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COURT OF APPEALS
STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

NO. 83

WILLIAM HARRIS,

Appellant.

20 Eagle Street
Albany, New York
June 7, 2018

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: Appeal number 83, The
2 People of the State of New York v. William Harris.

3 Good afternoon, counsel.

4 MR. SCHUMEISTER: Good afternoon. May it please
5 the court, my name is Daniel Schumeister and I represent
6 William Harris, the defendant-appellant in this case. With
7 Your Honor's permission, I'd like to request two minutes
8 for rebuttal.

9 CHIEF JUDGE DIFIORE: You may, sir.

10 MR. SCHUMEISTER: Thank you.

11 The trial court in this case committed
12 presumptively prejudicial error requiring reversal when, on
13 the last day of trial, and contrary to its explicit
14 statement on the second to last day of trial, it completely
15 denied Mr. Harris his Sixth Amendment right to a summation.

16 CHIEF JUDGE DIFIORE: Before we get to that,
17 counsel, let's talk about preservation.

18 MR. SCHUMEISTER: Sure, Your Honor.

19 CHIEF JUDGE DIFIORE: Was this preserved?

20 MR. SCHUMEISTER: Your Honor, I do not think
21 preservation was required in this instance, because
22 preservation was not realistic, given the way in which
23 proceedings unfolded. I - - - I would say, Your Honor,
24 that there was a lot of speed and surprise with which
25 everything unfolded.



1 As I mentioned on the penultimate day of trial,
2 the trial court had said that it would be - - - that the
3 parties would sum up as well. And then surprisingly and I
4 would say, out of nowhere, the court said that it - - - it
5 found it had the discretion not to hear - - -

6 JUDGE STEIN: So would this be a different case
7 if, the day before, the court had said, by the way, we're
8 going to finish up tomorrow and I'm not going to allow
9 closing arguments - - - summations.

10 MR. SCHUMEISTER: It might be a different case,
11 Your Honor. I - - - I would say, though, that overall the
12 court needs to take into account the totality of the
13 circumstances. There, I grant - - - I'm sorry, go ahead,
14 Your Honor.

15 JUDGE STEIN: I'm sorry; let me clarify. A
16 different case as regards to the requirement of
17 preservation, not necessarily the merits.

18 MR. SCHUMEISTER: Whether preservation would be
19 required if it was - - - if - - - if there was a warning -
20 - -

21 JUDGE STEIN: So if you knew the day be - - -
22 there was a warning the day before, would preservation then
23 be - - - would have been required to - - - to preserve
24 this?

25 MR. SCHUMEISTER: I think it might be a different



1 case, Your Honor, yes. Of - - - of course, that is not
2 what happened here, and I - - - I would note that - - -

3 JUDGE FAHEY: The interesting thing is here, is
4 you have a Constitutional right to a fair trial, right, and
5 you've argued that? You're arguing that here, right?

6 MR. SCHUMEISTER: Sure, Your Honor.

7 JUDGE FAHEY: Okay. So the - - - the kind of the
8 odd thing in this case is that the court did not make a
9 legal error. The CPL, in the strange anomaly that we have,
10 does allow the court to deny summation. So the question
11 for us, really is - - - is, if you don't have to preserve
12 that Constitutional error, because the court didn't make an
13 error, then can we get to the merits? You see what I'm
14 saying?

15 MR. SCHUMEISTER: I believe I do, Your Honor. I
16 - - - I would say that you're referring, I believe, to CPL
17 350.10.

18 JUDGE FAHEY: I'm trying to throw you a rope here
19 to argue preservation. I've given you a big long rope here
20 for you to go ahead and at least argue - - - then we can
21 talk about the merits anyway. All right.

22 MR. SCHUMEISTER: Well, I - - - I do not think
23 that it needs to be preserved under these sort - - - sorts
24 of circumstances where en - - - enforcing a preservation
25 requirement would, in effect, cause the waiver of the Sixth



1 Amendment right to a summation, which is within the Sixth
2 Amendment right to counsel.

3 JUDGE FAHEY: Well, well, all right, anyways.

4 MR. SCHUMEISTER: Absolutely.

5 CHIEF JUDGE DIFIORE: Back to the merits.

6 MR. SCHUMEISTER: Sure. I - - - I do want to
7 emphasize, however, that everything unfolded quite quickly
8 as you might see in the record. The defendant was not - -
9 - was not yet standing up when the verdict was being
10 rendered. And I - - - I do think that counsel made clear
11 her displeasure with what had unfolded when she said, if
12 you could have heard me further to elaborate. However, it
13 really was a quite quick - - -

14 JUDGE WILSON: Was that - - - is that close
15 enough in time to preserve, if we think preservation is
16 necessary, that comment by counsel?

17 MR. SCHUMEISTER: No, Your Honor, I don't think
18 so in these circumstances, because the record was closed,
19 because the verdict had been entered. And I think it's
20 clear from this court's decision in Carter, and then a more
21 on-point decision from the First Department in Agola, that
22 once the verdict has been rendered, the record is closed,
23 and you cannot reopen it to reconsider the issues.

24 I - - - I would also point this court to the
25 court's decision in McAlpin, where - - - when there was no



1 ample opportunity, then when they are only moments before
2 the imposition of sentence in that case, preservation was
3 not required. And similarly, in Conceicao, where there was
4 no actual or practical ability to object, the court heard
5 and de - - - decided the merits of those cases.

6 JUDGE GARCIA: Counsel, I - - - I have a slightly
7 different question. The respondents in their brief
8 actually make an on-the-merits argument, which you don't
9 seem to address in your reply. Your reply seems to
10 indicate all they made was this preservation argument, but
11 on page 22 of their brief, they say, "In any event, even if
12 defendant had preserved his claim that CPL 350 is
13 unconstitutional, that claim would fail on the merits."
14 And they argue that given that this is based on a right-to-
15 counsel theory in Herrera, that wouldn't apply where there
16 is no actual deprivation of liberty in a misdemeanor case,
17 for example. So what's the response to that?

18 MR. SCHUMEISTER: Well, I - - - Your Honor, I'm
19 not sure I follow your question. I - - - I would say that
20 to begin with, even - - - the - - - an error like this is
21 structural error in the federal jurisprudence and there is
22 no - - -

23 JUDGE GARCIA: But their argument though is - - -
24 their argument is, okay, even if you had preserved this,
25 your grounding argument in Herrera, which is a right-to-



1 counsel type of case, right? And that doesn't apply, the
2 argument goes, in a misdemeanor case like this where
3 there's no dep - - - deprivation of liberty.

4 MR. SCHUMEISTER: Well, Your Honor, there was a
5 dep - - -

6 JUDGE GARCIA: There's no right to counsel.

7 MR. SCHUMEISTER: There was a deprivation of
8 liberty in this case, because Mr. Harris was sentenced and
9 served three months.

10 JUDGE FAHEY: He's a B misdemeanor.

11 JUDGE GARCIA: Yeah, but that's - - -

12 JUDGE FAHEY: But I think the judge is - - - what
13 - - - the statute refers to both misdemeanors and vio - - -
14 and - - - and violations.

15 MR. SCHUMEISTER: Sure.

16 JUDGE FAHEY: So - - - so - - - so in that
17 instance, the People may be correct that you're not
18 entitled to a right to counsel in violation, let's say, of
19 harassment 3 or something like that. And in that
20 situation, you wouldn't be, so that part of the - - - the
21 court wouldn't be required to - - - to deal with that
22 Constitutional issue, but you would be on B misdemeanor.

23 JUDGE GARCIA: Right. It's an as applied, not a
24 facial challenge - - -

25 JUDGE FAHEY: Right.



1 MR. SCHUMEISTER: I - - - I would say it is as
2 applied. I - - - I would also say that this court held in
3 Garcia in 1999, it's the threat of imprisonment that crea -
4 - - that makes the right to counsel attach in - - - in
5 cases in this state, which - - - and in any event - - -

6 JUDGE GARCIA: Is there a statutory right to
7 counsel for misdemeanors in New York?

8 MR. SCHUMEISTER: I - - - I cannot answer that
9 off the tip of my tongue, Your Honor, whether there's a
10 statutory right for misdemeanors, but I would say that I
11 believe in Garcia, the court found that that right to
12 counsel attaches when - - - when there's the threat of
13 imprisonment under the Constitution, but I - - - I don't
14 want to represent that I recall whether there's a statutory
15 right for that as well.

16 I - - - I would say that there is no indication
17 from the merit - - - excuse me - - - there's no indication
18 from the record that trial counsel would have, as a matter
19 of strategy or otherwise intentionally, decided to waive
20 the right to a summation. For instance, in the - - - the -
21 - - the arguments that would have been made were - - - were
22 not going to repeat the arguments that were made during the
23 motion for trial order of dismissal.

24 During the trial order of dismissal motion that
25 the trial counsel made, she made it with a prima facie



1 framework. That, of course, is not what would be at issue
2 in a summation, where the court would be weighing for
3 reasonable doubt. And there were serious arguments to be
4 made. For instance, in terms of whether the single
5 crackpipe that was eventually tested was, in fact, Mr.
6 Harris's or perhaps the complaining witness's instead.

7 That's partially made clear because there were
8 certain issues as to the chain of custody, and the
9 consciousness of innocence that was mentioned during
10 sentencing by trial counsel.

11 We do, in addition, ask that not only should the
12 conviction be reversed, but that the accusatory instrument
13 should be dismissed given the fact that Mr. Harris has
14 served his sentence, that it's a relatively minor offense,
15 and that no other - - -

16 JUDGE FEINMAN: Do we have jurisdiction to do
17 that?

18 MR. SCHUMEISTER: Yes, Your Honor, under People
19 v. Allen and People v. Burwell, the - - - the court has
20 previously done just that, pointing to cases that were, in
21 fact, for, I believe, more severe offenses than the one
22 that Mr. Harris was here convicted of.

23 CHIEF JUDGE DIFIORE: Thank you, counsel.

24 MR. SCHUMEISTER: Thank you.

25 CHIEF JUDGE DIFIORE: Counsel?



1 MS. VISGAITIS: May it please the court, Rebecca
2 Visgaitis, for the respondent. Defendant did not preserve
3 for appellate review his claim that he was denied the
4 opportunity to present a summation.

5 JUDGE STEIN: But do you agree that the - - - the
6 correct standard for determining whether preservation was
7 required is whether defendant had - - - defense counsel had
8 a meaningful opportunity to object?

9 MS. VISGAITIS: For preservation, no. That
10 meaningful opportunity language that defendant relies on
11 comes from a federal Fifth Circuit decision about the
12 implicit waiver of the opportunity to - - -

13 JUDGE STEIN: What about Conce - - - Conceicao?

14 MS. VISGAITIS: I - - - well, I believe that this
15 case is more in line with this court's jurisprudence about
16 the ability to object in other right-to-counsel contacts
17 and in those cases, the Umali, and the Ryan, and Garray
18 decision, this court has held that preservation is required
19 where counsel is present and available to register a
20 protest. So in our view, all that was required for
21 preservation to be required here was that counsel had some
22 notice of what was happening.

23 JUDGE RIVERA: So - - - so - - - I'm the judge.
24 You get up and I say, no summations, guilty.

25 MS. VISGAITIS: I think that when you say no



1 summations, yes, that is the opportunity - - -

2 JUDGE RIVERA: I just said, no summations, and
3 then guilty. You're - - - you're in the room.

4 MS. VISGAITIS: Yes.

5 JUDGE RIVERA: You think that there's an
6 opportunity there that fits within the prior case law for
7 you to actually object?

8 MS. VISGAITIS: I mean, that's certainly a
9 tighter - - -

10 JUDGE RIVERA: No, it's a yes or no on this.

11 MS. VISGAITIS: Yes. I think saying - - -

12 JUDGE RIVERA: When - - - when would - - - when
13 would you have made that objection?

14 MS. VISGAITIS: Immediately when the court says
15 no summations, and perhaps you don't get the word out, but
16 perhaps you start to raise your hand, perhaps you start to
17 stand up and get that judge's - - -

18 JUDGE RIVERA: No summation, guilty.

19 MS. VISGAITIS: I think the "no summation" gives
20 an opportunity.

21 JUDGE RIVERA: You didn't - - - you didn't
22 actually interrupt me there, so you think you could have?

23 MS. VISGAITIS: Well, I have no objection here.
24 But I - - -

25 JUDGE RIVERA: Well, maybe you should - - - you



1 don't know how I view that.

2 MS. VISGAITIS: I believe that if the court is
3 saying what it's about to do, then that is defense
4 counsel's cue to give an objection. And here - - -

5 JUDGE RIVERA: Well, then is your argument - - -

6 CHIEF JUDGE DIFIORE: Did she - - - did she
7 register a protest - - -

8 MS. VISGAITIS: No.

9 CHIEF JUDGE DIFIORE: - - - defense counsel by
10 saying, well, I would have said to you, judge, that he had
11 no knowledge that there was cocaine in that crackpipe. She
12 didn't say that?

13 MS. VISGAITIS: She - - -

14 CHIEF JUDGE DIFIORE: Right after he stopped
15 talking?

16 MS. VISGAITIS: She did indicate that she had
17 some elaboration on what she had said in her motion in
18 support of a trial order - - - of her motion for a trial
19 order of dismissal, but when she said that she could have
20 further elaborated, she was not registering a protest. She
21 didn't say I could have further elaborated, and, in fact,
22 you - - - you denied my right to do so. She was stating a
23 fact that - - -

24 JUDGE RIVERA: If - - - if she did so after say
25 my example, no summations, guilty, if - - - if you had



1 been, you're - - - you're the counsel, said, oh, I object;
2 I want a summation. Is that preserved?

3 MS. VISGAITIS: I think that - - - that's a
4 tricky question, because whether - - -

5 JUDGE RIVERA: It's a yes or no. It's a yes or
6 no.

7 MS. VISGAITIS: I would say yes, that that would
8 be registering a protest and I - - - I think - - -

9 JUDGE RIVERA: Even though it's after having said
10 no summation, after having said the verdict.

11 MS. VISGAITIS: So I think what complicates the
12 issue is that you have to look at whether the court could
13 change its mind at that point, and I think - - -

14 JUDGE RIVERA: And - - - and can the court? Is
15 there - - - have we said that? Is there some statute that
16 permits that?

17 MS. VISGAITIS: This court's jurisprudence has
18 said that in other cases there was not an ability for the
19 court to change its mind. I think that there could be a
20 factual analysis of that, and I don't think that that was
21 enough of an issue in this brief for us to have fully
22 addressed whether it can be factual - - -

23 JUDGE RIVERA: Well, given - - - given what the
24 rules of pres - - - given the goals of the rules of
25 preservation, what should be the correct rule? In my



1 example.

2 MS. VISGAITIS: In - - - if counsel registers a
3 protest after the fact? Or - - -

4 JUDGE RIVERA: I'm asking you. In my example,
5 given the goals of the rules of preservation, how should
6 the rule be deployed to resolve that hypothetical?

7 MS. VISGAITIS: In - - - in your hypothetical of
8 counsel not objecting immediately or - - -

9 JUDGE RIVERA: No summation, guilty.

10 MS. VISGAITIS: I believe that that - - - counsel
11 had an opportunity to object when court said no summation,
12 and the court could have corrected the alleged error at
13 that point.

14 JUDGE RIVERA: They speak at exactly the same
15 time as the judge? No summation, guilty.

16 MS. VISGAITIS: Yes.

17 JUDGE FAHEY: Okay, can - - - can I ask do you
18 agree that generally a Sixth Amendment right - - - right to
19 counsel, a Constitutional claim, does not have to be
20 preserved? Generally that's true, right?

21 MS. VISGAITIS: Correct, yes.

22 JUDGE FAHEY: All right. So in this instance,
23 there was no statutory violation by the court. The court
24 was actually following the statute as - - - as it's
25 facially written. And there was a subsequent right-to-



1 counsel argument that was brought before Appellate
2 Division, and now we've got the same issue basically before
3 us. So isn't really the - - - the - - - under the - - -
4 the kind of strange circumstances of this case, because of
5 this statute, it - - - it seems that - - - that
6 preservation may not really be required here, so what do
7 you have to say about the merits?

8 MS. VISGAITIS: About the - - - the
9 Constitutional challenge to the statute or - - -

10 JUDGE FAHEY: Yeah, the validity of the statute.

11 MS. VISGAITIS: Sure. So - - - so the validity
12 of the statute, first of all, there was no argument at the
13 trial level about defendant's Constitutional rights - - -

14 JUDGE FAHEY: No, I - - - I understand all that.
15 I understand that, but we - - - you just - - - we both just
16 agreed, you don't have to preserve that. Okay.

17 MS. VISGAITIS: Right.

18 JUDGE FAHEY: So.

19 MS. VISGAITIS: So - - - so here, because under
20 both the federal and the state Constitution, you are not
21 necessarily entitled to counsel if you are not ultimately
22 sentenced to imprisonment.

23 JUDGE FAHEY: Yeah, but this - - - this is a B
24 misdemeanor, right? So he can go to jail for up to ninety
25 days on a B misdemeanor. So I get what you're saying about



1 violations. But that's not relevant here. I mean, the way
2 you read the - - - on the statute on its face, somebody can
3 do time, so - - - so they got a right to an attorney.

4 MS. VISGAITIS: So that's where the waiver comes
5 in here, because in addition to just preservation, it's
6 clear that defense counsel can waive the opportunity to
7 give a summation. And that's true under - - -

8 JUDGE FAHEY: But you're - - - you're not arguing
9 that that's what happened here, are you?

10 MS. VISGAITIS: Yes.

11 JUDGE FAHEY: Are you?

12 MS. VISGAITIS: That - - - that there was - - -

13 JUDGE RIVERA: Okay, what - - - what - - - what
14 do we look for in the record to evince the waiver?

15 MS. VISGAITIS: Sure. So I think that you look
16 for the fact that there was an opportunity to object and
17 especially here, where you have the court explaining
18 multiple times that it's not going to hear summation. And
19 that it's going to render a verdict without summations, and
20 then beginning to render that verdict, and initially
21 announcing an acquittal on some of the charges, and then
22 telling defendant to stand up to receive the rest of the
23 verdict. You have this extended opportunity here through
24 all of that, in which counsel - - -

25 JUDGE RIVERA: Do you have to waive before or



1 after?

2 MS. VISGAITIS: Sorry?

3 JUDGE RIVERA: You can have the waiver post?

4 MS. VISGAITIS: The waiver would need to - - -

5 JUDGE RIVERA: As opposed to pre.

6 MS. VISGAITIS: The waiver is - - - is
7 contemporaneous. The waiver is when the court is saying
8 that it is going to render a verdict without hearing
9 summations, and counsel is silent, that can - - - that can
10 demonstrate a waiver. And here - - -

11 CHIEF JUDGE DIFIORE: And counsel, let me ask you
12 this question. So would you agree, that the defendant's
13 right to counsel attaches upon the deprivation of his
14 liberty?

15 MS. VISGAITIS: Yes.

16 CHIEF JUDGE DIFIORE: Would you then also agree
17 that there's a violation of that right to counsel when the
18 judge prevents his defense attorney from presenting a
19 summation to the court?

20 MS. VISGAITIS: If the defense attorney has not
21 waived the opportunity to give that summation.

22 CHIEF JUDGE DIFIORE: Okay.

23 MS. VISGAITIS: And here, in addition to just the
24 opportunity, we have circumstances that actually
25 demonstrate that this may have been a strategic choice.



1 Counsel addressed - - -

2 JUDGE FAHEY: Not to sum up?

3 MS. VISGAITIS: Yes, which this court has
4 recognized can be a valid strategic choice - - -

5 JUDGE FAHEY: True.

6 MS. VISGAITIS: - - - in the Aiken decision.

7 JUDGE FAHEY: Okay.

8 MS. VISGAITIS: And - - - and here we have
9 defense counsel who had just made the argument in support
10 of her motion for a trial order of dismissal.

11 JUDGE FEINMAN: Yeah, but a trial order of
12 dismissal - - -

13 MS. VISGAITIS: She had - - -

14 JUDGE FEINMAN: - - - just goes to the elements.
15 It does not go to so-and-so is not believable. So-and-so,
16 you know, was impeached. I mean - - -

17 MS. VISGAITIS: Sure - - -

18 JUDGE FEINMAN: - - - they're not the same.

19 MS. VISGAITIS: There really wasn't - - - it - -
20 - there's no indication that there was going to be a
21 credibility argument about the drug possession.

22 JUDGE FEINMAN: But we don't know, do we, because
23 the judge didn't allow the summation.

24 MS. VISGAITIS: I believe that based on the
25 totality of the circumstances, if you look at the questions



1 that counsel asked on cross-examination of the witnesses,
2 and if you look at the one sentence extra she then added in
3 summa - - - or in her sentencing argument, that she - - -

4 JUDGE FEINMAN: Let me a - - - I mean, I know
5 this is a court of law, all right, and we don't make our
6 decisions based on equity. But is what happened here fair?

7 MS. VISGAITIS: Yes, because under these
8 circumstances, there is an indication that counsel waived
9 the right to give a summation. Counsel may have - - -

10 JUDGE FEINMAN: Counsel stood up and said, judge,
11 I don't need to sum up; we're ready to proceed to verdict?

12 MS. VISGAITIS: No, but that's not required. The
13 entire line of federal cases that both defendant and I have
14 cited in our briefs establish that there is an implicit
15 waiver available of the opportunity to give a summation.
16 And in many of those cases, we have circumstances very
17 similar to here, in which counsel's silence when the court
18 explicitly said that it was about to render a verdict
19 without hearing summation was enough to show an implicit
20 waiver of that opportunity.

21 CHIEF JUDGE DIFIORE: Thank you, counsel.

22 MS. VISGAITIS: This is something that can be
23 waived.

24 CHIEF JUDGE DIFIORE: Thank you.

25 Counsel?



1 MR. SCHUMEISTER: Thank you, Your Honor. Just to
 2 step back to the beginning of the People's presentation,
 3 when there's a discussion of this court's decisions in
 4 right-to-counsel cases and in the federal cases, I think
 5 that the - - - the single commonsense principle in terms of
 6 the question of whether there was an implicit waiver comes
 7 down to whether there was a chance to object, and counsel
 8 did not take the chance to object. I think realistically
 9 under the circumstances of this case, there was no chance
 10 to object.

11 Now the People have discussed a lot of the
 12 federal cases, claiming that they are quite similar to
 13 these circumstances. I - - - I would say that overall none
 14 of them bear much similarity to this case at all, either
 15 because there was a recess or there were - - - there was a
 16 large run-up to the denial of a summation, or counsel
 17 clearly showed that if she was able to interrupt at that
 18 time, for instance.

19 And so from all of those cases, I - - - I don't
 20 think they - - -

21 JUDGE RIVERA: So you're saying those cases are
 22 about an opportunity to consider and act - - - and/or act?

23 MR. SCHUMEISTER: Yes, there was a - - - there
 24 was both an opportunity to consider in those cases, which I
 25 think is something that - - -



1 JUDGE FAHEY: Well - - -

2 MR. SCHUMEISTER: - - - the Fifth Circuit cases
3 really emphasize, and also de - - - for sure, an
4 opportunity to act, which I do not think we had here.

5 Now - - - now just to - - - to clarify, it's our
6 position that under Garcia, the right to counsel attaches
7 once there's just a threat, not - - -

8 JUDGE FAHEY: Well, and the - - - the thing is,
9 is I suppose you could make an argument which seems to
10 being made on these federal cases that - - - that implicit
11 waiver may be a possibility, though it's not been imported
12 into New York law, but the id - - - I have a problem with
13 the idea that implicit - - - a summation may be implicitly
14 waived, but that is not the same as the right to counsel
15 being implicitly waived. Those are separate things, and
16 none of that took place here, and - - - and there's no
17 record to support that.

18 MR. SCHUMEISTER: I agree, Your Honor,
19 absolutely.

20 I - - - I would also say, the - - - the People
21 mentioned the - - - the Aiken case. There, I think this
22 court in its decision made clear that counsel in that case,
23 which was a tri - - - traffic violation case, had nothing
24 else to add. As I hope I made clear in our briefs, and
25 when I was standing up earlier, there really was something



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to add here. A real question of reasonable doubt as to whose "crackpipe" that was, whether it was the defendant's or the complaining witness's.

And just at base, this really was not fair to Mr. Harris. There - - - the right to summation is quite an important part of the adversary - - - of the adversary factfinding process. The Supreme Court made that quite clear in Herring, and this court should reverse the conviction and dismiss the accusatory instrument.

Thank you.

CHIEF JUDGE DIFIORE: Thank you, counsel.

(Court is adjourned)



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

I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. William Harris, No. 83 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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