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COURT OF APPEALS
STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

NUGENE AMBERS,

No. 165
(papers sealed)

Appellant.

20 Eagle Street
Albany, New York 12207
October 15, 2015

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY

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Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: 165, People v.
2 Ambers.

3 Counselor, go ahead.

4 MR. VORKINK: Good afternoon, Your Honors.

5 CHIEF JUDGE LIPPMAN: Do you want any
6 rebuttal?

7 MR. VORKINK: Two minutes, Your Honor.

8 CHIEF JUDGE LIPPMAN: Two minutes, sure, go
9 ahead.

10 MR. VORKINK: Good afternoon, Your Honors,
11 may it please the court, Mark W. Vorkink of Appellate
12 Advocates for appellant Nugene Ambers. The - - -

13 CHIEF JUDGE LIPPMAN: So what's the Turner
14 deal here?

15 MR. VORKINK: The facts in this case are
16 distinguishable as to the Turner issue, Your Honor,
17 and - - -

18 CHIEF JUDGE LIPPMAN: Go ahead.

19 MR. VORKINK: - - - to - - - to address
20 that specifically, in this case, counsel
21 affirmatively took the position that he did not want
22 the jury to compromise and to simply convict solely
23 on the mis - - - the two misdemeanor counts here.

24 The defense at trial, consistently
25 throughout, was actual innocence. It was that the

1 two complainants in this case were simply not
2 credible and that none of the claims the People had
3 put forward were - - - were supported by the
4 evidence. As a consequence of which, during
5 summation, counsel specifically asked the jury that
6 the only just verdict in this case was an acquittal
7 on all counts.

8 Thus, like in Turner, and unlike in Evans
9 and other type of Turner-like cases, counsel here
10 affirmatively rejected to the compromise, which could
11 have only been the only conceivable strategic reason
12 to leave those time-barred misdemeanor counts in
13 here. Thus, because counsel failed to seek dismissal
14 of those counts, counsel was ineffective - - -

15 JUDGE ABDUS-SALAAM: Are you saying,
16 counsel, that even though defense counsel at trial
17 didn't say I don't want to compromise, but his
18 strategy was to get an acquittal on all counts, that
19 he effectively said, I don't want to compromise?

20 MR. VORKINK: Absolutely, Your Honor.

21 JUDGE ABDUS-SALAAM: Okay.

22 MR. VORKINK: Absolutely, Your Honor. And
23 - - - and I - - - and I think that there's no other
24 read - - - way to read counsel's action in this case,
25 is to seek an outright acquittal and no compromise on

1 the misdemeanor counts.

2 JUDGE PIGOTT: Did - - - are you saying
3 that that's never a good strategy?

4 MR. VORKINK: No, absolutely not, Your
5 Honor. I think in some case, it could be a strategy,
6 but it was not the strategy advanced here.

7 JUDGE PIGOTT: Why - - - why was it a bad
8 strategy here?

9 MR. VORKINK: Well, I think because the
10 strategy advanced here was that the client - - - that
11 Mr. Ambers - - - was factually innocent of the
12 charges the People had brought. And that strategy
13 entailed seeking an acquittal on every single count
14 of the indictment, which is precisely what counsel
15 did.

16 And I think - - - I think that's why, in
17 many respects, Evans is actually sort of helpful in
18 understanding the Turner issue in this case,
19 precisely because in Evans, counsel did precisely
20 that, Your Honor. Counsel sought a compromise as an
21 alternative disposition that the jury could consider
22 asking them to drop down - - -

23 JUDGE PIGOTT: I - - - this is what I keep
24 saying. You can't - - - you can't ever ask for an
25 outright acquittal as a defense lawyer?

1 MR. VORKINK: I'm sorry, Your Honor?

2 JUDGE PIGOTT: You can't ask for an
3 outright - - - what am I missing? You're - - -
4 you're saying that because he didn't ask them for a
5 compromise verdict, he was ineffective.

6 MR. VORKINK: Yes, Your Honor.

7 JUDGE PIGOTT: All right. Why couldn't he
8 just ask for an outright acquittal?

9 MR. VORKINK: Well, I think - - - I think
10 counsel did ask for an outright acquittal.

11 JUDGE PIGOTT: I'm sorry, yeah. Why - - -
12 what - - - what's wrong with that? Why - - - why
13 wouldn't you not - - - why would you not do that?

14 MR. VORKINK: I - - - I don't think there
15 was anything wrong with that in this context.

16 JUDGE PIGOTT: Oh, okay.

17 JUDGE RIVERA: I think - - - I guess the
18 question perhaps that - - - that Judge Pigott's
19 questioning leads me to think of is, if indeed,
20 that's what he's sin - - - thinking, why can't he
21 hedge - - - why can't - - - why can't defense counsel
22 hedge bets in favor of the defendant and keep them
23 all - - - keep all those counts, thinking, I may not
24 be able to persuade them of innocence, but maybe I
25 can get them to find him guilty on the lowest count.

1 MR. VORKINK: You know, and - - -

2 JUDGE RIVERA: Why isn't that an
3 appropriate strategy? And can we even discern that
4 from the record?

5 MR. VORKINK: Well, I think the record - -
6 - I think the record affirmatively disproves that
7 strategy here. And I think - - -

8 JUDGE FAHEY: Well, let me ask this about
9 the record, then.

10 MR. VORKINK: Yes.

11 JUDGE FAHEY: And I don't - - - I know you
12 want to get that point, but - - -

13 MR. VORKINK: Yes, Your Honor.

14 JUDGE FAHEY: The Turner issue and the
15 statute of limitations blown on the EWOC - - - on the
16 endangering the welfare of a child, we're talking
17 about, right?

18 MR. VORKINK: Yes, Your Honor.

19 JUDGE FAHEY: All right. So it's not
20 dispositive of the case, because this is only a
21 partial Turner - - - much - - - kind of like the
22 previous case was, the same kind of problem we had
23 before; Turner talks about you being able to dismiss
24 it if it's dispositive, otherwise, then we have to
25 look at whether or not counsel was effective.

1 MR. VORKINK: Right.

2 JUDGE FAHEY: But here there's no 440
3 motion. Has there been?

4 MR. VORKINK: There's no 440 motion, Your
5 Honor.

6 JUDGE FAHEY: So we don't have any record
7 at all of what counsel was thinking or wasn't
8 thinking, and so, forgetting about if there - - - so
9 - - - so we're - - - we basically have to discern
10 whether or not there was a legitimate strategy in the
11 absence of a - - - of a - - - any kind of record on
12 the issue.

13 MR. VORKINK: In the absence of any, I
14 think, "off the record" record that would come about
15 in a 440 context, but I think, Your Honor, our
16 position would have to be is, and I think that
17 counsel's summation in this context makes clear that
18 he did not want a compromised verdict, and - - -

19 JUDGE FAHEY: Yeah, you see, I - - - maybe
20 I different than ev - - - I'm not sure that - - - I -
21 - - I don't think there's anything wrong with saying
22 I don't want a compromised verdict, but I'd be happy
23 if I get it. You know, that's a - - - he - - - he
24 goes for everything. If he doesn't get it, he takes
25 what he gets, but he's doing the best he can for his

1 client. I understand that strategy. That doesn't
2 seem - - - that just seems to be good advocacy for me
3 - - - to me, but - - -

4 MR. VORKINK: Well, except I think that
5 many other things occurred in this case which
6 demonstrate counsel's ineffectiveness, separate and
7 apart from the Turner issue.

8 JUDGE FAHEY: Well, you could go to the
9 prosecutor's summation; I think that you might have a
10 stronger argument for that, but - - -

11 MR. VORKINK: Exactly, Your Honor. That
12 would be our principal argument as to counsel's
13 ineffectiveness, would be his failure to object
14 effectively to a barrage of prosecutorial misconduct
15 during the summation.

16 JUDGE STEIN: Well, he did object numerous
17 times, did he not?

18 MR. VORKINK: Well, counsel said the word
19 "objection" several times, repeatedly. But as this
20 court has held time and again in Love and Medina and
21 Gray and other cases, simply saying the one word
22 "objection" does not constitute an objection simply -
23 - -

24 JUDGE STEIN: Well, that may be, but when -
25 - - when there are so many objections that you're

1 making, and - - - and in fact, you do state the basis
2 for some of them, might it not be a reasonable
3 strategy to say, you know, gee, if I - - - if I keep
4 repeating myself over and over again as to the basis
5 for my objection, A, I may be focusing the jury on
6 what the prosecutor's saying, and B, I - - - you
7 know, I - - - I may be annoying them, so I'll just
8 get my objection on the record, and you know, the
9 court knows what to do.

10 MR. VORKINK: And - - - and this court has
11 held that in Taylor, for example, but Taylor is not
12 this case. I think that in this case, this is a
13 counsel who did not fear interrupting the judge, as I
14 think as Your Honor said. Counsel did interrupt
15 those few times where he actually identified the
16 prejudice that was occurred to the client.

17 JUDGE STEIN: Right, but I'm talking about
18 the sheer amount of times that - - - that he would
19 have had to have done this.

20 MR. VORKINK: I - - - I think that all
21 counsel had to do here, Your Honor, was articulate
22 the basis for his objection. And I think - - - I
23 would urge the court to look at the colloquy after
24 the prosecutor's summation, because I think - - -
25 counsel, yes, he makes these standing sort of

1 objections, these general objections, which are no
2 objections at all, but then when he's given an
3 opportunity to articulate the basis for why he
4 interrupted previously, he limits it to two discrete
5 issues: the affirmative misstatement regarding the
6 testimony of Hoff (ph.) and Rosenfeld (ph.), which in
7 and of itself is extremely problematic in this case,
8 where you have uncorroborated allegations of two
9 young complainants - - -

10 JUDGE STEIN: But you had pretty strong
11 curative instructions on that, though, didn't you?

12 MR. VORKINK: There was a curative
13 instruction, but again, it - - - it fell after the
14 fact, and did not occur, and the mistrial motion was
15 denied during the course of the summation, and it
16 only went to whether or not the record supported the
17 prosecutor's - - - which he later admitted was not
18 supported by the record - - - that the client was
19 intoxicated when the abuse occurred.

20 Counsel did not - - - as he could have done
21 and as he should have done, because he sim - - - he
22 surely realized how prejudicial that type of
23 misconduct was to point out to the court and to ask
24 for a curative instruction or a mistrial on the
25 ground that all of the propensity arguments

1 concerning the fact that the client was drinking and
2 thus, he must have abused the complainants in this
3 case - - -

4 JUDGE ABDUS-SALAAM: Counsel, you - - - you
5 mentioned the mistrial. I - - - I believe trial
6 counsel asked twice for a mistrial and one of those
7 times was around the statement that the defendant
8 committed these crimes while he was drunk when there
9 was no support in the record for it.

10 MR. VORKINK: That's true, Your Honor.

11 JUDGE ABDUS-SALAAM: And there was - - -
12 there were curative instructions in - - - as Judge
13 Stein said, there were a number of objections here -
14 - - thirty, I think, in total - - - and half of those
15 were sustained. So are you saying for the half that
16 weren't sustained the - - - that counsel was
17 ineffective because he didn't articulate some sort of
18 basis for the objection?

19 MR. VORKINK: Well, let me clear here. I
20 think that - - - and our brief lays out this in far
21 more detail, but there is a variety of misconduct
22 that took place in this case.

23 Yes, counsel did say the word "objection"
24 in response to misstatements about the record
25 concerning the drinking, concerning Hoff and

1 your rebuttal.

2 MR. VORKINK: - - - Fisher and Wright.

3 Thank you.

4 CHIEF JUDGE LIPPMAN: Let's hear from your
5 adversary.

6 MS. SPANAKOS: Good afternoon, Your Honors.
7 May it please the court, Anastasia Spanakos on behalf
8 of Richard A. Brown, the respondent.

9 CHIEF JUDGE LIPPMAN: Counsel, what about
10 the - - - the applications for the mistrial over and
11 over again? Did the judge abuse his discretion in
12 not granting them when clearly, so much of this was
13 propensity, the alcoholism? Do you think there were
14 no legitimate grounds for a mistrial here?

15 MS. SPANAKOS: I would - - - I would urge
16 Your Honor to - - - to look at the record in totality
17 here, and what the court did here and the court cured
18 any potential error that occurred.

19 CHIEF JUDGE LIPPMAN: You think they cured
20 the error?

21 MS. SPANAKOS: Completely.

22 CHIEF JUDGE LIPPMAN: You don't think there
23 was - - - there was a propensity of the worst kind of
24 argument being made here and over and over again, and
25 not necessarily because counsel was ineffective.

1 Maybe because the opposite, because counsel was - - -
2 was in their face all the time and maybe pushing the
3 prosecutor, and the prosecutor took the bait, and
4 basically - - - it's all about propensity, isn't it?

5 MS. SPANAKOS: No, Your Honor.

6 CHIEF JUDGE LIPPMAN: Why not?

7 MS. SPANAKOS: The trial prosecutor did not
8 make a propensity argument here. What defendant does
9 on this appeal is he's - - - he labels some of the
10 prosecutor's comments and he takes them - - - and - -
11 - and he uses labels like "propensity", "shifting the
12 burden", but that's not what occurred here.

13 When you look at the summation in totality
14 and when you look at the comment made in the context
15 that they were made, the prosecutor was not making a
16 propensity argument.

17 CHIEF JUDGE LIPPMAN: What about the
18 alcoholism? Is there any proof to support all the
19 things he said about - - - all the - - - all the - -
20 - the - - - the things that the prosecutor said about
21 alcoholism causing each of these things? Is there
22 anything that supports that?

23 MS. SPANAKOS: The prosecutor's comments
24 were fair comment on the evidence that was educed
25 here at the trial.

1 CHIEF JUDGE LIPPMAN: But I'm asking you,
2 on the evidence that was educed, is there any basis
3 for this over and over again? This business with
4 alcoholism, that each one of these mileposts caused
5 this. Where does that come from?

6 MS. SPANAKOS: That comes from various
7 places during the trial, Your Honor. That comes from
8 defendant's written statement where he said - - - and
9 this was admitted into evidence - - - "I used to
10 drink a minimum of 200 ounces of beer right after
11 work".

12 JUDGE PIGOTT: Yeah, but wait a minute. I
13 - - - there - - - there's - - - it's hard to sort
14 out. There's so many objections and I think one of -
15 - - one of your defenses to that is it was fair
16 comment and what the defense said in its - - - in its
17 summation, am I correct?

18 MS. SPANAKOS: Yes, it is, because - - -

19 JUDGE PIGOTT: And that - - - and that it
20 always seems problematic to me. Why don't you object
21 when they make inappropriate comments in their
22 summation? I mean, do you - - - can you - - - can
23 you not do that? Can you sit back and say, ah,
24 here's another opportunity for me, fair comment to
25 call the guy a two-time felon, a drunk, a pervert, et

1 cetera? I mean, I - - - it - - - it always seemed to
2 me that the - - - that the People ought to be on
3 their feet when there's a - - - when there's
4 something to object to in the defense state - - -
5 summation.

6 MS. SPANAKOS: And the People did object a
7 few times, but there also is a theory that objecting
8 when defendant - - - defense counsel is up there
9 trying to make a summation could, you know, make the
10 jury look like you're trying to hide something,
11 you're trying to stop that - - -

12 JUDGE PIGOTT: Which is your way of saying,
13 how come they didn't object during yours. I mean, I
14 - - - I don't get that. You're saying well, he
15 didn't object to this, he didn't object to that, he
16 didn't preserve this; maybe he didn't want the jury
17 to think that he was trying to hide something. This
18 - - - this back - - -

19 MS. SPANAKOS: That is - - -

20 JUDGE PIGOTT: - - - this back and forth on
21 - - - on summations gets a little troubling like
22 that, because you want to say he didn't object to
23 some parts of the DA's summation, therefore it's not
24 preserved. I want to say that you ought to preserve
25 objections to the defense, and you say, well, no,

1 we're not going to do that. That's good trial
2 strategy on us; we're not going to. And I don't get
3 that.

4 I don't - - - don't understand why that you
5 wouldn't object if there's an objectionable thing in
6 the defense summation and ask for the appropriate
7 instruction, rather than sa - - - saying I can - - -
8 I can comment on that on my own and - - - and call it
9 fair comment. You under - - - am I making sense?

10 MS. SPANAKOS: I - - - I think I understand
11 where you're going with this, Judge, but I - - - I
12 don't think that that was - - - that the trial
13 prosecutor looks at it that way. They - - - they
14 object when - - - when they think something is that
15 egregious. But there - - - there is a large plain,
16 you say, you know, where the, you know, a prosecutor
17 and a defense attorney can go in their summation.

18 There are evi - - - there's comments they
19 can make based on evidence, comments they can make
20 that based on the inferences from the evidence, and
21 there, you know, the - - - the rhetoric that you're
22 allowed can go pretty far. A prosecutor, I don't
23 think, looks at it that I'm going to let them go so
24 far so I can go that far. I think you're presuming a
25 bad intent on the prosecutor's part, which you

1 shouldn't do.

2 JUDGE PIGOTT: No, no, what I'm - - - what
3 I'm saying is that you're - - - you're justifying
4 what may be out of bounds on your summation by saying
5 they were out of bounds on theirs.

6 MS. SPANAKOS: It is proper for us to
7 respond to their comments.

8 JUDGE PIGOTT: Right.

9 MS. SPANAKOS: This court has always said -
10 - -

11 JUDGE PIGOTT: I'm saying that maybe you
12 should be objecting to their comments if they're
13 inappropriate.

14 MS. SPANAKOS: We did object to a few of
15 them - - -

16 JUDGE PIGOTT: Right.

17 MS. SPANAKOS: - - - but we didn't object
18 to all of them.

19 JUDGE PIGOTT: And you're saying you didn't
20 object to all of them, because you didn't want to
21 appear to be trying to hide something in front of the
22 jury.

23 MS. SPANAKOS: That - - - that could be a
24 strategy - - -

25 JUDGE PIGOTT: Okay. Now, this is - - -

1 MS. SPANAKOS: - - - that the trial
2 prosecutor had.

3 JUDGE PIGOTT: And my point on the other
4 side is, yet you're saying about the defendant, he
5 did not object to what we were saying in our
6 summation. So why wouldn't you apply the same
7 rationale that maybe he didn't want it to appear that
8 he was trying to hide something from the jury?

9 MS. SPANAKOS: What I'm arguing that
10 defense counsel - - - he did object several times.

11 JUDGE PIGOTT: Right.

12 MS. SPANAKOS: And his failure to object
13 doesn't demonstrate that he was ineffective, okay.
14 When you look at counsel's representation, you have
15 to look at the totality of the representation from
16 the onset all the way to the end.

17 JUDGE PIGOTT: I looked at one of them in -
18 - - in terms of applying - - - appealing to the
19 emotions of the jury rather - - - and - - - and as
20 defense counsel pointed out where the prosecutor
21 called him "a two-time felon, a drunk, a predator who
22 had stolen the complainants' innocence, scarred them
23 for life, saying the complainants deserved an Oscar
24 if they lied, and there was no evidence that they
25 would lie, and misrepresenting the People's child sex

1 abuse expert's testimony, it failed to seek dismissal
2 on two clearly time-barred counts".

3 MS. SPANAKOS: Judge, you're taking a lot
4 of comments that were made sporadically in different
5 parts of the summation and you're putting them all
6 together, and when you do that, of course, it doesn't
7 - - -

8 JUDGE PIGOTT: Yes.

9 MS. SPANAKOS: - - - sound very good. And
10 they're - - -

11 JUDGE PIGOTT: Right.

12 MS. SPANAKOS: - - - they're - - - they're
13 very bad sound bites. But when you put them - - -
14 it's a thirty-three page summation - - - when you put
15 them through the summation and most of the arguments
16 she was making were proper, and most of the arguments
17 that she was making were responsive to defense
18 counsel's argument.

19 He had only one avenue to take here,
20 defense counsel. And he had argued that the victims
21 were incredible. He had argued that basically they
22 lied. He didn't use the word "lie", but that was his
23 argument. They fabricated this. They were angry.
24 They had motive. He had all these reasons.

25 JUDGE PIGOTT: Do you consider it vouching

1 for the truth of a - - - of a witness when you say
2 they deserve an Oscar?

3 MS. SPANAKOS: That - - - Judge, actually
4 that comment was proper and responsive. In voir dire
5 - - -

6 JUDGE PIGOTT: What - - - no, I think you
7 misunderstood my question.

8 MS. SPANAKOS: Okay.

9 JUDGE PIGOTT: Do you consider that
10 vouching for the truthfulness of a witness?

11 MS. SPANAKOS: No, that's not vouching - -
12 -

13 JUDGE PIGOTT: It's not?

14 MS. SPANAKOS: No.

15 JUDGE PIGOTT: Okay.

16 MS. SPANAKOS: The prosecutor - - - when
17 defense counsel says that the - - - that these
18 victims are fabricating everything, that they've
19 actually completely made the story up, that this
20 never occurred - - - and he said this several times -
21 - - this never occurred, okay, the girls basically
22 colluded with each other, and were angry over other
23 things, minor things - - - their sister, not getting
24 toys from him, whatever it might be, and that they
25 had the seed planted by the friend about the story

1 that they learned in the Bible study class.

2 When you say all of that, what defense
3 counsel is arguing is that they got up there and
4 their testimony was completely credible, okay, as the
5 trial court noted and said at sentencing, "their
6 testimony was compelling, impressive, and very
7 believable". Okay.

8 The girls got up there - - - another thing
9 that the prosecutor commented on summation is that
10 the girls were very emotional during their testimony.
11 They were crying and they were breaking down, okay.
12 So the prosecutor's comment that they would have to
13 be actresses if - - - if they - - - if this was all,
14 you know, a show, if this was all false, is not
15 vouching for them. It's explaining to the jury why
16 the victims were credible, why they should find them
17 credible.

18 Defense counsel discredited them completely
19 in his summation, and we're allowed to turn around
20 and respond to that and explain to the jury why we
21 find them credible.

22 JUDGE PIGOTT: Yeah, I get the explaining.
23 I just didn't - - - I thought, you know, saying they
24 deserve an Oscar is kind of - - -

25 MS. SPANAKOS: Well, Judge - - -

1 JUDGE PIGOTT: - - - vouching for their
2 credibility.

3 MS. SPANAKOS: - - - I'd like to point out
4 to you also that in voir dire, counsel questioned a -
5 - - an actress, and asked her about being able to put
6 on emotions on cue, cry on cue. And the trial
7 prosecutor's comment about the Oscar - - -

8 JUDGE PIGOTT: So when you objected to that
9 at voir dire, what was the Judge's ruling?

10 MS. SPANAKOS: I don't believe that was
11 objected to at voir dire, Your Honor.

12 Both the errors here that you have to
13 consider, there has to be clear error. There also
14 has to be some prejudice to defendant. And when you
15 view the totality of the record, okay, defendant
16 received a fair trial.

17 His attorney was effective throughout, did
18 many, many good things throughout, and nothing that
19 he raises here rises to the level that counsel did
20 not provide meaningful representation. And if there
21 was any error here by any of the prosecutor's
22 comments, that was completely cured by the incredibly
23 thorough, thorough curative instructions that the
24 court gave during the final jury charge.

25 CHIEF JUDGE LIPPMAN: Okay, counsel. Thank

1 abuse of discretion by the judge and still find that
2 counsel was effective?

3 MR. VORKINK: You could, Your Honor. You
4 could, Your Honor. I think that's prob - - -

5 CHIEF JUDGE LIPPMAN: Do you argue that?

6 MR. VORKINK: We - - - we did, Your Honor.

7 CHIEF JUDGE LIPPMAN: So, why - - -

8 MR. VORKINK: We - - - we argued that - - -
9 that the misconduct in and of itself and the court's
10 failure to give - - - to essentially grant the
11 mistrial motions that counsel made as to the issues
12 that he did preserve.

13 CHIEF JUDGE LIPPMAN: And you don't believe
14 that - - - that everything was cured by the judge?

15 MR. VORKINK: No, we do not, Your Honor.
16 We - - - these were objections that were made during
17 summation. Mistrial motions were denied repeatedly
18 by the judge during the course of that summation.
19 And yes, a curative instruction was later given, but
20 as this court recognized in Calabria and in Riback,
21 curative instructions may not be sufficient where the
22 misconduct at issue is sufficient egregious as it was
23 in this case.

24 I just one want to add one quick point
25 about - - -

1 CHIEF JUDGE LIPPMAN: Go ahead, counsel.

2 MR. VORKINK: - - - about the Turner issue.

3 I - - - I really think ineffectiveness always turns
4 on whether or not the defendant received a
5 fundamentally fair trial. It is fundamentally unfair
6 for a defendant to be convicted of time-barred counts
7 and for that conviction to stand. Thus, as the
8 Turner issue, we seek dismissal of the misdemeanors
9 on that principle.

10 CHIEF JUDGE LIPPMAN: Okay, thank you both.

11 MR. VORKINK: Thank you.

12 CHIEF JUDGE LIPPMAN: Appreciate it.

13 (Court is adjourned)

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

I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Nugene Ambers, No. 165, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



Signature: _____

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