERA: - - - and O'Rama apply to this
23 particular type of note.

24 MR. BOVA: Yes. But I - - - the - - - I think,
25 though, the waiver point is important though in terms of

1 the consequences here, because at the end of the day it's
2 pretty rare.

3 JUDGE RIVERA: What possible guidance could
4 counsel give? Don't give them the exhibit?

5 MR. BOVA: Well, so the - - - the first - - - the
6 first thing that counsel can do upon an exhibit request - -
7 -

8 JUDGE RIVERA: Yeah.

9 MR. BOVA: - - - is ask is - - - tell the - - -
10 ask the judge to ask for - - - ask the jury is there
11 anything you want with that in addition? Are there
12 supplements you want to that? But the more important - - -

13 JUDGE TROUTMAN: But normally - - -

14 JUDGE RIVERA: That's a fishing - - - that's a
15 little bit of a fishing. I mean, they've asked for what
16 they've asked for and that's - - - that's what's going to
17 be presented.

18 MR. BOVA: Well, there's no - - - but counsel can
19 have input as to whether or not they also - - -

20 JUDGE RIVERA: A jury has a right to see the
21 exhibits.

22 MR. BOVA: True. The other critical thing,
23 though - - -

24 JUDGE RIVERA: Yeah.

25 MR. BOVA: - - - is counsel needs to make sure

1 the jury gets a response to that note. And this court's -
2 - -

3 JUDGE RIVERA: Well, the response is to show them
4 the exhibit, isn't it?

5 MR. BOVA: Yes. But this record doesn't show
6 that that the response - - - the request to see Exhibit 38
7 while rehearing testimony was ever responded to. And - - -
8 and there are a lot of cases from this court, you know, in
9 People v. Silva, for example, where the problem was that
10 there was no record evidence of a response to the note.
11 That's much more prejudicial.

12 JUDGE RIVERA: Your red light is on. Can you
13 just quickly turn to the other notes from the first trial?

14 MR. BOVA: So the Appellate Division - - - we
15 agree with the Appellate Division on this one as to the
16 O'Rama error. The Appellate Division found that because
17 there was no verbatim notice at the first trial of notes
18 requesting a read back, that that was a violation of People
19 v. Parker and its antecedents and its progeny.

20 The only question that the Appellate Division
21 reached - - - the question the Appellate Division reached,
22 however, was harmless error. And the error was not
23 harmless.

24 The error was not harmless because testimony
25 regarding - - - the notes requested testimony from Glover

1 and Calvin. But the - - - but the notes explicitly
2 referenced testimony regarding the shooting. That was what
3 was omitted from the notice.

4 Their testimony infected the narcotics charge - -
5 - their - - - their - - - those notes bore on the narcotics
6 charges, too. Because both Calvin and Glover offer
7 testimony that linked Mr. Woods to those narcotics
8 operations.

9 So when the jury doesn't get a response to a note
10 request - - - when the jury requests information regarding
11 the shooting, answers and testimony regarding the shooting
12 can bear on the jury's assessment of their credibility as a
13 whole, including as to the narcotics count.

14 That's the classic falsus in uno instruction that
15 the jury receives every day. If they don't believe
16 testimony about A, they can then also not believe testimony
17 about B.

18 Thank you.

19 CHIEF JUDGE WILSON: Thank you.

20 MR. ROSE: May it please the court. Christian
21 Rose for the People.

22 The irreversible remedy of dismissal of the
23 murder charge is unwarranted when the defendant here
24 suffered no additional pre-trial incarceration, and his
25 ability to defend himself was not impaired by the delay.



1 The People offered good-faith reasons for the
2 delay - - -

3 JUDGE RIVERA: Yeah. But how about the other
4 factors?

5 MR. ROSE: The other factors are - - -

6 JUDGE RIVERA: Do you agree it's a lengthy delay
7 for a retrial?

8 MR. ROSE: The delay is a length - - - the delay
9 is lengthy, although this court has - - -

10 JUDGE RIVERA: And - - - and what was the reason
11 proffered for the delay?

12 MR. ROSE: The - - - the reasons proffered were
13 reinvestigation and reassessment. Reinvestigation is in
14 the People's opposition.

15 JUDGE RIVERA: Where - - - where would I find
16 that?

17 MR. ROSE: That would be on the - - - in the - -
18 - in the page of the record that - - - that discusses the -
19 - - the reasons for delay. It's one single paragraph in
20 the People's opposition to say that the - - - the delay can
21 be occasioned by good faith efforts to reinvestigate and
22 reassess.

23 JUDGE TROUTMAN: And is - - -

24 JUDGE RIVERA: So do the - - - the prosecution
25 ever go a little further and describe what the nature is of



1 the reinvestigation?

2 MR. ROSE: The People don't offer the what was
3 happening behind the scenes and the discussions that were
4 held internally. And without the defendant pressing them
5 for - - -

6 JUDGE HALLIGAN: Do they - - - do they provide
7 any details as to the dates or frequency of any meetings?

8 MR. ROSE: No. But I don't think that there is
9 an obligation to do that here when, in response to a
10 conclusory research - - -

11 JUDGE TROUTMAN: With respect to the
12 reinvestigation, the timing. Was that before two years and
13 eight months had passed, or at the end of the three years,
14 two months?

15 MR. ROSE: It's not clear from the record when
16 the reinvestigation is happening. But we do know that - -
17 -

18 JUDGE TROUTMAN: So would you - - - if two years
19 and eight months had passed before there was any
20 reinvestigation, would - - - would that be something that
21 could be countenanced?

22 MR. ROSE: If I'm understanding your question
23 correctly. We assume, for example, that there was no
24 reason for a delay in this case.

25 JUDGE TROUTMAN: We assume that two years, eight

1 months pass, and for this - - - for the sake of this
2 argument - - -

3 MR. ROSE: Yeah.

4 JUDGE TROUTMAN: - - - nothing happened. There
5 was no indication as to what was going on with respect to
6 an investigation. That it was only after that time passed
7 that there - - - and a new person started on the case, then
8 there was a reinvestigation. Do you get to let the initial
9 time just pass? And because now you - - - you have
10 reinvestigated, does that cure any problems as to the
11 earlier time frame where that may not have taken place?

12 MR. ROSE: Well, if I'm understanding your
13 question correctly. I mean, we - - - we also do have
14 reassessment going on during this time and so that the
15 actual reinvestigation is a separate individual - - -

16 JUDGE TROUTMAN: And the assessments, I - - -
17 it's interesting. There are times when the case was put on
18 the calendar, no one showed up from the People. There were
19 varying reasons given when someone did show up. When you
20 say they were reinvestigating particulars, you were
21 suggesting were provided to the court?

22 MR. ROSE: About the nature of the - - - the
23 reinvestigation and reassessment?

24 JUDGE TROUTMAN: Yes. How - - - would the dates
25 - - -



1 MR. ROSE: No. That's not put on the record.

2 JUDGE TROUTMAN: - - - and times of - - - of when
3 these meetings took place?

4 MR. ROSE: No. But there's no reason for the
5 People to - - - and when the People responded in their
6 affirmation and opposition to defendant's rather conclusory
7 motion to dismiss based on the People just had no good
8 cause at all. The People responded by saying that their -
9 - - the bulk of the delay was caused by reassessment and
10 reinvestigation.

11 CHIEF JUDGE WILSON: No.

12 JUDGE CANNATARO: Well, what about the time?
13 What about just the time? The - - - the extensiveness of
14 the - - - the delay? I'm not sure what you mean when you
15 say, you know, it was a conclusory assertion by the
16 defendant. I mean, it's taking years. And you've heard
17 some question about we're on the fourth trial now, third
18 retrial. Why would it take so long to have - - - you know,
19 to have another go at it?

20 MR. ROSE: So I just - - - the - - - the reason
21 why three years is - - - is reasonable in this case is
22 because of several factors. A, the crime was extremely
23 serious. Not only was it a murder which is the most grave
24 offense - - -

25 CHIEF JUDGE WILSON: But you've already tried it

1 three times at that point?

2 MR. ROSE: Yes. And there were - - - there were
3 - - -

4 JUDGE RIVERA: And one would think you'd move
5 judiciously because it is a serious crime.

6 MR. ROSE: That's right. But the - - - but after
7 the first three mistrials, they would place the People in
8 grave doubt about their ability to persuade a fourth jury
9 with the evidence that they have.

10 JUDGE TROUTMAN: Why - - - why weren't the People
11 concerned I'll say, for the sake of argument, after the
12 second mistrial? There - - - it's clear there's a problem
13 in how you're going forward with the case. Doesn't that
14 put you on notice that if you're going to reinvestigate,
15 that's the time to do it?

16 MR. ROSE: Well, there is a longer delay between
17 the second and third trials than there is between the first
18 and second trial.

19 CHIEF JUDGE WILSON: How long was that delay?

20 MR. ROSE: Between the second and third trials?

21 CHIEF JUDGE WILSON: Yeah.

22 MR. ROSE: About one year.

23 CHIEF JUDGE WILSON: A year?

24 MR. ROSE: Yes.

25 CHIEF JUDGE WILSON: And so why do you need three

1 times that almost for the fourth trial?

2 MR. ROSE: I think this is an incredibly rare
3 situation in which ordinarily - - - often doesn't go to a
4 fourth trial. But here we're presented with not only a
5 serious, very serious crime, but one of the most dangerous
6 defendants that, according to prosecutors, has come through
7 this office. And so when defense counsel requests the
8 People to consider dismissing the case in the interest of
9 justice, he understands that this is going to be a very
10 weighty decision that the office would have to undertake.

11 JUDGE RIVERA: Well, I would - - - I would think
12 that they might have requested that after the first
13 mistrial. Maybe after the second mistrial.

14 MR. ROSE: There's no record evidence of that.

15 JUDGE RIVERA: Okay. Well - - -

16 MR. ROSE: I mean, what we have is the - - -

17 JUDGE RIVERA: - - - and - - - and who bears the
18 consequences of that other than the prosecution's got to
19 establish why it's taking so much time to retry? You've
20 seen the other side, and they've seen you.

21 MR. ROSE: Well, this court's considered many
22 times whether the People - - - whether the defendant is
23 asserting his right to a speedy trial, in the sense that
24 he's making it known that the defendant actually wants a
25 speedy trial. Here the - - -

1 JUDGE TROUTMAN: So it's the defendant's fault
2 here? The defendant's lawyer didn't notify the People that
3 it's - - - it was incumbent upon the defendant's attorney
4 to ask for a specific trial date.

5 MR. ROSE: He didn't waive - - -

6 JUDGE TROUTMAN: Is that what you're saying?
7 It's his fault.

8 MR. ROSE: He didn't waive his right to a speedy
9 trial. But this court has recognized time and again - - -

10 JUDGE RIVERA: But doesn't counsel say I - - -
11 I've been trying to reach them. They don't return my
12 calls.

13 MR. ROSE: That doesn't mean that he wants a
14 speedy trial. It means that he's frustrated with the
15 process.

16 JUDGE TROUTMAN: That doesn't mean he wants a
17 speedy trial.

18 MR. ROSE: No.

19 JUDGE TROUTMAN: He shows up at court appearances
20 where there's no ADA.

21 MR. ROSE: Yes.

22 JUDGE RIVERA: And the court says I don't know
23 what's going on. I mean, it - - - it is startling that so
24 much time passes and the prosecutor is absent from these
25 calendar calls; doesn't communicate with defense counsel if

1 they're in some negotiation posture with them; and doesn't
2 provide, when they do show up, well, here's the reason,
3 here's the status.

4 One would think there would at least be some
5 statement as to whether or not you're going to retry,
6 instead of hiding that ball or explaining why you haven't -
7 - -

8 MR. ROSE: The People - - -

9 JUDGE RIVERA: - - - made a decision.

10 MR. ROSE: There are numerous record appearances
11 at which the People said that the office had not yet
12 decided to retry the case, which indicates that they were
13 reassessing whether to go forward with the case.

14 There is also a reference that - - -

15 JUDGE RIVERA: Well, I don't know that it does
16 that unless you say so.

17 MR. ROSE: Well, we did say so in the
18 uncontroverted affirmation. By the way, if - - -

19 JUDGE TROUTMAN: But an - - -

20 JUDGE RIVERA: Well, not to - - - not to the
21 court at the time. That's what I'm saying.

22 MR. ROSE: Well, at the time that the speedy
23 trial motion was made. When a record of this could have
24 been made if the defense had an issue - - -

25 JUDGE TROUTMAN: Well, let me ask you as to that

1 affirmation. Was that made by a person with knowledge of
2 the events that had preceded that attorney coming onto the
3 case?

4 MR. ROSE: He affirms that that's true. There's
5 no reason to think that - - -

6 JUDGE TROUTMAN: He was involved with the case
7 during - - - he was making appearances earlier?

8 MR. ROSE: No. But his affirmation affirms that
9 he's speaking about these - - - these facts. And - - -

10 JUDGE TROUTMAN: So let me try this. You're
11 saying he had personal knowledge as to what had occurred
12 prior to his being assigned to the case. Are you
13 suggesting that?

14 MR. ROSE: According to his affirmation, which I
15 presume would be informed by discussions with the
16 leadership in the office. I mean, nobody else could have
17 provided that besides - - - you know, it's not going to be
18 the case that the speedy trial motion has to be filed by
19 the chief of the trial division because he's involved in
20 these reinvestigations.

21 JUDGE RIVERA: So - - - so there's no
22 representation that somehow there's a change in leadership
23 or anything like that either, correct?

24 MR. ROSE: Well, I mean, it's - - - it's not in
25 the record, but we do know just based on the - - - the

1 office's history, that there was a change in leadership
2 during this time and that could - - - that could have
3 plausibly slowed - - - slowed things.

4 JUDGE RIVERA: And the prosecution could have
5 said that, but they didn't.

6 MR. ROSE: Prosecution could have said that. But
7 I just want to - - -

8 JUDGE TROUTMAN: But could have possibly, are you
9 suggesting that is a valid excuse when you're talking about
10 somebody's constitutional speedy trial rights?

11 MR. ROSE: In this case, yes. Because the other
12 factors - - -

13 JUDGE TROUTMAN: So could have possibly, that - -
14 - that is what you're saying - - -

15 MR. ROSE: I mean, I don't want - - -

16 JUDGE TROUTMAN: - - - enough?

17 MR. ROSE: Yeah. Even - - - even if we say - - -
18 even if we stipulated - - - which I - - - is not the case
19 here - - - that the delay was completely unexplained, that
20 would still, under this court's precedents, not require
21 reversal in this case because of the other extraordinarily
22 serious factors weighing in the People's favor. And I'll
23 note - - -

24 JUDGE HALLIGAN: Can I ask you a specific record
25 question? So the opposition says that defense requests for

1 adjournments have consumed a substantial portion of that
2 time. Does the record reveal exactly how much time is
3 attributable to defense requests for adjournments?

4 MR. ROSE: So we are missing a few calendar
5 appearances - - -

6 JUDGE HALLIGAN: So it doesn't tell us this,
7 correct?

8 MR. ROSE: Well, we don't know about some of the
9 - - - the periods that were coming before reassignment. We
10 know that after reassignment, the defense attorney takes
11 quite a - - - quite a long time to file their speedy trial
12 motion. So that could be what the prosecutor's referring
13 to.

14 But I just want to note that - - -

15 JUDGE HALLIGAN: But there's not - - - I'm just -
16 - - I'm just asking. There's not something else in the
17 record that - - - that lays that out in any more granular
18 detail; is that right?

19 MR. ROSE: For the pre-assignment delay? No.

20 JUDGE HALLIGAN: Okay.

21 MR. ROSE: But even in *People v. Prosser*, when
22 this court first found that a defendant does not waive his
23 right to a speedy trial by not asserting his right to it,
24 which we're not contesting, the - - - the court said that
25 it's - - - that this concern about a defendant sitting on

1 his hands was, I think the court put it, less than real.
2 Because the idea - - - because when a defendant goes into
3 court and does not press for a speedy trial in response to
4 the People's request for an adjournment, that means that
5 they are acquiescing to that delay.

6 It doesn't mean that you're waiving your right to
7 a speedy trial, but it certainly goes to the other factors
8 in the Taranovich case.

9 JUDGE TROUTMAN: But didn't this - - - didn't the
10 defendant's attorney appear without someone from the DA's
11 office being present?

12 MR. ROSE: At times, yes.

13 JUDGE TROUTMAN: And indicate to the court he - -
14 - he wanted a speedy trial motion?

15 MR. ROSE: No. No. What he said actually was
16 that time doesn't matter. They discussed a speedy trial
17 motion very early on.

18 JUDGE TROUTMAN: But there - - - there - - -
19 there then came a time when time became a problem. Didn't
20 the defense attorney indicate to the court at some time
21 prior to its actual filing, that that speedy trial motion
22 was, in fact, coming.

23 MR. ROSE: No. No. He never said that. He said
24 that he was - - - he was frustrated by the process taking
25 so long. I think that's fair. You know, he wants a

1 decision to be made, but he understands that the delay is
2 helping him because, A, it means that the People are taking
3 his request to dismiss the charges seriously. We know that
4 they actually were taking that request very seriously.

5 JUDGE TROUTMAN: What about the attorney saying
6 he didn't know what was going on with the - - - in the
7 District Attorney's Office? He didn't know the state of
8 the negotiations or discussions.

9 MR. ROSE: I mean, I'm not sure why he should
10 know. He should know that the People are reassessing, but
11 he doesn't need to know the - - - the details of this
12 investigation.

13 JUDGE TROUTMAN: He doesn't need to know if
14 you're going to just sit on it or whether you're going to
15 retry? He doesn't need to know that?

16 MR. ROSE: At a cer - - - if, at a certain point,
17 he had decided that the length of delay was too long to
18 make this decision, he could have moved for a speedy trial.

19 JUDGE TROUTMAN: So in essence, you're saying any
20 time that lapsed here that may be considered egregious, it
21 was on the defense because they didn't move forward with
22 the speedy trial motion?

23 MR. ROSE: No. What I'm saying is that the
24 reasons for delay here were not so egregious that this
25 court should ignore the other serious factors in this case.

1 That include a lengthy delay that is far shorter than
2 lengths of delay post-indictment that this court has
3 rejected speedy trial claims, including a sixty-six-month
4 delay between retrials.

5 JUDGE TROUTMAN: But don't you agree that with
6 respect to other trials, they are fact specific and there
7 may have been a record that would have supported that that
8 was not unreasonable? So we need to look at these
9 particular facts, shouldn't we?

10 JUDGE RIVERA: And it matters that this is the
11 fourth trial. The third retrial - - -

12 MR. ROSE: Well, I mean defense counsel - - -

13 JUDGE RIVERA: - - - of a first retrial?

14 MR. ROSE: Yeah. I mean, defense counsel never
15 said this below. And so this idea that a - - - a - - -
16 that retrials are easier to prepare for; that the People
17 didn't have good reasons that they weren't actually
18 conducting these meetings; that's completely unpreserved
19 because he never challenged - - -

20 JUDGE RIVERA: But it's your burden to explain
21 the delay. It's your burden to say this is the time we
22 needed, we could not have acted faster.

23 MR. ROSE: But we did, and defense counsel did
24 not file a reply objecting to that. If he had, there might
25 have been - - -

1 JUDGE RIVERA: But a conclusory statement is not
2 going to be good enough in opposition?

3 MR. ROSE: I mean, I don't think it's conclusory.
4 I mean, it's - - - it's unreasonable to think that a
5 prosecutor would state this is exactly the substance of
6 these internal discussions going on.

7 CHIEF JUDGE WILSON: You don't even - - - you
8 don't, even in your opposition, allege that you were
9 reinvestigating.

10 MR. ROSE: I'm sorry. I - - -

11 CHIEF JUDGE WILSON: You don't - - - don't even
12 allege in the opposition that you were reinvestigating.

13 MR. ROSE: No, we do. That's a - - - that's a
14 mischaracterization of - - -

15 CHIEF JUDGE WILSON: No. No, you don't. No, you
16 don't. You cite a case saying reinvestigation could be a
17 reason, and then you don't say we were reinvestigating.

18 MR. ROSE: It says reinvestigation and
19 reassessment, and - - - and it doesn't - - - and then the -
20 - - the - - -

21 CHIEF JUDGE WILSON: Could be - - - could be
22 reasons and you cite case law for that, but then you don't
23 actually say, and we were reinvestigating.

24 MR. ROSE: It follows with sentences that we're
25 explaining what was going on that. That - - - that this

1 was - - -

2 CHIEF JUDGE WILSON: You don't say anything about
3 - - - I've got it in front of me. It doesn't say anything
4 about reinvestigation.

5 MR. ROSE: I mean, I - - - I guess that the - - -
6 you know, you might read that differently, but the
7 Appellate Division found - - -

8 JUDGE RIVERA: Well - - -

9 MR. ROSE: - - - and I think that it has record
10 support, that the People were, in fact, reinvestigating - -
11 -

12 JUDGE RIVERA: Yeah. But there has to be record
13 support for the finding. And if there's none, it's pretty
14 hard to - - - to affirm in that way. But there is no
15 description of what this reinvestigation is. It could be I
16 - - - counsel went and read the file again.

17 MR. ROSE: Well, I think it's meaningful that - -
18 -

19 JUDGE RIVERA: Is that - - - would that be
20 reinvestigation? They reread the file?

21 MR. ROSE: No. But that's not what happens in
22 these cases when there's a mistrial on a murder.

23 JUDGE RIVERA: Well, how would we know?

24 MR. ROSE: Because the People said so in their
25 uncontroverted affirmation. I just want to - - -



1 JUDGE RIVERA: They didn't say anything. That's
2 the problem.

3 MR. ROSE: Well, they said that the reason was
4 meetings.

5 Now, I agree that the record - - -

6 JUDGE RIVERA: The reason was? I'm sorry.

7 MR. ROSE: The - - - the reason were these
8 meetings to reassess and to reinvestigate.

9 I agree - - -

10 JUDGE RIVERA: But again, they didn't give dates.
11 They could have been a week before counsel's - - - excuse
12 me - - - the prosecution said, okay, we're - - - we've
13 decided to retry. We're ready - - - ready to go.

14 MR. ROSE: I mean, that, I think, conflicts with
15 the record based on the - - - the calendar appearances that
16 we have between right after the third trial and shortly
17 before the fourth trial, that these discussions are
18 ongoing. We know that this decision would be difficult,
19 especially with reinvestigation and reassessment because -
20 - -

21 JUDGE RIVERA: Well, saying we haven't decided
22 doesn't mean that you've actually done anything other than
23 we - - - we just haven't decided. Doesn't mean you've
24 actually had any conversations about anything.

25 MR. ROSE: No, but it supports - - -

1 JUDGE RIVERA: That's the problem.

2 MR. ROSE: - - - the prosecutor's affirmation.
3 And the defense attorney here was best positioned to know
4 what the accuracy of those statements were. And if he
5 wanted to rebut it, he needed to file a reply. A hearing
6 could have been held where exactly these types of questions
7 that Your Honors are asking could have been aired.

8 JUDGE RIVERA: You have to rebut when there's
9 something to rebut to.

10 MR. ROSE: The - - - they could have rebutted. I
11 disagree. There weren't these meetings going on. In fact,
12 I had conversations with prosecutors stating that, oh, we
13 just aren't moving forward. If there's no rebuttal to the
14 People's good faith reasons, then - - -

15 JUDGE RIVERA: But he did say on the record, I
16 don't know what they're doing.

17 MR. ROSE: He didn't know what they were doing
18 with regard to where they were at in the reassessment and
19 the reinvestigation.

20 JUDGE RIVERA: I've called them, they don't
21 respond.

22 MR. ROSE: That happens at one calendar
23 appearance, yes. But we know that the prosecutor who tried
24 the first three trials was still in the office. He still
25 had this contact information. There's references to

1 another ADA who seems to be more involved later on in the -
2 - - in the delay. And then there's - - - then there's
3 ultimately the deputy chief of the trial division who makes
4 the ultimate decision. But - - -

5 JUDGE RIVERA: Can you address - - - because you
6 are going to run out of time very soon - - - the questions
7 that you've heard posed to opposing counsel regarding the
8 ineffective assistance of counsel claim in the 440, and
9 then we'll get to the - - - the merits of it.

10 MR. ROSE: Yeah. So I think to begin with, this
11 question of - - - of ineffective assistance is unreviewable
12 as a threshold matter, because the direct appellate record
13 does not establish there is no possible legitimate - - -
14 legitimate strategic question.

15 JUDGE HALLIGAN: That - - - that's the question,
16 right?

17 MR. ROSE: Yes.

18 JUDGE HALLIGAN: So why?

19 MR. ROSE: So - - - so why with regard to
20 unreviewable in this procedural posture? Or why was there
21 no ineffectiveness on the direct appellate?

22 JUDGE HALLIGAN: Are you arguing that we can't
23 reach the ineffective assistance claim because of the 440?

24 MR. ROSE: No. In Evans, this - - - this court
25 established that - - -

1 JUDGE HALLIGAN: Yes.

2 MR. ROSE: - - - it could review it on the direct
3 appellate record. I think that it still makes sense for
4 this court to exercise special caution before concluding
5 that there was no possible - - -

6 JUDGE HALLIGAN: But why, on this record, is
7 there not ineffective assistance?

8 MR. ROSE: So starting with the Lindo ID and
9 statement. So the Lindo ID and statement, the - - - Lindo
10 is the - - - is this eyewitness to the - - - to the murder
11 at the fourth trial that's presented for the first time.
12 And at the beginning of his testimony, he actually does
13 offer very damning testimony that the defendant was the
14 shooter. He states, right before I heard shots, I looked
15 over and I saw Travis Woods in the street.

16 Why that's important is because the murder took
17 place according to the people's other eyewitnesses, Calvin
18 and Glover, where the defendant was actually standing in
19 the street, not in a crosswalk where other people might be,
20 but standing in the street when he turned around to shoot
21 Barry Miller.

22 So that alone, as the prosecutor argued in
23 summation, provided powerful evidence that the defendant
24 had been ID'd by Lindo. Now that - - - and then the
25 ability of the defense counsel then to use the ID and

1 statement is to paint this witness not as just somebody
2 who's fearful on the stand, but as somebody who is a liar
3 and an opportunist. These are the words that he uses in
4 his - - - in his - - -

5 JUDGE RIVERA: Well, why wouldn't counsel first
6 try to keep that testimony out? And then if that fails,
7 then try to undermine him?

8 MR. ROSE: I think he - - - he - - - he did try
9 and keep this testimony out by repeatedly objecting during
10 the direct testimony where there's also these references by
11 the prosecutor to the statement and to this identification.

12 He could have reasonably believed that the
13 combination of the - - - the witness' initial testimony
14 that indicates that he saw the defendant shoot the - - -
15 the victim, coupled with - - -

16 JUDGE CANNATARO: When you say initial testimony
17 that he saw the defendant shoot the victim, you mean
18 testimony at trial?

19 MR. ROSE: So testimony at trial. And - - - and
20 let me be clear, not that he saw the defendant shoot the
21 victim - - -

22 JUDGE CANNATARO: No, I don't - - - I think he
23 categorically refused to say that at trial, didn't he?

24 MR. ROSE: I disagr - - - well, he categorically
25 refused to actually say that defendant shot the victim.

1 But he does say that right before he hears shots, he's
2 about a hundred - - - he's about a hundred feet away, he
3 turns and he sees the defendant standing right where the
4 other witnesses said the defendant was standing when he
5 shot the victim, in a place where you would not normally
6 expect somebody to just be standing in the middle of the
7 street.

8 JUDGE CANNATARO: Yeah.

9 MR. ROSE: Not in a crosswalk.

10 JUDGE CANNATARO: That's circumstantial evidence.

11 MR. ROSE: That's strong circumstantial evidence
12 which - - -

13 JUDGE CANNATARO: But he would not make - - -
14 make the defendant the shooter during his live testimony
15 portion?

16 MR. ROSE: Yeah. I think - - - I - - - I agree
17 with that. And - - - and the reason why - - - the - - -
18 the strategy - - - the strategic reason for using the ID
19 and statement both goes to why it's reasonable to let it in
20 in the first place. That the - - - the idea that the jury
21 would have, through a combination of this testimony and the
22 prosecutor's questions, understood that there was some
23 prior identification.

24 And then actually present this with - - - to the
25 - - - to the jury to be able to argue in the same way that

1 he had discredited the People's witnesses at the three
2 prior mistrials. Secured an acquittal on the attempted
3 murder at the first trial using the same strategy to paint
4 this - - - to paint this witness as a liar, an opportunist
5 who, in - - - in his words, when he's no longer in the
6 clutches of the NYPD right after the murder, he then
7 recants.

8 And so in that situation, it was reasonable both
9 to let it in. And also even if it wasn't, even if it was
10 error to let it in, to significantly mitigate the prejudice
11 of this ID and statement.

12 JUDGE RIVERA: Doesn't - - - doesn't the Lindo's
13 testimony bolster the testimony of the other witnesses
14 which were not credited at prior mistrials?

15 MR. ROSE: The - - - the - - - if I understand
16 your question, are you asking about the photo ID or the - -
17 -

18 JUDGE RIVERA: No. The other witnesses.

19 MR. ROSE: - - - testimony in general?

20 JUDGE RIVERA: The other two eyewitnesses.

21 MR. ROSE: Yeah. Just the - - - oh, sorry. So
22 just the statement - - - just the testimony itself, not
23 including the statement and ID. That provides strong
24 corroborating evidence of the People's other witnesses
25 because he sees the defendant at the - - - at the exact

1 time of the shooting in the same place that the People's
2 other witnesses say that the defendant was standing in the
3 street when he shot the victim.

4 So that is itself very strong testimony against
5 the defendant.

6 JUDGE TROUTMAN: What do you say about the
7 claimed O'Rama errors?

8 MR. ROSE: So the O'Rama errors, both - - -
9 alleged O'Rama errors about the first and the fourth
10 trials. The fourth trial regard - - - is regarding to an
11 exhibit request. I think this court has already rejected
12 that claim in Damiano. Every Appellate Division that has
13 reached this issue, which - - - which is all of them,
14 agrees that exhibit requests are ministerial requests that
15 don't actually implicate the procedures under O'Rama.

16 And there's no reason to - - - to revisit
17 Damiano, especially in the context of expanding - - -

18 JUDGE TROUTMAN: What about the suggestion that
19 it's not clear the court, in fact, responded to the
20 request?

21 MR. ROSE: I mean, I think that's true of most
22 exhibit requests when all the record that - - - the record
23 evidence that we have is sometimes, oh, I - - - I'm going
24 to send it back to the jury.

25 JUDGE TROUTMAN: No. Trial judges will say when

1 the attorneys come back, the jury has been provided with
2 exhibits on the record.

3 MR. ROSE: Sometimes they say that.

4 JUDGE TROUTMAN: The trial judges do that.

5 MR. ROSE: Sometimes they say that. Sometimes
6 they say we sent it back, although that again involves an
7 inference that the court officer didn't drop an exhibit on
8 the way. I mean, these sorts of mistakes happen.

9 JUDGE TROUTMAN: What about read back? What
10 about read back with respect to not specifically following
11 the requirements of O'Rama?

12 MR. ROSE: In terms of - - - are you talking
13 about the first trial note or - - - or the difference
14 between that and exhibit requests?

15 JUDGE TROUTMAN: When you're asking - - - when -
16 - - when there's a request for specific testimony, what do
17 you say about the second error?

18 MR. ROSE: Within the first trial there's these
19 notes that - - - that are regarding to the testimony about
20 the shooting - - -

21 JUDGE TROUTMAN: Right.

22 MR. ROSE: Right. So as a - - - as an initial
23 matter, we think that there was not actually an O'Rama
24 error because - - - or at least that preservation was
25 required. Because counsel - - - that the record shows that

1 counsel had knowledge of these notes based on the - - - the
2 rather extraordinary, I think, circumstantial evidence,
3 admittedly, that the defense attorney was provided with the
4 exact contents of the note.

5 The - - - one of the notes, for example, the
6 Calvin Glover note - - -

7 JUDGE TROUTMAN: So the - - - the record - - -
8 there's record support that he - - - he was provided with
9 the specifics of the jury's note prior to the response by
10 the court. Is that what you're saying?

11 MR. ROSE: Yes. That - - - that - - - in - - -
12 in this case, so the Calvin note is discussed at the end of
13 - - - of a day of trial and the - - - the court says, you
14 know, we've got the note, it's going to take a long time
15 for you to respond. We'll come back in the morning. The
16 counsel - - - attorneys are going to work overnight to
17 figure out what testimony there is, and states that there's
18 been an agreement about what testimony to come in.

19 I think that that agreement, the length of time,
20 the simple - - - the simplicity of the note, all are strong
21 evidence that the attorney was actually provided with - - -
22 with the note.

23 But even if he wasn't, the error would not be
24 prejudicial because the testimony related only to the
25 shooting and not to the drug charges. The - - - the people

1 who testify - - -

2 CHIEF JUDGE WILSON: Aren't those interrelated,
3 really?

4 MR. ROSE: No. I mean - - -

5 CHIEF JUDGE WILSON: No?

6 MR. ROSE: The - - - the drug charge is mostly
7 stem - - -

8 CHIEF JUDGE WILSON: People were involved in a
9 drug conspiracy that involves shooting people and those
10 guys trying to move up in - - - in the ranks?

11 MR. ROSE: Yes. But the - - - the jury at the
12 first trial convicted the defendant of various drug sale
13 counts that were overt acts in the conspiracy that
14 established that the defendant was guilty of the
15 conspiracy. So it could not have both found that - - -
16 essentially, it could not have found that the defendant was
17 both guilty of these drug sale charges and then innocent of
18 the conspiracy given the - - - and - - - and the - - - and
19 the witnesses who testified about the shooting, Calvin and
20 Glover, were not central to the People's case about the
21 conspiracy. Those were other of his - - - his co-operators
22 and his more immediate drug - - -

23 JUDGE RIVERA: Did the prosecution reference that
24 testimony at all to connect to the - - -

25 MR. ROSE: In summation?

1 JUDGE RIVERA: - - - charges? Yes.

2 MR. ROSE: Certainly not Glover. I - - - I - - -
3 I don't know about - - - about Calvin. But Calvin didn't
4 provide strong evidence of the defendant's participation in
5 the - - - in the drug organization. They weren't in the
6 same, like, smaller circle of drug dealers.

7 Whereas Joseph Marshall, who testifies at the
8 first trial, is defendant's underling in his own smaller
9 circle of cocaine and PCP.

10 JUDGE RIVERA: Your red light went off, but I do
11 want to circle back to your point about whether or not,
12 given the 440, this is reviewable. Because I do read the
13 Appellate Division as saying there is some part on direct
14 appeal that they can review, but then it's specific - - -
15 they specifically say, "to the extent defendant made a CPL
16 440.10 motion, the claims raised therein are unreviewable
17 because this court has denied leave to appeal from the
18 order denying the motion".

19 MR. ROSE: Yes. And - - - and - - - and so I
20 think that the Appellate Division did correctly conclude
21 that those were unreviewable. Not - - - not as a matter of
22 law - - -

23 JUDGE RIVERA: I'm saying then what portion of
24 that could we possibly review if they didn't review it?

25 MR. ROSE: Well, the - - - it would still be

1 reviewable on the direct appellate record because the - - -
2 the - - - this court would not be bound, for example, by
3 the court's previous decision to not - - -

4 JUDGE RIVERA: But what - - - what aspects of the
5 claims? Do we have to look at the 440.10 claims and parse
6 out what's left?

7 MR. ROSE: No. Those are outside the - - - those
8 are outside the record. This court can still review the
9 claims that were raised in the 440 on the direct appellate
10 record. It should just exercise special caution before
11 concluding that there is no legitimate strategic value - -
12 - or no legitimate strategy underlying the counsel's
13 actions.

14 If I could just say one last thing about a
15 hearing as an alternative remedy? It would be appropriate
16 here, especially in regards if you're not going to affirm -
17 - - which we would take - - - especially with regards to
18 the questions that are being asked about what are the
19 specifics of these meetings?

20 It - - - if this court thinks that the direct
21 appellate - - - or that the direct record here does not
22 support affirmance, it should do what the trial court then
23 should have done in the first instance in response,
24 probably, to an opposition or to a reply to the defendant
25 that didn't happen, at which the People would be able to

1 present evidence that - - - of when the - - - when the
2 meetings occurred, what were the specific reasons for delay
3 before dismissing this exceptionally serious murder charge
4 involving an - - - a notorious drug gang enforcer who I
5 think this was his fifth prosecution for shooting.

6 CHIEF JUDGE WILSON: Thank you.

7 JUDGE HALLIGAN: Can I ask you to respond to the
8 People's argument that defense counsel should have offered
9 some rebuttal to the assertion in the affidavit that there
10 were a series of meetings at the request of defense counsel
11 that justified the delay?

12 MR. BOVA: No. He didn't have to, because he
13 more than - - - he more than made that exact argument in
14 his opening motion. He specifically said in his opening
15 motion, there is no good cause for delay. I have - - -
16 they - - - it's too late for them, having failed to offer
17 any explanation for almost three years, to do so now. I've
18 been trying to get in touch with them - - -

19 JUDGE HALLIGAN: But - - - but once there's a
20 specific substantive reason that is offered in that
21 affidavit, whether you think it's enough or not enough, why
22 shouldn't defense counsel have addressed the factual
23 proposition, which is there were a series of meetings?

24 MR. BOVA: Well, his - - - his opening papers
25 effectively contradict that because he says there is no

1 reason for this. There's no - - - been - - - been no basis
2 provided.

3 JUDGE HALLIGAN: There's a difference between
4 saying there's no reason for - - - it's not sufficient for
5 delay in saying, you know, they - - - there were meetings,
6 there were two, they were - - - you know, on whatever
7 dates. The factual question is distinct it seems to me.

8 MR. BOVA: Well, I mean, at a minimum, he is
9 contradicting the - - - the broad good cause argument
10 that's made by the government. But in any event, if by not
11 putting in a reply, all he's really saying, and - - - and I
12 think as Judge Rivera was getting at, is this is facially
13 insufficient in the first place. There's nothing to reply
14 to. All you're doing is saying you're having meetings.
15 You were talking for almost three years. That's facially
16 insufficient.

17 His initial argument that there was no good cause
18 more than anticipated and rebutted that. And it really
19 doesn't take much to rebut the concept that the state
20 cannot sit for thirty months and have meetings to decide
21 whether to move forward. And the suggestion that defense
22 counsel had an obligation to do something besides being
23 inconsistent with the record, where, as early as 2010, he's
24 talking about a speedy trial motion schedule with the
25 court.

1 But more fundamentally, the suggestion that
2 counsel has any obligation here flies in the face of about
3 a century of law from this court. As early as 1955, it is
4 the state which initiates the action, and it is the state
5 which must see that the defendant is arraigned. It is
6 likewise the state which has the duty of seeing that the
7 defendant is speedily brought to trial.

8 The haphazard laxity here for almost three years
9 following three hung juries violated that core rule.

10 JUDGE RIVERA: How should we weigh in
11 consideration of the Taranovich factors, the fact that it
12 is not only a retrial, but the third time around?

13 MR. BOVA: I think it goes directly to the
14 complexity issue, which is - - - which is interlocked with
15 the seriousness factor.

16 As this court explained in Regan, we don't just
17 look at seriousness as a general abstract matter.
18 Seriousness matters because it bears - - - because when a
19 charge is serious, we're going to give the state more
20 leeway to prepare. But as this court held in Regan, even
21 when a charge is serious, if there's no indication
22 whatsoever that the seriousness had any impact on the
23 ability to prepare, then it doesn't carry much weight for
24 the state.

25 And here, once the prosecutor was finally

1 reassigned thirty months after the third mistrial, he was
2 ready in a month. It's because they had already test
3 driven their case. The record in - - - provides no
4 evidence whatsoever that there was any difficulty in
5 preparing. The problem is, they just took almost three
6 years to decide whether they wanted to take another go at
7 it at a fourth trial. That was unreasonable.

8 Thank you.

9 CHIEF JUDGE WILSON: Thank you.

10 (Court is adjourned)

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

I, Chrishanda Sassman-Reynolds, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Woods (Travis), No. 31 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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