

PETITION APPENDIX

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APPENDIX A

State of New York Court of Appeals

BEFORE: HON. JANET DiFIORE, Chief Judge

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

**ORDER
DENYING
LEAVE**

RAUL ALVAREZ,

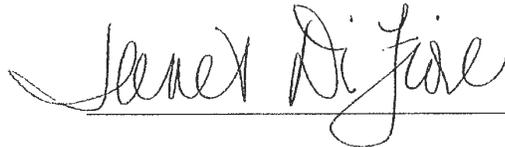
Appellant.

Appellant having applied for leave to appeal to this Court pursuant to Criminal Procedure Law § 460.20 from an order in the above-captioned case;*

UPON the papers filed and due deliberation, it is

ORDERED that the application is denied.

Dated: 7/21/22



Chief Judge

*Description of Order: Order of the Appellate Division, First Department, entered May 24, 2022, affirming a judgment of the Supreme Court, New York County, rendered March 24, 2017, and an order, same court entered on or about January 15, 2021.

APPENDIX B

Supreme Court of the State of New York
Appellate Division, First Judicial Department

Acosta, P.J., Manzanet-Daniels, Mazzairelli, Singh, González, JJ.

15835- 15835A	THE PEOPLE OF THE STATE OF NEW YORK, Respondent,	Ind. No. 5347/15 Case Nos. 2017-02554 2018-1139
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-against-

RAUL ALVAREZ,
Defendant-Appellant.

Robert S. Dean, Center for Appellate Litigation, New York (Mark W. Zeno of counsel),
for appellant.

Alvin L. Bragg, Jr., District Attorney, New York (Grace Vee of counsel), for respondent.

Judgment, Supreme Court, New York County (Gilbert C. Hong, J.), rendered March 24, 2017, convicting defendant, after a jury trial, of assault in the third degree, two counts of aggravated criminal contempt and six counts of criminal contempt in the first degree, and sentencing him, as a second felony offender, to an aggregate term of 3½ to 7 years; and order, same court and Justice, entered on or about January 15, 2021, which denied defendant’s CPL 440.10 motion to vacate the judgment, unanimously affirmed.

After a hearing, the court correctly denied defendant’s motion to vacate the judgment. Defendant did not establish a violation of *McCoy v Louisiana* (584 US —, 138 S Ct 1500 [2018]), because he failed to prove by a preponderance of the evidence that he insisted at trial that his attorney refrain from admitting guilt of third-degree assault and the accompanying contempt charges. There is no basis for disturbing the court’s credibility determinations. The attorney made these strategic concessions in a successful

effort to prevent his client from being convicted of second-degree assault, which would have resulted in a life sentence as a persistent violent felony offender. Although, at various stages of the case, defendant asserted his complete innocence of all charges, he has not established that he ever made an “express objection” (*id.* at 1511) to any concession of partial guilt, and counsel was not obligated to obtain defendant’s express consent (*see Florida v Nixon*, 543 US 175, 189 [2004]).

Defendant did not preserve his challenge to the court's interested witness charge, which followed the Criminal Jury Instructions, and we decline to review it in the interest of justice. As an alternative holding, we reject it on the merits (*see e.g. People v Boone*, 146 AD3d 458, 460 [1st Dept 2017], *lv denied* 29 NY3d 1029 [2017]).

Defendant is not entitled to a new trial based on the People’s impeachment use of the existence (but not the facts) of his 2016 burglary conviction, which was subsequently reversed on appeal, because there is no reasonable possibility that the use of this conviction contributed to the verdict (*see People v Robinson*, 154 AD3d 490, 491-92 [1st Dept 2017], *lv denied* 30 NY3d 1108 [2018]). Defendant was impeached by way of additional convictions, and there was overwhelming evidence that contradicted his testimony and established his guilt.

Likewise, defendant is not entitled to be resentenced. Unlike the situation in

Robinson (id.), defendant has not established that the later-reversed conviction influenced his sentence.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: May 24, 2022

A handwritten signature in black ink, reading "Susanna Molina Rojas". The signature is written in a cursive, flowing style.

Susanna Molina Rojas
Clerk of the Court

APPENDIX C

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK PART 63

-----X
THE PEOPLE OF THE STATE OF NEW YORK

-against-

DECISION AND ORDER
Indictment: 5347/15

RAUL ALVAREZ,

Defendant

-----X
GILBERT C. HONG, J.

For the Defendant: Robert S. Dean, Center for Appellate Litigation
Mark W. Zeno, of Counsel; Marika Meis, of Counsel
120 Wall Street, 28th Floor
New York, NY 10005

For the People: Raphaelle Monty, Assistant District Attorney
New York County District Attorney's Office
One Hogan Place
New York, NY 10013

Procedural History

After a trial presided on by this court, the jury convicted defendant on February 16, 2017, of Assault in the Third Degree (one count); Aggravated Criminal Contempt (two counts); Criminal Contempt in the First Degree (two counts), and related charges. Defendant was sentenced by this court on March 24, 2017, as a second felony offender to three and one half to seven years on the two counts of Aggravated Criminal Contempt, to run concurrently, and sentences on the remaining charges also to run concurrently.

Defendant moved pursuant to Criminal Procedure Law (CPL) 440.10, to vacate the judgment; and pursuant to CPL 440.20 to set aside the sentence, and to resentence the defendant.

The Issues for the Hearing:

This court granted defendant's CPL 440.10 motion to the limited extent of ordering a hearing to determine whether Mr. Herlich did confer with Mr. Alvarez on trial strategy, and specifically on whether Mr. Herlich advised the defendant that he would be conceding guilt on the key element of assault, and whether Mr. Alvarez either concurred, or remained silent, or whether he verbally and clearly disallowed any concession of guilt, which would preclude such a trial strategy.

The Hearing:

This court conducted an in-person hearing on November 23, 2020. Tim Pruitt, a staff attorney at the Legal Aid Society, and the defendant, Raul Alvarez, both testified for the defense.

Theodore Herlich, an attorney in private practice who represented the defendant at trial pursuant to Article 18b of the County Law, testified for the People.

Most of the facts necessary to determine the outcome of this hearing are not in dispute.

Facts not in dispute:

- The jury found the defendant guilty of Assault in the Third Degree; Aggravated Criminal Contempt, and related charges;
- Mr. Alvarez, throughout the pendency of this case, from his first interaction with the police through this instant hearing, maintained that he did not assault Evelyn Rivera, but that her injuries were sustained when they argued and when Ms. Rivera pulled at his necklace/chain, and when she fell against the furnishing in Mr. Alvarez's van;
- Defendant's prior counsel, Timothy Pruitt, was relieved from his assignment when he was too insistent that Mr. Alvarez take the People's offer and communication between counsel and defendant was too strained;
- Mr. Herlich's trial strategy was to concede that Mr. Alvarez did assault Ms. Rivera; but that he did so with his fist and not with a bottle or other dangerous instrument;
- If convicted of the top count, Mr. Alvarez was facing a minimum of 12 years to life, and a maximum sentence of 25 years to life;
- This court sentenced the defendant to an indeterminate sentence of 3 ½ years to seven years, to run concurrently to the sentence on all other counts, and to run concurrently to any sentence Mr. Alvarez was currently serving.

The Hearing Testimony:

Mr. Alvarez stated at the hearing that Mr. Herlich did not discuss the trial strategy with him: Defense Attorney Zeno: "Did [Mr. Herlich] ever discuss with you what his strategy was for beating the charges?" Mr. Alvarez: "No, sir." (Hearing Minutes, page 24, lines 8-10). Mr. Zeno asked Mr. Alvarez the following follow-up question: Mr. Zeno: "Had Mr. Herlich told you in advance his plan to concede that you were guilty of assault in the Third Degree what would you have said to him?" Mr. Alvarez: "I would have told him no." (Hearing Minutes, page 25, lines 8 – 12).

On cross-examination, Mr. Alvarez did admit that he had listened carefully throughout the trial and that he had understood the importance of the argument developed by Mr. Herlich from the outset in his opening statement, and in his cross-examination of the witnesses. Specifically, he heard Mr. Herlich opine that there was no bottle recovered in the investigation, and that Ms. Rivera did not refer to getting hit with a bottle when she first reported the incident at the scene. ADA Monty: “So it’s pretty clear to you that this bottle was important, correct? . . . That was one of the central themes of the trial, whether there was a bottle?” Mr. Alvarez: “Yes. There was a misdemeanor. They made it a felony. They added a bottle to it.” (Hearing Minutes, page 34, lines 3 – 11).

Further, on the question of whether Mr. Alvarez objected to the central issue being whether the assault was with a bottle or whether no dangerous instrument was involved, Mr. Monty continued: “You never told him that you did not approve of his strategy” Mr. Alvarez: “I figured he knew what he was doing”. (Hearing Minutes, page 34, lines 20 – 23).

On the following pages of the transcript, it is clear that even after the closing statement, wherein Mr. Herlich clearly conceded that Mr. Alvarez was guilty of assaulting Ms. Rivera with his fist, Mr. Alvarez did not voice his objection to either Mr. Herlich or to the Court.

Mr. Herlich, in his testimony on this issue at the hearing went farther. Mr. Monty: “So you specifically remember discussing this issue of the assault in the second degree versus the assault in the third degree with Mr. Alvarez?” Mr. Herlich: “Yes.” Mr. Monty: “And what was his response to that?” Mr. Herlich: “I don’t remember – I don’t remember anything in particular. But he didn’t – he never said to me no, I don’t want the jury to consider assault three”. (Hearing Minutes, page 47, lines 4 – 13). Mr. Herlich reiterated this clearly later on in the hearing: Mr. Herlich: “But he and I discussed assault three as a lesser included offense and my reasons for seeking the ability to argue it in the alternative which is to spare him from a life sentence, and he never made any objection to me about proceeding in that manner.” (Hearing Minutes, page 58, lines 23 – 25, page 59, lines 1 – 2).

Credibility:

The court finds that Mr. Pruitt and Mr. Herlich were credible, and that they testified credibly in all respects. When Mr. Herlich did not recall the conversation he had with Mr. Alvarez, he stated that he did not recall.

The court finds that Mr. Alvarez was credible in part and was not credible in part.

The hearing rested on “he said/he said” testimony, pitting the credibility of a predicate felon on a conviction he is seeking to overturn, with that of a seasoned and respected trial attorney, with his reputation and more at stake if he is found to have been untruthful to the court.

Further, it strains logic that the defendant sat through the opening statement, the questioning and cross-examination of the witnesses, the charge conference, and the closing, and that he did not see the trial strategy clearly unfolding consistently throughout the trial.

It seems more likely that the defendant permitted and acquiesced to the strategy, or at minimum, he did not proscribe it; and once found not guilty of the top charges and understanding that there was nothing to lose, he proceeded to challenge the strategy in the instant 440 motion, in an effort to get even the lesser charge dismissed as well.

The Trial:

This court presided over defendant’s trial. The court had ample opportunity to view defendant and Mr. Herlich interacting during the trial. They appeared in all respects to “be on the same page” and did not appear to be in conflict or at odds over basic trial decisions.

Mr. Herlich alluded to his strategy from the beginning. In his opening statement: “I’m telling you it’s a big difference, as finders of fact, whether the chipped tooth was sustained by being hit in the mouth with a beer bottle or being punched in the mouth. It’s a very big difference.” (Minutes 2/7/17, pg. 34, lines 13-17).

The jury heard testimony from Ms. Rivera as well as from a bystander who did not know either party. They heard Ms. Rivera’s excited 911 call. Further, when Mr. Alvarez testified, they heard that he had a criminal record, which impugned his credibility.

It is logical that Mr. Alvarez, even while proclaiming and maintaining his innocence, would not protest a tactical decision to concede guilt on a lesser charge to avoid the distinct possibility of a mandatory life sentence if convicted of the higher charge, especially as he heard the strong evidence being admitted against him at trial.

Conclusions of Law:

A defendant retains the ultimate authority to determine whether to plead guilty, waive trial by jury, testify on his or her own behalf, or take an appeal. As to these decisions, defense counsel must both consult with the defendant, and obtain consent to the recommended course of action. “However, [Counsel] was not additionally required to gain express consent before conceding [defendant’s] guilt” (*Florida v. Nixon*, 543 U.S. 175, 189 [2004]; see, *McCoy v.*

Louisiana, 138 S. Ct 1500 [2018]).

Especially where there is strong trial testimony, it has long been acceptable basic trial strategy to admit defendant's guilt as to a lesser crime in an attempt to show that the defendant was not guilty of the more serious charge (*People v. Frascone*, 271 AD2d 333 [1st Dept. 2000]; *People v. Bailey*, 181 AD3d 1172 [4th Dept. 2020], *lv. denied*, 35 NY3d 1025 [2020]; *People v. Wilson*, 117 AD3d 1408 [4th Dept. 2014], *lv. denied*, 23 NY3d 1026 [2014]). The First Department has ruled that conceding a defendant's guilt of a lesser charge in an attempt to avoid conviction on a greater charge is not tantamount to a partial plea of guilt (*People v. Garrick*, 11 AD3d 395 [1st Dept. 2004], *lv denied*, 4 NY3d 745 [2004]; *People v. Vazquez*, 26 Misc 3d 1220[A] [Sup. Ct., Bronx County 2010]).

Nonetheless, in this case, where the defendant consistently denied having perpetrated any assault on Ms. Rivera this court found that it was incumbent upon counsel to have discussed trial strategy with the defendant, and that defendant did not explicitly prohibit counsel from employing a trial strategy of conceding guilt to several of the charges.

This court finds that Mr. Herlich testified credibly that Mr. Alvarez did not enjoin Mr. Herlich from suggesting to the jury that if they believed that Mr. Alvarez did strike the victim, that he did so with his fist and not with a bottle or other dangerous instrument (*People v. Mason*, 13 Misc3d 128[A] [Appellate Term, 2nd and 11th Judicial Districts 2006], *lv denied*, 7 NY3d 792 [2006] "the judge, as trier of fact, having heard the witnesses and observed their demeanor, was in the best position to assess their credibility" 13 Misc3d at *1).

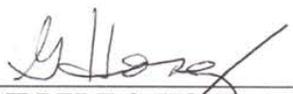
Conclusion:

At a hearing on a CPL 440 motion, defendant has the burden to prove by a preponderance of the evidence each fact essential to support his motion. Mr. Alvarez has not met this burden.

The defendant's motion pursuant to CPL 440.10, to vacate the conviction is denied.

This opinion constitutes the decision and order of this Court.

Dated: New York, New York
January 15, 2021


GILBERT C. HONG, AJSC

APPENDIX D

1 SUPREME COURT NEW YORK COUNTY
 CRIMINAL TERM PART TAP-2A
 2 -----
 3 THE PEOPLE OF THE STATE OF NEW YORK : INDICTMENT #
 4 : 5347-15
 5 :
 6 -against :
 7 RAUL ALVAREZ, :
 8 :
 9 Defendant. :
 10 -----

100 Centre Street
 New York, N.Y. 10013
 November 23, 2020

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11 B E F O R E:

HONORABLE GILBERT HONG,
 JUSTICE OF THE SUPREME COURT

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A P P E A R A N C E S:

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FOR THE PEOPLE:

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CYRUS R. VANCE, JR., ESQ.,
 New York County District Attorney
 BY: RAPHAELLE MONTY, ESQ.,
 Assistant District Attorney

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FOR THE DEFENDANT:

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Center for Appellate Litigation
 120 Wall Street, 8th Floor
 New York, NY 10005
 BY: MARK ZENO, ESQ.,
 MARIKA MEIS, ESQ.,

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Ashley C. Zaccaro, RPR
 Senior Court Reporter

1 COURT CLERK: Calling from the TAP-2A calendar
2 number four, Raul Alvarez, 5347 of 2015.

3 Your appearances.

4 MR. ZENO: Mark Zeno, Z-E-N-O, for Mr. Alvarez.

5 MS. MEIS: And also Marika Meis, M-A-R-I-K-A, last
6 name M-E-I-S for Mr. Alvarez.

7 MS. MONTY: Good afternoon, Judge. Raphaelle
8 Monty, M-O-N-T-Y, for the People.

9 THE COURT: Okay. Good afternoon, everyone. Good
10 afternoon Mr. Alvarez. We are here to do a 440 hearing
11 based upon a decision that I wrote back in August of this
12 year. Before we begin I just want to remind everyone,
13 because I know they gave us a lot of time, but I don't think
14 this hearing should take more than 15, 20 minutes.

15 But just to be clear, I'm going to read from the
16 record from the decision. The Court orders a hearing on the
17 issue of whether trial counsel Theodore Herlich conferred
18 with the defendant on crucial trial strategy specifically
19 regarding concession of guilt on the element of assault and
20 whether Mr. Alvarez consented to such strategy or was silent
21 when informed of what strategy would be. So it's a very,
22 very small issue. I want to make sure I limit you. The
23 attorneys, keep that in mind. Don't be surprised if I cut
24 you off. All right?

25 So it's the defense's motion, but I can go either

1 way. Does the defense prefer to go first?

2 MR. ZENO: Yes.

3 THE COURT: Okay. Go right ahead.

4 MR. ZENO: Okay. Mr. Pruitt's out in the hallway.

5 MS. MEIS: Wrong witness. It's Mr. Pruitt. He's
6 going to be called first.

7 COURT OFFICER: Remain standing. Raise your right
8 hand.

9 COURT CLERK: Do you solemnly swear or affirm that
10 any testimony you give to the Court shall be the truth, the
11 whole truth, and nothing but the truth?

12 THE WITNESS: I do.

13 COURT OFFICER: Have a seat. For the record please
14 state your full name followed by the spelling of your last
15 name.

16 THE WITNESS: Tim Pruitt, P-R-U-I-T-T.

17 COURT OFFICER: And your affiliation.

18 THE WITNESS: The Legal Aid Society.

19 THE COURT: All right. Mr. Zeno, you may inquire.

20 T I M P R U I T T , having first been duly sworn was examined
21 and testified as follows:

22 DIRECT EXAMINATION

23 BY MR. ZENO:

24 Q Mr. Pruitt, what is your occupation?

25 A I am a staff attorney at the Legal Aid Society.

1 Q And in your status as a staff attorney for the Legal
2 Aid Society did you come to represent a client named Raul
3 Alvarez?

4 A I did.

5 Q Do you see him in the courtroom?

6 A I do.

7 Q Will you point him out?

8 A He's sitting right next to you wearing a black jacket.

9 THE COURT: Indicating the defendant.

10 Q Do you recall when you came to represent Mr. Alvarez?

11 A Not exactly. I believe it was at the end of 2015. I
12 don't remember the exact date.

13 Q At what point in the criminal proceedings against
14 Mr. Alvarez did you come to represent him?

15 A I first picked up his case in Criminal Court
16 arraignments.

17 Q Do you recall what the charges were against
18 Mr. Alvarez?

19 A The top count was an assault two, and then there were
20 some underlying family offenses.

21 Q Do you recall your initial interview with Mr. Alvarez?

22 A Somewhat, yes.

23 Q Did you ask Mr. Alvarez if he assaulted the
24 complainant?

25 A Yeah. I spoke to him about the allegations against him

1 and got his side of the story.

2 Q Do you recall what his side of the story was?

3 A I do.

4 Q And what was that?

5 A Essentially if I remember all the facts correctly it
6 was that he was working on a pull or a truck of some sort when
7 his ex-girlfriend came. I believe she wanted to have sex with
8 him. I don't remember exactly what happened from there, but
9 then there was an argument. And the police came, and he was
10 adamant that there was absolutely no assault.

11 Q At the arraignment were you provided with a copy of
12 Mr. Alvarez's rap sheet?

13 A I was.

14 Q Do you recall what his record was?

15 A I mean, extensive.

16 Q Can you repeat that?

17 A Extensive.

18 Q Extensive. Do you recall having any discussion with
19 Mr. Alvarez about the sentences that he faced?

20 A I don't know if we talked about it right then in
21 Criminal Court arraignments, but it was certainly something we
22 discussed throughout the course of my representation of him.

23 Q And do you recall whether Mr. Alvarez was a persistent
24 felony offender?

25 A Yeah. He was deemed a mandatory persistent.

1 Q And you were aware that assault two was a violent
2 felony?

3 A Yes.

4 Q And the range for someone facing a violent felony as a
5 mandatory persistent was?

6 A On the D it's 16 to life, I believe.

7 Q And you would have advised Mr. Alvarez if not at that
8 meeting but of some subsequent meeting of that range?

9 A Yes, absolutely.

10 Q Did you have a strategy for approaching the case after
11 that arraignment?

12 A Yeah. I mean, I think my strategy is always kind of
13 two-fold, one to try to get the best offer possible, and if
14 that's not going to be possible or even if we do get a good
15 offer and don't want to, to prepare for trial.

16 Q Do you recall whether Mr. Alvarez told you that he
17 wanted to testify before the grand jury?

18 A I do.

19 Q And what did he say?

20 A That he wanted to.

21 Q And did you advise him not to?

22 A It was a discussion. But he ultimately did testify.

23 Q And after Mr. Alvarez was indicted did you discuss the
24 possibility of a plea bargain?

25 A Yes.

1 Q And what did you -- did you explore potential plea
2 bargains with the assistant district attorney?

3 A Yes.

4 Q And do you recall what your goal was when you engaged
5 in plea negotiations?

6 A I mean, it was to get a nonviolent offer so there
7 wouldn't be a mandatory life sentence.

8 Q And were you successful in obtaining a nonviolent
9 offer?

10 A Yes.

11 Q Do you recall what it was?

12 A I don't recall actually what the offer we eventually
13 got was, whether it was an attempted assault two or aggravated
14 family offense, but we were given an nonviolent offer.

15 Q And do you recall generally what the sentence range
16 what accompanied that offer?

17 A I think maybe two to four. I'm not exactly sure. It
18 was a nonviolent so indeterminate sentence.

19 Q And did you discuss with Mr. Alvarez whether in your
20 professional opinion that was a plea he should take?

21 A Yes. It was my recommendation that he take it.

22 Q And why was that?

23 A I mean, in some senses it's just a matter of math with
24 the exposure. After trial if he was to be convicted of the
25 assault two his exposure was just massive, and so getting a

1 significantly smaller offer was my reasoning for recommending
2 it.

3 Q Do you recall Mr. Alvarez's reaction to that suggestion
4 that he should consider pleading guilty?

5 A Yes. He did not want to at all.

6 Q And did he say why he didn't want to plead guilty?

7 A He was insistent on his innocence.

8 Q Did -- what efforts further, if any, than talking to
9 Mr. Alvarez about the risks of going to trial did you take to
10 encourage him to plead guilty?

11 A There had been a social worker assigned to the case who
12 had met with him. I can't remember if she ultimately put
13 together a package and that's how we ended up getting the
14 nonviolent offer, but she had been involved. And so I had her
15 speak to Mr. Alvarez as well. I remember that specifically. I
16 can't remember if I also spoke to him with a supervisor with me.
17 I may have. But I definitely had the social worker speak to
18 him.

19 Q And did those efforts succeed?

20 A In convincing him to take the nonviolent, no.

21 Q Did you speak to Mr. Alvarez about going to trial?

22 A Yes.

23 Q And did you conduct any investigation?

24 A Yes.

25 Q And did you advise him about your assessment of the

1 strength of the People's case?

2 A Yes.

3 Q And what was your assessment?

4 A Ultimately my assessment was that we had a real shot at
5 the assault two, but that there was a good chance that we go
6 down on at least some charges, be convicted on at least some of
7 the charges.

8 Q And do you recall what other charges there were in
9 relation that he was indicted for? In addition, I should say,
10 to the assault.

11 A I think it was the felony contempt, I believe, and the
12 aggravated family offense.

13 Q And did you explore with him the challenges in
14 defeating a felony contempt charge?

15 A Yes. We spoke about that.

16 Q And during these conversations did Mr. Alvarez ever
17 show any willingness to plead guilty?

18 A No. Quite the opposite.

19 Q Did there come a time when you learned that Mr. Alvarez
20 wanted a new lawyer to represent him?

21 A Yes.

22 Q Do you recall why he wanted a new lawyer to represent
23 him?

24 A I mean, I think the efforts on my part to try to
25 convince him to plea sort of led to a breakdown in our ability

1 to communicate and our relationship overall.

2 Q Do you recall approximately for how long you
3 represented Mr. Alvarez?

4 A I don't. I know we had gone through motion practice, I
5 believe, so it had been a number of months at that point. But I
6 don't remember exactly how long I represented him.

7 Q And during that -- during that period of months that
8 you represented Mr. Alvarez did he ever express a willingness to
9 admit his guilt to having assaulted Ms. Rivera?

10 A No. Not at all.

11 Q How would you characterize the strength of
12 Mr. Alvarez's opposition to pleading guilty and admitting he had
13 assaulted Ms. Rivera?

14 A He was emphatic about it. That's what led to his no
15 longer wanting me to represent him was discussing the
16 possibility of it.

17 Q And you were ultimately relieved from the case?

18 A I was.

19 Q During the entire time that you represented Mr. Alvarez
20 did he ever waiver in his insistence that he go to trial?

21 A No.

22 Q Did he ever tell you that he had assaulted Ms. Rivera?

23 A No, he did not.

24 MR. ZENO: No further questions.

25 THE COURT: People.

1 CROSS-EXAMINATION

2 BY MS. MONTY:

3 Q Good afternoon, Mr. Pruitt.

4 A Good afternoon.

5 Q You've been at the Legal Aid Society for a number of
6 years; is that correct?

7 A Yes. Since 2012.

8 Q And so you've represented a number of clients?

9 A Yes.

10 Q In your experience is it common for some of your
11 clients to be reluctant to plead guilty?

12 A Yes.

13 Q And have you had clients who have asked that you be
14 relieved from the case because they disagreed with your
15 recommendation?

16 A Yes.

17 Q Including your recommendation to plead guilty?

18 A Yes.

19 Q And have any of those clients later gone on to plead
20 guilty after they ask that you be relieved?

21 A I'm sure some have. I can't think of any specific
22 examples, but I'm sure some have.

23 Q You've represented Mr. Alvarez since the Criminal Court
24 arraignment; is that correct?

25 A That's when I, yes, started my representation of him.

1 Q And you mentioned that you had gone over his lengthy
2 criminal history?

3 A Yes.

4 Q Including the fact that he would be found persistent
5 violent felon if he was convicted of the top count?

6 A Yeah. That -- his record was long and there was
7 tolling, so I don't know that I knew he was a mandatory
8 persistent at Criminal Court arraignment. But I did come to
9 know that at some point rather early on.

10 Q But he would've been if he had been convicted of the
11 current case, correct?

12 A Yes.

13 Q When you explained the grand jury process to
14 Mr. Alvarez he decided to testify at grand jury; is that
15 correct?

16 A He did.

17 Q And you were with him when he did that?

18 A Yes.

19 Q And he told the grand jury that he was completely
20 innocent; is that correct?

21 A Yes.

22 Q And the grand jury still indicted him, correct?

23 A Yes.

24 Q Now, you testified that after Mr. Alvarez was indicted
25 you reviewed the case against him?

1 A Yes.

2 Q And you negotiated a plea with the assigned prosecutor;
3 is that correct?

4 A Yes.

5 Q And you urged Mr. Alvarez to take that plea, correct?

6 A Yes.

7 Q So much so that he demanded a new attorney from Judge
8 Wiley?

9 A Yes.

10 Q In October of 2016 the defendant asked Judge Wiley to
11 relieve you; is that correct?

12 A I don't remember when it was, but it was Judge Wiley
13 that he asked to relieve me.

14 Q And Mr. Herlich was appointed to replace you; is that
15 right?

16 A I know that now, but I didn't know it then. I know
17 someone else was appointed.

18 Q Did you meet with this new attorney?

19 A I don't -- I don't remember if I did or not or maybe a
20 phone call. I mean, usually in the past I get a call about the
21 case, but I don't remember meeting with Mr. Herlich.

22 Q And you probably would've given him your file; is that
23 correct?

24 A Yes, if he had asked for it.

25 Q And did you ever speak with or meet with that attorney

1 after that initial time?

2 A No.

3 Q Did you ever discuss the case with Mr. Herlich?

4 A Not that I recall.

5 Q And so Mr. Herlich never spoke with you about his trial
6 strategy; is that correct?

7 A Yeah, definitely not.

8 Q Were you present for any conversations between the
9 defendant and Mr. Herlich?

10 A No.

11 Q Did you ever speak with the defendant after you were
12 relieved off this case?

13 A No.

14 Q Did you see any of the trial?

15 A No.

16 Q And did you ever speak to the defendant about the
17 trial?

18 A No.

19 Q So you don't know how the defendant felt about the
20 trial or how the trial went; is that correct?

21 A No, I don't.

22 MS. MONTY: I don't have any further questions.

23 THE COURT: Redirect?

24 MR. ZENO: Nothing further.

25 THE COURT: Okay. Thank you. Have a nice day.

1 THE WITNESS: Have a nice day.
2 (Whereupon, the witness was excused from the
3 stand.)
4 THE COURT: Counsel, your next witness?
5 MR. ZENO: I call defendant Mr. Raul Alvarez to the
6 stand.
7 THE COURT: Okay.
8 COURT OFFICER: Remain standing right here. Raise
9 your right hand.
10 COURT CLERK: Do you solemnly swear or affirm that
11 the testimony you give to the Court shall be the truth, the
12 whole truth, and nothing but the truth?
13 THE WITNESS: Yes, sir.
14 COURT CLERK: Have a seat.
15 COURT OFFICER: For the record, sir, I just need
16 you to state your full name followed by the spelling of your
17 last name.
18 THE WITNESS: Raul Alvarez, A-L-V-A-R-E-Z.
19 COURT OFFICER: Thank you.
20 THE COURT: Mr. Zeno, you may inquire.
21 R A U L A L V A R E Z , having first been duly sworn was
22 examined and testified as follows:
23 DIRECT EXAMINATION
24 BY MR. ZENO:
25 Q Mr. Alvarez, how old are you?

- 1 A 55. I'll be 55 January 7th.
- 2 Q Were you recently released from prison?
- 3 A Yes. July 30th of 2020.
- 4 Q Where are you living now?
- 5 A 4 West 31st Street, New York, New York 10001.
- 6 Q Are you currently on parole or post-release
- 7 supervision?
- 8 A Yes.
- 9 Q Are you working?
- 10 A Yes.
- 11 Q Where are you working?
- 12 A I work with CEO, Center for Employment Opportunities.
- 13 CEO.
- 14 Q Were you working today?
- 15 A I was working on 99th Street and First Avenue.
- 16 Q Today?
- 17 A Yeah.
- 18 Q Were you arrested in 2015 for assaulting Evelyn Rivera?
- 19 A Yes, sir.
- 20 Q Did you make a statement to the arresting officer at
- 21 the time of the arrest?
- 22 A Yes, sir.
- 23 Q Do you recall generally what you told the arresting
- 24 officer?
- 25 A I told him that I never assaulted Ms. Rivera. I told

1 him I didn't know why she was doing that to me. I told him I
2 don't know why she'd do this to me.

3 Q After you were placed under arrest do you recall making
4 a videotaped statement to an assistant district attorney?

5 A Yes, sir.

6 Q Do you recall what you told the assistant district
7 attorney?

8 A Yes. Yes, sir.

9 Q What did you tell her?

10 A I told her I was coming from my brother's house, and I
11 parked on -- on -- I don't know the name of the street,
12 somewhere by Delancey, and I was fixing a starter on my truck.
13 And while I was under the truck Evelyn got into my truck without
14 permission, and I felt somebody get into the truck. And I got
15 out, and I look. It was her. So when I finished putting the
16 starter on the truck I told her I was going to Brooklyn to take
17 a shower, and then she said oh, you're going with that bitch.
18 That's what she said; you going back with that bitch.

19 And she started getting aggressive, and she started arguing
20 with me. She grabbed me by my neck and popped my chain here.
21 And I held her hands like this so that she don't pop my chain,
22 and she try to bite me here. And I went like that. It was a
23 natural reaction, and I guess that's how she chipped her tooth.
24 She also had a little scratch on her finger. She said I bit
25 her. I didn't bite her. I believe she got that from the

1 zipper, when she grabbed me by the zipper. That how she got the
2 scratch on her finger.

3 We were struggling between the two seats, and I don't know,
4 maybe that's how she got the bruises on her legs. I don't know
5 how she got the bruises, but she works in an office. So I don't
6 know how she got the bruises on her legs. But the chipped tooth
7 I was going like that when she tried to grab me here, then she
8 tried to bite me, and I shoved her away. That's how she chipped
9 her tooth.

10 MR. ZENO: Judge, can I just state for the record
11 that it appears Mr. Alvarez was showing that he --

12 THE COURT: I will allow you to state for the
13 record the defendant raised his left elbow and jerked it to
14 the left; however, we are so far beyond the scope of this
15 hearing. Get to the point where we talked with Mr. Herlich.

16 MR. ZENO: I will get there as quickly as I can.

17 Q Did there come a time when you asked for a new lawyer
18 in the case?

19 A Yes, sir.

20 Q Why did you ask for a new lawyer?

21 A Because Mr. Pruitt was trying to convince me to plead
22 guilty. I told him I wasn't interested in pleading guilty
23 because I never assaulted Ms. Rivera.

24 Q Did you understand that if you were convicted of the
25 top count in the indictment that you faced a life sentence?

1 A Yes, sir.

2 Q And did you understand -- do you recall that Mr. Pruitt
3 worked out a plea bargain for you that would have not involved a
4 life sentence and substantially less time?

5 A Excuse me?

6 Q Do you recall whether Mr. Pruitt worked out a potential
7 plea bargain for you and presented it to you that would not have
8 involved a life sentence?

9 A Yes.

10 Q And you chose not to take that plea bargain?

11 A Yes, sir. Chose not to.

12 Q Why did you choose not to?

13 A Because I never assaulted Mrs. Rivera.

14 Q Did there come a time when Mr. Pruitt was relieved of
15 your case?

16 A Yes. I asked him to please excuse himself from my
17 case.

18 Q And was a new lawyer assigned to represent you?

19 A Yes, sir.

20 Q Do you recall who that new lawyer was?

21 A I believe it was Mr. Herlich.

22 Q And did you have conversations with Mr. Herlich --

23 A Yes.

24 Q -- about pleading guilty?

25 A Yes. I told Mr. Herlich that I wanted to go to trial,

1 that I never assaulted Ms. Rivera. I told Mr. Herlich the same
2 thing I told the officer, the same thing I told the grand jury,
3 the same thing I told Mr. Pruitt, same thing I told the judge,
4 everybody else.

5 Q Did you discuss with Mr. Herlich that you wanted to go
6 to trial?

7 A Yes, sir.

8 Q Did you discuss with Mr. Herlich whether you wanted to
9 testify?

10 A Yes, sir.

11 Q And what did you tell Mr. Herlich?

12 A I told Mr. Herlich that I wanted to take the stand and
13 tell my part of the story.

14 Q What was your goal at trial?

15 A To be tried, to get acquitted.

16 Q To get acquitted?

17 A Yes, sir.

18 Q Did you have conversations with Mr. Herlich about
19 whether you would take the stand and testify on your own behalf?

20 A Yes, sir.

21 Q Did Mr. Herlich express an opinion about whether you
22 should testify?

23 A He was trying to convince me not to, not to the take
24 the stand, and I was telling him no, I want to take the stand
25 because I want to tell my part of the story.

1 Q Before the trial began did Mr. Herlich discuss with you
2 the possibility of conceding your guilt to the assault three?

3 A No, not at all. I told him I was not interested in any
4 plea bargains.

5 Q Did --

6 A I made it --

7 Q Again, before this trial, again, did Mr. Herlich tell
8 you that he planned to ask the Court for the lesser included
9 offense of assault in the third degree?

10 A No, sir. I would ask him to excuse himself from my
11 case as well. No. We never discussed anything of that.

12 Q During the course of the trial I'm going to ask you the
13 same questions. Did Mr. Herlich during the course of the trial
14 before you testified ever discuss with you that he was going to
15 ask the Court to submit the lesser included offense of assault
16 in the third degree?

17 A No, sir. No, sir.

18 Q During the trial did you decide to testify?

19 A Yes, sir.

20 Q Why did you testify?

21 A Because I wanted to tell the jury the truth, what
22 happened.

23 Q With respect to the altercation that you had with
24 Ms. Rivera in the camper what did you tell the jury?

25 A I told the jury I never -- I told the jury exactly what

1 I just said. I was fixing my starter, and I got out. Evelyn
2 Rivera was in my truck without permission, and I told her I was
3 going to take a shower. And she just started getting aggressive
4 and started fighting me. She wanted to have sex. I didn't want
5 to have sex with her. And she just started -- that's when she
6 just -- she lost it.

7 Q After you testified do you recall Mr. Herlich asking
8 the Court to submit the lesser included offense of assault in
9 the third degree?

10 A Do I recall Mr. Herlich? Yes.

11 Q Did you say anything to Mr. Herlich at that time after
12 he asked the Court to submit assault in the third degree?

13 A No, I didn't. No.

14 Q Did Mr. Herlich ever discuss with you why he had asked
15 the Court to submit assault in the third degree?

16 A No. No, sir.

17 Q Did Mr. Herlich ever discuss with you that his strategy
18 would be during summation to concede that you had committed the
19 assault in the third degree?

20 A No, sir. I made it clear to him that I wanted to go to
21 trial and plead that I was innocent. That's why I took the
22 stand.

23 Q In preparation for your testimony did you discuss with
24 Mr. Herlich what you were going to say?

25 A No. I just told him I wanted to take the stand.

1 Q Do you -- did Mr. Herlich during the course of his
2 representation ever visit you to discuss your upcoming trial
3 while you were incarcerated?

4 A No, not at all. I only see him in the booth. He would
5 come in for a few minutes right before the case was heard. That
6 was it. We never really had a lot of time to talk about the
7 case.

8 Q Did he ever discuss with you what his strategy was for
9 beating the charges?

10 A No, sir.

11 Q In summation did you hear Mr. Herlich say that in his
12 opinion you had committed the third degree assault but not the
13 second degree assault?

14 A Yes. I heard him say it. I couldn't believe it.

15 Q Did you hear Mr. Herlich say that because you had
16 committed the third degree assault you had also committed each
17 of the contempt charges?

18 A Yes. I heard him say that.

19 Q What was your reaction when you heard Mr. Herlich say
20 that?

21 A I just put my head down. I couldn't believe it. I'm
22 like, wow, my own lawyer, he hasn't even given the jury a chance
23 to deliberate. Why is he doing this to me?

24 Q Why didn't you say anything -- or did you say anything
25 to Mr. Herlich?

1 A I didn't say anything because I didn't want to be
2 disrespectful to the Court. I always been told that if I had
3 anything to say I had to say it to my lawyer.

4 Q Did you understand at the time whose choice it was to
5 submit assault in the third degree as a lesser included offense?

6 A It was my choice.

7 Q Meaning was it your choice or your lawyer's choice?

8 A It was his choice. He chose to do that. He never
9 spoke to me about anything.

10 Q Do you know whether or not that was his choice?

11 A I didn't even know he was going to do that 'til it
12 happened. I was like --

13 Q Did you know whether at that time whether it was
14 Mr. Herlich's right to concede your guilt to the assault in the
15 third degree?

16 A I didn't know.

17 Q Did you ever express directly to Mr. Herlich any
18 dissatisfaction with that decision?

19 A I didn't have a chance to talk to him. After that when
20 I -- after the trial they take me right to the back. They don't
21 give me that much time to. I didn't have much time to speak to
22 him after that.

23 Q So is --

24 A I told him I wanted to talk to him in the back. He
25 never came back there.

1 Q Is that a yes or a no? Did you express any
2 dissatisfaction?

3 A No.

4 Q Did you thank Mr. Herlich for what he'd done?

5 A No.

6 Q At sentencing did you thank him?

7 A No.

8 Q Had Mr. Herlich told you in advance his plan to concede
9 that you were guilty of assault in the third degree what would
10 you have said to him?

11 A I would've told him -- I would've asked him to excuse
12 himself. I would have told him no. Why would I go to trial and
13 risk going 12 to life if that was the case? I would just take a
14 plea bargain. I almost had all the time in already. I had,
15 like, 14 months already. Why would I go to trial? It doesn't
16 make sense.

17 MR. ZENO: Can I just have one minute?

18 No further questions.

19 THE COURT: People?

20 CROSS-EXAMINATION

21 BY MS. MONTY:

22 Q Good afternoon, Mr. Alvarez.

23 A Good afternoon.

24 Q Before this case you had been arrested over a dozen
25 times in the past, correct?

- 1 A Yes.
- 2 Q And three of those cases were for robberies; is that
- 3 correct?
- 4 A Two, yeah. That was over 20 years ago.
- 5 Q And you went to trial in three of those robberies; is
- 6 that correct?
- 7 A Yes.
- 8 Q Jury trials?
- 9 A Excuse me.
- 10 Q Those were jury trials?
- 11 A Yes, ma'am.
- 12 Q Did you testify at any of the trials?
- 13 A Um, yes.
- 14 Q Which ones?
- 15 A Both.
- 16 Q So the 1992 trial or the 1998 trial?
- 17 A Excuse me?
- 18 Q The 1992 trial?
- 19 A 1992, yeah.
- 20 Q And what about the 1998 trial?
- 21 A Yes.
- 22 Q And you were convicted at each of these trials that you
- 23 testified in; is that correct?
- 24 A Yes, ma'am.
- 25 Q So just to be clear, in those cases you told a jury

1 that you were innocent, and the jury still found you guilty; is
2 that right?

3 A Yes, ma'am.

4 Q You were arrested on this case in December of 2015; is
5 that right?

6 A Yes, ma'am.

7 Q And shortly after your arrest you spoke to the
8 arresting officer?

9 A Yes.

10 Q You waived your Miranda rights, correct?

11 A Yes, ma'am.

12 Q And you told the officer that you had not hit
13 Ms. Rivera?

14 A Yes, ma'am.

15 Q And you met with the prosecutor shortly after your
16 arrest, too, correct?

17 A Yes, ma'am.

18 Q You waived your Miranda rights again?

19 A Yes, ma'am.

20 Q And you told her that you had not hit Ms. Rivera?

21 A Yes, ma'am.

22 Q You also testified in the grand jury in this case; is
23 that right?

24 A Yes, ma'am.

25 Q Your first attorney, Mr. Pruitt, he was with you in the

- 1 grand jury; is that true?
- 2 A Mr. Pruitt?
- 3 Q Yes.
- 4 A I don't remember.
- 5 Q You had an attorney with you?
- 6 A I think so. I just -- I think it was Mr. Pruitt.
- 7 Q And you told the grand jury that you had not hit
- 8 Ms. Rivera?
- 9 A Yes, ma'am.
- 10 Q But the grand jury still indicted you; is that right?
- 11 A I guess so. They said I hit her with a bottle, and I
- 12 didn't even hit her with my hand. I don't know where the bottle
- 13 came from.
- 14 Q The grand jury indicted you even though you testified;
- 15 is that right?
- 16 A Excuse me?
- 17 Q The grand jury indicted you --
- 18 A Yes.
- 19 Q -- even though you testified?
- 20 THE COURT: He said yes.
- 21 Q After your grand jury testimony your lawyer worked out
- 22 a plea deal with the prosecutor on the case; is that right?
- 23 A Which attorney?
- 24 Q Mr. Pruitt.
- 25 A That's what he told me. I told him I wasn't

1 interested.

2 Q That was the attempted assault in the second degree?

3 A He just said he was trying to get me a plea bargain.
4 He didn't specify, he just said I'm trying to get you a lesser
5 -- a lesser sentence. And I told him I don't want anything. I
6 won't even take time served. I never assaulted Mrs. Rivera.
7 That's what I told him.

8 Q And Mr. Pruitt suggested you take that deal; is that
9 correct?

10 A He tried to, yes.

11 Q And you asked the judge on the case for a new lawyer?

12 A I asked him to -- I asked Mr. Pruitt to please excuse
13 himself from that case. I asked Mr. Judge Wiley to please --

14 Q And did you speak to the judge who had the case?

15 A Um --

16 Q Did you ask him for a new lawyer?

17 A I said I would like to have my attorney changed,
18 please. Yeah.

19 Q In October of 2016 that judge assigned you a new
20 attorney; is that right?

21 A Yes, ma'am.

22 Q That was Mr. Herlich?

23 A Yes.

24 Q After Mr. Herlich was assigned to your case did you
25 ever speak to your old attorney Mr. Pruitt?

- 1 A No.
- 2 Q And in October of 2016 you were in jail, correct?
- 3 A October 2016? Yes.
- 4 Q You were in on a robbery case, right?
- 5 A Excuse me?
- 6 Q You were in on your robbery case, correct?
- 7 A On a robbery case?
- 8 Q That's why you were in jail at the time?
- 9 A No.
- 10 Q But you were in jail?
- 11 A Yes.
- 12 Q So when this case was on you were produced from jail
- 13 every time; is that right?
- 14 A Yes.
- 15 Q And did you meet with Mr. Herlich every time your case
- 16 was on?
- 17 A With Mr. Herlich?
- 18 Q Yes.
- 19 A I don't remember if he was there every time. I think
- 20 there was a couple of times when he wasn't in court. I'm not
- 21 sure. I don't remember really.
- 22 Q Do you remember meeting with him before --
- 23 A Yes.
- 24 Q -- this case was called?
- 25 A Yes.

1 Q And the case was on a number of times; is that correct?

2 A Yes.

3 Q And the both sides were ready for trial, but it took a
4 while for the court -- for a court part to be found; is that
5 right? Do you remember that?

6 A Yes, ma'am.

7 Q So you were produced a number of times while you were
8 waiting for a court part?

9 A Yes, ma'am.

10 Q And did you meet with Mr. Herlich on each of those
11 occasions?

12 A No.

13 Q Did you meet with him on some of those occasions?

14 A Like, a few minutes right before we called the case he
15 would come in and talk to me and tell me the case was going to
16 be heard in a few minutes.

17 Q You told Mr. Herlich that you wanted to go to trial; is
18 that right?

19 A Yes, ma'am.

20 Q So you discussed this trial with him; is that right?

21 A I told him I never assaulted Ms. Rivera, and I wanted
22 to take the stand. I wanted to go to trial. I was not
23 interested in no plea bargains.

24 Q And you discussed the trial strategy with him?

25 A No. We never discussed any strategy, no.

1 Q Did you discuss the importance of the bottle with
2 Mr. Herlich?

3 A I told him that there was never no bottle. I never hit
4 Evelyn with my hand or with a bottle. I never should've got
5 indicted for that. That's what I told him. That's why I wanted
6 to go to trial.

7 Q So you told him there was no bottle?

8 A There was no bottle.

9 Q And did you discuss the assault three strategy of --

10 A No.

11 Q -- admitting the lesser included?

12 A No.

13 Q Never discussed that with him?

14 A Nothing.

15 Q And finally, this case was sent off in February of
16 2017; is that correct?

17 A Yes, that was.

18 Q And that was to Judge Hong; is that right?

19 A Yes.

20 Q You were present for that trial, right?

21 A Yes, ma'am.

22 Q This was important to you to be present?

23 A Yes.

24 Q And you paid close attention?

25 A Yes.

1 Q Again, this was not your first jury trial, correct?

2 A No.

3 Q In his opening Mr. Herlich talked about the bottle
4 being important. Do you remember that?

5 A He said something about the bottle.

6 Q And Mr. Herlich asked questions of the government's
7 witnesses, right?

8 A Yes.

9 Q There were police officers who testified?

10 A Um, I believe one, yeah. The arresting officer I
11 remember testifying.

12 Q And Mr. Herlich asked the police officer about the
13 bottle, right?

14 A Yes.

15 Q There were some witnesses that the People called about
16 the assault, right?

17 A Um, I don't remember what witnesses. Evelyn Rivera was
18 one, and the People from the -- the lady from the order of
19 protection.

20 Q And Mr. Herlich also asked those witnesses about the
21 bottle, right?

22 A Mm, yeah. It's -- the officers -- I remember him
23 asking the officer about the bottle.

24 Q Ms. Rivera also testified; is that correct?

25 A Yes, ma'am.

1 Q And Mr. Herlich asked her about the bottle?

2 A Yes.

3 Q So it's pretty clear to you that this bottle was
4 important, correct?

5 A There was no bottle. Yes.

6 Q And that was one of the central themes of the trial?

7 A Excuse me?

8 Q That was one of the central themes of the trial,
9 whether there was a bottle?

10 A Yes. There was a misdemeanor. They made it a felony.
11 They added a bottle to it. They made it a felony. That's what
12 happened.

13 Q And you and Mr. Herlich talked during the breaks in the
14 testimony during the trial, correct?

15 A Excuse me?

16 Q You and Mr. Herlich talked when there were breaks in
17 the trial?

18 A Did I hear Mr. Herlich talk? Yeah. I was listening.
19 I was sitting in the court.

20 Q You never told him that you did not approve of his
21 strategy?

22 A I mean, he's my attorney. I felt, you know, he's
23 supposed to help me. I figured he knew what he was doing. Why
24 would I say anything to him? He's my lawyer. He's there to
25 help me.

- 1 Q And you never spoke to Judge Hong during the trial
2 either; is that correct?
- 3 A To who?
- 4 Q To the judge.
- 5 A No. I never spoke. I was told I'm not allowed to
6 speak in court.
- 7 Q Testified at trial?
- 8 A Yes, ma'am.
- 9 Q And you told the jury that you did not assault
10 Ms. Rivera?
- 11 A Yes, ma'am.
- 12 Q You were there when the judge asked the attorneys to
13 talk about the charges to the jury; is that right?
- 14 A Yes, ma'am.
- 15 Q So you heard Mr. Herlich ask for the assault three
16 charge to the jury?
- 17 A Yes, ma'am.
- 18 Q Did you say anything at that point?
- 19 A No. I felt he was giving the jury an option, you know.
- 20 Q And did you say anything to the judge at that point?
- 21 A No. I had confidence I was going to be acquitted.
- 22 Q You were there for the summations as well?
- 23 A Yes, ma'am.
- 24 Q And you were paying attention?
- 25 A Yes.

1 Q So during the summation you heard Mr. Herlich talk
2 about the bottle again, correct?

3 A Yes, ma'am.

4 Q And then you heard Mr. Herlich talk about the assault
5 three charge; is that right?

6 A Yes. I heard him say that to the judge.

7 Q And you heard Mr. Herlich say that the People had
8 proven the assault three charge?

9 A I couldn't believe it when he said that. I was like --

10 Q And it's your testimony today that that was the very
11 first time you had ever heard Mr. Herlich say that?

12 A Yes.

13 Q But you didn't say anything?

14 A What am I supposed to say? I mean --

15 Q You didn't say anything before the jury was excused?

16 A He's my lawyer. He's supposed to help me. What was I
17 supposed to say? I didn't want to be disrespectful, you know?

18 Q And you didn't say anything to the judge after the jury
19 was excused, correct?

20 A I told the judge during sentencing I should've never
21 been convicted of assault.

22 Q And you didn't say anything to Mr. Herlich?

23 A No, I didn't.

24 Q And the jury deliberated after that, correct?

25 A Yes, ma'am. Mr. Herlich didn't give them a chance to

1 deliberate. He just said I was guilty.

2 Q And after reviewing the evidence the jury found you
3 guilty of the assault three charge?

4 A Yes. Because Mr. Herlich told them to find me guilty.

5 Q You didn't say anything to the judge about
6 Mr. Herlich's concession?

7 A No.

8 Q And again, you didn't say anything to Mr. Herlich about
9 it?

10 A No.

11 Q A few weeks later you appeared again before the same
12 judge for sentencing; is that right?

13 A Yes, ma'am.

14 Q You didn't reach out to Judge Hong in the interim? You
15 didn't write him a letter or say anything?

16 A Say what? I told him I wasn't supposed to be
17 convicted. I had faith I was going to be acquitted.

18 Q And you didn't reach out to Mr. Herlich before the
19 sentencing either; is that correct?

20 A No. I didn't have a chance to. The only time I see
21 Mr. Herlich is when they pull me out here.

22 Q Now Mr. Alvarez, you spoke at sentencing, correct?

23 A Yes, ma'am.

24 Q You told Judge Hong that you had not hit Ms. Rivera?

25 A Yes, ma'am.

1 Q But you didn't say anything to Judge Hong about this
2 assault three charge, did you?

3 A I told him I should've never been convicted of assault
4 period.

5 Q But you didn't say anything about Mr. Herlich making
6 the concession?

7 A No. What difference is it going to make? I mean, we
8 already put that in the jury's mind. What I am supposed to say?

9 Q And Judge Hong then sentenced you; is that correct?

10 A Yes, ma'am.

11 Q And not to the fifteen years to life that you could've
12 received but, in fact, to three and a half to seven years,
13 correct?

14 A Yes. The maximum.

15 Q And that time is concurrent to the other case you were
16 serving at the time; is that right?

17 A Yes. And it was dismissed.

18 Q And you didn't say anything to Mr. Herlich about the
19 assault three after the sentencing either, correct?

20 A No, I didn't. What am I supposed to say to him?

21 Q And in fact, didn't you tell Mr. Herlich that he had
22 done a good job for you?

23 A No. That --

24 Q That you were happy with the outcome?

25 A No. He did a terrible job. He got me convicted.

1 Q But today instead of being at the beginning of a life
2 sentence you said you've already been released on parole; is
3 that right?

4 A Right. But I was offered a two to four. If I wanted
5 to plead guilty I would've pled guilty to the two to four. Why
6 would I go to a trial and face 12 to life?

7 MS. MONTY: I don't have any further questions.

8 THE COURT: Any redirect?

9 MR. ZENO: Just one.

10 REDIRECT EXAMINATION

11 BY MR. ZENO:

12 Q Mr. Alvarez, if you faced the risk of a life sentence
13 but were offered two to four by which you did not go to trial
14 why did you choose to go to trial?

15 A Because I was innocent, and I wanted to prove I was
16 innocent. I never assaulted Ms. Rivera. That chick came and
17 grabbed me by my neck to grab my chain, and she tried to bite me
18 right here. And my natural, I just went like that.

19 Q And did you explain to Mr. Herlich why you wanted to go
20 to trial?

21 A Yes. I told him I was innocent. I never assaulted
22 her. I told you.

23 Q And why you were not willing to take the plea offer?

24 A Because I was innocent. I was not even willing to take
25 time served. I told him.

1 Q You explained that to him?
2 A Yes, specifically. Yes.
3 MR. ZENO: No further questions.
4 THE COURT: Any recross?
5 MS. MONTY: No, Judge.
6 THE WITNESS: Have a good day.
7 (Whereupon, the witness was excused from the
8 stand.)
9 MS. MEIS: Can we just switch? Can Mr. Zeno and I
10 switch for the next witness? Is that okay?
11 THE COURT: Say that again?
12 MS. MEIS: I'm going to switch seats with Mr. Zeno
13 for the next witness if that's okay.
14 THE COURT: Yes.
15 MS. MONTY: Judge, we call our next witness,
16 Theodore Herlich.
17 THE COURT: Just to be clear, defense rests?
18 MS. MONTY: Apologies.
19 MS. MEIS: Yes. Thank you.
20 THE COURT: People.
21 MS. MONTY: We call our first witness, Theodore
22 Herlich.
23 COURT OFFICER: Remand staining right here. Raise
24 your right hand.
25 COURT CLERK: Do you solemnly swear or affirm that

1 the testimony you give to the Court shall be the truth, the
2 whole truth, and nothing but the truth?

3 THE WITNESS: I do.

4 COURT CLERK: Have a seat.

5 COURT OFFICER: For the record I need you to state
6 your full name followed by the spelling of your last name.

7 THE WITNESS: Theodore Herlich, H-E-R-L-I-C-H.

8 COURT OFFICER: And your affiliation.

9 THE WITNESS: I was the trial attorney for Raul
10 Alvarez.

11 T H E O D O R E H E R L I C H , having first been duly sworn
12 was examined and testified as follows:

13 DIRECT EXAMINATION

14 BY MS. MONTY:

15 Q Good afternoon, Mr. Herlich.

16 A Good afternoon.

17 Q What's your occupation?

18 A I'm a defense attorney mostly.

19 Q And how long have you been a defense attorney?

20 A Since 1988, so --

21 Q Are you --

22 A -- 32 years.

23 Q Apologies. Are you currently in private practice?

24 A Yes.

25 Q And have you always been in private practice?

1 A No. I actually was at the Legal Aid Society for
2 15 years and then went into private practice in 2003.

3 Q And in total approximately how many clients would you
4 say you have represented in criminal cases?

5 A Thousands. I don't -- I can't even estimate the
6 number, but a lot.

7 Q Hundreds?

8 A At least.

9 Q And are defendants always happy with your
10 representation?

11 A No.

12 Q Have you ever had any complaints filed against you?

13 A Oh, with the Grievance Committee?

14 Q Yes.

15 A Sure.

16 Q Have any of those ever been substantiated?

17 A No.

18 Q Have you ever been found deficient by the New York
19 State law?

20 A Not that I know of, no.

21 Q You're currently part of the 18-B panel; is that
22 correct?

23 A Yes.

24 Q And in that role are you sometimes asked to replace
25 existing defense attorneys on cases?

1 A More often than not that's how I'm getting cases.

2 Q And what's the typical posture of a case when that
3 happens?

4 A I'm not sure I understand the question, but it's
5 usually the case is getting closer to trial. And there's --
6 maybe the client's not happy with the lawyer for who knows what
7 reason and they want a new attorney.

8 Q And in a case like that when you replace an existing
9 attorney what is your relationship with that prior attorney?

10 A With the prior attorney?

11 Q Correct.

12 A Nothing other than maybe to ask them for their -- a
13 copy of their file.

14 Q Do you stay in touch with the prior attorney?

15 A No.

16 Q Do you keep them apprised of the case?

17 A No, not at all.

18 Q How do you prepare for a case that will -- that you
19 believe will go to trial?

20 A That I --

21 Q That you believe will go to trial.

22 A Okay. Obviously I review the file, all of the
23 discovery material in a case. I try to ascertain what viable
24 defenses there may be and obviously consult with the client to
25 get their narrative version of the events and what their claimed

1 defense is.

2 Q And will you have conversations with a client before
3 going to the trial on their case?

4 A Many, yes, of course.

5 Q Do you agree to a trial strategy with the client?

6 A Yes.

7 MS. MEIS: Judge, I'm going to object to the
8 general questions. I think we should focus on this case.
9 This seems like a lot of general practice questions.

10 THE COURT: That objection's sustained, though the
11 whole appearance it's been done this way. But all right.
12 Let's talk about this case. People?

13 Q Now directing your attention to October of 2016; were
14 you assigned to a case of Raul Alvarez?

15 A Yes.

16 Q And what was the circumstances of the case?

17 A I was assigned to the case. The first thing I would've
18 done is look at, if I didn't have the attorney's file
19 immediately, review the court file before interviewing the
20 client. And I saw that this is an assault two, a class D as in
21 David violent felony offense, that this individual had two prior
22 violent felony convictions where he was out of jail less than
23 ten years from the date he was paroled on the original violent
24 felony conviction, and he was a persistent violent felony
25 offender if convicted in this case, which meant the minimum was

1 12 to life, the maximum was 25 to life.

2 So when I first met with Mr. Alvarez I spoke to him about
3 that and told him he's looking at a life sentence if he does not
4 succeed on the assault two count at trial. And after one or
5 more conversations it was crystal clear to me that Mr. Alvarez
6 wanted to go to trial. However, the prosecutor had offered the
7 nonviolent felony of attempted assault in the second degree, a
8 class E nonviolent felony, and I believe the offer was one and a
9 half to three. And I conveyed that to Mr. Alvarez and was
10 surprised that he would not accept that. But he rejected that,
11 and he wanted to go to trial. And so from that point on I
12 understood the case was going to trial.

13 Q And what were some of your first impressions of the
14 strength of the case?

15 A Well, at first I just may have had the attorney's file.
16 But I can tell you that way in advance of trial I knew two
17 things. There was a 911 call from a civilian, a male civilian.
18 But the complainant had come out of the camper of the defendant,
19 and she was heard on the 911 call. And she was actually
20 standing next to this male 911 caller, and you could hear her
21 voice recorded in the 911 call. She was extremely upset, but
22 she was saying he hit me in the mouth and knocked my tooth out
23 or something to that effect or he punched me in the mouth and
24 knocked out my tooth. She never mentioned the word bottle at
25 the time of the 911 call. That's number one.

1 Number two, something I knew well in advance of trial was
2 the fact that there was no property voucher for this bottle, so
3 I knew that it hadn't been vouchered by the police. So those
4 two factors led me to believe, okay, she obviously has a chipped
5 tooth, and she, according to her testimony, had injuries to her
6 legs like bruises. It seemed a reasonable defense that we would
7 ask for the lesser included offense of assault in the third
8 degree, a Class A misdemeanor, and argue that a bottle was never
9 used. There being no dangerous instrument there's no felony
10 assault, and Mr. Alvarez is saved from a life sentence.

11 Q So would it be fair -- apologies. Would it be fair to
12 say that whether there was a bottle or not was of import to you
13 from the beginning?

14 A Absolutely. Absolutely.

15 Q And did you discuss that with Mr. Alvarez?

16 A Yes.

17 Q Approximately how many times did you meet with
18 Mr. Alvarez as you were getting ready for trial?

19 A I don't -- can't give you a number, but we met many
20 times. We spoke in detail either before or after court
21 appearances in the interview pens of the courthouse, and it was
22 made known to Mr. Alvarez well in advance of trial that look, we
23 got to beat the assault two and save you from a life sentence
24 and that the plan was to ask for the lesser included offense of
25 assault in the third degree. And I -- although Mr. Alvarez, of

1 course, maintains his complete innocence in the case, he did not
2 object to me ever about getting the lesser included offense of
3 assault in the third degree charge to the jury.

4 Q So you specifically remember discussing this issue of
5 the assault in the second degree versus the assault in the third
6 degree; is that correct --

7 A Yes.

8 Q -- with Mr. Alvarez?

9 A Yes.

10 Q And what was his response to that?

11 A I don't remember -- I don't remember anything in
12 particular. But he didn't -- he never said to me no, I don't
13 want the jury to consider assault three, I want only a complete
14 defense that I'm not guilty of every charge in the indictment.
15 That never was said to me.

16 Q And based on your many years of doing this work would
17 you remember if a client said to you I absolutely do not want
18 you to follow this trial strategy?

19 A Of course.

20 Q When did you -- when during the course of the trial did
21 you first bring up to the jury this issue of the bottle?

22 A You know, I don't recall if it was in my opening
23 statement, but it may have been. But it was definitely the
24 heart and soul of my summation. With regard to my summation,
25 I -- you know, Mr. Alvarez testified in this case that he was

1 not guilty of all charges, and I did say that if the jury
2 accepted his testimony then they must acquit of all the charges.
3 But if they didn't accept his testimony I still was prepared and
4 did argue that there's no assault in the second degree here;
5 there's an assault in the third degree. The downside of assault
6 third, which is a misdemeanor, is that it by definition
7 constitutes a violation of criminal contempt and aggravated
8 criminal contempt in this case, all nonviolent felonies which
9 would not expose the defendant to a life sentence. But that was
10 made known that if you're convicted of assault three then you're
11 going down on all the contempt counts.

12 Q So if I understand you correctly, by conceding the
13 assault in the third degree you knew that you were necessarily
14 also conceding the felony contempt charges; is that correct?

15 A Yes. And that would be the alternative argument in the
16 event the jury did not accept Mr. Alvarez's testimony that he
17 was not guilty of all counts.

18 Q And again based on your many years of your criminal law
19 practice would you ever concede felony counts on behalf of a
20 client who had told you not to do so?

21 A If I was told not to do so I wouldn't have made that
22 argument.

23 Q Now, going back to the bottle, that was, again, the
24 center of your strategy at trial; is that correct?

25 A Yes. In order to overcome the assault second degree

1 class D violent felony offense charge, yes.

2 Q And you brought up this issue, the bottle, throughout
3 the People's case, correct?

4 A I believe so, yes.

5 Q Did you speak with the defendant during the trial?
6 There must have been breaks during testimony.

7 A I'm sure that we did.

8 Q And did he ever say anything to you about disagreeing
9 with your examinations?

10 A No. And there was no objection from Mr. Alvarez when
11 at a charge conference I requested the lesser included offense
12 of assault in the third degree, and nor was there any objection
13 that I heard from Mr. Alvarez following my summation. And after
14 the verdict to the best of my memory Mr. Alvarez shook my hand
15 and thanked me.

16 Q And do you remember what his reaction was after the
17 sentencing?

18 MS. MEIS: I thought he just answered that.

19 A After the sentencing?

20 Q Yes. Correct.

21 A I believe he was happy because the sentence had been
22 ordered to run concurrently with the three and a half to seven
23 he was already serving in his Brooklyn case. So it's like two
24 for the price of one after trial. It doesn't get any better
25 than that, and I'm sure he was very pleased.

1 Q And in fact, did Mr. Alvarez ever say anything to you
2 at all about this issue of conceding the assault in the third
3 degree?

4 A No.

5 Q When is the first time that you heard that he had
6 disagreed with that strategy?

7 A When I learned about the substance of the CPL 440
8 motion.

9 MS. MONTY: I have no further questions.

10 THE COURT: Cross.

11 CROSS-EXAMINATION

12 BY MS. MEIS:

13 Q Mr. Herlich, when you were assigned Mr. Alvarez's case
14 he was incarcerated, correct?

15 A Yes.

16 Q And throughout the duration of your representation of
17 him he remained incarcerated, correct?

18 A Yes.

19 Q You never visited him at his jail facility, right?

20 A No.

21 Q The only time you spoke to him were in the pens at the
22 courthouse for an appearance, right?

23 A Yes.

24 Q And when you first met Mr. Alvarez you knew that he had
25 asked for his prior counsel Mr. Pruitt to be relieved, right?

1 A Yes.

2 Q And did you obtain a file from Mr. Pruitt?

3 A Yes.

4 Q And you learned from Mr. Pruitt and Judge Wiley that
5 the reason Mr. Alvarez asked for new counsel was because he was
6 not interested in a plea that had been offered to him?

7 A Something to that effect, probably. That sounds right,
8 yes.

9 Q And when you first got assigned you actually spoke with
10 Mr. Alvarez as well, right?

11 A Yes.

12 Q And Mr. Alvarez made it clear to you that he was not
13 interested in pleading guilty?

14 A Yes. I don't recall if the day of the assignment or
15 subsequently I was made aware that the offer was to the E
16 nonviolent felony, but once he was very firm in refusing that it
17 was clear he wanted to go to trial, yes.

18 Q The offer, as you said, was to the E nonviolent felony,
19 right?

20 A Yes.

21 Q Which meant that he would not face a life sentence as a
22 result of the assault two violent charge, right?

23 A Right. And --

24 Q Was it your recollection that the offer was for a
25 sentence of two to four years or one and a half to three, if you

1 recall?

2 A I'm not sure. It's either one and a half to three or
3 two to four. It may -- I think it may have been one and a half
4 to three that was the offer.

5 Q And even though you knew that Mr. Alvarez had already
6 rejected that offer with prior counsel you tried to get him to
7 take that same offer because you thought it was a reasonable
8 offer to resolve the case?

9 A Well, I suggested if he wanted to lock in something
10 other than a life sentence, have a guarantee of not getting 12
11 to life, and it's a good deal. And if not, we moved on. And it
12 was one discussion. It was clear he wasn't taking it, and that
13 was the end of it. He was not browbeaten into trying to, you
14 know, force him into taking a plea. I never do that.

15 Q But Mr. Alvarez made it clear to you that he did not
16 want to plead guilty to the nonviolent offer with a nonlife
17 sentence, right?

18 A That's correct.

19 Q And he told you that he wanted to go to trial, right?

20 A Yes.

21 Q And when you met with him you discussed with him what
22 had actually happened that day when he was arrested, right?

23 A Of course.

24 Q And he gave you the same version of events that you had
25 from the grand jury minutes and his statements, right?

1 A Yes.

2 Q Which is that he never assaulted Ms. Rivera?

3 A Yes. That's his testimony at trial.

4 Q And he was adamant in that position, right?

5 A Yes, he was.

6 Q You had read the grand jury minutes, you received his
7 testimony before you went to trial, right?

8 A Right.

9 Q Even though you weren't present you saw that he had
10 insisted he had not assaulted Ms. Rivera, right?

11 A That's right.

12 Q And after about four months of you being on the case
13 the case all the ultimately went to trial, right?

14 A Yes.

15 Q Do you recall at the beginning of trial that Judge Hong
16 told Mr. Alvarez that he faced a life sentence if he were
17 convicted?

18 A I'm sure that was told to him.

19 Q Okay. And Mr. Alvarez still chose to proceed to trial,
20 right?

21 A Right.

22 Q In your opening you talked about Ms. Rivera's lack of
23 credibility, right?

24 A Right.

25 Q And that was the preview of how you were going to

1 challenge that she was not believable and that her testimony
2 could not sustain a conviction, right?

3 A Yes.

4 Q And Mr. Alvarez testified at trial?

5 A Yes.

6 Q You knew that he was going to want to testify?

7 A Yes.

8 Q He made that crystal clear to you?

9 A Yes.

10 Q And you knew the substance of his testimony was going
11 to be that he had not assaulted Ms. Rivera period, right?

12 A Right.

13 Q Not that he didn't use a bottle but that he didn't
14 assault her, right?

15 A Correct.

16 Q Did you actually prepare him for his testimony?

17 A Yes. He -- I obviously went over his testimony. I
18 heard his version of events on multiple occasions. I knew --
19 you know, I knew what he was going to testify about. It wasn't
20 like I had to educate him about his defense.

21 Q So you knew that he was going to say that he did not
22 assault Evelyn Rivera?

23 A Yes.

24 Q And in fact, in his testimony that is what he said,
25 right?

1 A Yes.

2 Q And he insisted that on cross-examination throughout
3 his cross-examination, right?

4 A Yes.

5 Q If you knew that that was going to be Mr. Alvarez's
6 testimony and that your trial strategy, as you claim, was to get
7 the assault three why did you try to have Mr. Alvarez admit to
8 an assault three?

9 A I'll put it this way: I understood what his testimony
10 was. He exercised his right to testify at trial, and in
11 summation I did indicate to the jury that if they accepted his
12 testimony that they must acquit of all charges. But in the
13 alternative if in their assessment of the evidence they believed
14 that Ms. -- whatever her name was, I can't recall -- her tooth
15 was chipped by Mr. Alvarez, I insisted it was not chipped by a
16 bottle to spare him a life sentence and to have him convicted of
17 assault in the third degree as an alternative view of the
18 evidence which the jury might find to be the case as opposed to
19 accepting in full Mr. Alvarez's testimony.

20 Q But you understood that the crux of your defense that
21 you're claiming you discussed with Mr. Alvarez was contrary to
22 his adamant position that he had never assaulted her?

23 A Yes. I understood what his defense was. He also knew
24 that I was going to ask for assault third degree as a lesser
25 included offense, not to give the jury something to think about

1 but to argue as an alternative to assault in the second degree,
2 and I never heard any objection from him about that.

3 Q Okay. Well, you say that you talked to him about this
4 strategy of trying to try it down from an assault two to an
5 assault three?

6 A Yes.

7 Q When did you speak to that -- when did you speak to him
8 about that?

9 A On a number of occasions. This isn't something that
10 just popped up at trial. Like I said, I was aware from the 911
11 call that the complainant never mentioned the bottle, and I was
12 aware from property vouchers that no bottle was recovered in the
13 case. And the police obviously admitted that they did not
14 recover a bottle. So I saw that there was a viable argument --
15 even if the jury accepts the People's evidence there's a viable
16 argument that Mr. Alvarez committed assault third degree as an
17 alternative way of viewing the evidence than the way Mr. Alvarez
18 himself presented it as he did nothing wrong and therefore he
19 should be acquitted.

20 Q So is it fair to say that in discussing this with
21 Mr. Alvarez you talked about having the assault three charge as
22 an alternative for the jury if they didn't come to a full
23 acquittal?

24 A Yes.

25 Q And do you keep a file for clients that you represent?

1 A Yes.

2 Q And do you put notations on the file when you speak
3 with a client?

4 A Notations I would put on a file including in this case
5 would be a defendant's narrative of the events of the subject
6 matter of the indictment, that is the facts of the case; any
7 names or contact information for witnesses. My personal
8 practice is I wouldn't make notations about the discussions of
9 what the theory of the defense is, things of that nature. The
10 file folder and the legal pad notes would be essentially what
11 are the defendant's versions -- version of the event, what
12 witnesses may a defendant have that I could get in touch with.
13 That's about it.

14 Q Okay. So do you not note on your file when you speak
15 with a client on a given court date?

16 A No. Unless there's something new, there's supplemental
17 facts that come out which happens often during a subsequent
18 discussion. If there's new facts that I wasn't aware of before,
19 that gets written down, absolutely.

20 Q And where you have a client like Mr. Alvarez who was
21 insisting that he was -- had never assaulted the complainant,
22 did you note on your file that you had discussed with him
23 pursuing this idea of adding a lesser charge?

24 A Whether I wrote it down or not I don't recall. I don't
25 think it was something I would necessarily write down. But it

1 was crystal clear to me that the assault three as a lesser
2 included offense was something that was very important, and it
3 was discussed with the defendant prior to trial. It wasn't
4 something thought of in the middle of trial.

5 Q Okay. So my question is do you have a file in this
6 case?

7 A Not -- I do not.

8 Q What happened to the file?

9 A I can't locate it. It may be in my house, but I cannot
10 find it. I tried to find it. I could not locate it.

11 Q Is it fair to say, Mr. Herlich, that seeking a lesser
12 charge is different than affirmatively conceding guilt to an
13 offense?

14 A If I'm seeking a lesser included offense of assault in
15 the third degree it's for the express purpose of arguing to a
16 jury in the alternative that at most the crime of assault third
17 degree was committed. I would never ask for the lesser included
18 offense of assault three if the argument was going to be this
19 defendant committed no crime, end of story.

20 Q And wasn't that exactly the defense that you understood
21 Mr. Alvarez was embracing, that he committed no crime, period,
22 end of story?

23 A That's his testimony. But he and I discussed assault
24 three as a lesser included offense and my reasons for seeking
25 the ability to argue it in the alternative which is to spare him

1 from a life sentence, and he never made any objection to me
2 about proceeding in that manner.

3 Q A lesser included can sometimes be a fallback position,
4 right?

5 A Well, like I said, it's an alternative argument to a
6 jury.

7 Q But an alternative argument to a jury is different than
8 affirmatively conceding and asking the jury to come back with a
9 conviction on a lesser included offense, right?

10 A I don't really agree with that. When I'm asking for a
11 lesser included offense I'm going to be arguing in the
12 alternative that that's the crime that was committed, not the
13 assault two but the assault three. It's not just oh, ladies and
14 gentlemen of the jury, consider this, by the way he's not guilty
15 of that as well. No. It's with the express purpose of saying
16 as an alternative argument that that's what the guy is guilty
17 of, not assault two.

18 Q Are you familiar at the time that you requested the
19 lesser included that it was a decision for you as the lawyer to
20 make?

21 A It was made by my discussions with Mr. Alvarez and to
22 my understanding and my memory that he had no objection to it
23 and that it was a joint defense, that the defense was, of
24 course, he's not guilty, but in the alternative at most it is an
25 assault three, not assault two.

1 Q Okay. Let me rephrase my question. Is it fair to say
2 that as a criminal defense lawyer you are well aware that there
3 are certain rights afforded to you as strategic decisions and
4 certain rights afforded to your client that he alone has, right?

5 A Yes.

6 Q For example, the decision of whether or not to go to
7 trial at all is a decision that your client alone has, right?

8 A That's right.

9 Q Did you understand at the time you were requesting the
10 lesser that it was the law that that was a decision that you
11 were to make?

12 MS. MONTY: Objection. I don't see the relevance
13 of this.

14 THE COURT: Sustained.

15 Q You claim that when you told Mr. Alvarez that you were
16 going to be asking for the lesser he did not object, right?

17 A Right. It was understood that that was the trial
18 strategy, at least in the alternative. In the event the jury
19 doesn't accept his full and complete defense we will argue that
20 at most it's an assault in the third degree if they find that he
21 was the person who caused the chipped tooth to the complainant.

22 Q Did he ever actually agree to that strategy or just
23 simply not say anything?

24 A It's my understanding that he agreed. I -- he never
25 said a word to me that he opposed that, so I think we were on

1 the same page. As far as I can tell we were on the same page.

2 Q At the time did you understand that Mr. Alvarez had a
3 right to decide whether or not to concede guilt to any charges?

4 MS. MONTY: Objection to that.

5 THE COURT: Sustained.

6 MS. MEIS: Judge, could we perhaps make a record
7 about that? I think it's an appropriate area for the
8 examination.

9 THE COURT: No problem.

10 Q Were you aware of Supreme Court case law on the issue
11 of a defendant's right to oppose conceding guilt to a defense?

12 MS. MONTY: Objection.

13 THE COURT: Sustained.

14 Q Did you explain to Mr. Alvarez that he had a
15 fundamental right to insist on his total innocence at trial?

16 MS. MONTY: Objection.

17 THE COURT: That I will allow.

18 A Yeah. And he exercised that right during his
19 testimony. But it was also agreed as far as my understanding
20 goes that in the alternative if that complete defense is not
21 accepted by the jury we will argue that at most he committed
22 assault three, not assault two. That was my understanding of
23 his defense, that I had his permission to not only argue that he
24 was completely innocent but in the alternative that he at most
25 committed assault three and the related contempt charges that go

1 along with that.

2 Q Did you prepare for your testimony in this case on
3 October 7, 2020 with the prosecution?

4 A I had phone calls with the prosecution about the case.

5 Q And in that preparation did the prosecutor ask you
6 whether you had ever had a client who insisted on their
7 innocence but that you wanted to embrace a strategy of conceding
8 guilt?

9 MS. MONTY: Objection, Judge. Outside the scope of
10 redirect.

11 THE COURT: I'll allow it, but that's it.

12 MS. MONTY: But --

13 THE COURT: I will allow the question, but then
14 let's move on. You can answer the question.

15 A Yeah. I had a client, to the best of my memory his
16 name was Pedro Morales. He went to trial in part 41 some years
17 ago, and there was one thing that was similar to this case.
18 Morales was charged with a B misdemeanor, public lewdness,
19 allegedly pulling out his penis and masturbating in the back of
20 a livery cab. And the female cab driver became very upset and
21 threw him out of the cab and made a police report.

22 A couple days later the cab driver sees allegedly Morales
23 walking down the street, calls the police. They come to arrest
24 him. He flees. And an officer, she injured her wrist in
25 tackling Morales in arresting him. So the defense that was

1 argued to the jury was, you know, Mr. Morales claims he didn't
2 commit public lewdness and there was no lawful basis for the
3 arrest, and therefore, ladies and gentlemen, you can find the
4 defendant not guilty of all charges. If there's no basis for
5 the arrest he had every right to run away.

6 However, if you find that the People have proven beyond a
7 reasonable doubt that Pedro Morales did, in fact, pull out his
8 penis and masturbate in the back of the cab then we must focus
9 on whether physical injury was sustained by the officer in your
10 evaluation of assault in the second degree. So that was the
11 argument there.

12 Q Okay. But my question is you did, in fact, discuss
13 with the prosecutor whether something like this had ever
14 occurred before?

15 A Yes.

16 Q And she specifically asked you what you would do --
17 what would your plan about be if this happened to you, right?

18 THE COURT: Okay. I don't understand that
19 question.

20 Q The prosecutor asked you what your plan would be, what
21 you would do if this ever happened to you, that a defendant
22 wanted to maintain their innocence and you wanted to concede
23 guilt to a lesser, right?

24 MS. MONTY: Objection, Judge. We were not allowed
25 to ask about the general --

1 THE COURT: Sustained. Anything else?

2 MS. MEIS: Judge, I think it's a relevant question
3 because of his prior statement.

4 THE COURT: Do you have anything else?

5 MS. MEIS: I do, Judge, but --

6 THE COURT: Then let's get to it.

7 Q Did you tell the prosecutor that if your client took a
8 position like Mr. Alvarez that you would have to look into
9 whether or not he had the final say on the issue?

10 MS. MONTY: Objection.

11 THE COURT: I'll allow it.

12 A I don't really understand the question. Can you please
13 ask it again?

14 Q That if a client like Mr. Alvarez took the position
15 that he did about maintaining his innocence despite your desire
16 to add a lesser that you would have to look into whether he had
17 the final say on that issue or not?

18 THE COURT: Okay. Now that I hear the question the
19 objection is sustained.

20 Q Drawing your attention to your closing argument; you
21 actually argued that Mr. Alvarez's testimony didn't account for
22 the injuries Ms. Rivera had, right?

23 A I don't recall every word of the summation, but --

24 Q You knew that Mr. Alvarez's testimony was that he did
25 not assault Evelyn Rivera, right?

1 A That's right.

2 Q You heard his testimony, yeah?

3 A Yes.

4 Q And in summation you argued that his testimony didn't
5 account for the injuries, right?

6 A You'd have to read me back my exact words, but he --
7 his testimony obviously -- in combination with the complainant's
8 testimony there's no way to account for the injuries if you
9 accept Mr. Alvarez's testimony. That's correct.

10 Q And then you argued that -- you argued outright that
11 the jury should find Mr. Alvarez guilty of assault in the third
12 degree, right?

13 A Right, after having asked the jury to acquit
14 Mr. Alvarez completely based on his testimony I went into the
15 alternative argument that if you don't accept his testimony and
16 you look at what the complainant said, at most he's guilty of
17 assault three, yes.

18 Q And now, you knew that if you conceded guilt to assault
19 in the third degree in turn that was essentially conceding guilt
20 on the felony contempt charges as well, right?

21 A Yes. Although there's a caveat with that because the
22 complainant testified that there were injuries to her legs,
23 bruising to her legs, so you didn't have to have Mr. Alvarez
24 convicted of chipping her tooth to have him found guilty of
25 aggravated criminal contempt and the related contempt charges if

1 the jury found that the injuries to her legs were proven beyond
2 a reasonable doubt.

3 Q But it was your understanding of how you were trying
4 this case in your summation that that would lead to a conviction
5 on the contempt charges as well, right?

6 A Yes, yes.

7 Q And you knew that the contempt charges were D
8 nonviolent felonies, right?

9 A Yes.

10 Q And based on Mr. Alvarez being a predicate the
11 sentencing exposure for him was up to three and a half to seven
12 on those contempt charges, right?

13 A That's right.

14 Q And that was substantially more than he was offered in
15 the plea to the attempted assault two nonviolent offense when
16 you took the case on, right?

17 A Absolutely.

18 Q And he had told you definitively that he did not want
19 to plead guilty even though there was a sentence -- an offer of
20 a sentence of two to four years, right?

21 A Yeah. He told me he did not want to plead guilty.
22 That's right.

23 Q And in fact, you were aiming for at trial concurrent
24 time on three and a half to -- three and a half to seven on the
25 contempt charges, right?

1 A Well, after the conviction, yes, that was the request
2 at sentencing.

3 Q Well, even before that going in isn't that what you
4 were aiming for?

5 THE COURT: Counsel, first of all, you're way
6 beyond the scope of the hearing. The issue is whether he
7 discussed strategy with his client and whether his client
8 agreed or was silent, not whether his strategy was good or
9 not. Do you have a question about any interaction he had
10 with your client?

11 Q Did you discuss with Mr. Alvarez that your aim was to
12 get him a sentence of three and a half to seven concurrent at
13 the end of trial?

14 A Three and a half to seven? No. I mean, he could've
15 gotten on the aggravated criminal contempt two to four, so if
16 you had -- if Mr. Alvarez had asked me what he's looking at
17 after trial if he beats the assault two charge he may be looking
18 at the maximum three and a half to seven. But he could've
19 gotten two to four or anything in between.

20 Q Did you tell the prosecutor in preparing your testimony
21 that you were aiming for three and a half to seven concurrent
22 going into trial?

23 MS. MONTY: Objection, relevance.

24 THE COURT: Sustained.

25 Q Did you talk to Mr. Alvarez before -- I'm sorry. Did

1 you talk to Mr. Alvarez after your closing argument?

2 A Well, we were sitting next to each other, and then
3 after my argument there was the DA's closing. So there was
4 ample opportunity for us to consult with one another, and he
5 never made -- said a peep about anything being unacceptable to
6 him that I had argued in front of the jury.

7 Q Did you speak to him at all at that time?

8 A I believe so. I'm sure we spoke after -- I mean during
9 jury deliberations or after the verdict and before the
10 imposition of sentence. So we spoke after my summation, yes.

11 Q I'm talking specifically after you've done your closing
12 argument. Obviously the People go next, right?

13 A Right.

14 Q And you didn't speak to Mr. Alvarez during the time
15 that the small break between your closing argument and the
16 prosecution's, right?

17 A I can tell you we were sitting next to each other the
18 entire time throughout the People's summation. If Mr. Alvarez
19 wanted to consult with me about anything I would have spoken
20 with him. Do I remember specifically if we spoke during the
21 People's closing argument? I can't recall that. I don't know.

22 Q You didn't speak to Mr. Alvarez at the close of the
23 proceedings that day because they had to put him on a bus and
24 send him back to his facility, right?

25 A I don't know that. I may have spoken to him after

1 court in the pens. I don't know.

2 MS. MEIS: I have nothing further.

3 THE COURT: Any redirect?

4 MS. MONTY: Just briefly.

5 REDIRECT EXAMINATION

6 BY MS. MONTY:

7 Q Mr. Herlich, there was an approximately -- apologies.
8 It was approximately four months between the time when you
9 became Mr. Alvarez's attorney and when the case went to trial;
10 is that correct?

11 A That sounds right.

12 Q And do you remember on which occasions you went to
13 speak with Mr. Alvarez, which days?

14 A I can tell you we spoke during the days there were
15 court appearances either in the pens before the court case was
16 called or after the case had been called, and we on multiple
17 occasions spoke for at least an hour, if not more than that.

18 Q Thank you.

19 A And on multiple occasions --

20 MS. MONTY: No further questions. Thank you.

21 THE COURT: Any recross?

22 MS. MEIS: No, your Honor.

23 THE COURT: Okay. Thank you, Mr. Herlich.

24 (Whereupon, the witness was excused from the
25 stand.)

1 THE COURT: Okay. The People rest?

2 MS. MONTY: Yes, Judge.

3 THE COURT: All right. I don't know if either of
4 you wants to argue anything, either of you, but I'll let
5 you.

6 MS. MEIS: Do you -- are you asking to submit --

7 MR. ZENO: Yes.

8 MS. MEIS: Could we submit something in writing,
9 your Honor, please?

10 MS. MONTY: We would prefer to do it orally, Judge.

11 THE COURT: I don't think it's necessary to do it
12 in writing. If you have something you want to focus on I'm
13 happy to hear. I sat through the trial. I sat through the
14 sentencing. I sat through the hearing. I think I know all
15 the evidence that was just stated now. Was there anything
16 in particular that you need to talk about in writing?
17 Otherwise I don't see any need to. If you want to make an
18 argument now I'm happy to hear it.

19 MS. MEIS: Judge, I just think we prefer it as a
20 cleaner and more precise way of making the arguments.

21 THE COURT: I think the record is very, very
22 thorough, far more thorough than I asked for it. Is there
23 anything you need to argue, or do you rest on your papers?

24 MS. MEIS: I think Mr. Zeno wants to argue.

25 THE COURT: Mr. Zeno, go right ahead. You can do

1 it from there if that's better for you. I can see you.

2 Just speak up because there's no mike.

3 MR. ZENO: I will do my best.

4 THE COURT: Okay.

5 MR. ZENO: So it seems as though, your Honor, even
6 today Mr. Herlich doesn't understand that he conceded his
7 client's guilt. He kept saying that he offered a concession
8 of guilt in the alternative to the assault two. That is not
9 at all what he did. He conceded his guilt to the assault
10 three. His summation is crystal clear. And by doing that
11 he also conceded his guilt to the contempt charges, which is
12 essentially the guilty plea that Mr. Alvarez had turned
13 down.

14 And so to expect or to accept that he had a
15 complete discussion with the client before trial or during
16 trial or before the summation about conceding guilt when he
17 still doesn't even seem to understand that that's actually
18 what he did -- he didn't concede guilt as an alternative.
19 You can look at the last two pages of the summation. He
20 just purely conceded guilt.

21 He seemed to be confused today about the difference
22 between making the attorney's choice which is whether or not
23 to submit a lesser included offense and choosing to concede
24 guilt to that lesser included offense, something that he
25 still remains confused about, something he still does not

1 recognize that he did in his summation. He conceded guilt.
2 He doesn't recognize that he did.

3 THE COURT: Okay. Thank you. People.

4 MS. MONTY: Judge, the issue before the Court is a
5 simple battle of credibility, who your Honor credits, a
6 defendant who is an interested witness and has lied his way
7 through every step of his criminal case or his trial
8 counsel, an officer of the court and a member in good
9 standing of the New York Bar for more than 30 years.

10 The version of events that defendant would have
11 your Honor believe is simply not credible. In order to
12 prevail on this motion the defendant has to convince the
13 Court by a preponderance of the evidence that he
14 affirmatively and repeatedly told his attorney that he
15 wanted a complete innocence defense and that despite his
16 clear directive Mr. Herlich conceded guilt on the assault
17 three on summation.

18 You'd have to believe, therefore, that Mr. Herlich,
19 an experienced criminal attorney who has represented
20 hundreds if not thousands of defendants in New York Supreme
21 Court conceded eight felony counts and one misdemeanor to a
22 jury against his client's expressed wishes and is now
23 perjuring himself before this Court to protect his
24 reputation.

25 One fact is very clear; the defendant has told the

1 exact same story that he did not hit Ms. Rivera at every
2 opportunity during this case. He told this to the arresting
3 officer, to the prosecutor in the Early Case Assessment
4 Bureau, to the grand jury, to the trial jury, to the
5 probation officer who wrote his presentence report, and to
6 your Honor at sentencing, and even now he repeats that
7 story. And every single person who has heard that testimony
8 and compared it to the facts has concluded the defendant is
9 lying.

10 The defendant is asking this Court in this motion
11 to overturn his conviction based on the Court's 2018
12 decision in McCoy v. Louisiana. In that case the Supreme
13 Court found that petitioners's Sixth Amendment right to
14 counsel had been violated when his attorney conceded guilt
15 at trial over petitioner's repeated objection to this
16 strategy. However, given the facts of this case McCoy is
17 simply an opposite, and instead the Court should look to
18 another Supreme Court precedent Florida versus Nixon which
19 was decided in 2004.

20 Nixon also sought to have his conviction overturned
21 because he claimed that he had not approved his counsel's
22 decision to concede guilt at trial. This Supreme Court in
23 Nixon held that an attorney has a duty of consultation, that
24 is you should discuss important trial decisions with his
25 client, however the attorney does not have to get explicit

1 approval to go forward with his strategy including where
2 that strategy concedes guilt.

3 Both in McCoy and Nixon decisions were written by
4 the late Justice Ginsburg, and she made clear that McCoy in
5 no way overturned Nixon. Instead, the two decisions ran
6 together made clear that an attorney who concedes guilt at
7 trial, the key factor in deciding whether a defendant's
8 Sixth Amendment right is violated is whether the defendant
9 clearly expressed his wish to make an innocence defense
10 ahead of trial.

11 If the lawyer went ahead and conceded guilt in the
12 face of a clear objection then the Sixth Amendment right is
13 violated under McCoy. Instead, if the client acquiesced or
14 was silent then the usual Strickland standard was used to
15 decide whether counsel provided constitutionally effective
16 assistance for his client. And like in Nixon, Mr. Herlich's
17 representation more than satisfies Strickland.

18 He participated fully in the trial, effectively
19 crossed the People's witnesses, and when faced with
20 overwhelming evidence introduced at trial conceded guilt on
21 the lesser included charge and with it on the contempt
22 charges as well in order to save the defendant from an
23 almost certain conviction on assault in the second degree
24 and with it a potential life sentence.

25 Based on the Supreme Court jurisprudence the

1 questions should be did Mr. Herlich discuss his plans to
2 concede the assault three charge and did the defendant
3 expressly reject that trial strategy. Mr. Herlich testified
4 that he spoke at length with the defendant about the case
5 ahead of the trial, including every time that the case was
6 called before -- before this court and the prior court. Mr.
7 Herlich was unable to provide the Court with exact dates,
8 but I would ask your Honor to consult the court file and
9 take judicial notice of when this case was called to get a
10 sense of how often the defendant and Mr. Herlich spoke.

11 Mr. Herlich was appointed to replace prior counsel
12 on October 13th of 2016. The case was next called on
13 October 27th, November 29th, on November 22nd where
14 according to the People's file Mr. Herlich was not present,
15 December 14th, and January 11th. The case was then on
16 January 23rd when both sides answered ready but no court
17 parts could be found. And the case was called again on four
18 more occasions. This means that Mr. Herlich met on at least
19 half a dozen occasions to discuss this case before the
20 commencement of trial.

21 In his testimony Mr. Herlich was clear that to him
22 the issue of the assault in the second degree or assault in
23 the third degree, that is whether a bottle or a fist was
24 used, was the crux of the case from the very beginning of
25 the representation, and that was what he discussed

1 repeatedly with his client. Unfortunately, we do not have
2 direct proof of the content of the conversations between the
3 defendant and Mr. Herlich. But even setting aside the
4 obvious credibility issues, Mr. Herlich's version of events
5 simply makes more sense.

6 What could he and Mr. Alvarez have possibly been
7 discussing all of those times if not the very heart of Mr.
8 Herlich's trial strategy? Why would Mr. Herlich have
9 mentioned the bottle at opening and at every cross if not to
10 lay the foundation for the assault three charge? Why would
11 Mr. Herlich have asked for the lesser included and then
12 argued complete innocence?

13 And finally, how could the defendant, someone who
14 is well versed in the criminal justice system, someone who
15 is facing his fourth felony jury trial, someone who already
16 addressed the Court in this case to fire his first attorney,
17 simply sit silently when, as he claims, the first time he
18 ever heard Mr. Herlich's strategy was when his counsel said
19 in summation I concede that the People did prove assault in
20 the third degree beyond a reasonable doubt?

21 Any reasonable person in that situation would have
22 done exactly what the petitioner in McCoy did, protested
23 openly and repeatedly to the Court that his attorney was
24 conceding guilt against his wishes. The fact that the
25 defendant did not protest in front of the jury or in front

1 of you, Judge, at the time or in front of you again at
2 sentencing just goes to show that what he is claiming today
3 is not what happened.

4 Finally, the defendant is improperly seeking to
5 bolster his claim by calling Timothy Pruitt, his first
6 attorney, to testify. That is simply irrelevant. What the
7 defendant and Mr. Pruitt discussed before Mr. Herlich
8 represented the defendant is simply of no import.
9 Mr. Pruitt had no knowledge of what the defendant and
10 Mr. Herlich discussed. And Mr. Pruitt admitted that he had
11 no idea what Mr. Herlich's trial strategy would be.

12 THE COURT: Okay.

13 MR. ZENO: May I just respond, less than a minute,
14 Judge?

15 THE COURT: Less than a minute.

16 MR. ZENO: Less than a minute.

17 Your Honor, you do not have to find that
18 Mr. Herlich committed perjury. The question that you
19 identified for this hearing was whether he confronted my
20 client with the trial strategy that he was going to concede
21 his guilt. He never testified before the Court that he was
22 going to concede his guilt.

23 THE COURT: Let's stop there for a second because I
24 do have a question for both of you. It's the same question.
25 So I think the facts speak for themselves. I was there for

1 the trial. I heard the testimony today. What actually
2 surprised me was that the defendant and Mr. Herlich are
3 pretty consistent on most of the issues in this case.

4 The defendant stated early on that he wanted a
5 trial. He wasn't going to plead guilty. Mr. Herlich
6 conceded all of those things. Mr. Herlich basically said
7 that he talked at length about the strategy. Even assuming
8 for argument's sake he didn't, I was there. I remember.
9 The strategy was clear as a bell even during jury selection.
10 It was clear as a bell during his opening, and it was clear
11 as a bell during the cross-examination.

12 That notwithstanding, so let's say hypothetically
13 the defendant said nothing, which he actually said he didn't
14 say anything about it. Once the defendant took the stand
15 and said something that was contrary to the general
16 strategy, my question I guess for both of you is did Mr.
17 Herlich have an affirmative duty to stop, reassess, and
18 discuss with his client how to proceed with the summation
19 and the charges?

20 What I heard them both say is that there was no
21 discussion, that Mr. Herlich continued with his defense, and
22 then at no time did the defendant interject and oppose it.
23 And Mr. Alvarez himself said I never told him. But my
24 question is did the defense attorney have an affirmative
25 duty once he heard his client testify to have a second

1 discussion? So just very quickly I want to hear from one of
2 you and then People.

3 MR. ZENO: Well, number one, that was Mr. Alvarez's
4 position throughout, that he was going to testify, and he
5 was going to say I did not assault her.

6 THE COURT: I know. My question is did -- once
7 that came out --

8 MR. ZENO: Once what came out? What the lawyer
9 knew was going to come out? He needed to tell the client,
10 his client, that I am going to concede your guilt in
11 summation and give him a choice as to whether he would
12 accept that or not.

13 THE COURT: But the strategy from the beginning had
14 to do with the bottle. The strategy from the very beginning
15 from this trial had to do with the bottle and the missing
16 bottle. So that was no surprise to Mr. Alvarez either.

17 MR. ZENO: But I disagree with your Honor. There's
18 a strategy of submitting a lesser as an alternative, and
19 that is different than submitting the lesser and ask that
20 the client be found guilty of that lesser. Mr. Herlich said
21 many times my strategy was to submit it as an alternative,
22 if the jury accepted his testimony not guilty but in the
23 alternative third degree assault. But that's not what he
24 said in summation. What he said in summation is find him
25 guilty of the third degree assault and therefore the

1 contempt counts as well. That is not -- that was not the
2 strategy that was discussed. That is a different strategy
3 than the strategy that was discussed.

4 THE COURT: Okay. People, do you wish to be heard?

5 MS. MONTY: Yes, Judge. Just as we said, reading
6 the McCoy and the Nixon decision together it is very clear
7 that the Sixth Amendment right is only violated if the
8 defense attorney concedes guilt in the face of a defendant
9 who says I do not want you to follow this strategy. And a
10 defendant who testifies one way is not necessarily a
11 defendant who disagrees with this strategy. Your Honor I'm
12 sure has seen many jury trials where a defendant testifies
13 and says that he or she is innocent and gets a different
14 strategy. Those are not mutually exclusive.

15 THE COURT: Okay. I need to just talk to my clerk
16 about a scheduling issue. It's not clear to me whether this
17 has to be scheduled or whether I can just submit a written
18 decision. I just want to find out.

19 (Whereupon, a discussion was held off the record.)

20 THE COURT: Okay. After discussing it with the
21 clerk we can put it on for a virtual date long in the
22 future. I anticipate giving you both a written decision
23 sometime in December, so it should be fairly quick. But
24 just to be safe we will put a date on a virtual part in
25 TAP-A or TAP-B say in January, and you'll have your decision

1 hopefully long before then. And --

2 MS. MEIS: Judge --

3 THE COURT: -- I don't expect anyone to be there
4 because it'll already be done one way or the other. But I
5 guess that all depends on after I read the minutes and make
6 a decision.

7 So the case will be adjourned to January 18th in
8 TAP-A. The parties will be notified as to what time on that
9 date or before. There will be a decision, and depending on
10 the decision we'll either set a new date for trial or the
11 case will be over. Okay?

12 MS. MEIS: Did you say 18th?

13 THE COURT: January 18th, TAP-A. You will be
14 notified as to what time closer to that date.

15 MS. MEIS: Judge, can we just say one thing in
16 regard to the Florida versus Nixon case the People cited to?

17 THE COURT: If --

18 MS. MEIS: I'll just ask you to relook at the
19 description of that defendant's behavior throughout because
20 he was described as, like, not participating at all in his
21 defense, never making his wishes known, and then, in fact,
22 absented himself because he was so uninvolved in the case.
23 And Mr. Alvarez repeatedly, as the People recognized, always
24 made clear that he insisted he was not guilty and had never
25 assaulted Ms. Rivera. So I think it's a very different

1 case.

2 THE COURT: I will keep that in mind when I review
3 the minutes and that case.

4 MS. MEIS: Thank you.

5 THE COURT: Happy Thanksgiving, everyone. It's
6 going to be the 19th. Apparently the 18th is a holiday. So
7 1/19.

8 *****

9 **REPORTER'S CERTIFICATION**

10

11 Certified to be a true and accurate transcript of the
12 original stenographic notes.

12

13 1/20/2021

Dated _____

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ASHLEY C. ZACCARO
SENIOR COURT REPORTER

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Ashley C. Zaccaro
Senior Court Reporter

APPENDIX E

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SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CRIMINAL TERM: PART 63

-----x

THE PEOPLE OF THE STATE OF NEW YORK : Indictment
: 5347/2015
-against- : Charge:
RAUL ALVAREZ, : ASSLT 3 - AGG CC
'Defendant. : INDETERMINATE

-----x SENTENCE

111 Centre Street
New York, New York
March 24, 2017,

B E F O R E :

HONORABLE GILBERT HONG, Justice

A P P E A R A N C E S :

For the People:

CYRUS VANCE, ESQ.
Assistant District Attorney
New York County
BY: ALEX GUITERMAN, ESQ.
Assistant District Attorney

For the Defendant:

THEODORE HERLICH, ESQ.
For Defendant Alvarez

PENELOPE MESSINA, RPR
Senior Court Reporter

*Penelope Messina, RPR
Senior Court Reporter*

FILED

APR 18 2018

SUP COURT APP. DIV.
FIRST DEPT.

1 THE COURT CLERK: Calendar No. 2, indictment 5347
2 of 2015, Raul Alvarez. Counsel, your appearance for the
3 record, please.

4 MS. GUITERMAN: For the People Alex Guiterman.
5 Good morning everyone.

6 MR. HERLICH: Theodore Herlich, H-E-R-L-I-C-H, for
7 Mr. Alvarez.

8 THE COURT: Good morning. There has been a
9 Probation report generated. Have both parties had an
10 opportunity to review the report?

11 MR. HERLICH: I have, your Honor.

12 MS. GUITERMAN: Yes, your Honor.

13 THE COURT: Okay. Is your client ready to
14 proceed?

15 MR. HERLICH: Yes.

16 THE COURT: Okay, we will start with the Predicate
17 Felony Statement. I understand the new one has been filed
18 and served?

19 MS. GUITERMAN: Correct, your Honor.

20 THE COURT: And, Mr. Herlich, you received a
21 copy?

22 MR. HERLICH: Yes, I have.

23 THE COURT: Okay.

24 THE COURT CLERK: Raul Alvarez, a statement has
25 been filed by the District Attorney's Office alleging that

1 you have been previously convicted of a felony. The
2 statement sets forth the date and place of each felony
3 conviction.

4 Have you been given a copy of the statement?

5 THE DEFENDANT: Yeah, my attorney just handed it
6 to me.

7 THE COURT CLERK: The statement reads as follows:

8 "On December 21, 1992, in Supreme Court of New York, in the
9 County of Kings, the defendant was convicted of the felony
10 of attempted robbery in the first degree, Penal Law 160.15,
11 sub one. Sentence upon that conviction was imposed on
12 February 3rd, 1993.

13 "The ten year period referred to in Penal Law
14 70.06 sub 1, sub B, sub V is extended by the defendant's
15 incarceration during the following time periods at the
16 stated location.

17 "From February 3, 1993, through February 27, 1993,
18 the defendant was incarcerated at Robert N. Davoren Complex,
19 RNDC previously ARD under the purview of the New York City
20 Department of Corrections.

21 "From February 27, 1993, through October 2, 2003,
22 the defendant was incarcerated at various facilities under
23 the purview of the New York City Department of Corrections.

24 "From February 15, 2005, to March 25, 2005, the
25 defendant was incarcerated at Anna M. Kross Center, AMKC,

1 "under the purview of the New York City Department of
2 Corrections.

3 "From August 23, 2005, through May 5, 2006, the
4 defendant was incarcerated at George Motchan Detention
5 Center, GMDC under the purview of the New York City
6 Department of Corrections.

7 "From May 5, 2006, through August 23, 2007, the
8 defendant was incarcerated at various facilities under the
9 purview of the New York State Department of Corrections.

10 "From May 13, 2009, through October 7, 2009, the
11 defendant was incarcerated at Anna M. Kross Center, AMKC,
12 under the purview of the New York City Department of
13 Corrections.

14 "From October 7, 2009, through September 10, 2010,
15 the defendant was incarcerated at various facilities under
16 the purview of the New York State Department of Corrections.

17 "From June 14, 2012, through February 14, 2013,
18 the defendant was incarcerated at Anna M. Kross Center,
19 AMKC, under the purview of the New York City Department of
20 Corrections.

21 "From February 12, 2015, through
22 February 20, 2015, the defendant was incarcerated at Anna M.
23 Kross Center, AMKC, under the purview of the New York City
24 Department of Corrections.

25 "May 10, 2015, to May 15, 2015, the defendant was

1 | incarcerated at Anna M. Kross Center, AMKC, under the
2 | purview of the New York City Department of Corrections."

3 | If you wish to dispute any charges made in that
4 | statement, you must specify the particular charge. If you
5 | do not, those charges will be deemed admitted by you.

6 | Now, Raul Alvarez, do you wish to dispute any
7 | charges made in that statement?

8 | THE DEFENDANT: I just don't recall the exact
9 | dates.

10 | (Defense Attorney Herlich conferred with
11 | defendant.)

12 | MR. HERLICH: Judge, do you want to begin -- does
13 | he admit to the prior felony conviction? You want to get
14 | through that first before we address any time issue?

15 | THE COURT: All right, that's fine. I don't have
16 | the felony statement before me so --

17 | (Hanging.)

18 | THE COURT: So, Mr. Alvarez --

19 | THE DEFENDANT: Yes, sir.

20 | THE COURT: First with regard to the predicate
21 | felony that's alleged, do you admit that on December 21st of
22 | 1992, you were convicted of the felony of attempted robbery
23 | in the first degree and were sentenced on February 3rd of
24 | 1993?

25 | Do you admit that.

1 THE DEFENDANT: Yes, sir.

2 THE COURT: Okay. Now with regard to the periods
3 of time that Angelina just went over, in order for you to
4 dispute, you need to be particular as to which one you are
5 disputing; and then the People will have to prove it.

6 If you are not specific, then I am going to accept
7 this. So talk to your attorney --

8 MR. HERLICH: Just give me one second.

9 THE COURT: -- and you tell me.

10 MR. HERLICH: Okay.

11 (Defense Attorney Herlich conferred with
12 defendant.)

13 MR. HERLICH: Judge, I reviewed the records with
14 my client, and I'll state for the record the following and,
15 of course, you are free to ask my client questions about
16 this.

17 My client having reviewed the records from state
18 prison he does acknowledge that he was paroled on
19 October 2, 2003, on that attempt rob one conviction; and he
20 was -- his parole was revoked; and he was received into
21 state custody again May 5th of 2006, and he was re-paroled
22 August 23, 2007.

23 His parole was again revoked and he was received
24 into state custody October 7th of 2009, and he was
25 re-paroled at the expiration of his sentence on

1 September 10, 2010, and according to my math that would
2 bring us to December 20, 2015, for the expiration of the
3 predicate clock, which is seven (7) days before the crime in
4 this case; however, he served a full year which is in
5 essence eight (8) months at Riker's Island on his contempt
6 second degree conviction; and he acknowledges that as well;
7 and that puts the ten-year clock into July of 2016;
8 therefore, establishing his predicate status as of the date
9 of the offense in this case, December 27, 2015.

10 My client will acknowledge everything I just
11 said.

12 THE COURT: Okay. So, Mr. Alvarez, just so I am
13 clear I heard from your attorney -- and I know he has gone
14 through it -- you've already admitted to the prior felony
15 conviction.

16 I guess my question then becomes are you
17 challenging any of the statements that are part of the
18 tolling portion of the Predicate Felony Statement? It
19 doesn't sound like you are, but I want to make sure for the
20 record. Are you?

21 THE DEFENDANT: No, I am not, Judge.

22 THE COURT: Do you wish to challenge the
23 constitutionality of anything that's in the Predicate Felony
24 Statement?

25 THE DEFENDANT: I don't understand.

1 (Defense Attorney Herlich conferred with the
2 defendant.)

3 MR. HERLICH: So my client did have an appeal that
4 was prosecuted on his behalf in that matter from 1992, and
5 he did not prevail on appeal; and he is not challenging the
6 constitutionality of that conviction.

7 THE COURT: Okay. Mr. Alvarez, is that correct?

8 THE DEFENDANT: Yes, sir.

9 THE COURT: Then at this point, I'm deeming the
10 defendant a second felony offender.

11 Is your client ready for sentence?

12 MR. HERLICH: Yes, your Honor.

13 THE COURT: Okay. Angelina.

14 THE COURT CLERK: Raul Alvarez, you are before the
15 Court for sentence following your conviction by trial to the
16 charge of assault in the third degree, under Count One;
17 Count Two, aggravated criminal contempt; Count Three,
18 aggravated criminal contempt; Count Four, criminal contempt
19 in the first degree; Count Five, criminal contempt in the
20 first degree; Count Six, criminal contempt in the first
21 degree; Count Seven, criminal contempt in the first degree;
22 Count Eight, criminal contempt in the first degree; and
23 Count Nine, criminal contempt in the first degree.

24 Before being sentenced the Court will allow you,
25 your attorney, and the ADA an opportunity to address the

1 Court with any matter relevant to the question of sentence.

2 For the People?

3 THE COURT: Do you want to bring in your victim?

4 MS. GUITERMAN: Sure, your Honor.

5 THE COURT: Okay.

6 (ADA Guiterman exited and reentered the courtroom.

7 (Ms. Evelyn Rivera entered the courtroom.)

8 THE COURT: Ms. Guiterman?

9 MS. GUITERMAN: I would like the People to do it
10 first before Ms. Rivera.

11 THE COURT: Whatever you like.

12 MS. GUITERMAN: Your Honor, it is the People's
13 position at this time we are asking for your Honor to
14 sentence the defendant to the maximum, which is two and a
15 third to seven years jail with a full final Order of
16 Protection.

17 We are asking your Honor to run that sentence
18 consecutive to his Brooklyn sentence, which was also two and
19 a third to seven years and that sentence was --

20 THE COURT: He is a predicate.

21 MR. HERLICH: That's three and a half to seven.

22 Ms. GUITERMAN: I am sorry. Three and a half to
23 seven. Thank you. Three and a half to seven and that
24 sentence was imposed in October.

25 When I say three and a half to seven that was the

1 Brooklyn sentence as well as the People's recommendation in
2 this case.

3 As your Honor is aware he was found not guilty of
4 the top charge of the indictment, the mandatory persistent,
5 which would have given him a minimum sentence of twelve to
6 life; so while of course the People respect the verdict that
7 was the jury's verdict, we do believe that the nature of
8 this crime and the defendant's long criminal history with
9 both this complainant as well as with other complainants
10 does warrant a consecutive sentence in this case.

11 THE COURT: Remind me again. The Brooklyn
12 conviction was for what and when?

13 MS. GUITERMAN: That was for commercial burglary
14 and that occurrence was I believe August. I believe August
15 of the previous year of 2015.

16 THE COURT: August of 2015?

17 MS. GUITERMAN: I believe and the trial occurred
18 in August of 2016.

19 THE COURT: Sentence?

20 MS. GUITERMAN: Sentence was imposed in October.

21 THE COURT: Which was what again?

22 MS. GUITERMAN: Which was three and a half to
23 seven years.

24 THE COURT: Okay.

25 MR. HERLICH: I think through the Molineaux during

1 pretrial discussions, your Honor, it was brought out by the
2 People it was, I believe, they were tools at a construction
3 site that was not open to the public.

4 THE COURT: I remember now.

5 MR. HERLICH: Yes.

6 THE COURT: Okay. I understand Ms. Rivera would
7 like to make a statement. Ms. Rivera, you may speak.

8 WOMAN: Your Honor, in all these years my life has
9 been -- I have been abused for all these years mentally and
10 physically. I can't even sleep. Sometime I cry. I am
11 depressed. I am on medication now.

12 I would like, your Honor, to give the most longer
13 time in prison to Mr. Alvarez; and if it's possible, you
14 could give me the Order of Protection; and I would like
15 Mr. Alvarez never have no more contact with me. Not even
16 from any other parties or his friends; and he has to
17 understand I don't want to talk. I don't want to be with
18 him. I don't want to be abused. He need to stay out from
19 me from his life. Thank you.

20 THE COURT: Thank you, Ms. Rivera.

21 Mr. Herlich?

22 MR. HERLICH: It is my understanding, your Honor
23 that every count that the defendant was convicted of I guess
24 could be characterized as inclusory, concurrent counts as
25 one event, and those counts would as a matter of law have to

1 run concurrently with one another; so I will address myself
2 to the D felony, the two counts under different theories of
3 aggravated criminal contempt where the sentencing range is
4 from two to four years in prison up to three and a half to
5 seven; and I would, of course, ask the Court to consider two
6 to four years, the minimum sentence on the aggravated
7 contempt count.

8 If the Court is not inclined to give the minimum,
9 and inclined to give the maximum sentence of three and a
10 half to seven, I would ask that, that maximum sentence run
11 concurrently with Kings County indictment 3590 of 2015, the
12 burglary in the third degree, based on the defendant's
13 conviction for stealing tools at a closed construction
14 site.

15 If the Court is inclined on the other hand to give
16 consecutive sentences to the Brooklyn indictment, I'd ask
17 the Court to consider something less than the maximum
18 sentence. Again to consider something in the range of two
19 to four, two and a half to five if it's going to be a
20 consecutive sentence.

21 It is my understanding that all the counts of
22 criminal contempt, first degree Class E felonies, the range
23 is one and a half to three up to two to four. They would
24 have to be in my understanding concurrent with the
25 sentencing on the aggravated contempt; and, of course, the

1 | misdemeanor conviction for assault in the third degree, the
2 | maximum of which is one year city time as a matter of law
3 | would merge with the sentences that involved state time; so
4 | my request is if you are inclined to give consecutive time
5 | that you not give the maximum sentence.

6 | Thank you.

7 | THE COURT: Thank you, Mr. Herlich.

8 | Mr. Alvarez, would you like to say anything before
9 | you are sentenced?

10 | THE DEFENDANT: Excuse me?

11 | THE COURT: Would you like to say anything before
12 | you are sentenced?

13 | THE DEFENDANT: Yes, sir. Your Honor, I would
14 | like to say I never assaulted Ms. Evelyn Rivera. I never
15 | threatened her. I never been a threat to Ms. Rivera. Never
16 | have been.

17 | You see how she got on the stand. Seventy percent
18 | (70%) she has been deceiving the district attorney since day
19 | one I have been arrested. She's got on the stand. Seventy
20 | percent of the things she say on that stand were not true.
21 | She said that she hasn't been with me since 2010. That
22 | wasn't true.

23 | She has been with me all these years. Every night
24 | she slept with me. I had no reason to hit her. I would not
25 | hit her. I care about this woman. She took good care of my

1 mother, but she got me looking like I am an animal. Like I
2 am a woman beater, and that's not true.

3 I did not assault this woman, sir. I did never
4 threaten her. She had two phones. Won for herself and one
5 she called me. The district attorney knows. She has been
6 deceiving the district attorney since I was locked up.

7 She had two phones. She was calling me every
8 single day. I am not guilty. I should never have been
9 found guilty of assault. I admitted that I did break the
10 Order of Protection; however, there was no violence. This
11 woman is bipolar. She is very jealous. She has insecurity
12 that she is dealing with.

13 Shes not the most beautiful woman in the world. I
14 could do better. That is the problem with this case, your
15 Honor.

16 THE COURT: Okay, Mr. Alvarez. Angie, ready?

17 Okay. Because Count 1A is the misdemeanor, I am
18 going to skip that count until the very end and start with
19 Count No. 2, aggravated criminal contempt.

20 First of all, Mr. Alvarez, I am going to honor
21 Ms. Rivera's request and issue a full and final Order of
22 Protection.

23 THE DEFENDANT: Yes, sir.

24 THE COURT: You are not to have any contact with
25 Evelyn Rivera. You are not to go to her home, school, or

1 place of business. You are not to call her on the phone,
2 text message her, email, or have any of your friends or
3 family try to speak to her for you. This order of
4 protection will go into effect and now as soon as your
5 sentence is complete.

6 Do you understand?

7 THE DEFENDANT: Yes, sir. I have not called her,
8 your Honor. I don't want nothing to do with her.

9 THE COURT: I understand.

10 THE DEFENDANT: I want nothing to do and I care
11 about her, but I cannot deal with her anymore.

12 THE COURT: All right.

13 With regard to Count Two, in addition I am
14 sentencing you in Count Two and Count Three to three and a
15 half (3 1/2) years to seven (7) years.

16 Count Four through Count Nine I am sentencing you
17 to two (2) to four (4) years on each.

18 Count 1A, I am sentencing you to one (1) year in
19 prison.

20 All of these sentences will run concurrent with
21 each other, and they will also run concurrent with the
22 Brooklyn matter.

23 In addition if DNA needs to be taken, you will
24 have to do that; and, counsel, do you want me to defer the
25 mandatory surcharge or --

1 MR. HERLICH: That was the defendant's request
2 that I forgot to mention; that he was asking if he could pay
3 it once he is released from prison.

4 THE COURT: Mandatory surcharge could be deferred.
5 Good luck.

6 MR. HERLICH: The only other request he said his
7 father is coming up from Puerto Rico in a month. Would the
8 Court consider executing stay of sentence for one month if
9 you are able to do so? That would be my request.

10 THE COURT: People, do you have an objection to
11 that? He has been sentenced but he wants to stay the
12 execution one month, so he would stay here for one month
13 before they send him upstate so he could see his father.

14 MS. GUITERMAN: People don't take a position, your
15 Honor.

16 THE COURT: So I will stay execution for August --
17 I am sorry, April 24th. 4/24, execution stayed. Good luck,
18 Mr. Alvarez.

19 MR. HERLICH: Thank you, your Honor.

20 * * *

21 (Sentence was recalled and continued as follows:)

22 MR. HERLICH: Theodore Herlich for Mr. Alvarez.

23 It was just brought to my attention, your Honor --
24 I managed to forget it from yesterday or the day before --
25 this defendant was brought here today specifically from a

1 state correctional facility. He is not even in city
2 custody, and he is going back upstate; so there is no need
3 to delay the execution of sentence.

4 THE COURT: So you are withdrawing your
5 application?

6 MR. HERLICH: Yes, I am.

7 THE COURT: And you are waiving your client's
8 appearance for this?

9 MR. HERLICH: Yes, I am.

10 THE COURT: All right, so the execution and stay
11 of sentence will be withdrawn.

12 MR. HERLICH: Thank you.

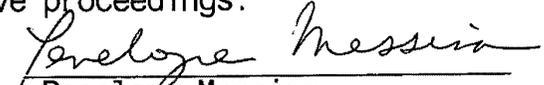
13 THE COURT CLERK: Sentence is imposed?

14 THE COURT: Sentence is imposed.

15 (Case was concluded.)

16 oOo

17
18 I hereby certify the foregoing to be a true and
19 accurate transcript of the original stenographic record
20 in the above proceedings.

21 
22 Penelope Messina
23 Senior Court Reporter
24
25

Penelope Messina, RPR
Senior Court Reporter

UNIFORM SENTENCE & COMMITMENT

UCS-854(8/2011)

STATE OF NEW YORK
SUPREME COURT, COUNTY OF NEW YORK
PRESENT: HON HONG, G.

Court Part: 63
Court Reporter: P.MESSINA
Superior Ct. Case #: 05347-2015



The People of the State of New York
- vs -
RAUL O ALVAREZ
Defendant
Male 01/07/1966 04845090P 67458941K
Sex DOB NYSID #: Criminal Justice Tracking #

Accusatory Instrument Charge(s) Count # Law/Section & Subdivision
1 CRMCTPT1 7 PL 215.51(B6)
2 AGGCC 2 PL 215.52(01)
3 CRMCTPT1 8 PL 215.51(0C)
4 CRMCTPT1 4 PL 215.51(B5)

Date(s) of Offense: 12/27/2015 To

THE ABOVE NAMED DEFENDANT HAVING BEEN CONVICTED BY [] PLEA OR [x] VERDICT, THE MOST SERIOUS OFFENSE BEING A [x] FELONY OR [] MISDEMEANOR OR [] VIOLATION, IS HEREBY SENTENCED TO:

Table with columns: Crime, Count #, Law/Section & Subdivision, SMF, Hate or Terror, Minimum Period, Maximum Term, Definite / Determinate **, Post-Release Supervision, CJTN. Rows include ASLT3, AGGCC, and CRMCTPT1.

* * NOTE: For each DETERMINATE SENTENCE imposed, a corresponding period of POST-RELEASE SUPERVISION MUST be indicated [PL § 70.45].

Counts See Remarks shall run CONCURRENTLY with each other [] Count(s) shall run CONSECUTIVELY to count(s)
Sentence imposed herein shall run CONCURRENTLY with See Remarks and/or CONSECUTIVELY to
Sentence imposed herein shall include a CONSECUTIVE term of [] PROBATION OR [] CONDITIONAL DISCHARGE.
Conviction includes: WEAPON TYPE: and/or DRUG TYPE:
Charged as a JUVENILE OFFENDER- age at time crime committed: years Court certified the Defendant a SEX OFFENDER [Cor. L § 168-d]
Adjudicated a YOUTHFUL OFFENDER [CPL § 720.20] CASAT ordered [PL § 60.04(6)]
Execute as a sentence of PAROLE SUPERVISION [CPL § 410.91] SHOCK INCARCERATION ordered [PL § 60.04(7)]
Re-sentenced as a PROBATION VIOLATOR [CPL § 410.70]

As a: [x] Second [] Second Violent [] Second Drug [] Second Drug w/prior VFO [] Predicate Sex Offender FELONY OFFENDER
[] Predicate Sex Offender w/prior VFO [] Second Child Sexual Assault [] Persistent [] Persistent Violent

Paid Not Paid Deferred (If deferred, court must file written order [CPL §420.40(5)]) Paid Not Paid Deferred (If deferred, court must file written order [CPL §420.40(5)])
Mandatory Surcharge \$300.00 Crime Victim Assistance Fee \$25.00
Fine \$ Restitution \$
DNA Fee \$50.00 Sex Offender Registration Fee \$
DWL/Other \$ Supplemental Sex Off. Victim Fee \$

THE SAID DEFENDANT BE AND HEREBY IS COMMITTED TO THE CUSTODY OF THE:
[x] NYS Department of Correctional Services (NYDOCS) until released in accordance with the law, and being a person sixteen (16) years or older not presently in the custody of the NYSDOCS. (New York City Department of Corrections) is directed to deliver the defendant to the custody of NYSDOCS as provided in 7 NYCRR Part 103.
[] NYS Department of Correctional Services (NYDOCS) until released in accordance with the law, and being a person sixteen (16) years or older presently in the custody of NYSDOCS, defendant shall remain in the custody of the NYSDOCS.
[] NYS Office of Children and Family Services in accordance with the law, being a person less than sixteen (16) years of age at the time the crime was committed.
[] County Jail/Correctional Facility

TO BE HELD UNTIL THE JUDGMENT OF THIS COURT IS SATISFIED.

REMARKS: Sentence imposed herein shall run CONCURRENTLY with WITH 3590-2015 KINGS COUNTY. Counts ALL COUNTS CONCURRENT shall run CONCURRENTLY with each other.

Commitment, Order of Protection & Pre-Sentence Report received by Correctional Authority as Indicated:
Official Name
Shield No.

Pre-Sentence Investigation Report Attached: [x] Yes [] No
Order of Protection Issued: [] Yes [x] No
Order of Protection Attached: [x] Yes [] No
03/24/2017 MILTON A TINGLING by: Date Clerk of the Court

Amended Commitment: Original Sentence Date:
Signature: A. PEREZ SENIOR COURT CLERK
Title



UNIFORM SENTENCE & COMMITMENT
Overflow Sheet

People of the State of New York
vs.
RAULO ALVAREZ

Sex: Male
DOB: 01/07/1966
NYSID: 04845090P
CJTN: 67458941K
Date of Offense: 12/27/2015

To: _____

The above named defendant having been charged by way of indictment or SCI with:

Indictment/SCI Charges:	Count #	Law Section & Subdivision:	Indictment/SCI Charges:	Count #	Law Section & Subdivision:
ASLT2	1	PL 120.05(02)			
ASLT3	1	PL 120.00(02)			
CRMCTPT1	9	PL 215.51(0C)			
CRMCTPT1	6	PL 215.51(B6)			
CRMCTPT1	5	PL 215.51(B5)			
AGGCC	3	PL 215.52(01)			

The above named defendant having been convicted of the most serious offense being a

Felony Misdemeanor Violation by Plea Verdict for the crimes of:

Crime	Count #	Law/Section & Subdivision	SMF/Hate/Terrorism	Min. Term	Max. Term	Definite	Post Release Supervision	CJTN
CRMCTPT1	6	PL 215.51(B6)		2 Y	4 Y			
CRMCTPT1	7	PL 215.51(B6)		2 Y	4 Y			
CRMCTPT1	8	PL 215.51(0C)		2 Y	4 Y			
CRMCTPT1	9	PL 215.51(0C)		2 Y	4 Y			

03/24/2017 MILTON A TINGLING
Date Clerk of the Court

by: _____
Signature

SENIOR COURT CLERK
Title

APPENDIX F

1 So obviously it's a real different story between
2 what the defendant says and what the complainant says.

3 Defendant obviously testified he never struck her,
4 he never hit her. And, you know, his testimony was also
5 challenged based on his grand jury testimony. He said in
6 the grand jury that he came downtown by way of
7 Second Avenue. But when he met in the D.A.'s Office
8 immediately after his arrest, he said he came downtown that
9 evening by FDR Drive and a number of other things about how
10 he got there.

11 I'm not going to harp on that, but you obviously
12 will utilize those inconsistencies in assessing the
13 defendant's credibility.

14 By the way, the Judge will instruct you on a
15 number of tools you can use to assess credibility.

16 And while I'm on that point, you've heard that the
17 defendant has a misdemeanor conviction. He also has a
18 burglary conviction that you heard about, and those were --
19 the Judge is going to instruct you, but they are admitted as
20 tools to utilize in assessing a witness's credibility.

21 If someone has a conviction for a crime, it
22 doesn't make them unworthy of belief. It's just something
23 you can consider in assessing their credibility. It cannot
24 be used for propensity purposes, oh, this guy commits
25 crimes, so he must have committed this crime. It's

A. L.

1 prohibited. The Judge will give you the instruction.

2 So the defendant's testimony is that he was under
3 his camper installing the starter. And less there be any
4 confusion, whenever he had to start the camper that day, he
5 had to go under the camper, hammer something, the starter or
6 the flywheel, whatever he had to hammer to get it to turn
7 over. He had to do that to start the car to drive uptown to
8 see his brother. And when his brother who said a mechanic
9 would come by and the mechanic never came by, then he had to
10 hammer the starter again to start it up after he purchased a
11 starter; and he drove downtown back to Rivington and
12 Attorney Street, and he installed the starter.

13 It is his testimony that Evelyn Rivera walked into
14 his camper because that's where they meet.

15 In fact, Ms. Rivera testified that during her
16 sexual liaisons on the lower east side, they had met at
17 Rivington and Pitt Street and Rivington and Attorney Street
18 on prior occasions.

19 So it's no -- I don't think it is a coincidence
20 that they met each other again this evening at the location
21 of his camper and also the location of his blue van which
22 was at Rivington and Attorney Street. This is like one of
23 their spots for meeting.

24 Now, having said that, I want to look at the
25 testimony of the complainant. You know what she said. She

A. L.

1 said that -- she says Alvarez wasn't under the van, under
2 the camper fixing it. He grabs her and pushes her into the
3 van, and he is grabbing her, punching her in the arms, and
4 ultimately takes a bottle -- and from the ways he described
5 it, it's by some undercut movement. From an upward motion
6 with the bottle, he chips her tooth.

7 Alvarez says he struggled with her and that he
8 denies hitting her, but she obviously has injuries. She has
9 a chipped tooth. She has bruises to her legs. She has two
10 marks on her fingers that you've already seen that she says
11 were bite marks.

12 Mr. Alvarez' testimony doesn't account for those
13 injuries, although one presumably could have bruises on
14 their legs from being in a struggle.

15 Her testimony was that Alvarez was kicking her.
16 And while Alvarez speculated that when she tried to bite me
17 because I was preventing her from popping my chain again,
18 she tried to bite him through his clothing, he received no
19 injury, but he speculated that perhaps that's how she
20 chipped her tooth. But, in my humble opinion, his testimony
21 doesn't account for the complainant's injuries.

22 So I asked the complainant because she
23 testified -- I'm sorry, she told the 911 caller that she was
24 punched in the mouth, I asked her something about punching.
25 And I said -- I asked her on page 184. She's describing the

A. L.

1 latter part of the fight in the camper, and she says to
2 Alvarez in the camper beginning at line 9:

3 "I tell it to him you broke my teeth. I said
4 leave me alone. And I remember he start to kicking me all
5 of my legs, all of my body. I feel so much pain. And
6 then -- I don't even know how I left from that door. It had
7 to be God. And I punch him and run."

8 And she goes on: "And it was somebody call the
9 cops."

10 The point is she said during her testimony - it
11 was actually the direct testimony while she was being
12 questioned by the prosecutor: "I punch him and run."

13 So she admitted that she did punch Alvarez.

14 So I wanted to pursue that somewhat on
15 cross-examination, and this is the response I got from her
16 from page 235:

17 "QUESTION: Did you testify under oath this
18 morning --"

19 I'm sorry, let me go back to 234.

20 "QUESTION: --" on page 234, line 17.

21 "Now, you testified that you punched Mr. Alvarez,
22 I don't know how many times, during the course of this
23 altercation. How many times did you punch Mr. Alvarez?"

24 "ANSWER: I never punched Mr. Alvarez.

25 "QUESTION: So it's your testimony now that

A. L.

1 that --" I'm sorry, I'm questioning her on cross in the
2 afternoon. So her direct was in the morning.

3 "QUESTION: So it's your testimony now that this
4 morning you never said you punched Mr. Alvarez? Whether
5 it's in self-defense or not is not the question. Did you
6 strike Mr. Alvarez at all? For clarity, did you punch
7 Mr. Alvarez?

8 "ANSWER: No, never.

9 "Did you testify under oath this morning that you
10 punched Mr. Alvarez during this altercation?

11 "ANSWER: No."

12 Okay, so did she forget what she said in the
13 morning, or does she again want to embellish her testimony
14 in a way that makes her only a victim and Alvarez only the
15 worse perpetrator? I must ask that you consider that line
16 of questioning in your assessment of her credibility.

17 Let me just go through the testimony of one more
18 witness, Mr. McKinley, who -- he has no skin in the game.
19 He has no motive to embellish. He's not a party to this
20 conflict.

21 He said -- I'm not at any page yet.

22 McKinley said first he thought it was a party. I
23 guess, like he said, the lower east side is wild. He said
24 something to that effect. He thought it was a party, and
25 then he saw a gentleman who was pulling out his phone

A. L.

1 apparently, took his phone out ultimately to call 911, who
2 told him it's not a party, it's a fight, it's some kind of
3 an altercation.

4 He, Mr. McKinley, then walked very close to the
5 camper, looked in through the driver's side window, and he
6 saw two silhouettes. He couldn't tell who was male and who
7 was female. And they -- the struggle had come into the
8 front part of the camper briefly where the driver's seat is
9 and the passenger seat, and then the two silhouettes went
10 back into the camper, and he heard banging like people
11 being -- banging into the walls of the camper. He said
12 something to that effect.

13 And he said that the complaining witness,
14 Ms. Rivera, said something like Ayudame in Spanish which
15 means help me after she exited the camper.

16 And the question on page 293:

17 "Continue after that, after she said Ayudame.

18 "ANSWER: 'He hit me, he punch me.' And she was
19 running towards me gesturing towards her face and mouth.
20 And she was upset about her teeth. She was saying, 'My
21 teeth, my teeth.'"

22 So again, 'He hit me, he punch me' as she gestures
23 to her mouth. She didn't say anything about a bottle.

24 Question on page 293.

25 "Did you see any injuries on this woman?"

A. L.

1 "ANSWER: She had a chipped tooth, a small chip on
2 her front teeth that she was very upset about."

3 Then on cross-examination I asked him a couple of
4 questions. On page 304 at the bottom:

5 "QUESTION: And I believe you testified she
6 gestured toward her teeth, and she said the guy punched me?"

7 "ANSWER: Yes.

8 "QUESTION: And she said -- did she say he broke
9 my teeth, he punched me? It was dark, and at that point you
10 saw a chipped tooth; is that fair to say?

11 "ANSWER: That's fair to say, yes.

12 "QUESTION: Isn't it also true, Mr. McKinley, that
13 she never told you that she was hit in the face in her teeth
14 with a bottle? Is that fair to say?

15 "ANSWER: She never mentioned a bottle."

16 Then on redirect by the prosecution at the bottom
17 of 305:

18 "QUESTION: And on cross-examination --" again,
19 Mr. McKinley is being crossed -- is being examined "-- you
20 were asked a few questions about what this woman told you
21 regarding the hitting and punching. Sitting here today, do
22 you remember her exact words to you?

23 "ANSWER: Exact words, I couldn't say, but I know
24 that she was saying to me he punched me, hit me, and was
25 concerned about her teeth. She was very upset.

A. L.

1 "QUESTION: You just said punched and hit. You
2 remember both of those phrases?

3 "I remember he -- punched for sure. They're
4 interchangeable words for sure."

5 And finally one last question by me.

6 "QUESTION: Mr. McKinley, didn't she say to you he
7 punched me in the mouth when she was indicating that her
8 tooth was chipped?

9 "ANSWER: I believe so. Yes."

10 And last question by the prosecutor:

11 Question on 307.

12 "One point of clarification, Mr. McKinley; do you
13 remember whether she said he punched me in the mouth, or he
14 punched me?

15 "ANSWER: As I remember, she was indicating this
16 injury to her mouth, and saying he punched me. That's how I
17 remember it."

18 So in the indictment you're going to consider a
19 number of charges, and I'll just briefly go through this.

20 There's the Assault in the Second Degree. You
21 will also have an opportunity to consider Assault in the
22 Third Degree, and then a whole bunch of contempt charges.

23 The contempt charges come in pairs because there
24 were two orders of protection in existence at the time of
25 December 27, 2015.

A. L.

1 At the time of that event, since there were two
2 orders of protection, this one act or event would constitute
3 a violation of both orders. So that's why they're in pairs.

4 So let me talk briefly about them first. There's
5 aggravated criminal contempt.

6 Again, the Judge is going to instruct you - and
7 that's where you get the law from - but that deals with the
8 outstanding orders of protection being in existence and the
9 defendant causing physical injury to the complainant.

10 The next two sets of Criminal Contempt in the
11 First Degree deal with there being physical contact between
12 the parties when there's an outstanding order of protection.

13 The next two pairs deal with there being threats
14 or menacing of the complainant while the orders of
15 protection were outstanding.

16 And the last two counts just deal with simply
17 violating the court order of protection without any --
18 without an additional requirement of physical injury,
19 physical contact or any type of threatening or menacing
20 behavior toward the complainant.

21 I guess as you can get my drift, the very, very
22 important question that you'll have to resolve is assault in
23 the second degree or assault in the third degree.

24 Assault in the second degree again will come from
25 the Judge, but both charges of assault require physical

A. L.

1 injury which, you'll hear, is either substantial pain or
2 impairment of physical condition.

3 Whether the People prove impairment of physical
4 condition, it's almost beside the point. I submit they did
5 not. There's no testimony that she missed work as a result
6 of this after she went to the dentist, but I concede that
7 she did testify about what the law would consider
8 substantial pain because she took Tylenol for a month and
9 put ice packs on her face or legs for an extended period of
10 time. That, I submit to you, would make out substantial
11 pain.

12 So I'm conceding the point that physical injury
13 was inflicted on Ms. Rivera.

14 Now, assault two, they both require physical
15 injury. The major difference between these counts was
16 physical injury inflicted by a dangerous instrument, here a
17 bottle, or was it inflicted by Mr. Alvarez punching her in
18 the face causing her to have the chipped tooth?

19 And in the event that you -- look, it would be
20 easy. If you accept every word that came out of the
21 complainant's mouth, he's guilty of every charge.

22 If you accept every word that came out of the
23 defendant's mouth, he's guilty of only the last two counts
24 of contempt because he was in the presence of Ms. Rivera at
25 the time of this incident.

A. L.

1 I submit to you that based on everything I've
2 said, this defendant - if you take the view of the evidence
3 I'm submitting to you - is, at most, with regard to assault,
4 guilty of assault in the third degree.

5 Again, the People must prove their case beyond a
6 reasonable doubt. I'm going to finally stop talking and
7 summarize this in this way.

8 You heard Mr. McKinley say she told me she was
9 punched in the mouth. She was gesturing to her teeth saying
10 he punched me.

11 The 911 call itself has the 911 caller repeating
12 the information he's getting from Ms. Rivera. He punched
13 me. He broke my teeth. He knocked my teeth out. He
14 punched me in the mouth, is on the 911 call.

15 You have Police Officer Ortiz admitting that she
16 told me that he hit her in the face and chipped her tooth
17 and never mentioned a bottle.

18 So I submit to you that in light of all of that
19 evidence, that this injury was not inflicted by a bottle.
20 The People have failed to prove the elements of assault in
21 the second degree beyond a reasonable doubt, but I concede
22 that they did prove assault in the third degree beyond a
23 reasonable doubt.

24 And if you find that to be the case, that physical
25 injury was caused by Mr. Alvarez, then it would follow that

A. L.

1 he's guilty of the remaining contempt charges which would
2 make your job somewhat easier. But, again, my central
3 thesis to you is that there is -- there is truly a
4 reasonable doubt that the chipped tooth was caused by a
5 bottle.

6 And again, as I indicated, the police never even
7 bothered to look for it. There was no bottle recovered,
8 introduced into evidence in this case, along with the words
9 that came out of the complainant's own mouth at the time of
10 the incident where she never mentioned the bottle and only
11 indicated he punched me in the mouth.

12 For that reason, I'm asking you to return a not
13 guilty verdict on assault in the second degree and return a
14 guilty verdict of assault in the third degree.

15 Thank you.

16 THE COURT: All right, Ladies and Gentlemen, does
17 anybody need a bathroom break before we -- okay.

18 So we'll take a 5-minute break, and then we'll
19 begin the People's summation.

20 COURT OFFICER: All rise.

21 (Whereupon, the members of the jury leave the
22 courtroom)

23 THE COURT: Okay, 5 minutes.

24 (Recess)

25 THE COURT: Bring in the jury.

A. L.

APPENDIX G

1 THE COURT: Yes?

2 MR. HERLICH: I would ask for the lesser
3 included offense of Assault in the Third Degree. I do
4 believe there is a reasonable view of the evidence that the
5 injuries sustained by the complainant were caused by
6 defendant punching her in the mouth. The 9-1-1 call,
7 itself, has a male saying he punched her in the mouth. The
8 civilian witness, Mr. McKinley, testified that when she
9 came to him she was gesturing towards her mouth, and saying
10 he punched me, he knocked out my teeth, he punched me. And
11 even Detective Ortiz indicated, at the scene, that she
12 indicated that she was struck in the mouth, and she never
13 mentioned anything about a bottle. So, I think there is a
14 reasonable view of the evidence that would justify the
15 lesser included offense of Assault in the Third Degree.

16 THE COURT: People?

17 MS. GUITERMAN: Your Honor, I would object to
18 that for two primary reasons; one is that understanding
19 that the people have the burden in this case, when the
20 defendant testified, he testified he did not touch her at
21 all; that he never assaulted her; he never hit her; he
22 never punched her. He denied hitting her, entirely. The
23 second is that, as Your Honor is aware, the other counts of
24 contempt in this case, involve physical injury.

25 THE COURT: Right.

1 MS. GUITERMAN: So, I don't know how that
2 would work, in a way that would not be confusing to the
3 jury, in terms of which counts apply to which physical
4 injury.

5 THE COURT: That's a separate issue, which I
6 want to address after I hear from both of you on what your
7 charges are.

8 But I do agree with Mr. Herlich, that I think
9 Assault 3 is made out.

10 I mean, there is evidence, on both sides. The
11 complainant testified it was a bottle. But there was also
12 a lot of testimony that there was no bottle. And there's
13 no testimony that a bottle was recovered. So, I will add
14 it as a lesser included.

15 However, it will be distinguished in the verdict
16 sheet as 1 A. If they find the defendant not guilty as to
17 count one, then they'll consider 1 A; otherwise, they are
18 to go from 1 directly to 2, if they find him guilty.

19 MR. HERLICH: Sure.

20 THE COURT: So, I will allow that.

21 Anything else, from the defense?

22 MR. HERLICH: No.

23 THE COURT: From the People?

24 MS. GUITERMAN: Nothing, Your Honor.

25 THE COURT: Okay. Very good.

APPENDIX H

1 COURT CLERK: Welcome back, jurors.

2 Please be seated.

3 Do both parties stipulate the jurors are present
4 and properly seated?

5 MS. GUITERMAN: Yes.

6 MR. HERLICH: Yes.

7 THE COURT: Mr. Herlich, does defense wish to
8 put on a case?

9 MR. HERLICH: Yes, Your Honor, the defense
10 will call Raul Alvarez.

11 THE COURT: Okay.

12 Mr. Alvarez.

13 COURT OFFICER: You can step up.

14 Follow me.

15 Remain standing. Raise your right hand. Face the
16 clerk.

17 COURT CLERK: Do you swear, or affirm, the
18 testimony you are about to give is the truth, the whole
19 truth, and nothing but the truth?

20 THE DEFENDANT: Yes, ma'am.

21 COURT CLERK: Thank you.

22 R A U L A L V A R E Z, having been first duly sworn, was
23 examined and testified as follows:

24 COURT OFFICER: For the record, state your
25 name. Spell your last name.

1 THE DEFENDANT: Raul Alvarez. Last name,
2 A-L-V-A-R-E-Z.

3 COURT OFFICER: County of residence, which you
4 live in.

5 THE DEFENDANT: Brooklyn, Kings County.

6 THE COURT: Okay.

7 Mr. Alvarez, I am going to remind you, we don't
8 have any mic's in the room; keep your voice up, so all the
9 jurors can hear.

10 THE DEFENDANT: Yes, sir.

11 THE COURT: Mr. Herlich, you may inquire.

12 MR. HERLICH: Thank you.

13 DIRECT EXAMINATION

14 BY MR. HERLICH:

15 Q. Mr. Alvarez, do you know someone named Evelyn
16 Rivera?

17 A. Yes, sir.

18 Q. And tell us how you met her?

19 A. In 2003 I met her; she was my mother's home
20 attendant; she took good care of my of mother, before my mother
21 passed away of diabetes.

22 Q. Where was your mom living, at this time that Ms.
23 Rivera was her home attendant?

24 A. 1170 Hancock Street, Brocklyn, New York.

25 Q. What section of Brooklyn is that?

1 A. That's Bushwick.

2 Q. And in 2003, were you living at home with your
3 mother, or were you living somewhere else?

4 A. I was renting from my family, yes.

5 Q. And tell us what happened in this relationship; did
6 you become lovers, or sexually involved with one another, in
7 2003?

8 A. Yes, sir.

9 Q. And how would you characterize the relationship, at
10 that time?

11 A. Well, she was a nice in the beginning. Don't get me
12 wrong, she is a good woman; she responsible; she is very
13 caring; she has good credit; she has two jobs; she doesn't use
14 drugs; she is a very good woman. But she is, like, bipolar;
15 she snaps for no reason at all. Sometimes we together, she
16 just starts crying for no reason at all, and gets violent.

17 Q. Let me ask you about the sexual relationship. When
18 it began in 2003, how often did you and Ms. Rivera have sex?

19 A. Every day. I have to have sex with her twice a day.
20 At night, we sleep together every night. At night I have to
21 have sex with her, and before she leaves to work, I have to
22 have sex with her again.

23 Q. And whose demands is that?

24 A. Her's.

25 Q. And where did this take place, in your van -- Let's

1 back up. Did you own a van, or a camper, at that time?

2 A. Yes, sir.

3 Q. What did you -- What kind of vehicle, or vehicles,
4 did you have?

5 A. A Chevy Van, and a Chevy camper.

6 Q. Hold on. Let me finish the question.

7 What vehicles did you have -- did you own, in 2003?

8 A. Same vehicle. The Chevy Van.

9 Q. And --

10 A. And I didn't have the camper then. I bought the
11 camper last year.

12 Q. So --

13 A. This was going on where I was living; me and Evelyn
14 would have sex in my room.

15 Q. And then, let's fast forward to approximately 2010;
16 by then, had the relationship stopped?

17 A. That's when my mother passed away. And in a way,
18 the relationship got stronger, when my mother passed away. But
19 I noticed she got more controlling. She was acting like she
20 was my mother, at times. And I had to go to sleep when she
21 would go to sleep. She didn't want me to smoke in the car.
22 She was trying to control everything I do, you know.

23 Q. Did she express to you on the day -- the very day of
24 your mom's funeral, that she didn't want to have a sexual
25 relationship with you, just wanted to be friends?

- 1 A. No, sir.
- 2 Q. And --
- 3 A. That's not true.
- 4 Q. And did this sexual relationship continue from 2010
5 until December 27 of 2015?
- 6 A. Yes.
- 7 Q. And --
- 8 A. From 2013, we went to Puerto Rico. 2014, Summer, we
9 went on a boat cruise --
- 10 Q. Hold on a minute.
11 You said you went to Puerto Rico in 2014?
- 12 A. 2013.
- 13 Q. '13.
- 14 Was that the cruise that Ms. Rivera testified about?
- 15 A. No. That's a separate incident.
- 16 Q. So in 2013, how did you get to Puerto Rico?
- 17 A. She paid for the tickets, through Jet Blue.
- 18 Q. And how long did you stay in Puerto Rico?
- 19 A. About a week.
- 20 Q. And do you remember what month, in 2013, that was?
- 21 A. I don't remember the exact month. I know it was
22 summertime.
- 23 Q. And the cruise was in 2014?
- 24 A. 2014 we went on a boat cruise; we caught the boat in
25 Ft. Lauderdale, and went to Bahamas, Saint Thomas, then we went

1 to Puerto Rico. And from there, we went to Santo Domingo.

2 Q. And during both of those trips to Puerto Rico, was
3 -- did you have a nice time? Were there problems?

4 A. Yeah, we had a nice time. She told me, I want you
5 to go with me because this is an experience you never going to
6 forget. And it's true, it was a beautiful experience.

7 Q. And did you have occasion to see a boxing match,
8 with Ms. Rivera, in Brooklyn?

9 A. We go to all the fights. I go to the gym on Myrtle,
10 and Wykoff, I go to the gym.

11 THE COURT: Myrtle.

12 A. Myrtle Avenue and Wykoff Streets.

13 And downstairs from the gym, they have like a social
14 club, where you could pay and watch the fights on a big screen
15 TV's.

16 Q. Was that just on one occasion, where you watched the
17 fight with Ms. Rivera?

18 A. No; we go see all the professional fights there.
19 And the Mayweather fights, the Pacquiao fights.

20 Q. Do you know how many times you went to see fights
21 with Ms. Rivera?

22 A. More than five times.

23 Q. And with regard to seeing Marc Anthony at Barclay
24 Center, when was that?

25 A. We went to Marc Anthony concert February,

1 Valentine's Day 2014; she paid for the tickets. And February
2 2015, Valentine's Day, we also went to a Marc Anthony concert
3 in Barclays Center, in Brooklyn.

4 Q. You went twice?

5 A. Yes; two times. Valentine's Day.

6 Q. During this period, let's say from 2010 going
7 forward, were you working at the time?

8 A. 2010?

9 Q. Yes.

10 A. Yes.

11 Q. And what kind of work do you do?

12 A. I was working for a C T Industries, delivering
13 cleaning supplies.

14 Q. How long did you have that job?

15 A. About four or five months.

16 Q. And have you worked since that time?

17 A. Yeah; I got other jobs. I work for Metropolitan
18 Lumber. I work for New Generation. I work for Marino's Ices.
19 I have commercial driver's license; I'm a truck driver.

20 Q. Now, I want to ask you about some incidents, or
21 alleged incidents that took place prior to the case that we are
22 concerned with; prior to December 27 of 2015.

23 And I will begin with August 19 of 2011, around 7
24 o'clock in the morning, or so; what happened, if anything?

25 A. What --

1 Q. Let me direct your attention to 445 East 120th
2 Street, I believe 12th floor apartment. What, if anything,
3 happened, between you and Ms. Rivera, on that day?

4 A. Evelyn has two phones; she has one phone that she
5 calls me, and she has one personal phone, for herself. I
6 believe the District Attorney has the other phone number. It's
7 a 0911 number; the last four digits is 0911. That's the phone
8 that she uses to call me. She has two phones, Evelyn Rivera.
9 And that day she called me to go to her house. Went to her
10 house, and I knocked on her door; she came out; she told me her
11 son was coming upstairs, to wait in the hallway a minute. I
12 asked her for a cup of water; she gave me cup of water. I was
13 drinking water in the hallway, waiting, and then the cops came
14 up, and tell me I was harassing her, and they arrested me.

15 Q. Did you call her that morning, and threaten to kill
16 her?

17 A. Not at all. Why would I threaten her? I love this
18 woman. She took good care of my mother. I would never want to
19 hurt Evelyn.

20 Q. During the course that day, before you were
21 arrested, had you called her multiple times?

22 A. I don't remember if I did, to be honest with you. I
23 really don't remember.

24 Q. And you were arrested by her door, or was it --

25 A. I was arrested in the hallway, you know, on the

1 stairwell. She gave me a cup of water, and told me to wait.
2 And the next thing, the cops came -- the officers came, and
3 they asked me what was I doing there. I was explaining she was
4 my girlfriend, and she had just given me a cup of water and
5 told me to wait in the hallway. And I -- I don't know -- I
6 don't know what this is stemming from, I told them.

7 Q. Now, as a result of that arrest, you were issued an
8 order of protection; fair to say?

9 A. Yes, sir.

10 Q. Okay.

11 Now, I want to direct your attention to April and May
12 of 2012, while that order of protection stemming from the
13 August 19, 2011 arrest was still in existence. Did you
14 repeatedly call Evelyn Rivera, during April and May?

15 A. She calls me.

16 Q. You don't call her?

17 A. Yeah; we call each other.

18 Q. Okay.

19 A. We do.

20 Q. And ultimately, you were charged with a number of
21 offenses, and you, in fact, pled guilty to Criminal Contempt in
22 the Second Degree, based on the phone calls made during April
23 and May, that violated the order of protection in that case; is
24 that accurate?

25 A. I don't remember exactly the date of the order of

1 protection. But I have an order of protection that they gave
2 me because --

3 Q. Hold on. The question is; did you plead guilty to
4 Criminal Contempt in the Second Degree, based on the phone
5 calls you made to Evelyn Rivera, during April and May of 2012?

6 A. Yes, I did.

7 Q. Now, I want to direct your attention to February 11,
8 of 2015, at approximately 8:15 p.m.; did you place a call to
9 Evelyn Rivera?

10 A. No.

11 Q. Now, between February 11 of 2015, the date where
12 there is an allegation by Ms. Rivera, that you called her --

13 A. Yes.

14 Q. -- and October 15 of 2015; had you continued to see
15 Ms. Rivera, and have sexual relations with her?

16 A. Yes; we never broke up.

17 Q. And how frequently did you have sexual relations?

18 A. Every day, two times a day; at night and in the
19 morning.

20 Q. And now, this is 2015; would that have been in one
21 or two of your vans, or camper?

22 A. In the camper, and in the van.

23 Q. And when you say "the van," are you referring to the
24 blue colored van?

25 A. Yeah; the Chevy. Yes. She knows the van, too.

1 Q. When you say "the camper," are you referring to the
2 beige camper?

3 A. Yes, sir.

4 Q. Whose -- The photograph that came into evidence this
5 morning -- Your camper, in fact, resembled the camper depicted
6 in that photograph; is that fair to say?

7 A. Yes, sir.

8 Q. Except your camper was beige in color?

9 A. Um'hum.

10 Q. So -- On October 15 of 2015, you were arrested for
11 the phone call that took place on February 11, 2015; fair to
12 say?

13 A. Yes, sir.

14 Q. And that phone call, the alleged phone call of
15 February 11, 2015, was alleged to have violated an order of
16 protection that was issued on January 29, 2013, and which was
17 in existence and is in existence until January 28, 2018; is
18 that accurate?

19 A. Yes, sir.

20 Q. Okay.

21 And you deny making that phone call; is that fair to
22 say?

23 A. What happened there was, I had a --

24 Q. I am just asking you about the phone call of
25 February 11, 2015?

1 A. Yes, I deny it. I didn't make the phone call. No.

2 Q. And just one more question about matters other than
3 the incident that we are here for. Isn't it true, sir, that on
4 February 20 of 2015, you were convicted of a misdemeanor; isn't
5 that a fact?

6 A. Yes, sir.

7 Q. And isn't it true, sir, also, that on August 8 of
8 2016, you were convicted of Burglary in the Third Degree?

9 A. Yes, sir.

10 Q. And --

11 A. There's an appeal process on that case.

12 Q. Just for clarification, those two convictions, the
13 misdemeanor and the Burglary 3, have nothing to do with Evelyn
14 Rivera; is that fair to say?

15 A. No.

16 Q. All right.

17 So, let me move forward, to December 27, of 2015; as of
18 that date, were you still seeing Ms. Rivera?

19 A. Yes.

20 Q. And how often were you seeing her?

21 A. Every day.

22 Q. And when, by the way, did you purchase the beige
23 Winnebago or camper, that is -- where this altercation is
24 alleged to have taken place?

25 A. In October.

1 Q. What year?

2 A. Around October 2015.

3 Q. And so, tell us -- Let's start with -- When you woke
4 up on December 27, 2015, where were you?

5 A. I was -- I woke up in Manhattan, with Evelyn, that
6 morning.

7 Q. Where?

8 A. On that street, what is it? Rivington.

9 Q. Rivington and Attorney Street?

10 A. Yes.

11 Q. Where did you spend the night? In your camper or --

12 A. In the camper, yeah.

13 (Whereupon, at this time, Angela Lant relieved
14 Geralyn Gale as the official Court Reporter.)

15 (Continued on next page.)

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1 Q. And so what time did you wake up in the morning, if you
2 recall?

3 A. She leaves at 4. She leaves at 4. I leave around
4 4:30, 5 to the gym. I work out, take my shower, and go to work.

5 Q. Was your blue van also at that location at that time?

6 A. No, not at the time, no.

7 Q. So on that day, December 27, 2015, did you, after
8 Ms. Rivera left for work, did you drive to the gym in Brooklyn?

9 A. No, I couldn't because the truck didn't want to start.
10 The camper didn't want to start. The starter was getting stuck
11 on me. It was getting jammed. I had to bang it to start the
12 truck.

13 Q. So did you bang it to start the truck?

14 A. No, I had to go -- I jumped on the train and picked up
15 the Chevy van and came back. I needed tools.

16 Q. The Chevy van is the blue van?

17 A. Yeah.

18 Q. Where did you go to get the blue van?

19 A. In Brooklyn. To Brooklyn, DeKalb Street, DeKalb Street
20 and Central.

21 Q. And you got the blue van, and where did you go?

22 A. I went back to Delancey to the truck. I picked up the
23 tools. I had tools in the van, the jack, and I started working
24 on the truck. I jacked it up. I pulled out a hammer. I tapped
25 the starter, and I tried it to start it. That's when I -- I

A. L.

1 called my brother to see if he could help me put the starter on.
2 He said he was going to have a mechanic put the starter on for
3 me. So I went over to his house --

4 Q. Okay, approximately what time was it that you went to
5 your brother's home?

6 A. It was around 3 o'clock.

7 Q. In the afternoon?

8 A. Yeah, around 3.

9 Q. And where did your brother live?

10 A. On 102nd and Park.

11 Q. In Manhattan?

12 A. Yeah.

13 Q. So you drove the camper to your brother's home?

14 A. Right.

15 Q. And what happened up there?

16 A. He was supposed to help -- get a mechanic to put the
17 starter on for me, but he couldn't find the guy.

18 So we went, and we bought the starter. And I took the
19 starter back with me back to Delancey. That's where I put it on
20 the truck.

21 Q. So you installed this new starter back -- when you say
22 Delancey, do you mean Attorney and Rivington?

23 A. Yes.

24 Q. Very close vicinity of your blue van?

25 A. Yes, same block. I parked it right behind it.

A. L.

1 Q. And that's Attorney Street?

2 A. Yeah.

3 Q. And how long did it take you to install that starter?

4 A. It was raining a -- drizzling that day. Took me about
5 an hour.

6 Q. So about what time did you finish, if you recall?

7 A. I know it was before 10, before 10 at night.

8 Q. Now, let me ask you about the electrical cord. Did you
9 hook up your electrical cord to any kind of source of
10 electricity?

11 A. To a generator I have. The generator, I chain it to
12 the tree so they don't steal it. I have a power generator
13 Honda. That's where I get my power from.

14 Q. Is that tree on the grounds of the school? Is the tree
15 that you chain your generator to on the grounds of the school?

16 A. Yes, right in front of the school.

17 Q. So where you park is right in front of the school?

18 A. Yeah.

19 Q. So what, if anything, happened at the time you were
20 repairing or replacing the starter in your camper?

21 A. I was replacing the starter, and I felt somebody get in
22 the truck. I knew it was Evelyn because we meet there every
23 night.

24 She just go right in the truck. She just walks right in.

25 So I was repairing the starter. I put the starter on. When

A. L.

1 I get up, I went to see if the car would start. It won't start.
2 I had to get back under the car and tighten up the screws, the
3 wires to the starter. And when I started the truck, I got real
4 happy that the truck started. And I told her I was going to go
5 back to Brooklyn to take a shower. And she said no, you're not
6 going nowhere. You're going to go with that -- she used the
7 word bitch. You just want to go with that bitch, she said.

8 I said no, I just want to take a shower.

9 She started fighting violently, grabbed me around the neck,
10 popped my chain. It wasn't the first time she popped my chain.
11 It wasn't. She grabbed the chain that my mother gave me. She
12 popped my chain before. She grabbed me by the collar like this,
13 (indicating), grabbed me, and I'm holding her hands like this
14 (indicating) so she don't pop my chain.

15 So she try to fight me. So I'm going like this
16 (indicating). She try to bite me. I'm going like this
17 (indicating). And then she popped the chain off, and she ran out
18 the truck. And I'm screaming: You're driving me crazy. You're
19 driving me crazy.

20 I was the one doing all the screaming basically.

21 Then she walked out of the truck. She walked out of the
22 truck. I walked out of the truck. I put the generator in the
23 truck, and I walked around the driver's side and got in, and I
24 had to get -- I was driving to get away from her.

25 Q. You testified you put the generator in your truck?

A. L.

1 A. Yes, back through the side door, the side door with the
2 step (indicating).

3 Q. What about the electrical cord which was still
4 hanging --

5 A. I didn't realize the cord was hanging out. I just
6 wanted to get away. I took off.

7 Q. And where did you go?

8 A. I drove a couple of blocks. I -- I don't know what
9 that avenue is there, maybe Attorney. I don't know the name of
10 that street. I made a left. I made a left, and then I went
11 like two blocks down and made another left. That's when the
12 officer approached me.

13 Q. Did you end up on Suffolk Street?

14 A. Right before the Williamsburg Bridge.

15 Q. What did you do at the Williamsburg --

16 A. I --

17 Q. You have to wait for me to finish the question before
18 you answer.

19 A. Right.

20 Q. So tell us what happened on Suffolk Street.

21 A. Somebody told me about the wire hanging out of the
22 truck. So I got out, started putting the wire back into the
23 truck, and that's when the officers approached the vehicle and
24 they told me if somebody had made a complaint.

25 The first thing I told the officer is I can't believe she's

A. L.

1 doing this to me.

2 If you check the papers, you see it there.

3 MS. GUITERMAN: Objection.

4 THE COURT: I'll allow it.

5 Q. So when you say somebody told you the wire was out, you
6 mean some --

7 A. Somebody said the wire -- as I was driving, "the wire,
8 the wire." I heard somebody, you know?

9 Q. Did Ms. Rivera, did you say that she tried -- she tried
10 to bite you, or did she bite you during this?

11 A. She was trying to bite me, yeah.

12 Q. Where?

13 A. I was holding her like this (indicating) so she don't
14 pop my chain. So she don't bite me, so I go like this
15 (indicating). She was trying to bite me right here
16 (indicating).

17 Q. Did she put her mouth there?

18 A. Yeah.

19 Q. What kind of clothing were you wearing?

20 A. I had a jacket. I had a military suit, and I had a
21 plastic jacket because it was raining. It was raining that day,
22 so I had a plastic jacket. I had a military jacket under.

23 Q. Did you ever hit Ms. Rivera?

24 A. No, not at all. I had no reason to fight with her.

25 Q. Mr. Alvarez, I just want to ask you about two other

A. L.

1 incidents that occurred between you and Ms. Rivera prior to this
2 date. So I'll go back in time to November 28th of 2013.

3 Drawing your attention to the vicinity of Hancock Street and
4 Central Avenue about 10 minutes after midnight, who were you
5 with at that time?

6 A. I was with Olga Benites.

7 Q. And this is in the Bushwick neighborhood?

8 A. Yes, two blocks from where my family lives.

9 Q. What, if anything, happened at that time?

10 A. Well, I was -- we was in the store, me and Olga, and
11 all of a sudden Evelyn jumped out, came out of nowhere. I don't
12 know where she came out from. And she was like oh, so this is
13 the bitch, this is the bitch, pointing to Olga and calling her
14 all kinds of names. And they just started fighting. And then
15 somebody called the cops, and she said I got an order of
16 protection against him.

17 And I said I got one against her, too.

18 The officer asked me where do you live?

19 I said my family lives right down Hancock.

20 They asked her where do you live?

21 She said I live in Manhattan.

22 They said you're under arrest, and they arrested her.

23 MS. GUITERMAN: Objection.

24 THE COURT: Sustained. The last portion will be
25 stricken.

A. L.

1 Q. What I want to ask you is what, if anything, happened
2 between you and Ms. Rivera? Did she -- you said earlier that
3 there was a different occasion, other than December 27 -- you
4 have to wait for the question to finish.

5 Before December 27th, you mentioned she popped your chain.
6 Did that occur at that time and place?

7 A. That happened on Hancock Street. That happened on
8 Hancock. She came over and she just started fighting for no
9 reason at all. She grabbed me by the chain and snatched my
10 chain. She scratched me, and then she ran off, and I called the
11 cops and the cops came and took photos.

12 Q. After this event, did you go to the precinct?

13 A. Yes.

14 Q. And did they take photographs --

15 A. Yes. I made a report against her. I got an order of
16 protection against her.

17 MR. HERLICH: At this time, I would like to show
18 the defendant Defense Exhibit A and B for purposes of
19 identification. They'll be subject to redaction before
20 being published to the jury, your Honor, but I would like to
21 show them to the defendant.

22 THE COURT: Show them to the People first.

23 (Shown to district attorneys)

24 Q. I ask the witness to take a look at the top document
25 first and just listen to my questions.

A. L.

1 I'm just directing your attention to the top photo --

2 A. Yes, sir.

3 Q. -- and the bottom photo. Do you recognize what they
4 show?

5 A. My chain that my mother gave me before she died.

6 Q. And what's the condition of the chain in that
7 photograph?

8 A. It's popped.

9 Q. And when was that photograph -- when and where was the
10 photo taken?

11 A. This was taken, I believe, that same day she attacked
12 me.

13 Q. And --

14 A. 11-30-2013. Date, 11-20 --

15 Q. Don't read from the document. Just try to respond to
16 my questions.

17 Is that at the 83rd Precinct?

18 A. Yes, sir.

19 Q. Look at the other photograph, please, on the other
20 form. What does that show?

21 A. A scratch on my face, (indicating).

22 Q. And where was that photo taken and when?

23 A. 83rd Precinct, same day.

24 MR. HERLICH: I move them into evidence subject to
25 redaction. So they won't be published to the jury at this

A. L.

1 time. Some of the written data has to be redacted,
2 your Honor.

3 THE COURT: Any objection?

4 MS. GUITERMAN: None, your Honor.

5 THE COURT: Defense Exhibit A and B are admitted
6 without objection subject to redaction.

7 (Whereupon, Defendant's Exhibits A and B,
8 previously marked for identification, are received and
9 deemed marked in evidence.)

10 Q. Lastly, Mr. Alvarez, I wanted to ask you about
11 January 14th of 2015. I want to draw your attention to the
12 corner of Halsey, H-A-L-S-E-Y, Street and Central Avenue in
13 Brooklyn at approximately 11:17 in the morning.

14 Now, what neighborhood is Central and Halsey?

15 A. Bushwick.

16 Q. And that's where your mom used to live?

17 A. Two blocks away. That's where the store at. That's
18 where we go to the store.

19 Q. And what, if anything, happened at that time that you
20 observed?

21 A. I was with Olga Benites, and we was in the store buying
22 something to eat, and I remember Evelyn came out of nowhere. I
23 don't know where she came from. And she started cursing Olga
24 out, calling her bitch, calling her a whore, and calling her all
25 kinds of names, and then they just started fighting. Her and

A. L.

1 Olga started fighting. I think Evelyn bit her finger, and
2 someone called the cops. When the cops came --

3 Q. All right, hold on.

4 If you know, from your personal knowledge, did Olga Benites
5 get treated at Wycoff Hospital for her injuries?

6 A. Yes, she did.

7 MR. HERLICH: Nothing further, your Honor.

8 THE COURT: Okay.

9 Ms. Guiterman.

10 CROSS-EXAMINATION

11 BY MS. GUITERMAN:

12 Q. Mr. Alvarez, you were asked some questions about
13 Olga Benites.

14 A. Yes, ma'am.

15 Q. Are you in touch with Olga Benites today?

16 A. No, I'm not. I don't call anyone. I don't call
17 anyone.

18 Q. Do you know where Olga is living as of today?

19 A. No, I don't.

20 Q. On August 8th of 2016, you were convicted of Robbery in
21 the Third Degree in Kings County; isn't that correct?

22 MR. HERLICH: Objection, your Honor.

23 THE COURT: Sustained.

24 MS. GUITERMAN: May we approach, your Honor?

25 THE COURT: Yes.

A. L.

1 (Whereupon, the following takes place at the side
2 bar, out of the presence and hearing of the jury:)

3 MS. GUITERMAN: My co-counsel has just informed me
4 that I said robbery. I did not mean to say that. Burglary.

5 MR. HERLICH: What's the date?

6 MS. GUITERMAN: August 8, 2016.

7 MR. HERLICH: Right, right, right.

8 Can we get a curative instruction?

9 THE COURT: You can rephrase the question. Okay?

10 MR. HERLICH: Thank you.

11 (Whereupon, the following takes place in open
12 court:)

13 THE COURT: Okay, Ms. Guiterman.

14 Q. Mr. Alvarez, I'm going to rephrase the question.

15 On August 8th of 2016, you were convicted of Burglary in the
16 Third Degree in Kings County; isn't that true?

17 A. Yes, ma'am.

18 Q. Kings County is Brooklyn; right?

19 A. Yes, ma'am.

20 Q. On February 20th of 2015, you were convicted of a
21 misdemeanor; isn't that true?

22 A. Yes, ma'am.

23 Q. On January 7th of 2013, you were convicted of criminal
24 contempt in the second degree in New York County; isn't that
25 true?

A. L.

1 A. I don't remember, but it's possible, yes.

2 Q. Didn't you testify just a few moments ago on direct
3 examination that on January 7, 2013, you were convicted of
4 criminal contempt in the second degree in New York County?

5 A. I just don't remember the exact dates. That's why I
6 said I don't remember. It's possible yeah, I did.

7 Q. You acknowledge that you received an order of
8 protection in connection with that case; correct?

9 A. Yes, ma'am.

10 Q. And that case was with Evelyn Rivera?

11 A. Yes, ma'am.

12 Q. You acknowledge that order of protection that you
13 received in connection with that case was on January 29, 2013?
14 That's the date that it was issued?

15 A. I believe so.

16 Q. Mr. Alvarez, I'm going to show you what's in evidence
17 as People's 7.

18 (Shown to defense attorney)

19 (Handed to witness)

20 You recognize that document, don't you?

21 A. Yes, ma'am.

22 Q. That's one of your orders of protection that Evelyn has
23 against you?

24 A. Yes, ma'am.

25 Q. Your name is listed on the top under defendant?

A. L.

1 A. Yes, ma'am.

2 Q. Evelyn Rivera is listed as the protected party?

3 A. Yes, ma'am.

4 Q. You were in court when that order of protection was
5 issued, weren't you?

6 A. Yes, ma'am.

7 Q. It was issued on January 29, 2013?

8 A. Yes. That's what it says here, yes.

9 Q. It expires on January 29, 2018?

10 A. Yes, that's what it says here.

11 Q. Your signature is on that document; isn't it?

12 A. Yes, it is.

13 Q. You signed that document in open court?

14 A. Yes, ma'am.

15 Q. When that order of protection was issued, the judge
16 warned you what the document meant; right?

17 A. Yes, ma'am.

18 Q. That judge was Judge Konviser?

19 A. Yes, ma'am.

20 Q. On January 29, 2013, you were in court when
21 Judge Konviser said the following:

22 "Mr. Alvarez, you are to have no contact with her
23 whatsoever. You can't call her; you can't write her; you can't
24 e-mail her; you can't Twitter her; you can't visit her; you
25 can't do anything; you can't have contact; you can't have a

A. L.

1 third party on your behalf call, or visit, or write her, or send
2 her a message. No contact means precisely that. No contact.
3 Do you understand that, sir?"

4 Do you remember Judge Konviser saying that to you?

5 A. Yes, ma'am.

6 Q. And when the judge was saying "her," you knew that her
7 was Evelyn Rivera; correct?

8 A. Yes. She -- she looks for me, too. She comes to
9 Brooklyn looking for me, too.

10 Q. When the Judge issued that, she was referring to
11 Evelyn Rivera; correct?

12 A. Yes, ma'am.

13 Q. And after Judge Konviser said that to you, you said
14 yes, ma'am; correct?

15 A. Yes, ma'am.

16 Q. Meaning that you understood the words that she said to
17 you?

18 A. Yes.

19 Q. On People's 7, the document that you're holding,
20 there's some boxes checked on that document; right?

21 A. To the left, yes.

22 Q. And you're aware that that document orders you to stay
23 away from Evelyn Rivera?

24 A. Yes.

25 Q. You're aware that that document orders you to have no

A. L.

1 communication with Evelyn Rivera?

2 A. Yes.

3 Q. You're aware that that document orders you not to
4 assault Evelyn Rivera?

5 A. I never assaulted Evelyn Rivera.

6 Q. My question is you're aware that that document orders
7 you not to assault her; correct?

8 A. Yes.

9 Q. You're aware that that document orders you not to
10 harass Evelyn Rivera?

11 A. Yes.

12 Q. You're aware that that document orders you not to
13 commit any crimes whatsoever against Evelyn Rivera?

14 A. Yes, ma'am.

15 Q. And that order of protection that you're discussing
16 now, you testified a few moments ago that you had another order
17 of protection in April and May of 2012; correct?

18 A. Yes.

19 Q. And that order of protection that was from April and
20 May of 2012 meant essentially the same thing as that document;
21 correct?

22 A. Yes, ma'am.

23 Q. And you knew in April and May of 2012 that you had that
24 order of protection; correct?

25 A. Yes, ma'am.

A. L.

1 Q. In April and May of 2012, you called Ms. Rivera;
2 correct?

3 A. She calls me, too. If I call her, it's because she
4 called me because I would not call her unless she calls me.

5 Q. But you did call her; correct?

6 A. It's possible that I did. I don't remember. Maybe
7 it's possible that I did.

8 Q. You testified a few moments ago you called each other;
9 correct?

10 A. Yeah, yeah. We never broke up.

11 Q. So is your testimony now you don't remember if you
12 called her?

13 A. I don't know if I called her that day. If she called
14 me it's possible I did call her, yeah.

15 Q. Between April and May of 2012, that two-month period,
16 you called Ms. Rivera sometimes during that period; correct?

17 A. Yes.

18 Q. And sometimes during that time period, Ms. Rivera would
19 answer her phone?

20 A. Yes.

21 Q. Sometimes during that time period, Ms. Rivera would not
22 answer her phone?

23 A. It's possible.

24 Q. Sometimes --

25 A. Sometimes the answering machine comes on, if she's

A. L.

1 working.

2 Q. And when the answering machine came on during that time
3 period, sometimes you would leave her a message, wouldn't you?

4 A. Never no threats. I never threatened Evelyn, never.

5 Q. Mr. Alvarez, during April and May of 2012, isn't it
6 true sometimes you would leave her messages?

7 A. It's possible if I call and the answering machine comes
8 on, probably I did leave her a message, yes.

9 Q. If Ms. Rivera did not answer her phone, you would be
10 angry that she didn't pick up, wouldn't you?

11 A. No, because she works. She works. Sometimes she's on
12 the train. She gets upset when she calls me and I don't always
13 answer the phone. I get a fight from her.

14 Q. Sometimes when she didn't answer her phone you would
15 call back again; right?

16 A. I leave her a message, and then I wait for her to call
17 me.

18 Q. Sometimes you called her more than once before she
19 called you back, fair to say?

20 A. Yeah, we call each other. We never broke up.

21 Q. And because you never broke up, in April and May of
22 2012 you would see one another; correct?

23 A. Every day.

24 Q. Sometimes you saw her in Brooklyn?

25 A. Yes.

A. L.

1 Q. Sometimes you saw her in Manhattan?

2 A. Yes.

3 Q. You can give the document back to the officer, thank
4 you.

5 On August 19th of 2011, you were outside of Ms. Rivera's
6 home; correct?

7 A. What day was that?

8 Q. August 19th of 2011.

9 A. I went upstairs to her house. I knocked on the door,
10 and she told me to wait in the hallway a minute. I asked her
11 for a cup of water. She gave me a cup of water, told me to wait
12 in the hallway, her son was coming up. That's when the officers
13 came and arrested me, told me I was harassing her.

14 Q. So it is your testimony today, sitting here today, on
15 August 19th of 2011 you never cursed at her through her door?

16 A. No, I didn't. She would have never opened the door if
17 I cursed at her. She opened the door and gave me a cup of
18 water. The officers came, and I had a cup of water in my hand
19 that she had gave me.

20 Q. Is it your testimony on August 19th of 2011 you never
21 threatened Ms. Rivera?

22 A. No, I didn't.

23 Q. You claim on August 19th of 2011 you never said to
24 Ms. Rivera: I'm gonna take your fuck-in life?

25 A. Never. I never said that to Ms. Rivera. Ms. Rivera

A. L.

1 took good care of my mother. I love this woman. I never want
2 to hurt her. I even dropped the charges on her when she got
3 arrested.

4 Q. There is no question before you, Mr. Alvarez.

5 MS. GUITERMAN: I ask to strike that last part.

6 THE COURT: Okay.

7 Q. (Con't.) On February 11th of 2015, the order of
8 protection that we were just discussing, it was still in effect;
9 correct?

10 A. Yes, ma'am.

11 Q. And on February 11th of 2015 you made another phone
12 call to Ms. Rivera, didn't you?

13 A. I don't remember the exact date. I know we called each
14 other every day. She calls me, I call her. This relationship
15 never ended. We've been together since 2010. When my mother
16 died, the relationship got even stronger.

17 Q. So it is possible on February 11th of 2015 you did call
18 Miss Rivera?

19 A. It's possible.

20 Q. That phone call was in violation of that first order of
21 protection that we just discussed; correct?

22 A. Yes, ma'am.

23 Q. As a result of that phone call, you received another
24 order of protection on October 16th of 2015; correct?

25 A. That -- now you know what that order of protection stem

A. L.

1 from; right?

2 Q. Listen to my question, Mr. Alvarez.

3 On October 16th of 2015, you received a second order of
4 protection; correct?

5 A. Yes, ma'am.

6 Q. I'm showing you what's in evidence as People's 6.

7 (Handed to witness)

8 You recognize that document; right?

9 A. Yes, ma'am.

10 Q. That's the order of protection you received on
11 October 16th of 2015?

12 A. Yes, ma'am.

13 Q. On that document your name is listed under defendant;
14 correct?

15 A. Yes, ma'am, right here.

16 Q. And Evelyn Rivera is listed as protected party?

17 A. Yes, I see her name right here.

18 Q. And that order of protection was issued on October 16th
19 of 2015?

20 A. Yeah, October 16, 2015.

21 Q. It expired on April 15, 2016; correct?

22 A. Yes.

23 Q. Your signature is on that document; right?

24 A. Yes, ma'am.

25 Q. You signed that document in open court?

A. L.

1 A. Yes, ma'am.

2 Q. And when that order of protection was issued, another
3 judge told you what that document meant; right?

4 A. Yes, ma'am.

5 Q. That judge was Judge Sokoloff?

6 A. Yes, ma'am.

7 Q. On October 16, 2015, when Judge Sokoloff issued that
8 order of protection, she said the following:

9 "You are not to have any contact with Evelyn Rivera.
10 You are not to contact her directly or indirectly through
11 other people, not in person, not by telephone, voicemail,
12 e-mail, regular mail, or if you have any contact with her
13 you are going to violate this order of protection and you
14 will be brought up on other charges."

15 You were present in court when Judge Sokoloff said that
16 to you?

17 A. Yes, ma'am.

18 Q. And in return you said the following: "Yes, thank you,
19 your Honor."

20 A. Yes, ma'am.

21 Q. And on that order of protection you see boxes checked
22 as well?

23 A. Yes, ma'am.

24 Q. You're aware that that document orders you to stay away
25 from Evelyn Rivera?

A. L.

1 A. Yes.

2 Q. You're aware that that document orders you not to have
3 any communication with Evelyn Rivera?

4 A. Yes.

5 Q. You're aware that that document orders you not to
6 assault Evelyn Rivera?

7 A. Yes. I never assaulted Evelyn Rivera.

8 Q. That's not my question, Mr. Alvarez.

9 A. Yes, ma'am.

10 Q. You're aware that that document --

11 A. Yes.

12 Q. Let me finish my question, first.

13 You're aware that that document orders you not to assault
14 Evelyn Rivera; correct?

15 A. Yes, ma'am, yes.

16 Q. You're aware that that document orders you not to
17 harass Evelyn Rivera?

18 A. Yes, ma'am.

19 Q. You're aware that that document orders you not to
20 commit any crimes against Evelyn Rivera whatsoever?

21 A. Yes, ma'am.

22 Q. And on December 27, 2015, you were aware that both that
23 document, People's 6, and the other document, People's 7, were
24 both in effect; correct?

25 A. Yes, ma'am.

A. L.

1 Q. In December of 2015, one of your phone numbers was
2 631-933-7750; correct?

3 A. I believe so.

4 Q. And in December of 2015, another one of your numbers
5 was 646-226-4935; correct?

6 A. I don't remember exactly. I remember the 7750.

7 Q. Do you remember after you were arrested in this case,
8 do you remember that the district attorney asked you some
9 questions?

10 A. Yeah. They brought me to the District Attorney's
11 Office, yeah.

12 Q. And do you remember sitting in a room with the district
13 attorney and a police officer?

14 A. Yes, ma'am.

15 Q. Do you remember being read your Miranda warnings?

16 A. Yes.

17 Q. And do you remember you stating that you agreed to
18 speak with the district attorney?

19 A. Yes, I did.

20 Q. Do you remember that when you had that conversation
21 with the district attorney and the district attorney asked you
22 for your phone number, you said your phone number was
23 646-226-4935?

24 A. That's possible. I just don't remember, you know -- I
25 don't remember the number. That's what I'm trying to tell you.

A. L.

1 That was months ago. It's possible it's my number. I just
2 don't remember the number right off of my head. I remember the
3 7750.

4 Q. Mr. Alvarez --

5 MS. GUITERMAN: I'm showing defense counsel.
6 (Attorneys conferring)

7 Q. (Con't.) I'm showing you a document.

8 (Handed to witness)

9 Please read to yourself the last paragraph of that
10 document. Look up when you're finished and just tell us if it
11 refreshes your recollection as to your phone number in December
12 of 2015.

13 (Pause)

14 A. I remember this.

15 Q. You can put it down, thank you.

16 Now, do you remember that in December of 2015 one of your
17 phone numbers was 646-226-4935?

18 A. It's possible.

19 Q. Is that a yes?

20 A. Yes.

21 Q. On December 27th of 2015, at around 10 o'clock p.m.,
22 you were on Attorney Street between Rivington and
23 Delancey Streets; right?

24 A. Yes, ma'am.

25 (Continued on next page)

A. L.

1 (Continued from previous page.)

2 Q. At that location, with you, you had more than one
3 vehicle; right?

4 A. Yes.

5 Q. One of the vehicles that you had with you was your
6 beige camper; correct?

7 A. Yes, ma'am.

8 Q. Another vehicle that you had with you was a blue
9 van; right?

10 A. Yes, ma'am.

11 Q. That blue van was working properly on that date;
12 correct?

13 A. Yes, ma'am.

14 Q. No mechanical issues with the blue van?

15 A. No.

16 Q. At that time and location, you saw Evelyn Rivera;
17 correct?

18 A. I didn't see her until she got into the truck. I
19 was under the truck putting the starter on the truck; I didn't
20 see her until she got into the truck. She walked in the truck
21 on her own.

22 Q. There's no question, Mr. Alvarez.

23 One minute.

24 (Whereupon, there was a pause in the
25 proceedings.)

1 Q. It's your testimony, today, that you were underneath
2 your car, fixing your starter, and when you got up, Evelyn was
3 already inside your camper; correct?

4 A. Yes, ma'am, yes.

5 Q. Is it your testimony today, that you did not see
6 Evelyn Rivera, until you were inside of your camper?

7 A. When I got up from the floor, putting on the
8 starter, I felt somebody get into the vehicle; I knew it was
9 her, because we meet there every day. But when I got up from
10 putting -- from under the car, I looked, and I seen her inside
11 the truck; yes.

12 Q. Just to be clear, it's your testimony, sitting here
13 today, that the first time you saw Evelyn Rivera at that
14 location, on December 27, 2015, was when she was already inside
15 your camper vehicle?

16 A. That day, yes, when she was already in the truck.
17 But we meet there every day. That's not the first time I seen
18 her in that area.

19 Q. Mr. Alvarez, you testified in the Grand Jury in this
20 case, didn't you?

21 A. Yes, ma'am.

22 Q. And when you testified in the Grand Jury, there was
23 a stenographer present, writing down everything you said?

24 A. Right.

25 Q. You had a lawyer with you?

1 A. Yes, ma'am.

2 Q. You took an oath to tell the truth in the Grand
3 Jury; correct?

4 A. Yes, ma'am.

5 Q. And that was the same oath that you took to tell the
6 truth today?

7 A. Yes, ma'am.

8 Q. And --

9 MS. GUITERMAN: Directing counsel to page 41,
10 beginning at line 24.

11 Q. Mr. Alvarez, you made the following statement in the
12 Grand Jury, didn't you: "I have a mobile home. I went to
13 visit my brother -- "

14 MR. HERLICH: Objection.

15 THE COURT: Start with the question.

16 Is this part of the statement?

17 MS. GUITERMAN: Yes.

18 THE COURT: It's part of the statement before
19 he is asked any questions.

20 MR. HERLICH: Well --

21 THE COURT: Continue.

22 Q. "I have a mobile home. I went to visit my brother.
23 On the way back the mobile home got stuck on me. The starter
24 was bad, so I parked the vehicle. I was fixing the starter. I
25 finished fixing the starter. I got up. Evelyn Rivera was

1 standing by the truck. She was standing right by the truck."

2 Do you remember saying that in the Grand Jury, Mr.

3 Alvarez?

4 MR. HERLICH: Objection.

5 A. She went in the truck.

6 MR. HERLICH: Objection.

7 May we have a side bar?

8 THE COURT: Side bar.

9 (Whereupon, a sidebar discussion was held at
10 the Bench, on the record, out of the hearing of the jury.)

11 MR. HERLICH: Judge, the Prosecutor stopped
12 at -- The Prosecutor stopped at "Evelyn was standing by the
13 truck. She was standing right by the truck." She stopped
14 there. The next sentence is, "she walked right in the
15 truck, without permission. She had walked right into the
16 truck."

17 THE COURT: This is when you objected.

18 MR. HERLICH: Yes; because she is not reading
19 the whole response. My --

20 THE COURT: I mean, particularly, he is right

21 --

22 MR. HERLICH: There should be a complete
23 answer.

24 THE COURT: This is the opening statement the
25 defendant gives. Unless you want the whole statement to

1 come in --

2 MR. HERLICH: How can you leave out "she
3 walked right in the truck, without permission."

4 MS. NOBEL: Because she specifically asked
5 him, did you see her prior to the time she was -- she went
6 into the truck, and he said, "No." Just right now. And
7 here he says something different. So, she is highlighting
8 the point that is different.

9 MR. HERLICH: And leaving out the part that's
10 consistent with what he said.

11 MS. NOBEL: Right. Because she is
12 highlighting the inconsistent --

13 MR. HERLICH: I don't think it's proper.

14 THE COURT: If you want do it completely
15 proper, you can have the whole statement read in.
16 Otherwise I will let the People do that. And then on
17 re-direct you can point out that the very next statement is
18 this. So, it's really up to you. I mean, I agree it's a
19 little strange impeachment, but it's only because it's the
20 defendant's testimony in the Grand Jury which is a little
21 bit different from a particular Q and A.

22 MS. NOBEL: She is highlighting --

23 THE COURT: I get it.

24 I mean, if you like -- What would you like to do?

25 MR. HERLICH: Let me see.

1 MS. GUI TERMAN: My point is, that he is
2 inconsistent different times. There are other times in the
3 Grand Jury testimony --

4 THE COURT: I heard it. I get it.

5 My suggestion, counsel, unless you have another
6 suggestion --

7 MR. HERLICH: I will deal with it on redirect.

8 THE COURT: Okay.

9 MS. NOBEL: Let's be clear; the whole
10 statement shouldn't be read in.

11 THE COURT: Stop. Just stop.

12 Let's keep going. All right.

13 (Sidebar concluded.)

14 THE COURT: All right.

15 At this point, the objection is overruled.

16 MS. GUI TERMAN: I am going to re-ask the
17 question, Your Honor.

18 THE COURT: Okay.

19 Q. Mr. Alvarez, when you were in the Grand Jury, you
20 said the following: "I have a mobile home. I went to visit
21 my brother. On the way back the mobile home got stuck on me.
22 The starter was bad, so I parked the vehicle. I was fixing the
23 starter. I finished fixing the starter. I got up. Evelyn
24 Rivera was standing by the truck. She was standing right by
25 the truck."

1 You said that in the Grand Jury; didn't you,
2 Mr. Alvarez?

3 A. I said, she walks in the truck. I said she was in
4 the truck. I always said she was in the truck. But when I got
5 up from fixing the starter, then I looked -- I felt when she
6 got into the vehicle.

7 THE COURT: Mr. Alvarez, she is not talking
8 about what else you said. She is just saying, is that what
9 you said.

10 A. No. I said she was in the truck.

11 Q. So, it's your testimony, today, that you never said
12 Evelyn Rivera was standing by the truck; she was standing right
13 by the truck?

14 A. No. I said she was in the truck. She went into the
15 truck without permission. That's what I said.

16 Q. Mr. Alvarez, you testified a few moments ago, there
17 was a court reporter in the Grand Jury writing down every word?

18 A. Right.

19 MR. HERLICH: Objection.

20 THE COURT: Well, the answer stands.

21 But let's move on.

22 (Whereupon, there was a pause in the
23 proceedings.)

24 Q. Mr. Alvarez, I am showing you page 42 of your Grand
25 Jury testimony. Please read, to yourself, lines 1 through 5.

1 (Handing.)

2 (Whereupon, the Court Officer is handing the
3 above mentioned item to the witness.)

4 Q. Just look up when you are done. Don't say anything
5 out loud.

6 (Whereupon, there was a pause in the
7 proceedings.)

8 THE DEFENDANT: Here it is. Right here.
9 (Showing the Court.)

10 THE COURT: She just wants you to read it.

11 MS. GUITERMAN: You can return that to the
12 officer.

13 Q. Do you remember, now, saying, before Evelyn Rivera
14 got inside the truck she was standing right outside?

15 A. I never said that. I said she was -- Look at line
16 6; that's what I said. She went into the truck without
17 permission.

18 Q. Mr. Alvarez, my question is, before she got into
19 your camper, isn't it true that you testified she was standing
20 outside --

21 A. No.

22 Q. -- before she got in?

23 A. No, I didn't.

24 Q. Is it your testimony, this transcript is incorrect?

25 A. It says it on line 6. Look at line 6 when it says.

1 That's what I said; she walked into the truck without
2 permission; that's what --

3 Q. Tell me if this is accurate. In the Grand Jury, you
4 stated the following: "I finished fixing the starter. I got
5 up. Evelyn Rivera was standing by the truck. She was standing
6 right by the truck. She walked in the truck without
7 permission."

8 Isn't it true, that before she got into the truck, you
9 testified she was standing outside the truck?

10 A. No I didn't. No I didn't. I said she walked into
11 the truck without permission. I was under the truck. I could
12 not see her, but I felt when she got into the truck; that's
13 when I got up and looked, and I seen her in the truck. I was
14 under the truck when she came --

15 Q. Mr. Alvarez --

16 (Whereupon, there was a pause in the
17 proceedings.)

18 THE COURT: Ms. Guiterman, is there a
19 question?

20 MS. GUITERMAN: I'm sorry?

21 THE COURT: Is there a question?

22 MS. GUITERMAN: Yes, Your Honor.

23 (Whereupon, there was a pause in the
24 proceedings.)

25 Q. It's your testimony, that on December 27 of 2015,

1 Ms. Rivera climbed into your truck?

2 A. Yes, ma'am.

3 Q. And it's your testimony, as you sit here today, that
4 you did not punch Ms. Rivera?

5 A. I did not punch Ms. Rivera. I had no reason to
6 punch Ms. Rivera.

7 Q. You claim, sitting here today, that you did not kick
8 Ms. Rivera?

9 A. I did not kick Ms. Rivera.

10 Q. You claim that you did not bite Ms. Rivera?

11 A. I did not bite Ms. Rivera. I did not assault Ms.
12 Rivera. I did not curse at Ms. Rivera. I had no reason to
13 fight with her. I went over there in peace. I went over there
14 to spend time with her, like I do every day. She is the one
15 that snaps for no reason at all.

16 Q. In fact, it's your testimony, as you sit here today,
17 that you never even touched Ms. Rivera; correct?

18 A. I told you what happened; she grabbed me by my neck,
19 to snap my chain. And I was holding her hands, like this.
20 (Indicating.) And then she tried to bite me. And I am going
21 like this. (Indicating.) That's possible how she chipped her
22 tooth. Because I never hit Ms. Rivera. I -- I don't know how
23 she got bruises.

24 Q. It's your testimony, as you sit here today, it's
25 possible she chipped her tooth by brushing her tooth on your

1 forearm?

2 A. She tried to bite me. First she grabbed me by here
3 (pointing.) She has the chain right now. She took the chain
4 off my neck. She grabbed me by the collar. I am holding her
5 hands like this (indicating) so she doesn't pop my chain. When
6 I am holding her hands like this (indicating) she is trying to
7 bite me over there, in the forearm. And I am going like this,
8 (indicating) preventing her from biting me. She didn't get to
9 bite me. That's possible how she chipped here tooth. That's
10 the only thing I can see that caused her to chip her tooth.

11 Q. You acknowledge, as you sit here today, that Ms.
12 Rivera did get her tooth chipped, inside your camper; correct?

13 A. I don't know. That's the pictures they show me with
14 a chipped tooth. I never noticed she had a chipped tooth in my
15 camper, because it was dark. When she came into the truck I
16 wasn't in the truck yet.

17 Q. It's your testimony that, as Ms. Rivera ran out of
18 your camper, you claim that she was yelling, "you're not you
19 are not going nowhere"?

20 A. She told me, when I finished fixing the starter, I
21 told her, I'm going to Brooklyn to take a shower. She said,
22 oh, you going back with that bitch. That's what she started
23 saying. Then she started getting all violent; that's when she
24 grabbed me by here (pointing) always going for my chain,
25 because she knows I value that chain a lot.

1 Q. After she ran outside of your camper, it's your
2 testimony that she was yelling at you, not to go anywhere?

3 A. I don't know what she was yelling. I was busy
4 trying to get away from her. I was trying to get away from
5 her. I even left the wire sticking out of the truck, because I
6 know I got an order of protection. I knew I was going to get
7 arrested.

8 Q. Okay.

9 MS. GUITERMAN: Directing counsel to page 64
10 of the Grand Jury.

11 Q. Mr. Alvarez, isn't it true, in the Grand Jury, you
12 were asked the following question, and gave the following
13 answer --

14 MS. GUITERMAN: Starting line 14.

15 Q. Okay.

16 "QUESTION: You said someone called the cops?
17 There was an eye witness to this incident?

18 ANSWER: Yes. There was people across the
19 street, I believe. I was trying to calm her down. She
20 kept screaming, "you not going nowhere." She was screaming
21 "you not going nowhere."

22 You were asked that question, and gave that
23 answer; correct?

24 A. That's while she was in the truck. You said when
25 she got out the truck; that's the question you just asked me.

1 While she was in the truck, yes, she was screaming that. When
2 she got out the truck -- The District Attorney just asked me,
3 was she screaming "you not going nowhere," when she got out the
4 truck. I don't know if she was screaming when she got out the
5 truck, because I wasn't even paying attention. She was
6 screaming that while she was in the truck with me, yes.

7 Q. It's your testimony, as you sit here today, that
8 simultaneously, as Ms. Rivera was attempting to bite your
9 forearm, she was also screaming, "you are not going nowhere"?

10 A. That's when she started biting; she said, you not
11 going nowhere. Not when she was trying to bite me -- She was
12 trying to bite me. Prior to that, she said, you trying to go
13 with this bitch, trying to go back to Brooklyn. So, no, she
14 wasn't saying it while she was trying to bite me; she said it
15 prior to trying to bite me.

16 Q. But you do acknowledge that Ms. Rivera ran outside
17 of your camper; correct?

18 A. Yes; because she knew I was leaving. I told her I
19 am leaving; I told her, get out, I am leaving.

20 Q. And it's your testimony that after Ms. Rivera ran
21 outside of your camper, when she was standing on the street,
22 she was holding a bottle in her hand?

23 A. I remember her having a plastic bottle, yeah. She
24 did have a plastic bottle. She always drinks water with it, a
25 plastic bottle with water.

1 Q. Is it your testimony she had that -- she had that
2 bottle with her when she entered your camper?

3 A. Yes. She always got a plastic water bottle. She
4 don't drink water from the faucet. She always carry a plastic
5 bottle with her.

6 Q. It's your testimony, you claim she had that plastic
7 water bottle after --

8 A. I remember seeing it, yes. I remember seeing the
9 bottle.

10 Q. It's your testimony, that that whole time, inside
11 your camper van, she is yelling at you, and attempting to bite
12 your forearm, she is holding a water bottle?

13 A. No; she put it down. There is a little sink, and a
14 table with microwave; she put the bottle down right there. She
15 put the bottle down. But I remember seeing a plastic bottle.
16 She always carry a plastic bottle with her, with water.

17 Q. You testified a moment ago, there is a sink and
18 microwave in your camper?

19 A. Yes.

20 Q. Is there -- There is a bed?

21 A. Two beds; one above the cab, front the part, above,
22 that is a bed. And then in the back, to the left, there is
23 another bed. And then it has a bathroom with a shower.

24 Q. There is -- There is a TV; right?

25 A. Yes.

1 Q. There's also a refrigerator?

2 A. Yes.

3 Q. You live outside of that camper; right. Out of that
4 camper?

5 A. Yes.

6 Q. So, you keep food in the camper?

7 A. No. I buy my own fresh food.

8 Q. You acknowledge there is refrigerator in the camper?

9 A. Yes. But we don't use it. For us to use the
10 refrigerator, I have to take out the generator, start it up,
11 and plug the generator for us to get power. We don't use the
12 refrigerator. I -- Sometimes I buy ice and keep ice.

13 Q. When you buy ice, you keep beer --

14 A. I don't drink beer. I never drink beer. I don't
15 drink beer, or liquor.

16 Q. You have ice to keep food and beverage fresh?

17 A. I don't keep food in there. I said when I do keep
18 stuff in there that needs to be cold, I use ice, instead of
19 refrigerator.

20 Q. Something that needs to be kept cold is something
21 perishable; correct?

22 A. Um --

23 Q. Is that a yes?

24 A. Yes.

25 Q. And --

1 A. But I didn't have no food in the truck.

2 Q. That's not my question.

3 You acknowledge, sometimes you kept ice in your truck;
4 correct?

5 A. Yes.

6 Q. And you acknowledge that on December 27, 2015, you
7 drove away so quickly, that you didn't realize your electrical
8 wire was dragging?

9 A. I was trying to get away from Evelyn; she was too
10 violent. I was trying to get away from that woman. The first
11 thing I do is get a way from her when she gets like that.

12 Q. You drove away so quickly, you didn't realize the
13 electrical wire --

14 A. I --

15 Q. Let me finish my question.

16 You didn't realize your electrical wire was dragging
17 outside of your vehicle; correct?

18 A. Yes, ma'am.

19 Q. And --

20 MS. GUITERMAN: I am at a good stopping point,
21 Your Honor, if Your Honor would like.

22 THE COURT: Let's have a side bar.

23 (Whereupon, there was a sidebar discussion, on
24 the record, outside the hearing of the jury.)

25 THE COURT: How much more do you have?

1 MS. GUITERMAN: Quite a bit.

2 THE COURT: Quite a bit?

3 MS. GUITERMAN: Yes.

4 THE COURT: All right. Okay.

5 (Sidebar concluded.)

6 THE COURT: All right.

7 Ladies and gentlemen, it's 1:00; it's time for
8 lunch. We are going to break for lunch. And I will see
9 you at 2:15, when we will continue with cross-examination
10 of Mr. Alvarez.

11 All right. So, have a great lunch.

12 COURT OFFICER: All rise.

13 Jury exiting.

14 (Whereupon, the jury exited the courtroom.)

15 COURT OFFICER: Okay.

16 THE COURT: So, I will see the attorneys at
17 2:15.

18 (Whereupon, a luncheon recess was taken.)

19 (Case recalled.)

20 COURT CLERK: Continued case on trial.

21 Indictment 5347 of 2015, Raul Alvarez.

22 Counsels, your appearance.

23 MR. HERLICH: Theodore Herlich, for the
24 defendant.

25 MS. GUITERMAN: Alex Guiterman, for the

1 People.

2 MS. NOBEL: Julie Nobel, for the People.

3 THE COURT: Okay.

4 Why don't we have Mr. Alvarez seated first, and
5 then we will bring out the jury.

6 (Defendant resumes seat in the witness box.)

7 THE COURT: Let's get the jury.

8 Thank you.

9 COURT OFFICER: All rise.

10 Jury entering.

11 (Whereupon, the jury entered the courtroom.)

12 COURT CLERK: Welcome back jurors. Please be
13 seated.

14 Do both parties stipulate that the jury is present
15 and properly seated?

16 MS. GUITERMAN: Yes.

17 MR. HERLICH: Yes.

18 MS. NOBEL: Yes.

19 THE COURT: We will continue with the
20 cross-examination of Mr. Alvarez.

21 People.

22 CROSS EXAMINATION

23 BY MS. GUITERMAN: (Continuing)

24 Q. Mr. Alvarez, when we left off this morning we were
25 talking about what was going on outside of your camper on

1 December 27, of 2015.

2 Taking you back inside of your camper, on December 27
3 of 2015, it's your testimony that Ms. Rivera was yelling and
4 screaming inside of your camper?

5 A. I was yelling and screaming, too. I am saying, you
6 are driving me crazy. You are driving me crazy. That's what I
7 was screaming.

8 Q. You acknowledge she was also screaming; correct?

9 A. She was screaming too, yeah.

10 Q. You testified this morning that you claim you have
11 no idea how she got that chipped tooth; correct?

12 A. The only thing I can assume is when she grabbed me
13 by here. (Pointing.) She grabbed me by my collar, to break my
14 chain. And I was holding her hands. And I told you, she tried
15 to bite me, and I am going like this. (Indicating.) She was
16 trying to bite me on my forearm. I was holding her hands from
17 preventing her from popping my chain. I started going like
18 this (indicating) because she tried to bite me. That's the
19 only way I can see she chipped her tooth.

20 Q. You do acknowledge she did have a chipped tooth;
21 correct?

22 A. I don't know, because it was dark when I walked into
23 the camper when. I walked into the camper, it was dark.

24 Q. When she first got into your camper, you didn't see
25 any injuries to her face, did you?

1 A. I didn't see no injuries, no. It was dark, like I
2 said. We -- It happened so fast when I got into the camper,
3 that I told her I am going back to Brooklyn; that's when she
4 just started getting violent, and she wanted to have sex. And
5 I told her, I don't want to have sex with her, and that's when
6 she grabbed me through here. (Indicating.)

7 Q. When she first got into your camper, you didn't see
8 any blood on her face; right?

9 A. No.

10 Q. When she --

11 A. I didn't see no blood when she left, either, I
12 didn't see it.

13 Q. When she first got into your camper, you didn't see
14 any redness to her face?

15 A. No, I didn't.

16 Q. You testified that she tried to bite you?

17 A. Yes.

18 Q. I want to be clear; did she ever actually bite your
19 forearm?

20 A. She tried to. She tried to grab, but I am going
21 like this. (Indicating.)

22 Q. You were wearing two jackets?

23 A. I was wearing a military jacket under, and a plastic
24 jacket over, like a hoodie, because it was raining that day,
25 and I was changing the starter.

1 Q. She never actually bit --

2 A. She had tried to.

3 Q. Tried to, or did?

4 A. She tried to. She didn't. I was going like this.

5 (Indicating.) Swinging back and forth.

6 Q. And on December 27, 2015, after she left your
7 camper, you had no marks on you; correct?

8 A. No. I have no marks on my hands, nothing. If I
9 would have touched her, believe me, my face would have been all
10 scratched up, because that's what she does.

11 Q. But you had no marks on you?

12 A. Nothing. Not on my hands, nothing.

13 Q. On December 27, 2015, Evelyn Rivera was hysterical
14 when she got out of your camper; wasn't she?

15 A. Yes, but it's not the first time she was hysterical.
16 She called me before, in 2011, telling me she was getting
17 robbed, crying and screaming on the phone. I am going crazy,
18 where you at? Where you at? She called me hysterical crying,
19 like she was getting robbed. I am trying to find out where she
20 is at; she won't tell me. When I get over there, it was all a
21 lie; she just wanted me to go pick her up.

22 Q. Mr. Alvarez, I am asking you about December 27,
23 2015; you acknowledge that when she got out of your camper, she
24 was hysterical?

25 A. She appeared that way. Yes.

1 Q. She was crying?

2 A. She appeared to be crying, yeah, but that's not the
3 first time she has --

4 Q. I am talking about that night, Mr. Alvarez?

5 THE COURT: Both of you, don't talk over each
6 other. Okay.

7 Listen to her question. And when she is done
8 answer the question.

9 When he is done ask the next question.

10 MS. GUITERMAN: Yes, Judge.

11 THE DEFENDANT: Okay.

12 Q. Staying on only December 27, 2015.

13 A. Yes, ma'am.

14 Q. She was crying; correct?

15 A. She appeared to be crying, yes.

16 Q. She was screaming when she got out?

17 A. She sound like she was screaming, yeah.

18 Q. When you got out of the camper, you were laughing?

19 A. I was not laughing, no. I was not laughing. No. I
20 was not laughing.

21 Q. You --

22 A. I was screaming, myself, saying, you driving me
23 crazy. You driving me crazy.

24 Q. You testified, earlier, Mr. Alvarez, that you drove
25 off quickly, because you were trying to get away from her?

1 A. Yes. Yes.

2 Q. But isn't it true, that she had already exited your
3 camper, on her own?

4 A. I told her, get out, I am leaving. Leave. I am
5 leaving. Get out. I am leaving.

6 Q. She did leave?

7 A. She jumped out.

8 Q. She left your camper before you did; correct?

9 A. Yes.

10 Q. And you knew, once you got out of your camper, that
11 there were two witnesses on the street; didn't you?

12 A. I didn't see them.

13 Q. And --

14 A. I didn't see them. I didn't get to see who they
15 were. I didn't even see them. It was at night.

16 Q. Is it your testimony, as you sit here today, that
17 you had no idea there were eye witnesses that night?

18 A. I didn't see them, who they were.

19 MR. HERLICH: Objection.

20 A. I didn't see who they were.

21 THE COURT: Sustained.

22 You don't have to answer the question.

23 Q. On December 27, 2015, when you got out of the
24 camper, you saw two men outside; didn't you?

25 A. I didn't see who they were. I know there was two

1 people standing there; I didn't know who they were. I was busy
2 trying to get away from her. That didn't take three seconds
3 even.

4 Q. I am not asking you if knew them. You saw two men?

5 A. I didn't know if they were males or females. I knew
6 there was two people standing out there; I didn't see who they
7 were. If you were to tell me, can you see the person who was
8 there that night, I wouldn't be able to tell you who it was.

9 Q. You do acknowledge there were two individuals?

10 A. There was two people outside.

11 Q. And they were standing with Ms. Rivera;
12 correct?

13 A. I didn't see them standing with her. I seen her
14 walking that way. (Pointing.) And I left. I didn't get to
15 see her standing with them. I left. I left the area
16 immediately.

17 (Whereupon, there was a pause in the
18 proceedings.)

19 Q. You know that one of the people that was on the
20 street on December 27, 2015, called the police; correct?

21 A. Well, I know we didn't call the cops. Evelyn
22 didn't. I don't know who called the cops. I know I didn't
23 call the cops. Evelyn didn't call the cops. Somebody else in
24 the street called the cops.

25 Q. And the person that did call the cops was on that

1 street, on Attorney Street; correct?

2 A. I don't know who called the cops. I know it was
3 somebody called the cops. I don't know who.

4 Q. And --

5 A. I don't know who called the cops. I was in the
6 truck with Evelyn. They was out side.

7 MS. GUITERMAN: One moment, Your Honor.

8 (Whereupon, there was a pause in the
9 proceedings.)

10 Q. At the time that you fled, on December 27, 2015, you
11 knew, at that moment, that someone had called the cops;
12 correct?

13 A. Yes, I knew somebody did.

14 Q. And you knew that the cops would shortly be
15 arriving?

16 A. I would assume.

17 Q. And you knew that if you stayed you could have been
18 arrested?

19 A. Yes.

20 Q. And --

21 A. Yes.

22 Q. And --

23 A. Yes.

24 (Whereupon, there was a pause in the
25 proceedings.)

1 Q. When you drove away, the camper started okay;
2 correct?

3 A. Because I had already changed the starter on it.

4 Q. That's not my question.

5 A. That's why it started.

6 Q. Mr. Alvarez.

7 At the moment that you drove away, after Evelyn Rivera
8 got out of your camper, it started properly; correct?

9 A. Yes, ma'am.

10 Q. And there were bottles in your car on that day,
11 weren't there?

12 A. No, there was no bottles in my car, no.

13 Q. And --

14 A. I don't drink.

15 Q. It's your testimony, that in 2015, in the months
16 leading up to December of 2015, Ms. Rivera would call you a
17 lot?

18 A. Yes.

19 Q. And --

20 A. Yes. Yes. Every day.

21 Q. You claim that she would call you a lot, from a
22 number that ended in 0911?

23 A. Yes.

24 Q. And --

25 A. That's one of her phone numbers. She has two

1 phones.

2 Q. And you claim that you never initiated those phones
3 calls?

4 A. We call each other. I stay with her every night.
5 She leaves at 4 in the morning; she goes to work. I go to the
6 gym, I take -- I work out. I take my shower. She calls me
7 every morning to make sure I got to Brooklyn all right. If I
8 wouldn't pick up the phone, she would call the gym.

9 Check her phone. You see the gym phone number on
10 there, too.

11 If I wouldn't pick up the phone, she call the gym, and
12 say, tell Alvarez to call me. And the guy behind the counter
13 said, Evelyn said to call her. I said, how does Evelyn get
14 this phone number? How would she dare to even call the gym and
15 send messages through the guy who there?

16 Q. You claim she also called you; correct?

17 A. Yes; she calls me. We call each other. We never
18 broke up; I told you.

19 Q. You claim you spent every night with her?

20 A. Every day. Every day we sleep together. Every
21 single day, up until the 27th when I got arrested.

22 (Whereupon, at this time, Angela Lant relieved
23 Geralyn Gale as the official Court Reporter.)

24 (Continued on next page.)

25

Geralyn Gale

1 Q. And when you slept with her, you claim you spent the
2 night in the camper?

3 A. In the camper, in the van.

4 Q. You've never been to her home, have you?

5 A. Never. I don't know where she lives. I don't know
6 where she lives, nope.

7 Q. You claim that on November 28, 2013, Ms. Rivera popped
8 your chain; is that right?

9 A. Yes, ma'am.

10 Q. Now, is that chain, was it popped so that it cannot be
11 repaired? What does pop mean?

12 A. It means she snatched it with the cylinder, lock,
13 that's what broke off. That's what had to be repaired. It cost
14 me \$10 to get a new cylinder. I remember I paid \$10 to get the
15 lock on the chain.

16 Q. You claim on December 27, 2015, she popped the same
17 chain?

18 A. Yes, and she has it. Yes. Yes, she has my chain.

19 Q. You don't know whether she has your chain.

20 A. She has my chain. I seen her pick it up. She has my
21 chain, yes, she does. She has it so when I get out, I can -- so
22 when I get out, she has the chain so she can come and try and
23 make up with her, give me back the chain and try to make up.

24 Every time she's upset, she takes something from the car and
25 runs away with it. She took my DVDs before, my GPS, and she

A. L.

1 away so I can chase behind her give me back my stuff and make up
2 with her.

3 Q. Mr. Alvarez, you claim Ms. Rivera wants to see you so
4 badly --

5 A. Excuse me?

6 Q. You claim that Ms. Rivera wants to see you so badly
7 that she takes things from you to have an excuse to see you?

8 A. Yes, ma'am. Yes, ma'am. Yes.

9 Q. Yet she's never told you where she lives?

10 A. She never told me where she lives, no. I don't know
11 where she lives. We just meet there. She has to live within
12 that area because she leaves at 4 in the morning. Like
13 10 minutes later she calling me where you at? I'm telling her
14 I'm close to the bridge. I already know she's in her apartment.
15 So obviously she has to live somewhere around there.

16 Q. You acknowledge even though Ms. Rivera has never given
17 you her address, you know she lives on the lower east side?

18 A. Yes, because we meet there every day. I know she don't
19 live far from there. I know she can't live that far because I
20 just told you why. When I leave at 4 in the morning, while I'm
21 still on the Williamsburg Bridge to go back to Brooklyn, she
22 calls me where you at? How far are you?

23 I know she's already at the -- she's already in the
24 apartment because she has two dogs, and the dogs start barking.
25 That's how I already know she's in her apartment.

A. L.

1 Q. You live in your motor home; correct?

2 A. Yes. I was staying there after my mother passed away.

3 Yeah, I bought a motor home.

4 Q. And you primarily live in Brooklyn; correct?

5 A. Yes.

6 Q. In addition to your motor home, we know you own the
7 blue van; correct?

8 A. Yes, ma'am.

9 Q. You also own another van?

10 A. A Ford van and a Honda.

11 Q. Is the Honda a sedan?

12 A. Honda Accord. She cut the seats on my Honda Accord.

13 Q. I'm just asking you about your vehicle.

14 Is it a four door?

15 A. Four-door sedan, yes.

16 Q. You also own a motorcycle?

17 A. Yes.

18 Q. You're pretty good with cars, Mr. Alvarez?

19 A. I know about cars. I know about mechanics.

20 Q. You're knowledgeable about how cars work?

21 A. Troubleshooting, yeah.

22 Q. One of the things you're familiar with is how a starter
23 works?

24 A. Yes.

25 Q. And you know a starter is appropriately named because

A. L.

1 it's part of the car that assists with physically starting up
2 the vehicle?

3 A. Right.

4 Q. Let me finish my question so the reporter can get it.

5 And you know that in order for an engine to start, the
6 engine has to be turned?

7 A. Exactly.

8 Q. And you know that that engine has to turn at a
9 substantial speed in order to be getting fuel into it; correct?

10 A. The battery has to be good, I know that. The battery
11 has to have enough juice. I don't know about all that other
12 stuff.

13 Q. You're not sure?

14 A. The battery has to have enough power for the engine to
15 start.

16 Q. You're not sure how fast the engine has to turn?

17 A. I'm not.

18 Q. You know, generally speaking, the way a starter works
19 is it turns the engine; correct?

20 A. Right. What happened was my starter, it was locking.
21 It locks because when you start the car, it has some teeth that
22 stick out and hit the flywheel. That's what starts the engine.

23 So sometimes the starter locks. You have to get under it
24 and tap it. You can call a mechanic. They'll tell you you have
25 to tap the starter to unlock it, and then the car will start.

A. L.

1 When I get stuck, I have to get under the car and hit the
2 starter with a hammer, and it unlocks the starter, the flywheel
3 and the starter. It's like a flywheel in there.

4 Q. Do you know, because you're knowledgeable about cars,
5 that that problem with the starter can only occur when the car
6 is being turned on; correct?

7 A. When I shut it off, it won't turn on sometimes. When I
8 turn off the car, sometimes it will not turn on.

9 Q. Right. The starter problem occurs when you're turning
10 a car from off to on; correct?

11 A. From off to on, right.

12 Q. You acknowledge that problem with the starter could not
13 occur suddenly while a car is already driving; correct?

14 A. No. It's -- the starter, it's already started the car.
15 No, once the car is on, the starter has nothing else to do with
16 it.

17 Q. You testified earlier that on December 27, 2015, you
18 went to visit your brother at around 3 p.m.; correct?

19 A. Yeah. Around that time, yeah. Some time in the
20 evening, yeah. I don't know the exact time. Some time in the
21 evening. Afternoon, I know that.

22 Q. And you also testified earlier that after you left your
23 brother's home, it was then that you fixed your starter on your
24 mobile home; correct?

25 A. I went to my brother's house. He was supposed to get a

A. L.

1 mechanic to fix the starter for me. He couldn't find the guy.
2 So I went and bought the starter and then went back to meet with
3 Evelyn.

4 Q. But it's your testimony today that in that process when
5 you went to see your brother, your mobile home was broken during
6 that period?

7 A. Well, the starter was locking up.

8 Q. And it's your testimony today that the mobile home,
9 because the starter was locking up, could not be driven in the
10 afternoon of that day; correct?

11 A. You could drive it. It will start if you tap the
12 starter. It could be driven, yes. You just have to tap it in
13 order for it to start.

14 Q. Is it your testimony that you drove the mobile home to
15 your brother's to fix it or the blue van?

16 A. I brought the mobile home over because we were going to
17 change the starter. My brother was going to get a mechanic to
18 fix the starter for me.

19 Q. And it's your testimony -- you testified this morning
20 that you finished installing that shortly before 10 p.m.;
21 correct?

22 A. I took the truck back to where to meet Evelyn, and it
23 started raining a little bit, and then I started putting the
24 starter on. That's -- as I was putting the starter on the
25 truck, I felt Evelyn go into the truck.

A. L.

1 Q. But you testified this morning that you got from your
2 brother's home to the lower east side; correct?

3 A. Yes.

4 Q. You testified in the grand jury in this case; correct?

5 A. Yes, ma'am.

6 Q. And it was your choice to testify in the grand jury;
7 right?

8 A. Yes, ma'am.

9 Q. When you were in the grand jury, you were under an oath
10 to tell the truth; correct?

11 A. Yes, ma'am.

12 Q. Your lawyer was present?

13 A. Yes.

14 Q. And you knew that if the grand jury believed you, they
15 might dismiss the case?

16 MR. HERLICH: Objection.

17 THE COURT: Sustained.

18 A. I --

19 THE COURT: You don't have to answer the question.

20 THE WITNESS: Sorry.

21 Q. It's your testimony today that you drove your camper
22 all the way back to Attorney Street from your brother's home;
23 correct?

24 A. Yes, ma'am.

25 Q. It's also your testimony today that earlier in the day

A. L.

1 on December 27, 2015, you were on the lower east side; correct?

2 A. Yes. We meet there every day. I was there. I'm there
3 every day. I don't deny it. I'm there every day with her.

4 MS. GUITERMAN: One moment, your Honor.

5 (Pause)

6 Q. I just want to be very clear, Mr. Alvarez. Your
7 testimony today is that your starter broke earlier in the day.
8 You went to visit your brother at around 3 p.m.. You were able
9 to get your starter working again. You drove your camper back
10 down in order to see Evelyn on the lower east side at around
11 10 p.m..

12 That is your testimony; correct?

13 MR. HERLICH: Objection.

14 A. I went to see my brother --

15 THE COURT: You're going to have to break it down.

16 MS. GUITERMAN: Okay.

17 Q. It's your testimony today that earlier in the morning
18 on December 27, 2015, you were on the lower east side; correct?

19 A. Yes.

20 Q. And it's your testimony that at some point in the
21 morning of December 27, 2015, the starter of your mobile home
22 started malfunctioning?

23 A. Yes.

24 Q. And it's your testimony that at around 3 p.m., you went
25 to your brother's on the upper east side, and he attempted to

A. L.

1 help you fix the starter; correct?

2 A. Yes. He was supposed to get a mechanic, yes.

3 Q. And it's your testimony that you then drove your mobile
4 home back to the lower east side --

5 A. We bought the starter first. We bought the starter.
6 He couldn't find a mechanic, so I drove back to meet with
7 Evelyn.

8 Q. You did buy a starter; correct?

9 A. Yes.

10 Q. And the camper then started working again?

11 A. Not until I put the starter back on the truck.

12 Q. But it is your testimony that from the moment you left
13 your brother's, you made it back down to the lower east side in
14 order to see Evelyn; correct?

15 A. Yes.

16 Q. Isn't it true, Mr. Alvarez, that in the grand jury you
17 testified that you were driving back to Brooklyn that day?

18 A. I was driving back to Brooklyn? I went to meet Evelyn.
19 I'm telling you the truth, I went to meet Evelyn.

20 Q. I'm just asking you in the grand jury in this case
21 isn't it true that you -- that you testified on December 27,
22 2015, you were on your way home to Brooklyn after you left your
23 brother's home?

24 A. Yes, but I was going to meet with Evelyn.

25 Q. But you acknowledge that Evelyn was not in Brooklyn;

A. L.

1 correct?

2 A. Right. She was in Delancey, right where the truck was
3 parked.

4 Q. And in the grand jury you testified that you were going
5 directly to Brooklyn; correct?

6 A. Yes. Yes.

7 MR. HERLICH: Objection.

8 THE COURT: Sustained.

9 Q. You also testified in the grand jury that as you were
10 driving --

11 MR. HERLICH: Objection.

12 THE COURT: Rephrase. If you want to refer to the
13 grand jury minutes, tell counsel what you're referring to.

14 MS. GUITERMAN: Page 59, lines 21 to 22.

15 Q. (Con't.) Isn't it also true that when you testified in
16 the grand jury, you testified that your starter got stuck at
17 around Essex Street?

18 MR. HERLICH: Objection as to form.

19 THE COURT: Exactly, as to form.

20 Q. (Con't.) Isn't it true, Mr. Alvarez, when you were in
21 the grand jury in this case you were asked the following
22 question and you gave the following answer:

23 Starting on line 19.

24 "QUESTION: Where exactly did you pull over? Your
25 starter got stuck; correct?

A. L.

1 "ANSWER: My starter got stuck around Essex Street,
2 Essex.

3 "QUESTION: Essex?

4 "ANSWER: Essex, yes.

5 "QUESTION: Do you know what cross --"

6 Isn't it true that you were asked that question, and you
7 gave that answer, Mr. Alvarez?

8 A. Yes, I was asked that question, but I don't know the
9 name of the street that the truck was parked that me and Evelyn
10 meet all the time. I don't know the name of that street.
11 That's why I used to say close to Essex Street which is by the
12 Williamsburg Bridge right there. The Williamsburg Bridge is
13 right there. That's why I said close to Essex Street.

14 Q. You drive all the time, right, Mr. Alvarez?

15 A. Yes.

16 Q. And you've been to the lower east side many times?

17 A. Yeah.

18 Q. So you know that Essex Street is about four blocks west
19 of Attorney Street?

20 A. I don't know -- I don't know the name of that street
21 where I got arrested where the truck is at. I don't know the
22 name of that street. That's why I said close to Essex Street.
23 I don't know the name of that street where I got arrested,
24 Attorney and Rivington.

25 Q. Just to be clear, today it is your testimony that your

A. L.

1 starter did not get stuck while you were driving home; correct?

2 A. The starter is bad all the time until I change it. The
3 starter is bad until I change it. I have to tap the starter for
4 the truck to turn on.

5 Q. You changed it after you parked your car on
6 Attorney Street; correct?

7 A. Yes. During the time I was changing it is when Evelyn
8 came and got into the truck. I was under the truck working on
9 it. That's when she got in and jumped into the camper.

10 Q. And that is when the car was parked in a parked
11 position?

12 A. It was still parked while I was under the truck fixing
13 it.

14 Q. It was not while you were driving?

15 A. No, no.

16 Q. Isn't it true that when you drove home from your
17 brother's apartment on the upper east side, you took
18 Second Avenue; correct?

19 A. Yes, I took Second Avenue.

20 Q. Is it your testimony today that you took Second Avenue?

21 A. Yes, I remember I took Second Avenue.

22 Q. After you were arrested in this case, you sat down with
23 the district attorney and a police officer; correct?

24 A. Yes, ma'am.

25 Q. You were read your Miranda warnings?

A. L.

1 A. Yes, ma'am.

2 Q. And you agreed to have a conversation; correct?

3 A. Yes, ma'am. I have nothing to hide, yes.

4 Q. Isn't it true in that conversation you said that you
5 took the FDR home, not Second Avenue?

6 A. I don't remember saying that. I don't remember saying
7 that.

8 Q. I'm going to show you --

9 MR. HERLICH: May we approach real briefly, Judge?

10 THE COURT: Yes.

11 (Whereupon, the following takes place at the side
12 bar, out of the presence and hearing of the jury:)

13 MR. HERLICH: Your Honor, if he's going to be
14 cross-examined about what he said on videotape at the ECAB
15 interview with the ADA, I should get a copy of that
16 transcript, and he should be asked the same format: Were
17 you asked this question and did you give this answer.

18 THE COURT: I don't know how the interview took
19 place.

20 Is that the transcript?

21 MS. GUITERMAN: This is. That is what I was
22 showing Mr. Herlich this morning. I'm trying to find the
23 portion I'm referring to.

24 THE COURT: And you have a copy of this?

25 MR. HERLICH: No, I don't.

A. L.

1 MS. GUITERMAN: Your former counsel did. I
2 apologize for that oversight.

3 THE COURT: Okay. You don't have an extra copy?

4 MS. GUITERMAN: I might. I have the VDF. It's in
5 the VDF as well.

6 THE COURT: The Q and A?

7 MS. GUITERMAN: His entire statement.

8 MR. HERLICH: Verbatim?

9 MS. GUITERMAN: Yes.

10 MR. HERLICH: It just doesn't show what the
11 question was?

12 MS. GUITERMAN: Correct. I can show you what I'm
13 referring to.

14 MR. HERLICH: Okay.

15 (Whereupon, the following takes place in open
16 court:)

17 Q. Mr. Alvarez, it's your testimony that you don't
18 remember telling the district attorney that you took the FDR?

19 A. Yes, ma'am.

20 Q. Do you remember telling the district attorney that you
21 took -- that you got off the Houston Street exit?

22 A. No, I don't. I remember saying I came down
23 Second Avenue.

24 Q. I'm going to show you a document, Mr. Alvarez.

25 (Showing to defense attorney)

A. L.

1 MR. HERLICH: Okay.

2 (Handed to witness)

3 Q. Please read the top paragraph to yourself. Don't say
4 anything. Just look up when you're done.

5 (Pause)

6 Q. (Con't.) Do you know now remember telling the district
7 attorney that you took the FDR at the Houston Street exit?

8 A. No, I don't. That other paragraph there -- I don't
9 remember --

10 Q. Mr. Alvarez, there is no question before you.

11 THE COURT: There is no question.

12 Q. (Con't.) It is your testimony, Mr. Alvarez, as you sit
13 here today that you were on the lower east side on the morning
14 of December 27, 2015; correct?

15 A. Yes, ma'am. I had stood there the night before with
16 Evelyn. So I wake up there every morning.

17 Q. And it's also your testimony, as you sit here today,
18 that you were on the lower east side in the late morning of
19 December 27, 2015; correct?

20 A. Well, when I was coming back -- you mean when I was
21 coming back from my brother's?

22 Q. You were -- yes.

23 A. Yes, I was coming down from my brother's. I was going
24 back to meet with Evelyn.

25 Q. And it's your testimony, as you sit here today, that

A. L.

1 | you went to visit your brother at around 3 p.m.; correct?

2 | A. Some time in the evening, yes.

3 | Q. Before 3 p.m. on December 27, 2015, you were on the
4 | lower east side; correct?

5 | A. Yes, ma'am.

6 | Q. Because that's where your camper was parked?

7 | A. Yes, ma'am.

8 | Q. Mr. Alvarez, isn't it true in the grand jury you were
9 | asked the following question, and you gave the following answer:

10 | Page 60, line 10.

11 | "QUESTION: I want to be very clear about what time you
12 | were in the vicinity of Essex Street. You stated that you
13 | left your brother's place at around 9 o'clock p.m.?

14 | "ANSWER: Around 9, yeah.

15 | "QUESTION: You were on the lower east side after
16 | 9 o'clock p.m.?

17 | "ANSWER: I was coming down Second Avenue, yes.

18 | "QUESTION: You were never near Essex around noon that
19 | day?

20 | "ANSWER: No."

21 | Do you remember being asked those questions and giving
22 | those answers?

23 | A. I don't remember those questions, but I can do -- I can
24 | tell you that I was always -- I always been in Essex Street
25 | because I meet there with Evelyn every day. That's the truth.

A. L.

1 I meet with Evelyn there every day.

2 Q. So you acknowledge, as you sit here today, that your
3 testimony in the grand jury was different from what you're
4 saying today?

5 A. I'm saying I don't remember those questions. That's
6 what I'm saying. I'm not saying it's different. I'm saying I
7 don't remember those questions. I definitely don't remember
8 saying that bottom paragraph I don't want to read out loud, but
9 I definitely don't remember saying that to anyone.

10 Q. So it's your testimony that the questions and answers
11 that were just provided from the grand jury are false?

12 A. I don't remember saying that --

13 MR. HERLICH: Objection.

14 THE COURT: Sustained.

15 Q. When you were visiting your brother on the upper east
16 side, that was at 120th and Park; correct?

17 A. 102nd and Park.

18 Q. 102nd and Park?

19 A. See, they wrote that wrong. They wrote 120. Sometimes
20 they write things wrong in those transcripts, too, because they
21 did it with my transcript. There are things that I never said
22 that are on there.

23 Q. Mr. Alvarez, the letters two and zero are both in 120;
24 correct?

25 A. Well, 102 is different from 120.

A. L.

1 Q. Mr. Alvarez, I'm asking you a very simple question. In
2 the number 120, there are the numbers one and two; correct?

3 A. Yes, ma'am. Yeah.

4 Q. And then the number 102, there are the numbers one and
5 two?

6 A. Yes, ma'am.

7 Q. Correct?

8 The brother that you were visiting, is that Angel Alvarez?

9 A. No.

10 Q. A different brother?

11 A. Yeah.

12 Q. Mr. Alvarez, you testified a few minutes ago that the
13 reason why you were going to the lower east side you claim was
14 to meet up with Evelyn; correct?

15 A. Every day.

16 Q. But you also testified earlier today that you had no
17 plans to meet up with Evelyn; correct?

18 A. That -- I testified today that I had no plans to meet
19 with Evelyn?

20 Q. I'll rephrase.

21 You testified today that you were fixing your starter, and
22 Evelyn suddenly got into your camper; correct?

23 A. Right. Right. I was there to meet her. I meet her
24 there every night. Why you think I have my blue van there and
25 the camper? I had two vehicles there, not one. She knows both

A. L.

1 of my vehicles, too.

2 Q. And to be clear, that was on the lower east side and
3 not your home in Brooklyn; correct?

4 A. That was on -- what street was that, Rivington and
5 Attorney?

6 Q. It was not in Brooklyn, correct --

7 A. No, it was not in Brooklyn.

8 Q. -- where you say you live?

9 A. No, it was in Manhattan. She meets me in Brooklyn
10 sometimes. I meet her in Manhattan.

11 Q. Mr. Alvarez, isn't it your testimony that you didn't
12 want to have sex with Evelyn that night?

13 A. No, I didn't because she started fighting with me. In
14 the morning I wouldn't mind having sex with her; but after she
15 stress me out, I don't want to have sex with her. That's the
16 problem, she fights with me, curses me out, and then she wants
17 to make love like nothing happened. I'm like what, are you
18 nuts?

19 Q. Mr. Alvarez, it's your testimony that you wanted
20 Ms. Rivera to get out of your camper that night; correct?

21 A. After she started getting violent, yeah.

22 Q. But it's also your testimony that you drove down to the
23 lower east side specifically to see her?

24 A. Yes. I went there in peace to spend time with her, yes.

25 Q. Mr. Alvarez, you've known Ms. Rivera since 2003; right?

A. L.

1 A. Yes, ma'am.

2 Q. And you had a sexual relationship on and off with her
3 for the past 14 years?

4 A. Straight. We never broke up. We going on twelve
5 years.

6 Q. You know her pretty well; right?

7 A. Yes. I went through hell with her.

8 Q. You know that she likes boxing?

9 A. Yes. I know she was divorced by her husband, too. He
10 dropped dead like not even two years later of a stroke.

11 Q. You know that she now lives alone?

12 A. Yes.

13 Q. You know that she works as a home health aide?

14 A. Very responsible, yes.

15 Q. And in the past, possibly today, you loved
16 Evelyn Rivera?

17 A. I still do. She took good care of my mother. I would
18 never want to hurt her. I wouldn't want to see her in here.
19 That's why I dropped the charges; I dropped the order of
20 protection.

21 Q. Mr. Alvarez, there is no question about that before
22 you.

23 You love Evelyn Rivera; correct?

24 A. Yes, I do.

25 Q. But Evelyn Rivera has never told you where she lives,

A. L.

1 is that true?

2 A. You know what her problem is, she never want me to
3 smoke. That's the reason why. When she was on 120th, I would
4 stay at her house every night. When she moved, you don't want
5 to stop smoking, I'm not giving you my address because you keep
6 smoking, you don't want to stop.

7 That's my fights with her, I can't smoke in my own vehicle.

8 Q. And she never invited you over?

9 A. No, not to her new apartment, no.

10 MS. GUITERMAN: Nothing further at this time,
11 your Honor.

12 THE COURT: Mr. Herlich.

13 REDIRECT EXAMINATION

14 BY MR. HERLICH:

15 Q. On cross-examination, Mr. Alvarez, you were asked a
16 question or two about your grand jury testimony in this case
17 from pages 41 through 42, and I'll just read it to you so I can
18 ask you a question.

19 "I have a mobile home. I went to visit my brother. On
20 the way back, the mobile home got stuck on me. The starter
21 was bad so I parked the vehicle. I was fixing the starter.
22 I finished fixing the starter. I got up. Evelyn Rivera was
23 standing by the truck. She was standing right by the truck.
24 She walked right in the truck without permission."

25 Do you recall that answer?

A. L.

1 A. I remember I told them what she did. She walked into
2 the truck without permission. She did.

3 Q. And I would like to ask you if you recall in the grand
4 jury the following questions and answers from page 62, lines 5
5 through 18.

6 "QUESTION: It's your testimony today that when you
7 first came upon Ms. Rivera on the street, she told you she
8 wanted to have sex with you?

9 "ANSWER: She walk -- I was under the car changing
10 the starter. When I got up, she was already in the truck.
11 She was already inside the truck. I am like what are you
12 doing here. She's like what bitch you been with, what,
13 what."

14 MS. GUITERMAN: Objection. Outside the scope.

15 THE COURT: I'll allow it.

16 Q. (Con't.) "She had started, what bitch you been with
17 with her. She wanted to have sex. I didn't want to have
18 sex with her. She got an order of protection against me.
19 She is not supposed to be in my truck. I agreed to get away
20 from her. She -- when she was getting violent."

21 Do you recall that question and answer?

22 A. Yes, sir.

23

24 (Continued on next page)

25

A. L.

1 (Continued from previous page.)

2 MR. HERLICH: Nothing further, Your Honor.

3 THE COURT: Re-cross?

4 MS. GUITERMAN: One moment, Your Honor.

5 (Whereupon, there was a pause in the
6 proceedings.)

7 RE-CROSS EXAMINATION

8 BY MS. GUITERMAN:

9 Q. Mr. Alvarez, you were just asked a question about
10 your Grand Jury testimony, regarding your mobile home getting
11 stuck on Essex Street; do you remember that?

12 MR. HERLICH: Objection.

13 THE COURT: I will allow it.

14 A. Yes.

15 Q. And it was your testimony today, that the reason why
16 you were driving downtown was in order to stop on the Lower
17 East Side; correct?

18 THE COURT: I'm sorry? In the Grand Jury, or
19 today?

20 MS. GUITERMAN: No, no. Today.

21 Q. It was your testimony today, that when you left your
22 brother's home, you left with the purpose of going to see
23 Evelyn, on the Lower East Side; right?

24 MR. HERLICH: Objection, beyond the scope.

25 THE COURT: I will allow it.

1 A. I went to my brother's house; he was supposed to get
2 a mechanic to fix the truck; he couldn't find the guy. So I
3 bought the starter. It was getting late. I went back to meet
4 Evelyn. I parked over there, and started to put the starter on
5 the truck, and that's when she walked into the truck.

6 Q. You were putting the starter on the truck after you
7 had already parked your camper; correct?

8 A. Yes. I had already parked the camper, yes.

9 Q. That was on Attorney Street?

10 A. That's Attorney Street, yeah, Attorney Street.

11 Q. Isn't it true, in the Grand Jury you testified that
12 your starter got stuck at Essex Street?

13 A. I told you, I stood there.

14 MR. HERLICH: Objection.

15 THE COURT: Sustained.

16 We just went over this. We just went over this on
17 redirect.

18 MS. GUITERMAN: Exactly, Your Honor.

19 THE COURT: So, you want to do it a third
20 time?

21 MS. GUITERMAN: One moment, Your Honor.

22 (Whereupon, there was a pause in the
23 proceedings.)

24 Q. Your testimony today, Mr. Alvarez, when you say that
25 you fixed your starter when the car was parked, was that in the

1 evening?

2 A. At night, yeah; when I came back from my brother's.

3 Q. That was at 10:00 p.m.; correct?

4 A. Between -- In between, yeah. Around that time,
5 yeah.

6 (Whereupon, there was a pause in the
7 proceedings.)

8 MS. GUITERMAN: I'm sorry, Your Honor, one
9 moment.

10 (Whereupon, there was a pause in the
11 proceedings.)

12 MS. GUITERMAN: Nothing further, Your Honor.

13 THE COURT: Mr. Herlich.

14 MR. HERLICH: No.

15 THE COURT: Mr. Alvarez, you can have your
16 seat.

17 THE DEFENDANT: Thank you, sir.

18 (Defendant resumes his seat at the defense
19 table.)

20 THE COURT: Mr. Herlich?

21 MR. HERLICH: The defense rests, Your Honor.

22 THE COURT: All right.

23 Ladies and gentlemen, you have now heard both
24 sides. Once again, it's customary for the attorneys and I
25 to have a discussion, administratively, outside of the

APPENDIX I

Alvarez

1 R A U L A L V A R E Z ,
2 called as a witness, accompanied by
3 attorney, Timothy Pruitt, Esq.,
4 stated as follows:

5 BY MS. GUITERMAN:

6 Q. Mr. Alvarez, please state your full
7 name and address?

8 A. Raul Alvarez, 9730 81st Street
9 Ozone Park, New York 11416.

10 Q. Is MS. Timothy Pruitt, seated next
11 to you, your attorney?

12 A. Yes, ma'am.

13 Q. You have in front of you a document
14 that's entitled waiver of immunity. It's
15 marked as grand jury exhibit number 11 for
16 identification. Have you read grand jury
17 exhibit number 11 for identification today
18 prior to entering the grand jury chamber?

19 A. My attorney read it to me and I
20 signed it.

21 Q. Okay. And that's your signature at
22 this bottom of the page?

23 A. Yes.

24 Q. Have you conferred with your
25 attorney for the purpose of deciding whether

TD

Alvarez

1 you will swear to the waiver of immunity and
2 testify before the grand jury?

3 A. Yes, ma'am.

4 Q. Do you desire additional time to
5 consult with your attorney?

6 A. No.

7 Q. MS. Alvarez, do you understand that
8 although you are appearing before this grand
9 jury as a witness, the grand jury may charge
10 you with the commission of a crime or crimes
11 based upon your testimony and other evidence
12 before the grand jury?

13 A. Yes, ma'am.

14 Q. Do you understand that your
15 testimony before this grand jury may be used
16 against you in this and in other proceedings?

17 A. Yes, ma'am.

18 Q. Do you understand that you have a
19 right to refuse to appear and be sworn before
20 this grand jury and to refuse to give any
21 testimony whatsoever that might tend to
22 incriminate you?

23 A. Yes, ma'am.

24 Q. Do you now wish to swear to the
25 waiver of immunity and testify before the grand

TD

Alvarez

1 jury?

2 A. Yes, ma'am.

3 Q. Do you do so voluntarily?

4 A. Yes, ma'am.

5 Q. Has anyone forced you or coerced
6 you in anyway to sign, swear to, or execute
7 this waiver?

8 A. No.

9 Q. Has any promise been made to you by
10 anyone in connection with you signing, swearing
11 to or executing this waiver?

12 A. No.

13 Q. If you wish to waive immunity and
14 testify please stand and raise your right hand,
15 so the foreperson can swear you to the waiver.

16 FOREPERSON: Do you some solemnly
17 swear that you have read the document
18 exhibit number 11, entitled waiver of
19 immunity, that you understand it, that
20 you have signed it and that the
21 statements made by you therein are true,
22 so help you God?

23 THE WITNESS: Yes, ma'am.

24 MS. GUITERMAN: I now offer and
25 receive grand jury exhibit number 11 into

TD

Alvarez

1 evidence.

2 FOREPERSON: Do you solemnly swear
3 that the evidence you shall give to the
4 grand jury upon this complaint against
5 Raul Alvarez shall be the truth, the
6 whole truth and nothing but the truth, so
7 help you God?

8 THE WITNESS: Yes, ma'am.

9 BY MS. GUITERMAN:

10 Q. The grand jury is investigating an
11 incident which occurred on December 27th, 2015
12 at approximately 10:00 p.m. on Rivington Street
13 -- between Rivington and Attorney Street in New
14 York County. Do you have a statement that you
15 wish to make with regard to that incident?

16 A. Yes, ma'am. Well, first I want to
17 say my name is Raul Alvarez. I'm 49 years old.
18 I was born in Puerto Rico. I was raised here.
19 I met Evelyn Rivera in 2003. She was my
20 mother's home attendant. And, unfortunately, I
21 been having a bad relationship with her ever
22 since. What happened was on that day I was
23 coming from -- I went to visit my brother
24 Christmas day. I have a mobile home. I went
25 to visit my brother. On the way back the

TD

Alvarez

1 mobile home got stuck on me. The starter was
2 bad, so I parked the vehicle. I was fixing the
3 starter. I finished fixing the starter. I got
4 up. Evelyn Rivera was standing by the truck.
5 She was standing right by the truck. She
6 walked right in the truck without permission.
7 She had walked right into the truck and laid on
8 the bed. She asked me to have sex with her. I
9 told her I didn't want to have sex with her. I
10 was dirty. My hands were greasy. I didn't
11 want to have sex with her. She was violent.
12 She started screaming. Excuse my language,
13 what bitch you been with. She started
14 screaming and getting violent. I was trying to
15 get away from her because she has an order of
16 protection against me. The order of protection
17 stems from some text messages that was sent to
18 her from my other girlfriend I was with before.
19 Her and Evelyn got into an argument. I don't
20 know what happened. They -- Evelyn got
21 arrested. She had went to Brooklyn starting
22 trouble where I live, all the way from
23 Manhattan. And that the order of protection
24 stems from the text messages that were sent to
25 Evelyn. She had an order of protection against

TD

Alvarez

1 me. She was violent. I was trying to get
2 away. She was like you not going nowhere. She
3 had grabbed me by here. She had popped my
4 chain. I got out of the truck. I walk away.
5 I went through the driver's side. I got into
6 the truck. I started it up. She got out. I
7 left. I went about, I would say, about four
8 blocks and the wire from the -- one of the
9 wires from the generator was sticking out. So
10 I stopped the truck. I put in the wire. The
11 cops pulled up. They told me -- she had asked
12 me what's the problem. I said I had a -- my
13 girl, she came, she had an order of protection
14 against me. She had came over. I don't know
15 how she knew where I was at. She had just
16 appeared out of nowhere. The officer told me
17 wait a minute. Then next thing I know I was
18 being arrested for assault. This is not the
19 first time I been arrested. This woman had me
20 arrested. This is not the first time people of
21 the jury. This is not the first time. She's
22 done this numerous times already. The
23 Assistant District Attorney knows. I spoke to
24 the District Attorney about this. I was
25 arrested. And I explained to the officer

TD

Alvarez

1 exactly what happened. The officer said
2 listen, I have to arrest you cause she was
3 making a complaint. I requested to speak to
4 the grand jury, the District Attorney. The
5 officer came to me pick up, ask me if I wanted
6 to speak to the assistant district attorney. I
7 went to speak to the District Attorney. I
8 requested to speak to the grand jury, tell my
9 part of the story.

10 Q. Does that conclude your statement?

11 A. Yes, ma'am.

12 Q. You spoke of a woman named Evelyn
13 Rivera, right?

14 A. Yes, ma'am.

15 Q. You stated that you know her since
16 2003?

17 A. Yeah, she was my mother's home
18 attendant.

19 Q. You had an intimate relationship
20 with Ms. Rivera, right?

21 A. Yes.

22 Q. You had sexual intercourse with her
23 in the past?

24 A. Yes.

25 Q. On December 27th of 2015 you were

TD

Alvarez

1 aware that there were two different orders of
2 protection in place in favor of Evelyn Rivera,
3 correct?

4 A. Yes, ma'am.

5 Q. You are aware of both orders of
6 protection because you were in court when both
7 orders were issued?

8 A. Yes, ma'am.

9 Q. You signed both of those orders?

10 A. Yes, ma'am.

11 Q. MS. Alvarez, I will show you what's
12 in evidence as grand jury exhibit one and two.

13 A. Yes.

14 Q. I'd like to direct your attention
15 to grand jury exhibit one, if you flip them
16 over, you will see the stamps, so you can
17 understand?

18 A. Yes.

19 Q. Do you see grand jury exhibit
20 number one?

21 A. Yes.

22 Q. Do you recognize your signature on
23 the bottom of that document?

24 A. Yes, ma'am. Yes, I do, ma'am.

25 Q. On the front?

TD

Alvarez

1 A. Yes.

2 Q. Are you aware that order of
3 protection expires on January 29th of 2018?

4 A. Yes.

5 Q. So it was in effect on December
6 27th of 2015?

7 A. Excuse me.

8 Q. It was in effect on December 27th
9 of 2015?

10 A. Yes, it was in effect, yeah.

11 Q. Okay. Now, I'd like to direct your
12 attention to grand jury exhibit number two. Do
13 you know which document I am referring to.

14 A. I see two different ones. I don't
15 know which is two.

16 Q. If you flip them over there is a
17 stamp that each one has a number.

18 A. This is two.

19 Q. Now, you are looking at grand jury
20 exhibit number two. Do you recognize your
21 signature at the bottom of that document?

22 A. Yes, ma'am.

23 Q. You are aware that that order of
24 protection expires on April 15th of 2016?

25 A. Yes, it says, yeah, April 15th

TD

Alvarez

1 2016, yeah.

2 Q. So it was in effect -- I'm sorry.
3 It expires -- withdrawn. It was in effect on
4 December 27th of 2015, correct?

5 A. It says October 16th, 2015. It
6 says dated 10/16/15. Then it says 4/15 2016.

7 Q. The October date that you just read
8 that's the date that order was issued, right?

9 A. Yes, ma'am.

10 Q. April 15th, 2016 is the date that
11 it expires?

12 A. Yes, ma'am.

13 Q. So that order was in effect on
14 December 27th, 2015?

15 A. Yes, ma'am, yes.

16 Q. You are aware that both of those
17 documents order you to stay away from Evelyn
18 Rivera?

19 A. Yes.

20 Q. Both orders order you not to have
21 any communication with Ms. Rivera, is that yes?

22 A. Ma'am, yes.

23 Q. Both orders order you not to
24 assault Ms. Rivera?

25 A. I never assaulted Ms. Rivera.

TD

Alvarez

1 Q. My question is the orders direct
2 you not to assault her?

3 A. Right, right, yes, of course.

4 Q. The orders also direct you not to
5 harass Ms. Rivera?

6 A. Exactly.

7 Q. The orders order you not to commit
8 any crimes whatsoever against Ms. Rivera?

9 A. Yes, ma'am.

10 Q. MS. Alvarez, over the course of
11 your life time you been convicted of ten
12 misdemeanors, correct?

13 A. Yes. I made mistakes in my past,
14 yes. However, I believe I have made the
15 efforts to change my life. I got my commercial
16 driver's license. I am working now. I work
17 for, umm, New Generation. I am a driver for
18 New Generation. I delivered circulars.

19 Q. I asked you whether you were
20 convicted of ten misdemeanors?

21 A. Yes, I have.

22 Q. You also been convicted of two
23 felonies?

24 A. Yes, ma'am.

25 Q. On March 18th, 1988 you were

TD

Alvarez

1 convicted of robbery in the first degree in
2 Kings County, New York, correct?

3 A. Yes, ma'am.

4 Q. During the course of that robbery
5 you were armed with a gun?

6 A. Yes, ma'am.

7 Q. On December 21st, 1992 you were
8 convicted of an attempted robbery in the first
9 degree in Kings County, New York?

10 A. Yes, ma'am.

11 Q. During the course of that attempted
12 robbery you caused serious injury to someone?

13 A. No.

14 Q. Tell us what happened in this case?

15 A. I don't remember what happened.

16 That was how many years was that, ma'am?

17 Q. You were convicted in 1992?

18 A. I don't remember. I know there was
19 no physical injury.

20 Q. You acknowledge though you were
21 convicted of attempted robbery in the first
22 degree?

23 A. It was attempt, yes.

24 Q. It's your testimony today that you
25 don't remember what happened in that case?

TD

Alvarez

1 A. I know there was no physical
2 injury. I know that for a fact there was no
3 physical injury.

4 Q. But you remember that in 1988 you
5 used a gun?

6 A. 1988 yes, I was convicted in 1988,
7 yes.

8 Q. On March 9th of 1996 you were
9 convicted of possession of contraband while in
10 prison in the second degree in Erie County,
11 New York, correct?

12 A. Yes.

13 Q. You committed that offense while
14 you were in prison because of the attempted
15 robbery in the first degree I just asked you
16 about?

17 A. Yes.

18 Q. While you were inside of that
19 prison you had contraband?

20 A. Yes.

21 Q. February 20th of this year 2015 you
22 were convicted of criminal mischief in Kings
23 County, New York, correct?

24 A. Yes, ma'am.

25 Q. During that incident a vehicle was

TD

Alvarez

1 driving in front of you and that vehicle
2 stopped short, correct?

3 A. Yes.

4 Q. That caused you to hit the rear end
5 of that vehicle?

6 A. She hit my vehicle.

7 Q. Your two vehicles collided?

8 A. She hit my vehicle. That's what
9 happened.

10 Q. After the two vehicles collided you
11 had got off your car and began screaming at the
12 other vehicle, correct?

13 A. No, no. That's not what happened.

14 Q. Tell us what happened?

15 A. When she hit my vehicle, she took
16 off. She left. She took off. I skid behind
17 her. Then she stopped the cop car. I was
18 behind her, following her. She got to the
19 precinct. When I got to the precinct, I told
20 the police that she hit the car. She had
21 claimed I broke the back window. I got
22 arrested for that.

23 Q. You did, in fact, break the window
24 of that car, didn't you?

25 A. I did not break the window. No, I

TD

Alvarez

1 didn't.

2 Q. You were convicted of criminal
3 mischief though, correct?

4 A. Yes, I pled to it.

5 Q. I'm sorry.

6 A. I pled to it.

7 Q. You pled to it because you broke
8 that window?

9 A. No, that's not why. I wanted to
10 get out of jail.

11 Q. Are you telling this grand jury
12 that you pled guilty to criminal mischief?

13 A. Right.

14 Q. Which is a crime that says you
15 broke property?

16 A. Right.

17 Q. You're claiming you did not break
18 the window?

19 A. I did not break the window. They
20 gave me time served. I was going to get out if
21 I pled. I got out cause I wanted to get out.

22 Q. It was in your interest to lie to
23 the judge?

24 A. It wasn't a lie. They said do you
25 want to plead. My lawyer said -- told me that

TD

Alvarez

1 if I plead to it, I will be released, so I pled
2 to it cause I can be released. I didn't want
3 to stay in jail.

4 Q. When you plead to a crime, a judge
5 asks you questions, one of the questions a
6 judge asks you did you commit this crime?

7 A. Yes.

8 Q. You responded yes to that crime?

9 A. Yes, I did.

10 Q. You're telling us today that you
11 did not commit that crime?

12 A. I did not break the window. I did
13 not break the window. I pled guilty because I
14 wanted to get out of jail. I did not break the
15 window.

16 Q. On January 7th of 2013 you were
17 convicted of criminal contempt in the second
18 degree in New York County, correct?

19 A. Excuse me?

20 Q. On January 7th, 2013 you were
21 convicted of criminal contempt in the second
22 degree here in New York County?

23 A. I don't know that. I don't
24 remember that, I didn't break the window. I
25 did not break the window.

TD

Alvarez

1 Q. Isn't it true that between 2011 and
2 2013 there was a series of incidents between
3 you and Ms. Rivera?

4 A. Yeah.

5 Q. In connection with those incidents
6 you were arrested?

7 A. Yes. She makes false accusations.
8 Like I said, this is not the first time she
9 made the false accusations. This is not the
10 first time I been arrested for this. This is
11 first time people of the jury, this woman is
12 bipolar. She has split personality. This
13 woman is --

14 Q. MS. Alvarez, I will bring you back.
15 On January 7th of 2013.

16 A. Yes.

17 Q. As a result of those incident that
18 we just talked about?

19 A. Right.

20 Q. You pled guilty to criminal
21 contempt in the second degree?

22 A. Yes, I did.

23 Q. As a result of that plea there was
24 an order of protection in place?

25 A. Yes, ma'am.

TD

Alvarez

1 Q. In fact, before that plea there was
2 another order of protection in place?

3 A. Yes.

4 Q. That's what those cases were about?

5 A. I think one had already expired.

6 Q. You pled guilty to criminal
7 contempt?

8 A. Yes, I did.

9 Q. Which means -- means you were
10 guilty of criminal contempt?

11 A. I pled guilty, yes. That's for
12 some phone calls that I made.

13 Q. Phone calls you made?

14 A. Phone calls that I made.

15 Q. When you made the phone calls you
16 actually were threatening to hurt Ms. Rivera?

17 A. No, no, no, no, no. Me and Evelyn
18 Rivera were on the phone all of the time. No,
19 I never threatened to hurt Evelyn Rivera.

20 Q. You acknowledge calling Ms. Rivera?

21 A. Yes, we were in a relationship. I
22 loved this woman. I loved her. She had took
23 care of my mother.

24 Q. When you called Ms. Rivera there
25 was an order of protection in place, right?

TD

Alvarez

1 A. Umm, yes. She came to visit me
2 too. She had come to visit me. She had
3 brought my clothes.

4 Q. Please, I just ask whether there
5 was an order in place?

6 A. Yes, there was.

7 Q. Okay. Did you still called her,
8 correct?

9 A. She is the only person I had. I
10 lost my mother. I don't know nobody else, but
11 her. She is the only person I have to bring
12 socks and clothes. I don't have anybody else.

13 Q. Please listen to the question. If
14 you need it rephrased, I will. You are aware
15 at this time you made the phone calls there was
16 an order of protection in place, right?

17 A. Yes.

18 Q. That order of protection was a
19 court order for you not to have any
20 communication with Ms. Rivera?

21 A. Yes, ma'am.

22 Q. But you still called her, correct?

23 A. Yes, ma'am, I did.

24 Q. As a result you were convicted of
25 criminal contempt in the second degree?

TD

Alvarez

1 A. Yes, yes.
2 Q. You live in Brooklyn now, right?
3 A. Yes, ma'am.
4 Q. You said that on December 27th,
5 2015 you were visiting your brother?
6 A. Yeah.
7 Q. Where does your brother live?
8 A. One Twentieth and Park.
9 Q. What time did you leave your
10 brother's place?
11 A. Maybe like -- I don't know exact
12 time. I don't know exact time I left. I know
13 it was late after 9:00.
14 Q. After 9:00 in the evening?
15 A. Little bit after nine.
16 Q. Where were you headed?
17 A. I was going home.
18 Q. That's to Brooklyn?
19 A. To Brooklyn, yeah.
20 Q. How did you get there, the FDR?
21 A. No. I took, what was that, First
22 Avenue, Second Avenue. I think it's Second
23 Avenue, Second Avenue is one that comes
24 downtown right, Second Avenue.
25 (CONFERRING)

TD

Alvarez

1 Q. You're telling this grand jury that
2 when you drove from your brother's house
3 downtown on December 27th of 2015 you were
4 driving southbound on Second Avenue?

5 A. I was coming downtown towards the
6 Williamsburg Bridge from 120th. I was coming
7 down.

8 Q. You did not take the FDR?

9 A. No, I didn't take the FDR.

10 Q. Umm, after you were arrested in
11 this case you spoke with the Assistant District
12 Attorney, correct?

13 A. Yes, I did.

14 Q. There was also police officers
15 present in the room when that conversation
16 happened?

17 A. Yes, ma'am.

18 Q. And before you spoke with the
19 Assistant District Attorney, umm, you were read
20 a series of Miranda warnings?

21 A. Yes, they gave me the rights.

22 Q. You understood that you had the
23 right to remain silent?

24 A. Yes.

25 Q. You chose to answer questions?

TD

Alvarez

1 A. Yes, ma'am.

2 Q. You did so voluntarily?

3 A. Yes, ma'am.

4 Q. Isn't it true that you told the
5 Assistant District Attorney that on December
6 27th, 2015 you took the FDR downtown and got
7 off on Houston Street exit?

8 A. I don't remember saying that. I
9 remember coming. I didn't take the FDR. You
10 cannot get on the FDR with a mobile home. You
11 can't get on the FDR with a mobile home.

12 Q. My question to you was whether or
13 not you told the Assistant District Attorney
14 that you took the FDR?

15 A. I don't remember saying that I took
16 the FDR. No, I don't. I came down Second
17 Avenue. You can't get on the FDR with a mobile
18 home.

19 Q. Where exactly did you pull over.
20 Your starter got stuck, correct?

21 A. My starter got stuck around Essex
22 Street, Essex.

23 Q. Essex.

24 A. Essex, yes.

25 Q. Do you know what cross streets you

TD

Alvarez

1 were near?

2 A. No, I don't know. I am not
3 familiar with that area.

4 Q. Okay. But you hadn't been in that
5 location earlier that day?

6 A. Excuse me.

7 Q. You had not been on Essex Street
8 earlier that day?

9 A. No.

10 Q. I want to be clear about what time
11 you were in that vicinity of Essex Street you
12 stated that you left your brother's place at
13 around 9:00 p.m.?

14 A. Around nine, yeah.

15 Q. You were only on the lower east
16 side area after 9:00 p.m.?

17 A. I was coming down Second Avenue,
18 yes.

19 Q. You were never near Essex Street
20 around noon that day?

21 A. No.

22 Q. Was your mobile home -- can you
23 describe your mobile home for us?

24 A. It's Chevy mobile home. It's 1981
25 Chevy mobile home.

TD

Alvarez

1 Q. Okay. And that vehicle was with
2 you the entire day?

3 A. Yeah.

4 Q. You claimed that when you first saw
5 Ms. Rivera that evening your mobile home was in
6 a parked position, correct?

7 A. It was on front of park.

8 Q. It was in park, it wasn't in drive?

9 A. It was not in drive. It was
10 parked. I was fixing the starter.

11 Q. Umm, and it's your testimony today
12 that after the incident inside of your van, you
13 got into your driver's seat, correct?

14 A. I came out the side and got into
15 the driver's seat to leave. She didn't want me
16 to leave. She was like you not going nowhere.
17 She had grab me. I got order of protection
18 against her. I didn't want to be around. She
19 broke her own order of protection by coming
20 into my vehicle.

21 Q. MS. Alvarez, I am asking whether
22 you got into the driver's seat following the
23 incident between you and Ms. Rivera?

24 A. Yes, I did.

25 Q. And it's your testimony that Ms.

TD

Alvarez

1 Rivera got out of the van and left after the
2 incident?

3 A. Yes, I drove off, yeah. I drove
4 off.

5 Q. It's your testimony today that when
6 you first came upon Ms. Rivera on the street,
7 she told you she wanted to have sex with you?

8 A. She walk -- I was under the car
9 changing the starter. When I got up, she was
10 already in the truck. She was already inside
11 the truck. I am like what are you doing here.
12 She's like what bitch you been with, what,
13 what. She had started, what bitch you been
14 with her. She wanted to have sex. I didn't
15 want to have sex with her. She got an order of
16 protection against me. She is not supposed to
17 be in my truck. I agreed to get away from her.
18 She -- when she was getting violent.

19 Q. MS. Alvarez, there is two orders of
20 protection. They direct you to stay away from
21 her, right?

22 A. I don't even know where she live.
23 I don't know where Evelyn lives. I don't know
24 where she works. I don't know nothing about
25 Evelyn.

TD

Alvarez

1 Q. Yet coincidentally though you don't
2 know where she lives, your car happened to
3 break down on Essex Street?

4 A. Coming from my brother's house,
5 yes.

6 Q. You are telling this grand jury
7 this woman, who has two orders of protection
8 for you to away from her --

9 A. Yes.

10 Q. -- Suddenly walks into your van and
11 --

12 A. Yes.

13 Q. It's your testimony today that this
14 woman, who has two orders of protection for you
15 to stay away from her suddenly walked into your
16 van?

17 A. Yes, yes.

18 Q. Let me finish my question MS.
19 Alvarez. Laid down on the bed and told you she
20 wanted to have sex with you?

21 A. Yes, yes, yes, yes.

22 Q. Do you expect this grand jury to
23 believe that?

24 A. Yes. That's the truth. That's the
25 truth people of the jury. She came into my

TD

Alvarez

1 vehicle. She had wanted me to have sex with
2 her. I didn't want to have sex with her. She
3 started getting all violent. She has orders of
4 protection against me. I tried to get away
5 from her. She was screaming. Somebody calls
6 the cops. She didn't call the cops. Somebody
7 else called the cops. I took off cause I know
8 if I stayed I am going to get arrested. She
9 was not supposed to be in the vehicle. I got
10 two blocks down. The cops came. They asked me
11 what happened. I explained the situation to
12 them. Next thing I know I was being arrested
13 for assault.

14 Q. You said someone called the cops.
15 There was eyewitnesses to this incident?

16 A. Yes, there was people across the
17 street, I believe. I was trying to calm her
18 down. She kept screaming you not going
19 nowhere. She was screaming you not going
20 nowhere.

21 Q. It's possible --

22 A. She had a bottle in her hands too.

23 Q. It's possible that some of the
24 people, who you saw outside your van, had been
25 there earlier in the day?

TD

Alvarez

1 A. It's possible, yeah. I don't know.
2 I didn't see them. I know somebody called
3 them. She didn't.

4 Q. It's possible that someone was
5 there during the day?

6 A. Possible.

7 Q. You are under oath right now MS.
8 Alvarez.

9 A. Yes, ma'am.

10 Q. It's your testimony today that you
11 were nowhere near Essex Street anytime before
12 9:00 p.m. that day?

13 A. Nowhere near Essex Street. No, I
14 wasn't. No, I wasn't.

15 MS. GUITERMAN: I have no further
16 questions for the witness.

17 THE WITNESS: No, I wasn't.

18 MS. GUITERMAN: At this time --

19 (CONFERRING)

20 Q. A member of the grand jury would
21 like to know what color your mobile home is?

22 A. It's white, with brown and like a
23 rust stripe.

24 (CONFERRING)

25 Q. Grand juror would like to know if

TD

Alvarez

1 you struck Ms. Rivera with a bottle?

2 A. No, I didn't. No, I didn't. I
3 didn't touch Ms. Rivera people of the jury. I
4 did not touch Ms. Rivera. My lawyer told me I
5 could get a lot of time for this. I want to
6 let you know these are false allegations. I
7 never touched Ms. Rivera. She had broke her
8 own order of protection by coming into my
9 vehicle. I left.

10 Q. MS. Alvarez, I will ask you a
11 question.

12 A. Yes, ma'am.

13 Q. Did you see that Ms. Rivera had a
14 chipped tooth after she left your van?

15 A. No, I didn't see a chipped tooth.

16 Q. You said that didn't you?

17 A. No, I didn't. I didn't see no
18 chipped tooth. I didn't see no chipped tooth.
19 I didn't see no chipped tooth. It was dark
20 anyway. I didn't see no chipped tooth.

21 MS. GUITERMAN: Any other
22 questions?

23 (CONFERRING)

24 THE WITNESS: Can I say something
25 to the grand jury.

TD

Alvarez

1 MS. FERRARI: There was no question
2 before you, sir.

3 THE WITNESS: Okay. All right.

4 BY MS. GUITERMAN:

5 Q. Grand juror would like to know
6 isn't it true that after Ms. Rivera stepped out
7 of your van that you came out of your van and
8 laid on the ground?

9 A. I didn't lay on the ground. I
10 left. I got into the vehicle and left. I
11 didn't lay on the ground, no.

12 Q. Isn't it true that the electric
13 cord to your van was trailing behind you?

14 A. Yes. That's why I stopped a couple
15 of blocks. I told you. I stopped. I stopped
16 like two blocks. I realized that the wire was
17 out. I was putting the wire back into the
18 truck. That's when the police rolled up.

19 Q. The reason why you raced off is
20 because you were afraid the police were coming?

21 A. No.

22 Q. Let me finish my question. The
23 reason you raced off is because you were
24 worried the police were coming because you saw
25 --

TD

Alvarez

1 A. I didn't see nobody on the phone.
2 I didn't know the cops were coming. I didn't
3 know that. I know Evelyn Rivera didn't call
4 the cops. She was right there with me.

5 Q. Mr. Alvarez, didn't you testify
6 just a few moments ago that you were worried
7 these eyewitnesses were calling the police?

8 A. I said somebody had to have called
9 the police. She didn't. That's what I said.
10 It wasn't her that called the cops. That's
11 what I said. Eyewitnesses called the cops. I
12 know it wasn't her.

13 Q. You do acknowledge that on December
14 27th you raced away from that location with the
15 electrical cord of your vehicle trailing behind
16 you?

17 A. I didn't realize it was out. I was
18 trying to get away from her. This woman is
19 crazy. She has orders of protection against
20 me. She was breaking her own order of
21 protection by coming into the vehicle. I even
22 forgot the cord was out.

23 Q. You did race off?

24 A. I am trying to get away from her.
25 I took off. Yes, I am trying to get away from

TD

Alvarez

1 her. Yes, she popped my chain too.

2 (CONTINUED ON NEXT PAGE BY RS)

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Alvarez

1 PEOPLE VS. RAUL ALVAREZ
2 5TH DEC/JAN 2016 GJ
3 DECEMBER 31, 2015
4 RDS RELIEVING TD
5 BY MR. GUITERMAN:

6 (CONFERRING)

7 Q. A grand juror would like to know
8 were you running in Ms. Rivera on the this
9 date, was it total coincidence you think?

10 A. No, it was a coincidence, no. She
11 has a way of finding me through the phone,
12 because this is not the first time. I have
13 witnesses. I gave you my witnesses. I gave
14 you my witnesses.

15 Q. If you believe that it was a
16 coincidence then is it your testimony Ms.
17 Rivera knew your car starter would break down
18 at precisely that location?

19 A. I don't know that she knew my
20 starter with break down but she knew I was
21 there. How would she appear there if she
22 didn't know I was there? How does she know I'm
23 there? She has a way of finding me through her
24 phone. I don't know how she does it, but she
25 does it through the phone. She knows exactly

RDS

Alvarez

1 where I'm at.

2 Q. Isn't it true that she lives in the
3 area?

4 A. I don't know where she lives. I
5 swear on my mother's grave I don't know where
6 Evelyn lives. I don't know where she works, I
7 don't know nothing about Evelyn.

8 Q. But your starter did happen to
9 break down right on the lower east side, right?

10 A. Yes, it did. I didn't know that's
11 where she lives.

12 MR. GUITERMAN: There is no
13 question before you.

14 THE WITNESS: Okay, I'm sorry.

15 (CONFERRING)

16 Q. A grand juror would like to know
17 prior to December 27 when was the last time you
18 saw Ms. Rivera?

19 A. Ms. Rivera been coming to my
20 neighborhood, she comes to neighborhood. I
21 gave you phone numbers to my work. All you
22 have to do is call them and find out how many
23 times Evelyn Rivera come where I live. I gave
24 you the phone numbers. I told you to call my
25 witness. All I have to do is call just ask

RDS

Alvarez

1 what si the situation with Evelyn that is all
2 you have to do.

3 Q. But none of those witnesses were
4 present on December 27?

5 A. No, they were not there but they
6 know the situation with her.

7 (CONFERRING)

8 THE WITNESS: This woman always
9 comes my house to where I live. She have
10 always come to, where I live.

11 MR. FERRARI: Mr. Alvarez, you been
12 given an opportunity to speak before the
13 grand jury. There is no question before
14 you.

15 Q. A grand juror would like to know if
16 you know how Ms. Rivera suffered physical
17 injury on December 27 if in fact she did have
18 physical injury?

19 A. I didn't touch Evelyn Rivera. I
20 don't know if she has any injuries or not but I
21 did not touch Evelyn Rivera. I did not touch
22 or injure, I did not hit her.

23 Q. Is it your testimony that you have
24 no idea how she got any injuries?

25 A. No, I don't. I don't have any idea

RDS

Alvarez

1 how she got those injuries, if she has
2 injuries. I doubt it because I didn't touch
3 her.

4 MR. FERRARI: You're excuse. Thank
5 you, Mr. Alvarez.

6 (WITNESS & ATTORNEY EXCUSED)

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RDS