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COURT OF APPEALS  
STATE OF NEW YORK

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PEOPLE,

Appellant,

-against-

NO. 6

MYERS,

Respondent.

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20 Eagle Street  
Albany, New York  
January 4, 2023

Before:

ACTING CHIEF JUDGE ANTHONY CANNATARO  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE MICHAEL J. GARCIA  
ASSOCIATE JUDGE ROWAN D. WILSON  
ASSOCIATE JUDGE MADELINE SINGAS  
ASSOCIATE JUDGE SHIRLEY TROUTMAN

Appearances:

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Xavier Austin Reyna  
Official Court Transcriber



1                   ACTING CHIEF JUDGE CANNATARO: Our next appeal is  
2                   number 6, People v. Myers.

3                   MR. ROTHSCHILD: Good afternoon, Your Honors.

4                   May it please the court. Phil Rothschild from  
5                   Hiscock Legal Aid on behalf of Mr. Myers.

6                   I'd like to reserve two minutes for rebuttal.

7                   ACTING CHIEF JUDGE CANNATARO: Sure. You got two  
8                   minutes.

9                   MR. ROTHSCHILD: It's undisputed that the  
10                  attorney general in this case did not have consent to  
11                  record the conversation between Dudley Harris and Mr.  
12                  Myers, making it an intercepted communication under CPL  
13                  700.05.

14                  JUDGE GARCIA: Counsel, just so I understand what  
15                  the effect of your rule would be - - - and I know this is a  
16                  hypothetical, not this case.

17                  Investigators working on the hit and run, somehow  
18                  independently recover the tape from the prison, right? And  
19                  I know that's not what happened here, but they do in my  
20                  world here for now. They recover the tape. They're about  
21                  to turn that tape over in discovery, and they - - - one of  
22                  the officers working on that AG warrant comes in and say,  
23                  Hey, what a coincidence; we intercepted that call as well.

24                  Now do they have to give notice under 700.70?

25                  MR. ROTHSCHILD: Well, I think you're really just



1 referring more to the Diaz case, because in that case they  
2 had a whole plan and policy for recording all - - - and  
3 ferreting through all the conversations.

4 I would submit in that case it's distinguishable  
5 insofar as that the discovery, the identification, occurred  
6 as a result of - - -

7 JUDGE GARCIA: But let's say it's Diaz except  
8 there's a wiretap too. And right before they turn over the  
9 Diaz tape, they learn there was a wire, and it captured the  
10 same conversation they're about to turn over that they  
11 discovered through investigation and getting out of the  
12 prison. Do they have to give notice under 700.70?

13 MR. ROTHSCHILD: I think under Diaz they don't.  
14 I think under your circumstances I think it's - - - under  
15 the circumstances we have here, I think they have to  
16 because it's an intercepted communication by the definition  
17 of the statute, because you have to look at - - - the  
18 statute itself, 700.05 subdivision 3, mirrors Penal Law  
19 section 250. And as it defines, an intercepted  
20 communication is the telephonic communication intentionally  
21 overheard or recorded by a person other than the sender or  
22 receiver without the consent of the sender or receiver.  
23 That contemplates that the sender or receiver is giving  
24 consent to that individual doing the recording.

25 Now, divining legislative intent - - -



1 JUDGE SINGAS: Why can't it be that once you  
2 consent for one purpose, you give consent for all purposes?

3 MR. ROTHSCHILD: Because I think the statute  
4 intends that the person who's doing the recording has to  
5 have the consent, and I think we can look at that from the  
6 nature of the statute.

7 This is a comprehensive statutory screen - - -  
8 statutory scheme, Article 700. I think the provisions need  
9 to be read in context. They need to be made to agree with  
10 each other. And I think the person doing the wiretapping  
11 in this case can be either a private individual or law  
12 enforcement. For the former, that means potential criminal  
13 liability under section 250 of the Penal Law. For the  
14 latter, 730 - - - 700.30 subdivision 5 identifies the  
15 person as the individual designated by the district  
16 attorney to execute the wiretap.

17 In this case, it was detective Abraham who  
18 intentionally recorded the call, and no one consented to  
19 his recording of it.

20 Now, the focus till now has always been on who -  
21 - - on whether the person doing the recording has the  
22 consent of the sender or receiver.

23 JUDGE RIVERA: Even if that recording is not the  
24 evidence?

25 MR. ROTHSCHILD: I think so, Your Honor, because



1 the difference in this case and what we submit is that the  
2 jail recording, the Justice Center recording, was derived  
3 from it because part of the - - - part of the contents is  
4 the identification. And there was really no identification  
5 from the Justice Center recording. There's no way they  
6 would've recorded, which is why there's a - - - why this is  
7 distinguished.

8 JUDGE RIVERA: So then does your argument rise  
9 and fall with our determination of whether or not we agree  
10 with you on that it's derived?

11 MR. ROTHSCHILD: I think it rises or falls on the  
12 question of consent, because - - -

13 JUDGE GARCIA: If we get to derived, to Judge  
14 Rivera's question, do you think we should apply it for the  
15 poisonous tree analysis?

16 MR. ROTHSCHILD: I think not, Your Honor, because  
17 that is essentially grafting on a Fourth Amendment  
18 exception. The statute - - - this statute was - - -

19 JUDGE GARCIA: So what's your definition of  
20 derived from?

21 MR. ROTHSCHILD: I think the definition of  
22 derived is you have information which - - - I think the  
23 identification in this case more than suits this - - - for  
24 the purposes of derivation because without it, they would  
25 not have found it but for - - -



1 JUDGE GARCIA: So just a but-for test?

2 MR. ROTHSCHILD: Well, I think that's one test  
3 that can be applied. But I think that the fact that the  
4 person who testified at trial regarding these tapes never  
5 identified these individuals, couldn't identify them,  
6 because it was just a person who was a custodian of the  
7 tapes.

8 I think that goes a long way towards talking  
9 about whether this is in fact the intercepted communication  
10 or the evidence derived from it. But the focus has always  
11 been - - - as I said, the focus has always been on who - -  
12 - who has the consent been given to. Until now, basically,  
13 it has always been - - - either the sender or receiver has  
14 always given the consent to that individual.

15 The only exception I found is this court's  
16 decision in Badalamenti, and there they extended it - - - I  
17 believe it was Judge Singas's office - - - to vicarious  
18 consent, but we would submit that's entirely  
19 distinguishable because there's public policies and  
20 rationales because there it was like the parent or guardian  
21 had the - - - presumed to have - - - to give consent, where  
22 it was found - - - reasonably found to be in the best  
23 interest of the child. We have no such consideration in  
24 this case.

25 Here, the prosecution claims that Mr. Jones'



1 consent to the Justice Center recording, somehow  
2 transferred to a totally separate call and recording.  
3 Remember, this is a three-way conversation. There's one  
4 call, and then there's another call, with the difference  
5 that - - -

6 JUDGE SINGAS: But if we think about the evidence  
7 of the statement, right, that it was introduced rather than  
8 as the call, right? So the statement - - - not the vehicle  
9 by which the statement came in, but the evidence being the  
10 statement that he made concerning the red light - - -  
11 passing the red light. Then isn't your argument stronger  
12 if it's a derived from versus a consent?

13 MR. ROTHSCHILD: Well, I think that it's - - - I  
14 think - - - the first hurdle, obviously, is the consent.  
15 And as far as derived from, I think it's - - - our  
16 position, obviously, is that the consent was not provided  
17 to the actual recording of the intercepted communication.

18 And yes, there may have been consent vis-à-vis  
19 the jail recording, but that is a totally separate  
20 recording, and it's off - - - it's off in a different  
21 location in the universe. It would not have been - - -

22 JUDGE RIVERA: Because it's a simultaneous  
23 recording, right?

24 MR. ROTHSCHILD: Yes. There's no - - -

25 JUDGE RIVERA: I mean, a simultaneous recording



1 and it's just one conversation? Lots of people are on that  
2 conversation. It's not two separate calls; it is one phone  
3 call.

4 MR. ROTHSCHILD: Well, actually, Your Honor, it's  
5 - - - the first call was made - - -

6 JUDGE RIVERA: Okay.

7 MR. ROTHSCHILD: - - - and then the person was  
8 three-wayed in. And the conversation was between Mr.  
9 Harris and Mr. Myers, and - - -

10 JUDGE RIVERA: Are you saying that Jones could  
11 not hear that conversation?

12 MR. ROTHSCHILD: No, but I think it's - - -  
13 there's nothing in the record - - -

14 JUDGE RIVERA: Okay. Why isn't that like I call  
15 you, we're in a conversation, and you go into another room,  
16 put the phone on speaker, and three other people are on  
17 that call?

18 MR. ROTHSCHILD: That is problematic, Your Honor.  
19 But I think that the real question is - - -

20 JUDGE RIVERA: Well, problematic which way?

21 MR. ROTHSCHILD: Well, it's problematic insofar  
22 as - - -

23 JUDGE RIVERA: For you or for him?

24 MR. ROTHSCHILD: I think it spells out the public  
25 policy difficulties in this case insofar as that the - - -





1 Article 700 was devised basically in response to the fear  
2 of overbroad government intrusion. It is not an extension  
3 to the federal wiretap, the Capolongo, and they wanted  
4 strict application. They wanted wide application of this  
5 to ensure that there was - - - when there was this type of  
6 recording, that it would follow the rules and regulations.

7 Capolongo made it particularly clear that - - -  
8 that there was a strict adherence required vis-à-vis notice  
9 because what had occurred before.

10 So the public policy - - -

11 JUDGE GARCIA: Counsel, it seems to bring you  
12 back again, and I think is your point, to consent.

13 MR. ROTHSCHILD: Yes.

14 JUDGE GARCIA: Because if this is an intercepted  
15 communication, we don't - - - we never get to derived from,  
16 right?

17 MR. ROTHSCHILD: Yes.

18 JUDGE GARCIA: So I think it's somewhat  
19 underlying Judge Rivera's questions too.

20 So their argument, it seems to me - - - the best  
21 argument is this conversation was consented to. So it's  
22 not an intercepted communication; you never get to derived  
23 from.

24 It's the same question and - - - back and forth  
25 on this. What you entered is the same thing that was



1 consented to, so why is this an intercepted communication?

2 MR. ROTHSCHILD: Because I think the - - - the  
3 Fourth Department's definition of consent runs contrary to  
4 the legislative intent to regulate such - - - to regulate  
5 such practices. It's an intrusion of privacy.

6 We have new technology. We have people who may  
7 no - - - in this case, the second conversation, there's no  
8 indication that either Mr. Myers nor - - - that Mr. Myers  
9 even knew about or he definitely never consented - - -

10 JUDGE TROUTMAN: So is it because the AG told the  
11 others about the phone call? Is it derived from it because  
12 the recording - - - the AG told the other department about  
13 the call?

14 MR. ROTHSCHILD: Yes, as they're entitled to do  
15 under 700.65.

16 JUDGE TROUTMAN: Right. So the calls are going  
17 out at the same time. There's a notice in the prison about  
18 calls.

19 MR. ROTHSCHILD: Yes.

20 JUDGE TROUTMAN: So that's one set of notice, but  
21 then they put these other people on the call, and they're  
22 having additional people.

23 MR. ROTHSCHILD: Yeah, and there's no indication  
24 that Mr. Myers ever heard that call or heard the  
25 prerecorded - - -



1 JUDGE TROUTMAN: It's just there.

2 MR. ROTHSCHILD: It's just there, and he's on a  
3 totally separate call. And that makes it problematic, and  
4 I think that - - - and I understand - - -

5 JUDGE RIVERA: But we're back to Jones and Harris  
6 did.

7 MR. ROTHSCHILD: Yes.

8 JUDGE RIVERA: Right? And so now all these  
9 people - - - it's like my hypothetical. All in that one  
10 conversation. It's not separate calls, and you only need  
11 one, right, to consent?

12 MR. ROTHSCHILD: Well, you only need one, Your  
13 Honor, but the problem is I think this strains the statute  
14 because what it does is it expands the exception beyond  
15 what was intended by the legislature.

16 I think Justice Brandeis' warning - - - in the  
17 Olmstead case in his dissent stressed the clause is  
18 guaranteeing individual protection against specific abuses  
19 of power, must have the similar capacity of adaptation to a  
20 changing world.

21 No one knew about three-way calling beforehand.  
22 This really opens up what I would submit is a very  
23 dangerous position, a very dangerous situation where a  
24 person can be essentially wiretapped without notice.

25 ACTING CHIEF JUDGE CANNATARO: So in this



1 version, in the consent version, it really doesn't matter  
2 that there was a - - - that everyone was unaware of a  
3 wiretap because it's what happened when people got added to  
4 the call and weren't aware of the consent that the other  
5 callers might have given previously. The wiretap is almost  
6 extraneous to this argument.

7 MR. ROTHSCHILD: But the wiretap is still there,  
8 and the wiretap is what caused the jail center recording to  
9 be discovered.

10 ACTING CHIEF JUDGE CANNATARO: True, but that - -  
11 -

12 MR. ROTHSCHILD: And that - - -

13 ACTING CHIEF JUDGE CANNATARO: - - - that goes to  
14 I think the question Judge Singas said, that wouldn't it be  
15 better to approach from a derived from perspective?

16 MR. ROTHSCHILD: I think that the problem with  
17 derived from is that it's - - - it makes - - - the problem  
18 is they're so many different ways to consent. I mean, you  
19 consent whenever you make a phone call and you're on the  
20 phone and they say, This call may be recorded or monitored  
21 for quality control purposes, or for example, when you're  
22 making a call from work, you're implied in giving consent  
23 when you're making a call.

24 JUDGE GARCIA: Don't we still have to get to  
25 derived from? Even if we accept - - -



1 MR. ROTHSCHILD: Yeah.

2 JUDGE GARCIA: - - - your argument and there's no  
3 consent, to purposes of the wire tapping statute, you still  
4 have to suppress this call, find that it was derived from  
5 the intercepted communication.

6 The lack of consent, doesn't that just get you  
7 700.05? It's an intercepted communication. And then now  
8 we have to determine is it derived from that intercepted  
9 communication.

10 MR. ROTHSCHILD: Well, I would submit that it  
11 clearly is.

12 But I think, Your Honor, you mentioned  
13 suppression. It's preclusion. I mean, it's - - -

14 JUDGE GARCIA: I'm sorry. Yeah, yeah.

15 MR. ROTHSCHILD: And they put in a very strict  
16 standard - - -

17 JUDGE GARCIA: Right.

18 MR. ROTHSCHILD: - - - and let's be honest here,  
19 the burden on the People is de minimis. It's - - -  
20 literally, all you have to do is hand a piece of paper  
21 within fifteen days. They knew of this two months  
22 beforehand. And I would submit that the statute was  
23 intended basically to cover as much as possible without  
24 such a wide-ranging exception.

25 ACTING CHIEF JUDGE CANNATARO: Thank you,



1 Counsel.

2 MR. ROTHSCHILD: Thank you.

3 MR. TYLER: Good afternoon. My name is Ken  
4 Taylor. I'm from the Onondaga County District Attorney's  
5 Office.

6 Picking up from, if I understood - - -

7 JUDGE GARCIA: Let's pick up just on this  
8 hypothetical.

9 AG decides there's somebody using the phone in  
10 Sing Sing for bad purposes and commit crimes. It goes up  
11 on a wiretap on the Sing Sing phone. They don't have to  
12 give a notice on anything. No call they've intercepted off  
13 of that phone do they have to give notice for.

14 MR. TYLER: By my reading, I think that's true.  
15 And under Diaz that's true.

16 JUDGE GARCIA: Do you think that could possibly  
17 be the purpose of this statute?

18 MR. TYLER: I don't - - - I think the purpose of  
19 this statute is to protect individuals who have not  
20 consented - - - who have given no consent to any third  
21 party overhearing it.

22 JUDGE GARCIA: Forget notice. I'm up on the  
23 phone, on the Sing Sing phone and, you know, I can use it  
24 whenever I want. I can say this, do this, do that, and I  
25 never have to give notice that anything I've done is



1 derived from a wiretap. In fact, the target of the wiretap  
2 would never have to learn there was even a wiretap up on  
3 that phone because he's consented to all the calls on the  
4 prison calls.

5 MR. TYLER: If you have consent, I think that's  
6 true.

7 JUDGE SINGAS: Yeah, but following up on that,  
8 could you have put in the wire - - - the AG wire into  
9 evidence? Suppose you didn't put in the jail call, you put  
10 in the AG wire. Using your logic, you would say you  
11 wouldn't have had to serve notice of that either.

12 MR. TYLER: Because the call was also a  
13 consented-to conversation.

14 I think you're right. The office did take the  
15 step of using the jail call. By my argument, I guess that  
16 is a superficial detail. It shows that the call was in  
17 fact also simultaneously a consented-to recording.

18 JUDGE GARCIA: I guess you'd have to authenticate  
19 the recording. So you'd have to do something, right?

20 MR. TYLER: Sure, sure.

21 To - - - with my adversary, I believe Judge  
22 Singas - - - Judge Rivera, I don't want to misinterpret  
23 what your point was. Part of the difficulty, I think, why  
24 we're far apart in arguing whether this is an intercepted  
25 communication is because you're right. It's a problem with



1 characterizing it. It's not two calls; it's the same  
2 telephonic exchange that exists in two different manners  
3 under two different legal principles. Excuse me.

4 JUDGE GARCIA: This case is strange. It's  
5 unusual because it seems to me, and I've been struggling  
6 with this, you have two separate recordings, that is pieces  
7 of evidence, right? You've got the recording done on an  
8 AG's wire; you've got the recording done by the prison.

9 There's a way to look at it to say, well, the  
10 conversations are the same, the evidence is the same. But  
11 if I look at it as this thing was anything else, it would  
12 clearly be derived from.

13 So does the fact that there was consent on this  
14 part of it - - - because - - - does that transform the wire  
15 recording into a consensual tape? And I struggle with that  
16 concept, one because of that Sing Sing example that I gave,  
17 but it seems to me the recording itself is a different  
18 piece of evidence, and the fact that there's no violation  
19 per se for using that piece of evidence - - - I could pick  
20 up on a wiretap that there's a body buried somewhere and  
21 it's on public land. I send that out. They dig up the  
22 body. Clearly, there's no violation by digging up the body  
23 on public land, but it's still derived from.

24 And it seems to me this fits better within that  
25 approach, that this tape is a separate piece of evidence





1           coincidentally mirroring what you picked up on the wiretap,  
2           but getting that was derived from your wire.

3                   MR. TYLER:   So if I understand your point, Judge  
4           Garcia, your point is we get beyond the intercepted  
5           communication.  The consent depends upon who is listening  
6           and consent to that listener.

7                   JUDGE GARCIA:  At the time it's done.  Not to  
8           interfere with the Diaz issue where we said, Sure, you can  
9           record the tape and then you can give it - - - like you can  
10          record a wiretap tape, and under the provisions of 65, I  
11          guess it is give it to law enforcement.

12                   So not that, but yes.  Continue.

13                   MR. TYLER:  No, I think I understand your point.  
14          By that logic, you get to the derived from.

15                   And what is interesting about this case is what  
16          we're talking about - - - and I agree with you.  This might  
17          not happen again in any other case.  Even if we have  
18          parallel recordings going, maybe it would.

19                   But the evidence - - - in the limited number of  
20          cases where we're talking about derived from, it's  
21          typically law enforcement goes and gets a search warrant  
22          that's propped up by probable cause.  It depends upon the  
23          intercepted communication, right?  And then you'd get  
24          physical evidence - - - drugs, gambling records - - - and I  
25          think this gets to your point.  It's easier to see how

1 that's derived from. If there was no other legal basis to  
2 - - - for law enforcement to get to it, they would not have  
3 otherwise had it but for the intercepted communication.

4 What's interesting about this case, and I hope it  
5 makes it a little bit stronger for the People - - - it's  
6 unusual. It's exactly the same.

7 JUDGE GARCIA: So that's not a - - - that's not a  
8 fruit of a poisonous tree argument you just made, though,  
9 right? Derived from, in terms of fruit of the poisonous  
10 tree, isn't limited to search warrant applications, for  
11 example. I mean, in my body example, that would be a  
12 derived from, right?

13 MR. TYLER: That would be derived from because  
14 you would not have otherwise had any possible way of - - -

15 JUDGE GARCIA: Even though there's a legal way, I  
16 could've gone and dug up everything in the park, but it's  
17 not - - - that doesn't mean it doesn't derived from?

18 MR. TYLER: No. I would have to agree with that.

19 JUDGE SINGAS: Can you continue your point that  
20 you were making? So you're saying that - - - before Judge  
21 Garcia's question. You said this isn't like search warrant  
22 where you get evidence because of something that came out  
23 of the wire. Your point is what, that that call was going  
24 to be recorded anyway with consent, so?

25 MR. TYLER: So that call, we have an independent



1 basis for getting that call under Diaz; that is freely  
2 available as a jail call recording.

3 JUDGE SINGAS: Yeah, but you don't know - - - my  
4 issue with this is you don't know that that call is  
5 relevant to your case but for that wire?

6 JUDGE GARCIA: Especially here because of the  
7 parties.

8 ACTING CHIEF JUDGE CANNATARO: That's the issue.  
9 It's available to you, but it wasn't exploited in an  
10 investigatory way by you.

11 The actionable information came from the wiretap.

12 MR. TYLER: I'm not positive, respectfully, that  
13 I agree that the record supports that conclusion. Are you  
14 saying that there's no other way we could've determined the  
15 legal relevance of the call?

16 For example - - -

17 ACTING CHIEF JUDGE CANNATARO: The record, as I  
18 understand it, was that the information about the  
19 inculpatory statement that was made during the call came  
20 from the people who were doing the tap, not from somebody  
21 at the prison saying, Oh, let me play this recording and  
22 see what's on it, or someone from the police going up to  
23 the facility and gathering the recording.

24 That's - - - that's - - - I think that goes to  
25 that hypothetical, or that theory, that Judge Garcia was



1 making that they're really two separate things. They look  
2 very similar. They look identical, but it's who was using  
3 it, who was possessing it, and what did they do with it?

4 And all I'm saying is that every bit of  
5 information that was useful, with respect to what was on  
6 this recording, came from the tap, not from the fact that  
7 there was a recording at the correctional facility.

8 MR. TYLER: I don't know if I'm prepared to  
9 concede that law enforcement could not have gleaned the  
10 significance of the call but for the wiretap.

11 ACTING CHIEF JUDGE CANNATARO: So now you're  
12 arguing something like inevitable discovery?

13 MR. TYLER: Right, no.

14 Defendants, for example, my counterpart raised  
15 the issue of identity of the callers. Defendant identifies  
16 himself as M.I. on the call. And naturally, I would expect  
17 - - - I haven't listened to the AGs other recording, but  
18 that's going to be identical to the recording we have here.  
19 That would - - - it's just logical.

20 JUDGE GARCIA: But I think the point would be if  
21 - - - let's say even the call went to M.I. and you had a  
22 number, potentially you could go into the prison and you  
23 could say, Give me any calls to this M.I. cell phone.

24 But as I understand this call, M.I. is handed the  
25 phone by someone else. So it makes that argument that they



1 would have found this tape harder, right? I mean, what  
2 would they have been looking for?

3 MR. TYLER: No, he's definitely down the stream,  
4 and he's not one of the - - - it would be easier if he were  
5 one of the two in jail. He's not. He's - - -

6 JUDGE GARCIA: Or even the person who got the  
7 call from jail, but he's not.

8 MR. TYLER: True, true.

9 But I don't know, on the record that we have, I  
10 necessarily concede that they would not have understood the  
11 significance - - -

12 JUDGE RIVERA: No, but - - - well, maybe I  
13 understand the significance given the - - - what is said,  
14 but how do they know that this person is Mr. Myers? How  
15 are you going to find Mr. Myers when they're saying M.I. -  
16 - - or M.I.? Excuse me.

17 MR. TYLER: Well, the record - - -

18 JUDGE RIVERA: How are they going to know?

19 MR. TYLER: The record is not well set up for me  
20 to respond to that well, and I don't think it's well set up  
21 for appellant to raise that as an argument in his favor.  
22 Because defense counsel at trial stipulated to Mr. Myers'  
23 identity; it did not put the People to their proof on that  
24 point.

25 JUDGE GARCIA: But their argument is this is



1 derived from your intercepted communication, and we agree -  
2 - - assume we agree it's an intercepted communication. Who  
3 is the burden on the derived from front?

4 You know, who is the burden - - - let's say it's  
5 derived from, to say, No, no, we would've had an  
6 independent source; no, we would've made an inevitable  
7 discovery; no it's too attenuated. Whose burden is that in  
8 an ordinary case?

9 MR. TYLER: It may be - - - well be law  
10 enforcement's because they're the party in the position to  
11 be able to say how they got something or the other means  
12 they would have available. Defendant would not necessarily  
13 know that.

14 JUDGE WILSON: Then wouldn't you want derived  
15 from to be interpreted as broadly as possible? Because the  
16 place it really appears is in the proceeding section, the  
17 700.65, which authorizes law enforcement to turn over any  
18 information derived from an intercepted communication to  
19 all sorts of other uses.

20 I mean, if you're going to read it narrowly in  
21 70, you're going to read it narrowly in 65, and that's  
22 going to constrain you. This is all borrowed from Title  
23 III of Omnibus Act by federal law, so.

24 MR. TYLER: It is, and I see your point. I have  
25 some push and pull there with how broadly to read derived



1 from. In my view - - -

2 JUDGE WILSON: It's going to hamstring you in  
3 enforcement if you read it narrowly.

4 MR. TYLER: No, I appreciate that point. That  
5 makes sense.

6 It's my view that under - - - I know this is not  
7 directly on point with the issues. It's my view that under  
8 - - - if 700.65 applied here, this was a proper use of this  
9 call. It was handed off to law enforcement for a  
10 nontestimonial - - - nonsworn testimonial purpose, which if  
11 it had been sworn testimony, that would require an  
12 amendment of the eavesdropping warrant. This was a  
13 permissible use if 700.65 was directly at issue here.

14 JUDGE SINGAS: Well, do you think 700.65 applies  
15 here?

16 MR. TYLER: I don't, because as briefed, my  
17 argument is this is not an intercepted communication at  
18 all. The fact that consent exists means that the primary  
19 purpose behind Article 700 - - -

20 JUDGE WILSON: Well, the wiretap communication is  
21 an intercepted communication.

22 MR. TYLER: That one's true. That part is - - -

23 JUDGE WILSON: By the statute, I mean, that's,  
24 right, unambiguous.

25 MR. TYLER: Correct, correct. That one is a



1 wiretap communication.

2 JUDGE GARCIA: I guess I'm having some trouble  
3 understanding the push and pull of the two sections.

4 Because if I say derived from means something  
5 here and for notice purposes, and I say that's pretty  
6 narrow, then anything else isn't derived from. So if I go  
7 to the statute about what I can share, if it isn't derived  
8 from, I don't have restraints on it. So I don't understand  
9 why one would affect the other in terms of statutes doing  
10 very different work, to me.

11 So you know, I don't think our definition of  
12 derived from here is not - - - it's going to limit what can  
13 be shared. I think if you made a narrower decision as to  
14 what derived from means, it means more could be shared  
15 because it's not covered by the statute at all, right? And  
16 because that second statute is a limiting statute.

17 MR. TYLER: The second statute's a limiting  
18 statute. The first statute's just a notice statute. So  
19 they do - - - I understand your - - - they serve different  
20 purposes.

21 For my purposes, what I - - - I see my red light  
22 is on. What I advocate in our brief is not a but-for test,  
23 but will the People have had any other legal avenue to get  
24 to that piece of information. Here, again - - -

25 JUDGE TROUTMAN: It's just because recordings





1 take place in the jail. It doesn't mean that all of them  
2 are going to then get into the hands of the law enforcement  
3 officers prosecuting for something else.

4 MR. TYLER: True.

5 JUDGE TROUTMAN: They're all recorded, but  
6 they're not all necessarily brought to the attention of the  
7 prosecuting agency. And so that's the complicating factor  
8 here, and it was the other investigation that was going on  
9 that then said, Well, they're both there.

10 MR. TYLER: You should check out this call.

11 JUDGE TROUTMAN: Yeah.

12 MR. TYLER: It's - - - no, I agree with that.  
13 And we are the - - - we disclosed that to defense counsel,  
14 and that's what motivated the motion to preclude, so.

15 Factually, that is an interesting knot here. And  
16 it's - - - and I have to agree with you. Intercepted  
17 communications - - - jail calls, there's hundreds of them  
18 in every case. I'm not sure I'm prepared to concede we  
19 would've never found it, but in fact, that was how it came  
20 to our attention in this case.

21 JUDGE RIVERA: But I think my - - - my  
22 difficulty, where I think he has a very strong point, is  
23 that you found it. You're listening to it. You can't  
24 follow the breadcrumbs to Mr. Myers without the wiretap  
25 information. That's - - - that's - - - this is going to



1 the derived from. That's where I think he's got a very  
2 strong argument, that standing on its own, which is I  
3 thought your argument, just looking at the recording from  
4 the center, that alone is not going to get you Mr. Myers.

5 I know your point is that he stipulates it at the  
6 trial, but that's because these other things have gone on  
7 not necessarily independent of it, right?

8 MR. TYLER: That's true, but I - - - I guess we  
9 never fully know whether there'd be an independent basis.  
10 Small communities, investigators, I know a lot of people in  
11 the community, suspects, witnesses - - - I don't know if  
12 I'm prepared to say - - -

13 JUDGE RIVERA: And you got his voice on a phone  
14 call?

15 MR. TYLER: Well, I - - -

16 JUDGE RIVERA: I mean, that's what it boils down  
17 to since - - - it's not - - - the name is not Michael  
18 Myers, unless you're saying that somehow prosecutors would  
19 know M.I. is Michael Myers; there's no doubt.

20 MR. TYLER: Entirely true. And the prosecutor  
21 here two or three times tried to call a witness at trial to  
22 identify the voice, and he was dissuaded to by defense  
23 counsel in the court.

24 JUDGE GARCIA: But you'd have to get to the tape  
25 to begin with. I mean, you'd have to find that tape for



1 some reason. And I just don't see anything in this record  
2 that indicates you - - - law enforcement would've found  
3 that tape without the wiretap, unless you can show me  
4 something.

5 I mean, because it's different parties. They  
6 hand the phone off, so you're not a target phone number  
7 that they would've been interested in; there's no evidence  
8 they were. And it's not a person calling out of the prison  
9 that's necessarily associated with the hit-and-run.

10 So that's problem with any kind of independent  
11 source, inevitable discovery argument you could make, which  
12 isn't in the record anyway.

13 MR. TYLER: That - - - no. That's true. If  
14 that's your definition of derived from, and factually how  
15 it happened here, then no, there isn't evidence in the  
16 record to support that conclusion.

17 ACTING CHIEF JUDGE CANNATARO: Thank you,  
18 Counsel.

19 MR. TYLER: Thank you.

20 MR. ROTHSCHILD: Your Honors, regarding derived  
21 discovery, I would point you to my main brief, page 19, the  
22 footnote.

23 Inevitable discovery was not expressly raised  
24 below and is unpreserved. The prosecution admitted that  
25 they were tipped off to the Justice Center recording, and



1 that's in the record page 186 to 188. Also, there's no  
2 provision in CPL's Article 700 expressly incorporating  
3 inevitable discovery. You know - - -

4 JUDGE GARCIA: Counsel, the record is somewhat  
5 unclear on me, but was there someone from the Syracuse  
6 investigation on the wire?

7 MR. TYLER: There was the - - - I believe it was  
8 - - - I apologize, detective, not Martinez, Abraham.  
9 Detective Abraham was the one doing. And he was familiar  
10 because he actually - - - I assume that he had worked on  
11 this case before. He had said he heard this individual's  
12 voice multiple times, maybe hundreds of times, because he  
13 had been working on this hit-and-run case for a while, and  
14 that it's not coincidental that, you know, this indictment  
15 was not filed until after they received this information  
16 vis-à-vis the wiretap.

17 ACTING CHIEF JUDGE CANNATARO: So staying within  
18 this derived from field that we're playing in right now,  
19 that makes it even more compelling that this - - -  
20 everything useful that was - - - that was - - - I was going  
21 to say derived from - - - that was extracted from this  
22 conversation came from the wiretap, didn't it?

23 MR. ROTHSCHILD: Absolutely, Your Honor.  
24 Absolutely.

25 And if there's no other questions? Yes, sir.



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ACTING CHIEF JUDGE CANNATARO: Thank you,  
Counsel.

(Court is adjourned)



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

I, Xavier Austin Reyna, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Myers, No. 6 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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