

1 will tell you, your Honor, much of what I am going to be
2 going over is in my motion to dismiss -- second motion
3 to dismiss. I don't know if you want me to reiterate.

4 THE COURT: Counsel, why don't the two of you
5 approach.

6 (Discussion held off the record.)

7 THE COURT: Counsel.

8 MR. MASSIMO: Thank you, your Honor.

9 Your Honor, at this time I would ask for a
10 trial order of dismissal. I believe that it's very
11 clear under the circumstances of this case that the
12 evidence -- the People have not put forth sufficient
13 evidence to demonstrate that the officers had any right
14 to attempt to arrest my client at the time that they did
15 attempt to arrest my client.

16 I think it's very clear the only actions taken
17 by my client prior to that time were the action of,
18 Number 1, using words towards the police officers that
19 we've heard during the course of trial.

20 About the words we heard during the course of
21 this trial, while they may be curse words and even an
22 ethnic slur, those words are not punishable themselves
23 under our law.

24 The First Amendment to the United States
25 Constitution protects those words. Article 1, Section 6

1 or 8, your Honor -- I believe it's 8 -- of the New York
2 State Constitution protects the freedom of speech of the
3 words that the defendant used.

4 The words were not words that would fall under
5 an exception to the First Amendment. They do not
6 qualify as fighting words in any way, shape, or form, or
7 any other exception to the First Amendment.

8 When the officers approached Mr. Wharton, the
9 officers took the action of requesting from Mr. Wharton
10 his identification. At that time they had no right to
11 do so. They had no right to ask him for that
12 identification. They did not have probable cause to
13 believe that he was involved in any crime. While the
14 officers testified during the course of the trial they
15 were conducting an investigation with regard to a
16 trespassing, they never, ever testified that Mr. Wharton
17 was a suspect in that trespassing, and that's a key
18 issue of this trial. Indeed, Mr. Wharton wasn't a
19 suspect. The officers were looking for information from
20 individuals.

21 I believe at the beginning of the trial I
22 cited a People v. Johnson and I apologize. The case is
23 actually People v. Howard. People v. Howard -- and I
24 will get a cite in a moment -- People v. Howard stands
25 for the right, quite simply, that an individual has a

1 constitutional right not to speak to a police officer.

2 An individual also has a constitutional right
3 not to produce identification in response to a request
4 by an officer that is not predicated on any type of
5 probable cause.

6 Mr. Wharton was well within his rights when
7 the officers walked up to him and asked him for his
8 identification to deny that. Even if you believe -- and
9 I understand that at this point for a trial order of
10 dismissal the People have to be given a favorable
11 inference on the evidence -- even if you believe that
12 Mr. Wharton pushed the table towards Officer DeCaro,
13 that act is clearly in response to the officer's
14 unlawful request for him to produce identification. In
15 fact, Officer DeCaro testified that it was after the
16 second request for identification that Mr. Wharton
17 allegedly did that. At that time when he refused to
18 produce the identification, they had no right to arrest
19 him. There was no evidence of disorderly conduct.

20 The officers' testified during the course of
21 this trial that this was an individual dispute between
22 the officers and Mr. Wharton. There was not a dispute
23 of a public nature. Mr. Wharton was not attempting to
24 incite any individual in the Dunkin' Donuts to take
25 action against the police officers. The main element of

1 a disorderly conduct charge is that it must be a public
2 infraction, an infraction of a public nature that
3 involves a substantial number of the public.

4 MR. CANTY: I'm going to object, Judge. It is
5 a total mischaracterization of the statute.

6 THE COURT: Fortunately, we don't have a jury
7 here to confuse.

8 MR. MASSIMO: I will rephrase it. The
9 defendant must have intent to cause public inconvenience
10 or annoyance or alarm. Frankly, I believe the annoyance
11 or alarm has been stricken from the statute by federal
12 law, but even as much there are numerous cases with
13 regard to disorderly conduct where there is an
14 individual dispute between a police officer and an
15 individual where the individual has no intent to involve
16 any other portion of the public witness the dispute that
17 it cannot constitute disorderly conduct.

18 Therefore, the officers did not have a right
19 to arrest Mr. Wharton, certainly not for disorderly
20 conduct. The obstruction of governmental administration
21 charge they did not have a right to arrest him for as
22 well. Mr. Wharton never did anything of the physical
23 nature to obstruct their investigation. Even if he had
24 pushed the table toward the officers, I don't see how
25 that obstructed their investigation. Basically, the

1 officers were there to talk to witnesses, people that
2 don't have to talk to them anyway. The fact that
3 Mr. Wharton might have said, we will not speak to you,
4 is nothing more than an exercise of his constitutional
5 right to remain silent and possibly informing the other
6 individuals that they have a constitutional right not to
7 speak to a police officer.

8 It is my position at the time the officers
9 went to effect the arrest of Mr. Wharton they had no
10 probable cause to arrest him for any crime and,
11 therefore, it is clear that the People have not met
12 their burden, even in the most favorable light to them,
13 of proving an authorized arrest, therefore, the
14 resisting arrest is insufficient evidence as well.

15 Thank you, Judge.

16 MR. CANTY: Your Honor, for the Court to grant
17 a trial order of dismissal you look at the evidence in
18 light most favorable to the People. When you do that, I
19 believe you will see the People have made out a case
20 with each and every charge the defendant is facing.

21 With regard to the disorderly conduct, this is
22 not a private altercation between the police officer and
23 the defendant. This is a situation where the police
24 were conducting an investigation and the defendant
25 interjected himself into that investigation. His own

1 words show it was not a single altercation between him
2 and the police. He said, we don't have to speak to any
3 of you niggers. He interjected himself into the
4 situation.

5 We heard testimony from two of the clerks at
6 the Dunkin' Donuts and one specifically stated how she
7 didn't specifically know how it was stated, but it was a
8 very loud interaction between the defendant and the
9 police. This is something the other patrons heard.

10 We also heard testimony that has gone
11 uncontradicted that patrons left the store as a result
12 of this defendant's actions.

13 With respect to what the defense counsel
14 believes is the status of the constitutionality of the
15 statute, it is really not for this Court to review at
16 this point. The fact is it's a law that on the books.
17 It's one that needs to be strictly enforced, and if this
18 defendant has violated, he should be found guilty, which
19 the People believe he has done.

20 With respect to the obstruction of
21 governmental administration, People were conducting an
22 investigation and that statute specifically reads the
23 defendant intentionally impeded the administration of
24 law or attempted to prevent a public servant from
25 performing an official function by means of

1 intimidation, physical force, or interference.

2 That's specifically what this defendant did.
3 He interfered by interjecting himself by taking the
4 police's attention away.

5 It goes on to read, or by means of an
6 independently unlawful act, which is also what we have
7 here. This defendant engaged in an unlawful act of
8 disorderly conduct. Not in one way, not in two ways,
9 but in three ways.

10 First, his language, used obscene language
11 that served no legitimate purpose. It was strictly used
12 to distract the police from conducting their
13 investigation.

14 Secondly, by engaging in fighting. Defense
15 counsel has put forth an argument that it was almost
16 justified after the police asked the defendant for ID a
17 second time. It's acceptable for him to throw the table
18 at the police officers. Not only is it unacceptable,
19 it's against the law for which this defendant is
20 charged.

21 And, thirdly, he created an atmosphere in a
22 public place that caused a hazardous or physically
23 offensive condition.

24 This is an individual that took a chair, threw
25 it across the room, hit an officer, and then when the

1 officers tried to place him lawfully under arrest, he
2 resisted, and in doing so he continued to create this
3 physically hazardous and offensive condition.

4 Also, your Honor, when we look at the
5 resisting arrest again, the People's evidence goes
6 uncontradicted. We have the testimony of two officers
7 of the Nassau County Police Department that stated under
8 oath that it took approximately a minute after they
9 informed this defendant that he was being placed under
10 arrest to finally gain full control of this individual.
11 He refused their verbal command. He fought with them by
12 flailing his arms and his legs. And, not only do we
13 have the testimony of the witnesses, we have the video
14 that shows almost 46 seconds after we're told he was
15 placed under arrest, the defendant flailing his arms in
16 an attempt to thwart the police department's effort to
17 place him under arrest.

18 After reviewing all this evidence in the light
19 most favorable to the People, it is our position the
20 trial order of dismissal should be denied. Thank you.

21 THE COURT: I find the People have made out a
22 prima facie case, based on the testimony and the
23 evidence that has been presented at trial, so I'm
24 denying the application for a trial order of dismissal.
25 All right.

1 Counsel, with respect to the law that you wish
2 the Court to consider in making a determination, do you
3 want to make a written post-trial memo of law?

4 MR. MASSIMO: I would be happy to, your Honor.

5 THE COURT: Okay. Do you want to step up?

6 (Discussion held off the record.)

7 THE COURT: I will need a copy of the minutes.
8 For the record, I'm accepting post-trial memos. Defense
9 is getting me a post-trial memo no later than January
10 5th. People will have their post-trial memo to me by
11 January 12, and this case will be scheduled for verdict
12 for 2-22 before me wherever Part I am sitting in.

13 MR. CANTY: Thank you, your Honor.

14 MR. MASSIMO: Thank you, Judge.

15 MR. CANTY: Are we going to close?

16 THE COURT: Everybody take your coats off.
17 Have a seat. We just listened to the trial order of
18 dismissal. Excuse me. You can proceed.

19 MR. MASSIMO: May it please the Court,
20 Mr. Canty, Mr. Wharton, your Honor, at the end of this
21 trial I think it's very clear as to how the factual
22 issues in this case should be resolved.

23 I will start with the first two witnesses who
24 were called in the case and, as far as their testimony
25 goes, I don't think they added anything whatsoever

1 towards any of the charges against Mr. Wharton. Both of
2 the witnesses did not even hear what Mr. Wharton said.
3 Both of the witnesses testified that they continued to
4 work throughout the entire time. I believe the first
5 witness may have said something about a table, but when
6 asked again on cross-examination she didn't remember,
7 and I really think neither one of those two witnesses
8 add anything to this case.

9 This case really comes down to the two police
10 officers that have testified. What we know in this case
11 is that at some point on that evening Mr. Wharton was in
12 Dunkin' Donuts, and it's clear from the evidence, not
13 only from the testimony of the officers, but a very
14 crucial piece of evidence in this case is the videotape,
15 which unfortunately doesn't show portions. But if you
16 want to believe the police officers' testimony, all the
17 key events that they need in this case happen when the
18 videotape happens not to be on them and where the people
19 are at, and I think that lends doubt to the credibility
20 what they testified to.

21 But I think there is more doubt to their
22 credibility as you do go through the evidence. You see
23 Mr. Wharton at the counter. He is buying the sandwich.
24 It could be more off on the videotape what he is doing.
25 You see money changing hands. You see Mr. Wharton

1 getting his sandwich. What is interesting is that the
2 officer who wasn't clear as to exactly when Mr. Wharton
3 started speaking to him. What's interesting though,
4 Mr. Wharton is allegedly yelling out these terrible
5 words of what has been testified to at the trial. I
6 don't think I have to go over it again.

7 Judge, the officer says that, he believes,
8 it's happening while Mr. Wharton is not only paying for
9 a sandwich but tipping the Dunkin' Donuts' employees.

10 Now, does it make any sense to you, your
11 Honor, that the defendant would be tipping the Dunkin'
12 Donuts' employees while screaming at these two officers
13 curse words and an ethnic slur? I believe, your Honor,
14 that Mr. Wharton never said anything to those officers
15 until he starts to walk away, and what we saw on the
16 videotape, he walks away at 8:50 and 54 seconds.

17 But if you look at the videotape, and I know
18 you will, Judge, you will notice that the tape doesn't
19 go second by second but changes time every four seconds.
20 When you look at the videotape and when Mr. Wharton goes
21 out of this picture, it is almost where it changes to
22 8:50 and 58 seconds. It would be around 57, somewhere
23 in that area. When the tape comes back on showing the
24 individual, it's 8:51:02. We're talking a matter of
25 seconds over here that Mr. Wharton allegedly sits down

1 at this table and pushes a table towards the police
2 officer.

3 Now, your Honor, I believe that it's really
4 clear the People have failed to prove beyond a
5 reasonable doubt that Mr. Wharton actually pushed the
6 table towards either one of those two police officers.

7 What's incredible in this case is that both
8 officers came into this courtroom and testified we made
9 the decision to arrest Mr. Wharton after he pushed the
10 table towards us. Yet neither one of them even put in
11 the original paperwork that he pushed the table towards
12 them. The most important fact in the case they happen
13 to leave out of their paperwork? I submit to you, your
14 Honor, that they are not credible on this point. It
15 also happens not to be on the videotape, not in their
16 paperwork, not on the videotape, but they want you to
17 believe it occurred and they want you to believe he did
18 this because they realized months after they charged him
19 that the original charges would not be sufficient for
20 arrest of Mr. Wharton. That is why they had to change
21 their testimony.

22 The first time Officer Kouril admitted on the
23 stand, although he tried to dodge it to some extent, but
24 he admitted on this stand the first time he ever had
25 anything written in the paperwork with regard to

1 Mr. Wharton pushing a table toward either one of those
2 two officers was in June of 2004, almost six months or
3 five-and-a-half months, whatever it is, after this
4 incident. All of a sudden he remembers this very
5 important fact which led them to place this person under
6 arrest several months after the incident, after the
7 defense put in a motion to dismiss.

8 I think it's clear, your Honor, that there is
9 a reasonable doubt as to whether or not Mr. Wharton
10 pushed the table towards them. And, without the table,
11 this case is very simple. They want you to believe that
12 patrons fled out of this Dunkin' Donuts. But, again,
13 your Honor, you have the video evidence. You have the
14 evidence right there that shows that, Number 1, at the
15 time that Mr. Wharton even started speaking to the
16 police officers there was only one table of two
17 individuals sitting in the back. The table that was
18 next to them we had seen during the course of the trial.
19 These people were clearly up and left the restaurant
20 before this incident had started. There is one table
21 there. We don't know why the people left. For all we
22 know they finished their coffee. When it comes down,
23 who exacerbated the situation, Mr. Wharton or the police
24 officers? These officers are trying to investigate
25 obviously the crime of the century, a trespass --

1 MR. CANTY: Objection, Judge.

2 THE COURT: Okay. Counsel, if I had a jury
3 here, I would sustain that objection.

4 MR. MASSIMO: Okay. They are investigating a
5 trespass at the high school. It is clear from the
6 evidence that these people aren't the suspects. They
7 want to speak to these individuals. They want to talk
8 to the other two individuals. These officers for some
9 reason believe that these people have to speak to them,
10 and if people don't speak to them, they are interfering
11 with an investigation. That is not what the laws of
12 this country are. No one ever has to speak to a police
13 officer, if they don't want to. But they believe that
14 Mr. Wharton is obstructing their investigation by
15 cursing towards them. That's what they believe is the
16 obstruction of their investigation, and because of that
17 they now focused their attention on Mr. Wharton. The
18 officers walk over to Mr. Wharton, and at this time we
19 have mixed testimony. Do -- we know that both officers
20 have testified they asked Mr. Wharton for his
21 identification before he allegedly pushed this table at
22 them.

23 If you believe Officer DeCaro, it's after the
24 first time they asked him for identification he
25 allegedly pushed the table. If you believe Officer

1 Kouril, they ask him for the identification twice before
2 he pushes the table. How he refused to provide the
3 identification and push a table in a matter of six to
4 eight seconds is beyond me, your Honor, and, by the way,
5 sit down at the table, sit down, refuse to give the
6 identification, and push the table in a matter of six
7 seconds.

8 Now, I will submit law with regard to this,
9 but I do submit to the Court that at this point in time
10 the officers had no grounds to arrest him for disorderly
11 conduct. The original charge that they charged
12 Mr. Wharton with is disorderly conduct for the use of
13 obscene and abusive language, and the law you will see
14 Mr. Wharton cannot be prosecuted for the words that the
15 officers testified to. But the issue then becomes then
16 do they have a right to request his identification. I
17 will submit law as to that effect as well whether they
18 had a right to ask for an identification.

19 But from a factual standpoint what I really
20 want you to concentrate on with regard to the pushing of
21 the table is not only, as I mention, the lack of time
22 that this really could have occurred, but I also want
23 you to concentrate on the positioning of the table and
24 the testimony of the officers.

25 If you really want to believe what Officer

1 Kouril is telling you where he was standing when that
2 table was pushed at him, it would be contrary to all his
3 training and experience. The last thing Kouril would do
4 in this situation is get in between two tables. That's
5 asking for the defendant to take action that could
6 incapacitate him from doing his job. Do you really
7 believe he got in between two tables so Mr. Wharton
8 could push it towards him? And, if you remember his
9 testimony and you look at the videotape, that's the only
10 position he could have been in.

11 I submit to you the evidence and much more
12 likely and, of course, it's their burden to prove
13 reasonable doubt, I submit there is a reasonable doubt
14 because I submit to you it's pretty clear that the
15 officers are the ones who moved the table to enable
16 themselves to get a position of unobstructed access to
17 Mr. Wharton if they needed to. They would not put
18 themselves in a position with somebody who is allegedly
19 making the trouble he is making in a position to have an
20 object between themselves and Mr. Wharton.

21 I also submit to your Honor what happens after
22 this point is also contraindicating to what the officers
23 said. If you wish, the video after it goes off, after
24 the table incident, you will see Mr. Wharton sitting in
25 his chair. You will see him holding his sandwich. Not

1 exactly the actions of somebody who is taking violent
2 actions towards police officers holding a sandwich in
3 his hand and putting in his lap.

4 At some point he moves his arm forward, but
5 it's clear it is not towards the officer. He may be
6 trying to put his hand toward the table, but you will
7 see he doesn't even get anywhere close to because you
8 will see Officer Kouril take that table and push the
9 table back. Not Mr. Wharton. Officer Kouril is the one
10 who pushes the table back. At this point Mr. Wharton is
11 seated and I think the testimony was clear that
12 Mr. Wharton was not the one who got up. But when you
13 watch that tape, watch how the officer gets in take down
14 position on Mr. Wharton. You are going to have Officer
15 Kouril in front of Mr. Wharton. Officer DeCaro coming
16 back behind him to take him down. He doesn't have the
17 opportunity to get up.

18 Interestingly, Judge, no testimony from the
19 police officers that they showed Mr. Wharton a badge.
20 Never happened during the course of the trial.

21 MR. CANTY: I'm going to object. I believe
22 there was testimony they were wearing their badge.

23 THE COURT: I don't have a recollection of
24 that. That's one of the questions that I will review
25 the testimony.

1 MR. MASSIMO: Yet they claim that they had
2 asked Mr. Wharton or told Mr. Wharton he was being
3 placed under arrest. I submit to you they never even
4 told him he was being placed under arrest. They took
5 him down. They want you to believe that he was pushing,
6 grabbing, and flailing his arms.

7 Now, I know there are portions of that that
8 are not on the tape, but when you look at this tape and
9 you look at where the officers are, you tell me if he is
10 resisting or if the officers are in control of
11 Mr. Wharton.

12 And, by the way, your Honor, when you review,
13 Officer DeCaro admitted that Mr. Wharton's arms were
14 underneath his body at that time. They're trying to
15 claim that with two police officers on top of him you
16 have seen the individual here on top of him, two police
17 officers on top of him, his arms underneath his body
18 that he's flailing his arms? I submit to you he
19 couldn't get his arms free and you will see at some
20 point Officer DeCaro take his arm. He is taking his arm
21 out from underneath his body and moving it back behind
22 him. But it's not Mr. Wharton that's resisting him.
23 It's Officer DeCaro pulling it out, putting into
24 position, and you tell me anywhere on this videotape
25 where he is pushing and grabbing officers during this

1 arrest? It's not there.

2 I submit to you there is a reasonable doubt as
3 to whether or not he was pushing his arms or flailing
4 his arms. Once they get the handcuffs on him, there's
5 no problem with Mr. Wharton. You see it right on the
6 tape. He gets up off the ground and he walks out of the
7 store.

8 Your Honor, I will submit the law with how I
9 believe you should apply these facts. However, the main
10 issues I believe for your Honor in this case are as
11 follows:

12 Whether or not the officers had any reason to
13 believe that Mr. Wharton committed disorderly conduct.

14 Whether or not those actions would cause
15 public inconvenience, annoyance, or alarm, as that term
16 is defined under the law, and that is a term that is
17 common in all three subdivisions with which Mr. Wharton
18 is charged with. And, I think when you look at the law,
19 you will see that this cannot constitute disorderly
20 conduct, and no reasonably trained officer under these
21 circumstances would believe that Mr. Wharton could be
22 charged with disorderly conduct.

23 As far as abusive and obscene language, the
24 law with regard to the First Amendment, Article 1,
25 Section 8, is very clear that these words are

1 constitutionally protected. These are not the types of
2 words that can be prosecuted under that subdivision.
3 The words are narrowed by the First Amendment and New
4 York State courts have done many, many decisions with
5 regard to this issue.

6 With regard to a hazardous condition, again, I
7 will submit the law, but you will see the hazardous
8 condition that serve no legitimate purpose, the law
9 under that subdivision is directed to very different
10 actions. It is in the commentaries. It is directed to
11 the actions such as putting nails on a roadway so that
12 cars will run over it. Throwing a stink bomb into a
13 crowd. It is not for a type of action that the People
14 want you to believe it is, which is that his words have
15 no legitimate purpose behind them. If that were the
16 case, the statute would be boundless. Almost any action
17 by an individual that a police officer disagreed with,
18 would be considered not a legitimate purpose, so I think
19 you will see, as you look into that, it cannot possibly
20 fall under that subdivision.

21 With regard to fighting, tumultuous behavior,
22 I believe it is clear the People failed to prove
23 reasonable doubt that Mr. Wharton engaged in tumultuous
24 behavior or there is reasonable doubt to believe with
25 regard to obstruction of governmental administration.

1 This is a critical part of the case. These officers
2 believed at the beginning of the case when they
3 originally failed to charge -- and I think the evidence
4 shows this -- that Mr. Wharton could have been
5 prosecuted with the obstruction of governmental
6 administration solely by the words he used. Although
7 the statute used the word "interfere", but the law is
8 clear it should be a physical interference, a physical
9 action by Mr. Wharton.

10 The only testimony we have had to any physical
11 action allegedly by Mr. Wharton is the table, and I'm
12 not going to reiterate that, but I will say the People
13 have failed to prove that point beyond a reasonable
14 doubt that he pushed the table towards the officer.
15 And, the People have failed to prove that Mr. Wharton's
16 physical actions obstructed the officers in their
17 investigation.

18 What should have happened here, your Honor?
19 The officers should have realized they weren't getting
20 information from the situation and should have turned
21 around and walked out of the restaurant; it wouldn't
22 have escalated.

23 When it comes down to it, the United States
24 Supreme Court has said on many occasions that officers
25 must have thick skin. In fact, they, under the law,

1 should be able to take more verbal abuse than the
2 average citizen because they are trained police
3 officers. They are supposed to -- when an individual
4 says a curse or something towards them that they don't
5 like, they are supposed to be the bigger person and turn
6 around and walk the other way.

7 Officers Kouril and DeCaro, they didn't do
8 that. They wanted to show Mr. Wharton who was boss.
9 How dare he speak to a police officer in that fashion.
10 They got guns and badges and they got handcuffs and they
11 are going to use the handcuffs, and they did, and they
12 arrested him for being a wise guy. But at the same time
13 they violated very fundamental and basic constitutional
14 principles. This is a free society; it is not a police
15 state, your Honor. Our constitutional rights are
16 cherished. They have been here for 200 years. They are
17 here for a reason. Our founding fathers put these
18 constitutional rights in place for exactly this type of
19 situation, to prevent the police from overstepping their
20 boundaries.

21 And, I think when you look at this evidence,
22 there's only one just verdict when you apply these facts
23 to the law, and that verdict will be not guilty of any
24 of the three subdivisions of disorderly conduct
25 Mr. Wharton is charged with, not guilty of obstruction

1 of governmental administration, and not guilty of
2 resisting arrest because even if you believe he flailed
3 his arms, I think what you will find is the arrest
4 wasn't authorized.

5 Thank you, your Honor.

6 MR. CANTY: May I proceed?

7 THE COURT: Yes.

8 MR. CANTY: Thank you.

9 Defense counsel, your Honor, defense counsel
10 is correct when he states the People bear the burden of
11 proving the defendant's guilty beyond a reasonable
12 doubt. And, I submit to you today, Judge, that after
13 hearing all the evidence, after hearing from four
14 witnesses called by the People, we have met our burden
15 on each and every count beyond a reasonable doubt.

16 Before I go into the testimony we heard from
17 the People's witnesses, I would like to address some of
18 the issues defense counsel brought up on his closing.

19 This video that we watched does not add or
20 detract from any of the testimony we have heard. It
21 merely shows us what occurred at certain points. It was
22 not created by the police. It doesn't go to show
23 whether or not actions that were not taped did not
24 occur. Here it shows what actually occurred at a
25 certain time.

1 When we watched the video, we see specifically
2 that the defendant did commit certain crimes in which he
3 is accused of when we put them together with the
4 testimony we heard. And, the fact of the matter is,
5 this whole situation would have been avoided. Defense
6 counsel is correct. It could have been avoided if this
7 defendant did not engage in criminal conduct.

8 In order for us to believe what defense has
9 put forth as an explanation, we need to believe that the
10 police outside of nowhere decided to take the attention
11 away from two individuals and walk up to this man after
12 buying a sandwich, after getting change for his
13 sandwich, for no reason at all.

14 But, in fact, when we watch the video, which
15 we will in a second, we see the man standing right next
16 to him is in the same direction this defendant was
17 speaking.

18 Also, we hear about the table. This case is
19 not about whether or not this defendant pushed the
20 table. He is not being charged with pushing a table at
21 a police officer. In fact, that is one of the elements
22 that the People have proven beyond a reasonable doubt
23 that goes to why he was arrested on that day.

24 And, we will watch the video defense counsel
25 says is something like six seconds that the tape shows

1 the defendant will walk over, sit down, and then push
2 the table at the officers. But when we watch that
3 carefully, your Honor, I think it's more than like two
4 seconds. While two seconds doesn't seem like a long
5 time, when you think about it, he is only a few feet
6 away from the table to begin with. He has the
7 opportunity to sit down. He is walking with the
8 officer. He is asked either once or twice whether or
9 not he has ID, and at that point he pushes the table.

10 So he just explained this to you in less than
11 two seconds. It could have happened quicker than that.
12 Two witnesses asked him once for ID and twice for ID.
13 Those minor inconsistencies are hallmarks of truth.
14 They show the two officers didn't have a scheme to get
15 this defendant. They would have told you stories that
16 were exactly the same down to the very last detail.
17 They didn't do that. They came in here; they were asked
18 questions. They took that oath and they told the truth,
19 and the truth is on that day this defendant pushed that
20 table into the officer's leg.

21 Defense counsel then argues that maybe the
22 defendant was justified in pushing the table because he
23 had refused twice to give his ID.

24 How dare the police ask somebody for ID?
25 Under defense counsel's explanation we would all be

1 justified in throwing tables at police officers when
2 they ask us questions we are not comfortable with.

3 I know your Honor does not find that a
4 suitable explanation to the action of the defendant.
5 Defense counsel stated on his closing they were
6 basically asking the defendant -- asking the defendant
7 to shove the table at them when he walked around the
8 table putting himself between the table and another --

9 MR. MASSIMO: Objection. I don't believe
10 that's what I said.

11 MR. CANTY: That's what defense counsel said
12 why he wouldn't have walked between two tables because
13 he would have been asking for the defendant to push the
14 table at him. The fact of the matter is it isn't that
15 the people properly positioned themselves to speak to
16 the defendant. It is this defendant obstructed
17 governmental administration.

18 We ask who exacerbated this situation? The
19 defendant. The defendant didn't have to speak to the
20 police at all. Until he opened his mouth, until he
21 acted in a disorderly manner, until he yelled out, fuck
22 that. This is my hood. We don't have to talk to any of
23 you niggers. You have to wait for me to finish eating
24 because I ain't talking to either of you niggers.

25 That's the key word in that statement. The

1 key word is "we." That comment wasn't directed not only
2 at the police. It was also directed at his friends that
3 the police were talking to. He wanted to make sure they
4 knew they weren't going to get any cooperation from the
5 individual. He was telling his friends, listen to me.
6 You don't have to talk to them.

7 And, what did that do? That took the police
8 attention away from the two suspects and focused it
9 solely on the defendant.

10 We also heard testimony from our first
11 Detective DeCaro and he told us specifically on direct
12 that he was wearing his badge when he went to Mineola
13 High School around his neck -- on a chain around his
14 neck. And, I asked him again on direct, were you
15 wearing the badge when you walked in? And, he said, we
16 were wearing our badges around our neck when we walked
17 into Dunkin' Donuts. We heard it and one of the clerks,
18 she stated she had seen a badge.

19 Now, let's go to the specifics of the
20 testimony we heard. We heard from two clerks from
21 Dunkin' Donuts. The testimony at times was difficult to
22 understand, and I understand that, but when we focus on
23 what we heard, they gave us some crucial information,
24 however limited, that shows this defendant did commit
25 those crimes in which he is accused of.

1 First of all, we heard from Ms. Wijebahu who
2 stated that she saw the defendant try to move the table.
3 She heard the table move.

4 Now, we see on the video the defendant try to
5 grab at the table again. But that testimony goes
6 directly to the testimony of the two detectives who told
7 us this defendant pushed the table into his leg.

8 Then we heard from Ms. Swedy, and she told us
9 they stood him up -- the defendant up when they
10 attempted to arrest him. He was flailing his arms and
11 she demonstrated for us, and she said he was standing up
12 and they had to put him on the ground, and then they got
13 the handcuffs on him.

14 She also stated she saw the badge and she
15 stated when they were talking to this defendant, she
16 described it a loud disturbance, very loud. She's
17 approximately 10 to 15 feet away and this defendant has
18 now caused a loud disturbance in a public place, the
19 Dunkin' Donuts.

20 Then we heard from our two police officers.
21 When we look at the testimony of the two police
22 officers, defense counsel wants us to believe that they
23 got in a take-down position when they were going to
24 arrest him for the resisting arrest, but we will watch
25 the video and you will see the defendant is sitting. If

1 the police had wanted to take him down to the ground,
2 they would have pulled him back over the chair. That
3 chair would be either on the ground or well out of the
4 way. The chair that we see does not support the
5 contention of the defense counsel. In fact, it supports
6 the testimony of the police officers.

7 Now, we have the obstruction of governmental
8 administration. Your Honor, as you know, the law states
9 that the defendant intentionally obstructs, impairs, or
10 perverts the administration of law or other governmental
11 function or prevented or attempted to prevent a public
12 servant from performing an official function by means of
13 intimidation, physical force, or interference, or by
14 means of any independently unlawful act.

15 When this defendant screamed those words out
16 across the Dunkin' Donuts, (1), he engaged in an
17 independently unlawful act. And, when he sat down and
18 directed the police to where he was sitting and pushed
19 the table into their legs, he also prevented that
20 investigation by physical force and interference. That
21 testimony is uncontroverted.

22 Now, defense counsel accuses the officers of
23 moving the table. He has shown nothing to contradict
24 their testimony. These two officers with almost 40
25 years of experience combined on the police forces, they

1 get up here and tell us that this defendant pushed the
2 table. There is no other evidence to suggest otherwise.

3 The first count of disorderly conduct by
4 making where he uses abusive or obscene language or make
5 an obscene gesture with intent to cause public
6 inconvenience, annoyance, or alarm, or recklessly
7 creating a risk thereof, that was his intent when he
8 screamed out. That was his intent when he yelled, fuck
9 that. This is my hood. We don't have to talk to any of
10 you niggers. You might as well wait for me to finish
11 eating 'cause I ain't talking to either one of you
12 niggers.

13 If he didn't want to talk to the police, he
14 could have said, I am not talking to him. That wasn't
15 his intent. By making this comment it was to be
16 disorderly to create an atmosphere in this store, this
17 Dunkin' Donuts, by using abusive and obscene language,
18 and, that's, in fact, what he did. Not only did he do
19 that, but when he took the table and shoved it into the
20 leg of the officer, he engaged in fighting or tumultuous
21 behavior, the second disorderly conduct count, and his
22 intent, again, there was to cause public inconvenience,
23 annoyance, or alarm.

24 That was a store filled with patrons with this
25 defendant yelling, with this defendant taking a table

1 with people sitting feet away from him, throwing it into
2 the officer's leg.

3 And, the last disorderly conduct, by creating
4 a hazardous or physically offensive condition. His
5 condition, his statements, his actions on that day
6 proved that he created a physically hazardous
7 conditional. And, the point was to create
8 inconvenience, annoyance, or alarm.

9 Your Honor, we heard the testimony of two
10 officers. They asked him, can we see some ID? He takes
11 the table and throws it into the leg and at this point
12 they determine they are going to place him under arrest.

13 Defense counsel wants you to believe the
14 argument should be between whether or not he resisted or
15 whether or not the police had control of him.

16 The police had a certain amount of control of
17 him. But the fact is this defendant resisted. You're
18 right he didn't run out of the store. They didn't lose
19 complete control, but when they committed to handcuff
20 him, he flailed his arm. And, when you look at the
21 statute to resist the arrest, this defendant resisted
22 arrest.

23 We will watch the video and you will see how
24 long he resisted, 45 seconds. Defense counsel asked
25 Detective DeCaro to please point out where on this tape

1 you see resisting, and what did Detective DeCaro do? He
2 points out specifically a whole 45 seconds after he
3 commanded the defendant to put his hands behind his
4 back. We see the defendant's hand flailing in the air
5 as the officer attempts to put it back and place it in
6 handcuffs.

7 Ask yourself, your Honor, is this somebody
8 that is resisting arrest? Forty-five seconds after they
9 have commanded him to put his hand behind his back they
10 are still struggling to put the cuffs on him.
11 Forty-five seconds. This is a dangerous situation where
12 the police believe that suspect needs to be placed into
13 handcuffs. Forty-five seconds they are struggling with
14 him to make sure he is in the custody of the police, and
15 he resists.

16 Detective DeCaro also stated on his direct
17 that he watched as patrons left the store, as did
18 Detective Kouril.

19 Now, when we watch the video, your Honor,
20 you'll see specifically that this defendant resisted,
21 specifically, that everybody in the store especially at
22 the counter are really fixed on the direction in which
23 the defendant is yelling.

24 THE COURT: We are ready.

25 (Viewing videotape.)

1 MR. CANTY: Your Honor, as you can see at this
2 time, at 8:51:50, the defendant has left the counter and
3 is now, according to testimony, just about a step away
4 from where the table is and a full 12 seconds later we
5 pick up on a different camera angle and the table has
6 been pushed.

7 Now, if we rewind the tape, we look at the
8 original position of the tables, your Honor.

9 (Rewinding videotape.)

10 (Viewing videotape.)

11 MR. CANTY: There is quite a bit of distance
12 at the table where the defendant finally sits down at
13 and where Officer DeCaro stated he walked in between the
14 table. There would be no reason for him to pull the
15 table out of the way. One officer has walked in between
16 and standing on the defendant's right, and the one
17 officer is now standing on the left. And, if we are to
18 believe defense counsel's contention, they will pull the
19 table closer to them after he's already walked through.
20 There was no need for him to move the table. The only
21 explanation is the testimony we heard, is the defendant
22 pushed the table at the officer's leg.

23 Then when we continue to watch the video, your
24 Honor --

25 (Viewing video.)

1 MR. CANTY: -- again, that space at 8:52:02,
2 both officers are standing on the right and left-hand
3 side of the defendant respectively.

4 Now, defense counsel wants you to believe at
5 this point the officers decided to take him down, to
6 take him down to the ground. Well, for them to take him
7 down, you would have to believe they just throw him
8 immediately to the ground.

9 If you look carefully at the video, the chair
10 he is sitting in doesn't move. It moves a little back
11 and still stays upright. It is consistent with the
12 testimony you heard from the clerk. He brought him on
13 his feet. He was flailing his arms and they had to
14 bring him down to the ground.

15 If we look at the same testimony of both
16 police officers, they had determined the defendant was
17 going to be placed under arrest. It is 8:52:02. Again,
18 we see the defendant reaching for the table, the same
19 table he had just pushed at the officers.

20 What did the officers do? They push it out of
21 the way because they don't want to be injured again.

22 8:52:02 we come back. It's now 8:52:42 and we
23 see Detective DeCaro has the hand of the defendant.
24 Well, a full 40 seconds later in that video and the
25 officers have still failed to put this defendant in

1 cuffs. They were unable to put him in cuffs at this
2 point because their testimony supports what we see in
3 this video. He flailed his arms; he kicked his legs; he
4 refused to comply with orders; he resisted arrest.

5 The officer told us he had to put his body
6 over the legs because he was kicking his legs, to
7 protect himself and the safety of others. He also
8 stated Detective DeCaro was never on the defendant, and
9 you can see elsewhere the defendant is trying to pull
10 his arm. A full 42 seconds after we hear testimony and
11 we see the officers attempt to arrest the defendant, he
12 is still not in cuffs and here's the chair still
13 upright.

14 Your Honor, that testimony fully supports the
15 testimony of both officers. Defense counsel can wish it
16 didn't happen that way. You can accuse them of moving
17 the table, and he wants to, but their answers are clear.
18 They told us they in no way moved the table other than
19 when they pushed it away from the defendant.

20 It is important for the police officers to
21 effect an arrest quickly and for the safety of the
22 defendant and of the officers. When it takes over 40
23 seconds for them to effect an arrest, that is a classic
24 sign that this defendant didn't want the cuffs on him.

25 Your Honor, after you review all the evidence,

1 after you review all the testimony of the three
2 witnesses the People called, the testimony they gave us
3 is uncontroverted. The officers got up here and told
4 you exactly what happened. The fact that the
5 information wasn't in the original paperwork is wholly
6 irrelevant. They didn't determine what charges were
7 finally going to be filed against this defendant. That
8 was done by the district attorney. They came in. They
9 gave testimony as to what happened that night. And,
10 that testimony has gone uncontradicted by defense
11 counsel. He asked numerous questions. They never
12 changed their story. Their story is consistent with
13 what happened on that evening. It's consistent with the
14 facts, and it's consistent with a violation of
15 disorderly conduct, sub 3, and disorderly conduct, sub
16 1, and disorderly conduct, sub 7, as well as obstruction
17 of governmental administration, and lastly, the
18 resisting arrest.

19 I am confident after you review all the
20 evidence, and the testimony, and you apply it to the law
21 that is valid in this case, you will return the only
22 verdict that is consistent with justice, the only
23 verdict consistent with the truth, and enter a verdict
24 of guilty of obstruction of governmental administration,
25 guilty of disorderly conduct, sub 1; guilty of

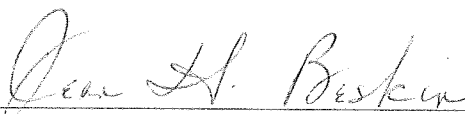
1 disorderly conduct, sub 3; guilty of disorderly conduct,
2 sub 7; and guilty of resisting arrest. Thank you.

3 THE COURT: Thank you, Mr. Canty.

4 2-22 before me for verdict. Thank you very
5 much.

6
7 * C E R T I F I C A T I O N *

8 The foregoing is certified to be a true and
9 accurate transcript of my original stenographic
10 notes for the above-mentioned proceedings.

11 

12 Jean H. Beskin, Official Court Reporter
13 Notary Public, State of New York
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