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COURT OF APPEALS

STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

No. 133

DEREK CHISHOLM,

Appellant.

20 Eagle Street
Albany, New York 12207
May 30, 2013

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE VICTORIA A. GRAFFEO
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE ROBERT S. SMITH
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM

Appearances:

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1 CHIEF JUDGE LIPPMAN: 133, People v. Chisholm.
2 Counselor, you want any rebuttal time?

3 MS. GLASHAUSSER: Two minutes, please, Your
4 Honor.

5 CHIEF JUDGE LIPPMAN: Two minutes. Sure. Go
6 ahead.

7 MS. GLASHAUSSER: May it please the court, my
8 name is Allegra Glashausser, and I represent appellant
9 Derek Chisholm.

10 Your Honors, review of the confidential
11 informant's testimony here was necessary. That review
12 never happened, and the People should not now be rewarded
13 for their delay.

14 CHIEF JUDGE LIPPMAN: Well, what - - - we know
15 the transcript is there now. Why - - - why - - - doesn't
16 that kind of make the whole issue be resolved easily?

17 MS. GLASHAUSSER: The transcript needed to be
18 produced for the suppression court. It needed to be
19 produced before trial.

20 CHIEF JUDGE LIPPMAN: I understand that, but now
21 we have the transcript that - - - we just ignore that?

22 MS. GLASHAUSSER: Well, this court is not a
23 court of factual jurisdiction, so this court can't review
24 the transcript - - -

25 JUDGE SMITH: Your - - - your answer is yes, we

1 do ignore it.

2 MS. GLASHAUSSER: Yes, exactly. The fact that
3 the transcript has now been produced six years later
4 doesn't change the fact that it was not introduced at the
5 suppression court; it wasn't introduced when the People
6 had the burden of showing that the warrant - - -

7 CHIEF JUDGE LIPPMAN: You're saying we don't
8 have the power to look at the transcript now?

9 MS. GLASHAUSSER: Exactly. The fact that the
10 suppression court - - -

11 CHIEF JUDGE LIPPMAN: Why - - - why don't we
12 have the power?

13 MS. GLASHAUSSER: This is a court of - - - this
14 is not a court of factual jurisdiction, and this court
15 never considers facts, especially in the - - - in the
16 first instance.

17 JUDGE ABDUS-SALAAM: So then we'd have to send
18 it back down to the court below to look at the transcript
19 as it should have done in the first instance?

20 MS. GLASHAUSSER: I don't believe that that's
21 the appropriate remedy, and in fact, the People don't even
22 ask for this case to be sent back.

23 CHIEF JUDGE LIPPMAN: What's the appropriate
24 remedy?

25 MS. GLASHAUSSER: The appropriate remedy here is

1 suppression. The People had their full opportunity before
2 the suppression court to present the evidence that this
3 search warrant met the probable - - - met probable cause.
4 The statute that requires that the - - - that the
5 confidential informant's testimony be under oath and
6 recorded isn't some sort of hollow exercise. It's a
7 constitutional - - -

8 JUDGE READ: So you're saying that since they
9 missed the opportunity the first time around, they can't
10 fix it or correct it now?

11 MS. GLASHAUSSER: Well, it's not that they
12 missed it. They had their opportunity, and it was through
13 no fault - - -

14 JUDGE READ: Well, they didn't take - - - they
15 didn't take - - - they missed it in the sense that they -
16 - - they didn't take the opportunity the first time around
17 or there was nothing that would have prevented them the
18 first time around. And so now you're saying they've - - -
19 that there's no opportunity to correct it.

20 MS. GLASHAUSSER: Exactly. As this court found
21 in Serrano, this review is not just some sort of hollow
22 exercise. It's not a technicality. It's to decide
23 whether the constitutional requirements have been met.

24 JUDGE PIGOTT: What's the prejudice to you if
25 they do it now?

1 MS. GLASHAUSSER: The People have had not just
2 one opportunity, but four opportunities. To allow them
3 now - - -

4 JUDGE PIGOTT: Let's assume - - - let's assume
5 that. What's the prejudice to you if they do it now?

6 MS. GLASHAUSSER: It's giving the People a
7 windfall while the defendant has spent six years
8 litigating this issue. Allowing the People at the last
9 minute - - -

10 JUDGE PIGOTT: What's the windfall?

11 MS. GLASHAUSSER: They've - - - they're able to
12 benefit from their delay, and this would just - - -

13 JUDGE PIGOTT: How are they able to benefit from
14 their delay?

15 MS. GLASHAUSSER: Because they can hope, in the
16 next case, that the case won't make it up to the Court of
17 Appeals; that maybe in the next case they will never have
18 to produce the transcript. This - - - to allow the People
19 to have another opportunity now would encourage future
20 delays and encourages inefficiency that allows - - -

21 JUDGE RIVERA: So you're arguing this was done
22 in bad faith?

23 MS. GLASHAUSSER: No, it - - - it doesn't matter
24 - - - I'm not arguing that it's done in bad faith, but the
25 People get their one opportunity just as the defense gets

1 one opportunity to present their case.

2 JUDGE ABDUS-SALAAM: You said they had several
3 opportunities, counsel, and they didn't produce the
4 transcript until one of the members of this court granted
5 leave to the pro se - - - by that time, pro se defendant,
6 and that's when the transcript appeared.

7 MS. GLASHAUSSER: Exactly.

8 JUDGE ABDUS-SALAAM: So in - - - in the case
9 that you were about to posit, the next defendant who may
10 be - - - unlike this defendant, no transcript was ever
11 done, they'd have to wait six years or more to find out
12 that that wasn't done or - - -

13 MS. GLASHAUSSER: Exactly. And that's a
14 prejudice to the defendant. The defendant is entitled to
15 a hearing on whether probable cause was properly found for
16 this search warrant. Magistrates can make mistakes just
17 like everybody else, and the reason that we have this
18 statutory requirement is to protect those constitutional
19 rules.

20 JUDGE PIGOTT: But isn't it frozen in time now?
21 I mean, you - - - you know exactly what happened. You've
22 got a transcript that says what happened.

23 MS. GLASHAUSSER: Well, I don't know at all what
24 happened. I don't know - - -

25 JUDGE PIGOTT: And you wouldn't have known if

1 they had done it the first time, right? I mean, you don't
2 get - - - you don't - - - it's all redacted. You don't
3 have the - - - you know, the chance to look at that.

4 MS. GLASHAUSSER: Well, what we have here is no
5 court has reviewed probable cause. No court has reviewed
6 that transcript. No court has found that the confidential
7 informant testimony was under oath. No court has found
8 that that transcript complies with the statute.

9 JUDGE PIGOTT: Is there any way they could
10 possibly do that now?

11 MS. GLASHAUSSER: No.

12 JUDGE PIGOTT: They can't? The transcript
13 doesn't show that?

14 MS. GLASHAUSSER: I'm not sure what the
15 transcript shows, but on its face, that's not enough. So
16 in Serrano, this court found that there was no substantial
17 compliance and the probable cause showing hadn't been met,
18 even though there's no doubt that there was a transcript;
19 it's just that the court reporter was ill and hadn't
20 produced it. So in this - - - even in Serrano - - - and
21 there was no doubt that it was under oath. So Serrano is
22 even more clear about what happened. Here, we don't know.

23 JUDGE SMITH: So you - - - you say the statute
24 is violated once the People have failed to produce the - -
25 - the record for review by the suppression court, even if

1 it - - - even though it may exist somewhere?

2 MS. GLASHAUSSER: Right. When there's no
3 showing in the suppression court that - - - that the
4 statute was complied with, and the suppression court has
5 never had the opportunity to make a proper determination
6 as to whether probable cause exists - - -

7 JUDGE SMITH: Let me - - -

8 MS. GLASHAUSSER: - - - at all.

9 JUDGE SMITH: Let me - - - let me change the - -
10 - the area of inquiry for a moment. Suppose you're - - -
11 suppose you're right about the confidential informant.
12 Suppose we have to view this as though the confidential
13 informant had never showed up. Couldn't we hold that the
14 - - - the affidavit in itself on which the search warrant
15 was issued is good under Aguilar/Spinelli?

16 MS. GLASHAUSSER: No. Here, the - - - the
17 affidavit in this case specifically mentions that the
18 confidential informant was brought in so the magistrate
19 could determine his reliability.

20 JUDGE SMITH: Okay. But I - - - yeah. I mean -
21 - - but I mean, before we get into the details, in theory,
22 if - - - if the affidavit had enough in it and if it had
23 enough in it without the statement you just quoted, then
24 we wouldn't need to worry about all these other issues,
25 correct?

1 MS. GLASHAUSSER: It - - - it's hard to imagine
2 a case where the magistrate is bringing in a confidential
3 informant just - - - not for a legal reason but just as an
4 extra reason - - -

5 JUDGE SMITH: But it is not - - - not that hard
6 to imagine doing something out of excessive caution. You
7 have a barely sufficient case and you figure let's play it
8 safe and get the informant in here.

9 MS. GLASHAUSSER: That's not this case. Here,
10 we have - - -

11 JUDGE SMITH: Okay. But why - - - why is it - -
12 - I mean, first of all, theoretically, in that case, then
13 the warrant could be upheld, in that case that you say
14 isn't this case?

15 MS. GLASHAUSSER: I believe that anytime a
16 confidential informant is brought in for the magistrate to
17 assess his or her reliability that the - - - the statute
18 has to be complied with and the suppression court has to
19 review it, and that's what this court has held.

20 JUDGE SMITH: Okay. You're saying even if the
21 confidential informant's testimony was unnecessary, you're
22 entitled to suppression?

23 MS. GLASHAUSSER: If the court were to find it
24 unnecessary, maybe it would be a different case from here
25 but - - -

1 JUDGE SMITH: Okay. Now - - - now tell us why
2 it wasn't unnecessary. Tell us why the affidavit without
3 - - - without reference to the informant's testimony, why
4 that affidavit isn't good enough.

5 MS. GLASHAUSSER: Sure. The affidavit doesn't
6 establish the confidential informant's rely - - -
7 reliability, and the police officer writing the affidavit
8 and the magistrate reading it were - - - were both aware
9 of that, which is why they brought the confidential
10 informant in.

11 All we have in the affidavit are these - - - we
12 have three assertions that he had bought drugs in the
13 past. That's similar to what we had in Taylor where the
14 confidential informants had purchased LSD. This court
15 found that that was not enough to establish reliability.
16 When the confidential informant comes in to establish
17 reliability, the suppression judge has to review that
18 testimony because otherwise we don't know what happened.
19 We don't know if the confidential - - -

20 JUDGE ABDUS-SALAAM: Counsel, what if - - - what
21 if the transcript did exist and had been discovered in six
22 months rather than six years, would your argument be the
23 same?

24 MS. GLASHAUSSER: If the transcript is
25 discovered before trial, then my argument is different,

1 because the point of the statute is to make sure that
2 evidence that is unconstitutionally obtained doesn't get
3 entered into trial. That's the moment when we want to
4 have this review. After that - - -

5 JUDGE ABDUS-SALAAM: So once the trial is done,
6 it doesn't matter whether the transcript exists, and it
7 can be found - - - it's, well, game over, essentially, for
8 the People.

9 MS. GLASHAUSSER: Although that's not this case,
10 yes, it's the People's duty to present the transcript at a
11 moment before - - - before trial, and that's clear under
12 this court's case law and it's - - -

13 JUDGE SMITH: Suppose - - - suppose the People
14 come in the day - - - yeah, the day after trial. The - -
15 - the evidence has been admitted at the trial. Your guy's
16 been convicted. You're about to go screaming on appeal.
17 The People - - - the People come in and say, for good - -
18 - we have - - - we have a good excuse, Judge, we - - -
19 couldn't find the transcript, but now we've got it, and we
20 ask you to - - - to consider suppression in light of the
21 transcript. Would that be okay?

22 MS. GLASHAUSSER: No. If the People have had
23 their full opportunity to introduce the transcript
24 initially, they don't get another one, and that - - - that
25 - - -

1 JUDGE SMITH: Yeah, but even if they're not - -
2 - even if they're in no way at fault for - - - yeah,
3 suppose the - - - the court reporter was deathly ill and
4 he had a miraculous recovery and typed up his notes.

5 MS. GLASHAUSSER: In that situation, the People
6 could do a reconstruction hearing at the suppression stage
7 as they tried to do, for example, in Taylor. There's no
8 reason to - - - to wait until after the trial to have that
9 review. The reason we have the review in advance is - - -

10 JUDGE SMITH: Now, let me ask - - - let me ask,
11 I think, the same question in a different way; I might get
12 a different answer. You agree with me that your case is
13 better because it was six years and not six weeks after
14 the trial?

15 MS. GLASHAUSSER: Of course. My case is totally
16 different than if it was six weeks, but it - - - but the
17 rule should still be at that moment.

18 CHIEF JUDGE LIPPMAN: Okay, counselor. Thanks.

19 MS. GLASHAUSSER: Thank you.

20 CHIEF JUDGE LIPPMAN: Counsel.

21 MS. ALDEA: Good afternoon, Your Honors. May it
22 please the court, my name is Donna Aldea. I'm appearing
23 here today pro bono as a special assistant district
24 attorney.

25 CHIEF JUDGE LIPPMAN: Counsel, six years is a

1 long time to not produce the transcript.

2 MS. ALDEA: It is, except no one had any idea
3 that the transcript didn't exist.

4 CHIEF JUDGE LIPPMAN: So whose problem is that?

5 MS. ALDEA: Well, I mean - - -

6 CHIEF JUDGE LIPPMAN: Is it their problem?

7 MS. ALDEA: It's actually nobody's problem in
8 this case because the transcript was wholly unnecessary.

9 CHIEF JUDGE LIPPMAN: So do we have authority to
10 look at that transcript now or to say - - -

11 MS. ALDEA: You have no - - -

12 CHIEF JUDGE LIPPMAN: Yeah. Go ahead.

13 MS. ALDEA: Well, Your Honor, you have - - -

14 CHIEF JUDGE LIPPMAN: What do we do? Take
15 judicial notice of the transcript? What do we do?

16 MS. ALDEA: You have no need to look at the
17 transcript at all because what this court said in Serrano
18 very, very clearly is that - - - and I'm going to actually
19 read it because I don't want to misstate it. The language
20 is, "The search warrant and supporting affidavit do not,
21 by themselves, establish probable cause." That's why we
22 need to look at it. But in this case, unlike in Serrano,
23 the search warrant itself, on its face, stated that it had
24 been transcribed; it had a court reporter's name, which
25 shows - - -

1 CHIEF JUDGE LIPPMAN: So as long as we know it's
2 transcribed, it's okay?

3 MS. ALDEA: As long as it's under oath and as
4 long, in conjunction - - -

5 JUDGE ABDUS-SALAAM: Then why did the - - -

6 MS. ALDEA: - - - with the affidavit - - -

7 JUDGE ABDUS-SALAAM: Counsel, why did the
8 Appellate Division order the transcript produced?

9 MS. ALDEA: Well, what's more interest - - - the
10 Appellate Division ordered it produced as an extension of
11 poor-person relief because what happened is the appellant,
12 in applying for a poor-person motion, said, I'd also like
13 the court in camera to take a look at this transcript, and
14 the court said okay.

15 JUDGE SMITH: Which is not such an unreasonable
16 thing to ask, is it?

17 MS. ALDEA: Not at all. So the court granted
18 that.

19 JUDGE SMITH: And you - - - you don't think it's
20 a problem if the transcript's been burned?

21 MS. ALDEA: Your Honor, that may be a problem if
22 you need it. But what I think is interesting, and this is
23 really what's dispositive, counsel stated here before the
24 court that nobody has ever assessed probable cause.
25 That's the heart of this, but that's not true. The

1 magistrate assessed probable cause based on the affidavit
2 and the confidential informant that appeared before the
3 magistrate.

4 JUDGE SMITH: But - - - but isn't - - - isn't
5 his assessment supposed to be reviewable by the
6 suppression court?

7 MS. ALDEA: Yes, Your Honor. And then the
8 suppression court reviewed probable cause because the
9 suppression court - - -

10 JUDGE SMITH: And you - - - you say it's
11 adequate for the suppression court to look at a piece of
12 paper that says that the guy's testimony was transcribed
13 and have no idea what it said?

14 MS. ALDEA: It was adequate in conjunction with
15 the affidavit in this case because the affidavit specified
16 both a basis of knowledge and, under the circumstances
17 here, reliability, specifically - - -

18 JUDGE SMITH: Isn't that the same thing as
19 saying you'd be fine if there had - - - if the
20 confidential informant had never showed up at all?

21 MS. ALDEA: Yes, that's exactly what I'm say - -
22 - well, no, no, no. Let me take that back. I'm not
23 saying that. Because there was one additional thing that
24 was added to this by the search warrant, and that is the
25 search warrant indicated that the confidential informant

1 had appeared before the magistrate.

2 JUDGE SMITH: Okay. Suppose you didn't have
3 that. Would you - - - would you lose the case?

4 MS. ALDEA: I think you could still argue in
5 this case that there were declarations against penal
6 interests which would have satisfied Aguilar/Spinelli's
7 reliability prong by themselves, and those are noted in
8 the affidavit. But in this case, whatever the
9 declarations against penal interests are, in this case
10 they're corroborated - - -

11 JUDGE SMITH: So you're say - - - you're saying
12 the fact that he swore - - - that he did show up and raise
13 his hand - - - put one hand on the Bible and raised the
14 other hand, that that's - - - that, plus the affidavit, is
15 enough.

16 MS. ALDEA: Absolutely.

17 JUDGE SMITH: It doesn't matter what you - - -
18 you don't need any - - -

19 JUDGE PIGOTT: Well, let me ask you a question.

20 MS. ALDEA: Completely sufficient.

21 JUDGE PIGOTT: Under - - - under 690, the
22 defense lawyer is - - - is authorized, I don't know if
23 he's encouraged, to suggest questions to be asked because,
24 you know, somebody's got to know something about this
25 informant, and you're not telling the defendant who it is.

1 So if it's someone who has an ax to grind, if it's an ex-
2 spouse, if it's, you know, someone who's a disaffected
3 friend or something, there may be reasons why questions
4 were or were not posited to the - - - to the confidential
5 informant, and that may have an effect on the - - - on the
6 appeal.

7 MS. ALDEA: Well, that's not relevant under this
8 particular section because here it was an application for
9 a search warrant, and so the defendant wasn't involved in
10 that to be able to ask questions. This wasn't a hearing
11 that happened after the fact. There was no Darden hearing
12 in this case or anything else.

13 So here - - - and I want to go to the statute a
14 little bit because I want to look at two things. The
15 extension - - - this is not Serrano. I just want to make
16 that very, very clear. The situation that is presented
17 before this court is unlike anything this court has ever
18 seen or ruled on. The defendant is arguing here for the
19 first time that in a case where clearly there was probable
20 cause for the search warrant, which is all the
21 constitution guarantees a defendant will get - - - here,
22 the defendant got it, and yet the defendant is saying, I
23 get suppression in spite of that. Then the statute,
24 690.40 - - -

25 JUDGE SMITH: How - - - how - - - I mean,

1 probable cause - - - is the reliability of the informant
2 an element of probable cause? It is, isn't it?

3 MS. ALDEA: Well, actually, Your Honor, in
4 Taylor, which the defendant has relied upon extensively -
5 - - in Taylor, the court specifically said, we agree with
6 the Appellate Division that the two-pronged
7 Aguilar/Spinelli test is inapplicable (sic) - - - is
8 inapplicable where the warrant application is based - - -
9 in this case, the witness appears and testifies before the
10 magistrate who is then himself in the position - - -

11 JUDGE SMITH: Now, wait a minute. If you - - -
12 you wouldn't say that - - - that probable cause was shown
13 if you didn't have the statements in the affidavit of what
14 the informant had told the officer, would you?

15 MS. ALDEA: When the - - - when an applicant - -
16 - when the actual confidential informant appears before
17 the magistrate, the reliability prong of Aguilar/Spinelli
18 is automatically satisfied, automatically. And actually -
19 - -

20 JUDGE SMITH: What - - - what says that?

21 MS. ALDEA: Well, you know what says it most
22 clearly, which I want to point out? Taylor says it, which
23 is this court's decision in Taylor, and this is
24 specifically on page 688.

25 JUDGE PIGOTT: Why would you ever need a Darden

1 hearing, then?

2 MS. ALDEA: Excuse me, Your Honor?

3 JUDGE PIGOTT: Why would you ever need a Darden
4 hearing, then?

5 MS. ALDEA: That's when there is an allegation
6 that there is no confidential informant at all, and so no
7 one has appeared before the magistrate, and there is a
8 danger that the police officer just made up that someone
9 exists. Here, however, that wasn't an issue.

10 JUDGE SMITH: And why - - - why then does the
11 statute say you've got to make a record of what he says if
12 all the - - - the important thing is just that he showed
13 up?

14 MS. ALDEA: To preserve it for appellate review,
15 and that's what Serrano says. Now, there are two - - -

16 JUDGE PIGOTT: Why would they be reviewing it?

17 JUDGE SMITH: Why - - - why does the appellate
18 court have to review something that they said that it was
19 of no importance of the suppression court?

20 MS. ALDEA: Well, Your Honor, the statute isn't
21 only interested in cases where it's of no importance. The
22 statute is interested in cases where you do need, in fact,
23 to have testimony before the court to establish both
24 prongs of Aguilar/Spinelli. That's not the case here.

25 But what I - - - my second point of the argument

1 was there's no constitutional violation because here there
2 was probable cause. But more importantly than that, there
3 is no statutory violation, because if you look at the text
4 of the statute, the statute does not govern whether the
5 record will be made available; it says nothing about that.
6 The statute says, in determining an application for a
7 search warrant, the court may examine under oath any
8 person and any such examination must be recorded. In this
9 case, we know - - -

10 JUDGE SMITH: You're saying - - - you're saying
11 - - -

12 JUDGE RIVERA: What's the point of that? What
13 would be to point of recording it?

14 JUDGE SMITH: So you record it and not keep the
15 record?

16 JUDGE RIVERA: It's got to be used for
17 something.

18 MS. ALDEA: Yes, Your Honor, but in this case -
19 - - but my point is in this case there was no
20 constitutional violation, there was no statutory violation
21 because we know from the warrant itself that it was, in
22 fact, recorded.

23 JUDGE SMITH: You - - - you - - -

24 JUDGE RIVERA: What would be the purpose of
25 that?

1 MS. ALDEA: The purpose of it, Serrano said, is
2 to - - - and Taylor as well, to permit appellate review.
3 Now, in this case - - -

4 JUDGE SMITH: But - - - but are you - - - are
5 you really saying that you comply with it by recording it
6 if you do not keep a copy of the record?

7 MS. ALDEA: Well, we did keep a copy of the
8 record in the sense that the record was available.

9 JUDGE SMITH: It took you a while to find it
10 though, huh?

11 MS. ALDEA: Yeah. Your Honor, I actually do
12 want to address that because that's actually pretty
13 important here. The first time that anybody ever assumed
14 that the record was unavailable was in the leave
15 application to this court. That is the first time that
16 issue came up, ever. In every other motion that was
17 filed, in the briefs below, all the parties assumed that
18 the transcript was available. Nobody knew that the
19 transcript was unavailable until the court reporter - - -

20 JUDGE ABDUS-SALAAM: But the transcript was not
21 unavailable; it was there. The court reporter just said,
22 I couldn't find it - - -

23 MS. ALDEA: Exactly.

24 JUDGE ABDUS-SALAAM: - - - under whatever she
25 looked for it. But what - - - didn't the People have an

1 obligation at some point to say to the court reporter, as
2 they did after leave was granted here, look for it under
3 the warrant number, not the - - - the defendant's name?

4 MS. ALDEA: Yes, and what I'm - - -

5 JUDGE ABDUS-SALAAM: So where was the People's
6 obligation in this?

7 MS. ALDEA: What I'm saying, Your Honor, is the
8 People complied with that as soon as they could, because
9 if you look at the timing of this - - - and I urge the
10 court to do this; this was first raised - - - the first
11 time that anyone thought that the transcript couldn't be
12 located, that it hasn't been provided to the appellate
13 court, was when the defendant, in their leave application,
14 said in a footnote - - - now, this was not in the May
15 leave application. The May leave application did not
16 raise this claim. This claim was not raised in the
17 Appellate Division.

18 And then what happened is, after the People
19 responded to the leave application on January 20th, the
20 defendant asked for permission to file a supplemental
21 leave application, filed a late leave application that, in
22 a footnote, for the first time - - - this was two weeks
23 late, was this leave application - - - in a footnote, the
24 supplement said for the first time that the court reporter
25 could not find it.

1 JUDGE SMITH: Well, I - - -

2 MS. ALDEA: The People were never served with
3 that affidavit.

4 JUDGE SMITH: It was - - - actually, it was the
5 Appellate Division who asked that the transcript be
6 produced.

7 MS. ALDEA: And everyone assumed, including the
8 defendant, that it had been produced because nobody knew,
9 except for the court and maybe the defendant, I don't
10 know, that the transcript had not been located by the
11 court reporter. In fact, you know, as proof of that, I
12 want to point out - - -

13 JUDGE SMITH: The - - - the - - - you're saying
14 the Appellate Division asked for the transcript; the court
15 reporter said, sorry, court, I haven't got a transcript,
16 and didn't tell you?

17 MS. ALDEA: Yes, Your Honor.

18 JUDGE SMITH: Seems odd.

19 MS. ALDEA: It was not served upon us at all.
20 And it's not that odd because it was in an application for
21 poor-person relief. And so essentially, the court was
22 under an obligation to furnish the transcripts to the
23 defendant; the reporter had to furnish the transcripts to
24 the court and to the defendant.

25 JUDGE SMITH: The transcript - - - the

1 transcript of a confidential informant gets furnished to a
2 pro se defendant?

3 MS. ALDEA: No, no, no, no. That was going only
4 to the court under seal, and the People had no knowledge
5 that the court reporter had not complied with it. I don't
6 know that that matters to the application because really,
7 in earnest, Your Honor, what this issue comes down to is
8 you do not need - - - by Serrano's own terms, if the
9 warrant on its face in conjunction with the affidavit
10 establishes probable cause - - -

11 JUDGE ABDUS-SALAAM: Could we - - - could we
12 stop there, counsel? You said the warrant on its face
13 establishes probable cause. What were the - - - what on
14 the warrant, other than that it was transcribed, that you
15 said that it had this notation that there was a
16 transcription of something? How does that show that there
17 was probable cause?

18 MS. ALDEA: The transcription isn't required for
19 probable cause. What the warrant says at the beginning is
20 testimony - - - actually, a deposition having been made
21 before me or testimony having been made before me by this
22 confidential informant on this date. That - - - once the
23 court - - - the suppression court knows that the
24 confidential informant appeared before the court, then
25 according to this court's own holding in Taylor, that

1 establishes the reliability prong of Aguilar/Spinelli. If
2 the affidavit, additionally to that, also has declarations
3 against penal interests, which it did here, and also has a
4 clear statement - - -

5 JUDGE ABDUS-SALAAM: But wait a second.

6 MS. ALDEA: - - - of a basis - - -

7 JUDGE ABDUS-SALAAM: You say that - - -

8 MS. ALDEA: - - - of knowledge.

9 JUDGE ABDUS-SALAAM: You say the affidavit had a
10 declaration against penal interest, but it was the police
11 officer's affidavit, right, which said the CI told me
12 something.

13 MS. ALDEA: Correct.

14 JUDGE ABDUS-SALAAM: So how is that a
15 declaration against the CI's penal interest? That's the
16 police officer saying that the CI said something.

17 MS. ALDEA: That's why I'm saying when you read
18 it in conjunction, because what the search warrant had on
19 its face is this CI appeared before me and gave me this
20 deposition. "Deposition" implies that it's under oath,
21 although I would point out that the statute doesn't make
22 that mandatory; the statute only makes the recordation
23 mandatory.

24 CHIEF JUDGE LIPPMAN: Okay, counselor, okay.

25 Thank you.

1 MS. ALDEA: And so as a result, Your Honor,
2 there was neither a constitutional violation nor a
3 statutory violation here, and the only windfall in this
4 case, if you don't send it back or you don't just rule on
5 it here, would be to the defendant.

6 Can I just say one - - -

7 CHIEF JUDGE LIPPMAN: No, no. That's it,
8 counselor. Thank you.

9 MS. ALDEA: Okay. Thank you.

10 CHIEF JUDGE LIPPMAN: Go ahead, counsel.

11 MS. GLASHAUSSER: I - - - I just want to address
12 quickly how many times this issue has previously come up.
13 This came up at the suppression court when the defendant
14 moved to have the court review the transcript. So that
15 was the People's first opportunity. It came up again in
16 the Appellate Division, and then it came up again in the
17 leave - - - at the leave stage and now. So there have
18 been numerous opportunities. And there - - - despite
19 these opportunities, no reviewing court has actually
20 reviewed the probable cause determination, and that's
21 what's missing here.

22 Important in the People's argument about Taylor
23 and the warrant on its face somehow being sufficient is
24 that the Taylor court suppressed. The Taylor court said,
25 yes, when the confidential informant comes in and

1 testifies, that can establish reliability, but unless we
2 have this record of that testimony that we can review and
3 we know it's under oath, then you haven't established
4 reliability and therefore suppression - - - suppression is
5 - - - was granted in that case. So the warrant here
6 doesn't show - - -

7 JUDGE SMITH: Was it - - - was it granted for
8 lack of probable cause or was it - - - or was it granted
9 for noncompliance with the statute?

10 MS. GLASHAUSSER: Well, the court in - - -
11 what's interesting about this statute is that this court
12 in Taylor and in cases since have - - - have discussed how
13 the statute is protecting a constitutional right.

14 JUDGE SMITH: I understand - - - I understand
15 they're related - - -

16 MS. GLASHAUSSER: So the - - -

17 JUDGE SMITH: - - - but they're not the same
18 thing, are they?

19 MS. GLASHAUSSER: No, but the - - - a violation
20 of the statute, this court has found, is, in effect, a
21 violation of the constitutional right.

22 JUDGE SMITH: Okay. Now, you've - - - am I
23 right in thinking that Taylor was a suppression for
24 violation of the statute, granted, a statute designed to
25 protect constitutional rights, but not for a violation of

1 the Constitution itself?

2 MS. GLASHAUSSER: Yes.

3 JUDGE SMITH: And what are you arguing - - -
4 well, what do you say was violated here, the statute or
5 the Constitution or both?

6 MS. GLASHAUSSER: Both. What's violated here is
7 the statute and the lack of review of the constitutional
8 rights because of this violation of the statute, and under
9 either ground, suppression is required.

10 CHIEF JUDGE LIPPMAN: Okay. Thanks, counselor.

11 MS. GLASHAUSSER: Thank you.

12 CHIEF JUDGE LIPPMAN: Thank you both.

13 Appreciate it.

14 (Court is adjourned)

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

I, David Rutt, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Derek Chisholm, No. 133 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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