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COURT OF APPEALS
STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

NO. 92

MICHAEL BAY,

Appellant.

92 Franklin Street
Buffalo, New York
November 15, 2023

Before:

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

Appearances:

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Official Court Transcriber



1 CHIEF JUDGE WILSON: Next matter on the calendar
2 is People v. Bay.

3 MS. HARDESTY: Good afternoon, Your Honors. May
4 it please the court.

5 Kayla Hardesty, Cortland County Public Defender's
6 Office, for the appellant, Michael Bay.

7 I am requesting five minutes rebuttal.

8 CHIEF JUDGE WILSON: Yes.

9 MS. HARDESTY: Thank you. Certificate of
10 compliance and name only will not shield the People from
11 the application of the speedy trial statutes, where
12 discovery is incomplete, and no exception applies to excuse
13 the nondisclosure or permit the People to be deemed ready
14 despite the missing material.

15 JUDGE GARCIA: Counsel, can I ask you - - -

16 JUDGE SINGAS: Are you asking for a per se rule -
17 - -

18 JUDGE GARCIA: Yeah. Okay.

19 JUDGE SINGAS: Are you asking for a per se rule?
20 If something is not given, that certificate is illusory;
21 the only remedy is dismissal?

22 MS. HARDESTY: No. So the People have the
23 obligation to exercise due diligence, make reasonable
24 inquiries, and disclose all known informational materials
25 subject to discovery. Once that's done, they file their

1 certificate of compliance, that would be a proper
2 certificate of compliance under those circumstances.

3 JUDGE GARCIA: Even if they find something later?

4 MS. HARDESTY: If they - - - it depends. If they
5 find something later, as long as they've exercised the due
6 diligence and reasonable inquiries and that can be
7 demonstrated, something that is found later would not
8 necessarily invalidate a later or a previous certificate of
9 compliance.

10 JUDGE GARCIA: What would the process, in your
11 view, be at that point? So certificate of readiness is
12 filed. Ten days, twenty days go by. People find something
13 else. It should have been disclosed, no doubt. They come
14 into court, or they send a later, and they say we found
15 this additional document. What's the process that you
16 think should happen at that point?

17 MS. HARDESTY: So at that point - - - and they've
18 already filed their original - - -

19 JUDGE GARCIA: Yes.

20 MS. HARDESTY: - - - certificate?

21 JUDGE GARCIA: Sorry. Yes.

22 MS. HARDESTY: At that point, they would file a
23 supplementary certificate of compliance. And this is
24 actually an amendment from 2022 regarding supplemental
25 certificates. At that point, after their supplemental

1 certificate is filed, the court would have to make an
2 assessment to - - - to make sure that they had exercised
3 due diligence from the outset to determine the propriety of
4 that original certificate, so - - -

5 JUDGE GARCIA: So the - - - the - - - who gets
6 charged to that intervening time from original to
7 supplemental would depend on the inquiry into the good
8 faith of the original filing?

9 MS. HARDESTY: The - - - the due diligence and
10 the reasonable inquiries, yes. And if it's found that the
11 original certificate was not proper, based on that
12 assessment of the due diligence and reasonable inquiries,
13 then the People's statement of readiness would have been
14 illusory.

15 JUDGE TROUTMAN: And the court would have to
16 engage in a process of examining whether in fact, that due
17 diligence occurred if there was a challenge.

18 MS. HARDESTY: Yes, exactly. And that's right in
19 CPL 30.35. And in this case, there was an inquiry made by
20 the trial level judge; however, the inquiry was
21 insufficient to determine the due diligence and the
22 reasonable inquiries. In this case - - -

23 JUDGE TROUTMAN: Why was it insufficient?

24 MS. HARDESTY: It wasn't sufficiently probing of
25 any due diligence or reasonable inquiries. In this case,

1 the trial judge asked simply, has disclosure been
2 reasonably met? The inquiry should be a meaningful
3 assessment of the People's due diligence and reasonable
4 inquiries. It should be open-ended questions.

5 JUDGE TROUTMAN: So an actual inquiry as to what
6 was or wasn't done?

7 MS. HARDESTY: Yes, that's correct. And the
8 defense attorney, if discovery is missing and they're aware
9 of it at that time, should make a record of that so that
10 the court can make a proper assessment as to the People's
11 readiness.

12 JUDGE HALLIGAN: And - - - and here - - -

13 JUDGE SINGAS: And what stage is that? Is that
14 at the - - - at the first juncture where a judge is looking
15 to see whether or not to accept the People's certificate of
16 compliance? Or is that done the second - - - at the second
17 juncture, when they try to file a supplemental or at both?

18 MS. HARDESTY: Both. It would be both.
19 Certainly, from the outset, when the original statement of
20 readiness is filed, it should happen then. And then - - -
21 sorry - - - after - - - since the amendment to the
22 supplemental certificate of compliance section now says
23 that the propriety of the original should be assessed based
24 on - - -

25 JUDGE SINGAS: So in - - - in this case, when

1 originally, they said they - - - they filed their original
2 certificate and the judge said, there's no DIR here and
3 there's no 911, what should have happened at that - - - at
4 that juncture?

5 MS. HARDESTY: So what should have happened is
6 the judge should have inquired as - - - as to how the
7 People know that there's no domestic incident report. Have
8 they reached out to the police and asked about it since it
9 is a statutorily mandated item of discovery in family
10 offenses. So it should have been a more probing inquiry
11 into the People as opposed to just taking their word for it
12 that it doesn't exist.

13 JUDGE HALLIGAN: If - - - if at that juncture - -
14 - and I know this is not what we have on the record - - -
15 but if at that juncture, the prosecutor had said, I reached
16 out, and it looks to us like it was a walk-in for the
17 following reasons, and so there's no 911 call. And then
18 later - - - and then filed the certificate later on,
19 discovered that, in fact, that was incorrect. Is that the
20 sort of inquiry that might be sufficient, where there's a
21 basis provided for the assertion?

22 MS. HARDESTY: Yes, certainly. The People should
23 be giving more information as to how they - - - why they
24 believe it would be a walk-in. So as you just said, Your
25 Honor, that would be the detail that we'd be looking for in

1 order to make that determination.

2 JUDGE CANNATARO: And what would happen if there
3 was a subsequent discovery by the People of that item,
4 which they've now accounted for with a reasonable excuse?
5 What's the - - - what's the secondary inquiry when they try
6 and submit a new certificate of compliance post disclosure?

7 MS. HARDESTY: So it would be a more in-depth
8 inquiry. And I guess - - -

9 JUDGE CANNATARO: Like a why didn't you find this
10 the first time kind of inquiry?

11 MS. HARDESTY: Right. And how - - - how did this
12 come up now when previously you said that you spoke with
13 the officer who indicated that it was actually a walk-in
14 and not a 911 call. So just a more detailed inquiry into
15 that.

16 JUDGE CANNATARO: And is that a person - - -
17 because that - - - you know, is there such thing as a good
18 excuse and a bad excuse to that context? Or having given
19 an acceptable answer to the court the first time, which
20 turned out not to be true, or you just sort of out of luck
21 now, if you're the - - - the prosecutor?

22 MS. HARDESTY: As long as they can - - - the
23 prosecutor can demonstrate their due diligence and
24 reasonable inquiries and it's sufficient to the court, that
25 would be sufficient to not invalidate their prior

1 certificate, so - - -

2 JUDGE HALLIGAN: Presumably, that would have to
3 be sorted out on a case-by-case basis - - -

4 MS. HARDESTY: Correct.

5 JUDGE HALLIGAN: - - - because the circumstances
6 will differ?

7 MS. HARDESTY: Correct.

8 CHIEF JUDGE WILSON: So the 2022 Amendment
9 doesn't apply to this case; is that right?

10 MS. HARDESTY: That's right.

11 CHIEF JUDGE WILSON: So is the result any
12 different here?

13 MS. HARDESTY: I don't - - - I don't think it
14 would have been since the original inquiry wasn't
15 sufficiently probing, regardless. So it's unlikely that it
16 would have happened in that had it been in effect.

17 JUDGE GARCIA: Let's say a judge, anyways, not -
18 - - not this - - - this hypothetical, but a judge makes
19 that determination. They come in, looks at it, okay, I
20 accept this as a good faith filing. What would be the
21 standard of review for that? So if we saw it, you appealed
22 it, but we heard that. Again, it's not this case. I
23 understand I'm not speaking about this case. But there is
24 this determination on the record. There's an inquiry.
25 Judge makes a determination, good faith filing. What would

1 we review that for?

2 MS. HARDESTY: So the review would be as to the
3 due diligence and reasonable - - -

4 JUDGE GARCIA: Would it be an abuse of discretion
5 on the part of the judge?

6 MS. HARDESTY: That could, potentially, yes.
7 Absent a valid statutorily defined exception, a statement
8 of CPL 30.30 readiness that's preceded by an improper
9 certificate of compliance is illusory and would not stop
10 the speedy trial clock. Because the People, in this case,
11 did not file a proper certificate of compliance, their
12 statement of readiness was illusory, making the case
13 subject to dismissal on speedy trial grounds.

14 JUDGE SINGAS: And the exception that you're
15 referring to, is that if something was lost or destroyed?

16 MS. HARDESTY: Yes. So there's several
17 exceptions. The People have argued that the defense is
18 requesting a perfect prosecutor standard. That's just not
19 the case. And that's not what the statute says. The
20 statute has exceptions for items that are lost or
21 destroyed, has exceptions for - - - if the People are
22 seeking a protective order, and also special circumstances.
23 And those are things that they would have to go to the
24 court for a request.

25 JUDGE HALLIGAN: But the statute also says

1 reasonable inquiry, right? And so - - - so is it your view
2 that a reasonable inquiry might still be one in which there
3 is a mistake even if it doesn't fall within one of those
4 exceptions?

5 MS. HARDESTY: Yes. That's possible. As long as
6 the reasonable inquiries are made, I - - - I think that the
7 statute is flexible in the stand - - - from the standpoint
8 that not necessarily every single little inquiry is always
9 going to get every little item.

10 JUDGE HALLIGAN: So reasonable doesn't mean
11 perfect?

12 MS. HARDESTY: Correct. And the statute doesn't,
13 like I said - - -

14 JUDGE HALLIGAN: Use that word.

15 MS. HARDESTY: - - - ask for a perfect prosecutor
16 standard.

17 JUDGE RIVERA: So can the prosecutor rely on
18 representations from, let's say, the police department that
19 - - - that was responsible for an arrest or an
20 investigation? They rely on those statements.

21 MS. HARDESTY: So to a certain degree, because
22 the People are deemed to be in the possession of all items
23 possessed by the police. And 245.55 delineates an entire
24 section of - - - called flow of information that the
25 prosecutor has the burden of establishing with the police.

1 And one of them is that they can request an entire file
2 from the police, and the police would have to turn that
3 over.

4 JUDGE RIVERA: But let's say the - - - the - - -
5 the mistake is at - - - with the police. They missed
6 something, and they just - - - they just didn't turn it
7 over, and they find it a month later. Does that fall on
8 the shoulders of the prosecutor?

9 MS. HARDESTY: It does.

10 JUDGE RIVERA: What else would the prosecutor
11 have done?

12 MS. HARDESTY: So the prosecution should always
13 be making - - -

14 JUDGE RIVERA: They - - - they - - - they turn
15 over the entire file; that was your example, something not
16 in there. It's not something that, looking at the file,
17 one would think, obviously, is missing. Why should that
18 fall on the prosecutor?

19 MS. HARDESTY: Because they're deemed to be in
20 the possession of all items in the possession of the
21 police. And not having that fall - - -

22 JUDGE RIVERA: Sure. I understand that. But
23 here's the file that's been sent over, right? I mean,
24 you're talking about the constructive possession that's
25 recognized in the statute versus now I've got possession of

1 the file that should have contained this - - - this
2 material, this document, perhaps, or some other material.
3 And - - - and the police inform me, that's it, we don't
4 have anything else. And a month later, they found it.

5 MS. HARDESTY: So the problem with that scenario,
6 the problem with it not falling on the prosecutor is that
7 that would then incentivize the police to not turn over
8 everything knowing that that would be some sort of
9 exception.

10 JUDGE CANNATARO: Can I just add a wrinkle to
11 that? Let's say the - - - the prosecutor reaches out to
12 the police, says, there should be a DIR in this case. You
13 know, I'm asking you for the DIR. Please give it to me. I
14 have to disclose it. And the response is, there isn't one,
15 and certificate of compliance is filled out. And it has
16 all the things that we were discussing about a duly
17 diligent search for the material. But yet, it does turn up
18 ten days later. And the police have an excuse for why it
19 wasn't disclosed the first time. Does - - - does the
20 prosecutor, at least, have the benefit of being able to use
21 the police excuse?

22 MS. HARDESTY: It depends on the excuse. If that
23 could potentially be a special circumstance situation,
24 although, it would depend on the reasoning why there isn't
25 a domestic incident report filed if it's a family - - -

1 family offense that requires that.

2 JUDGE HALLIGAN: Is - - - is there are a perfect
3 police requirement even though there's not a perfect
4 prosecutor requirement? Or does the police get the same
5 requirement that they have to exercise due diligence and
6 make a reasonable inquiry?

7 MS. HARDESTY: So the statute doesn't specify
8 with regard to the police, specifically. However, if the
9 police are aware that these cases are getting dismissed on
10 speedy trial grounds - - -

11 JUDGE HALLIGAN: But I think that - - - that's
12 not exactly the question I mean to ask. Are the police
13 subject to a stricter or more stringent standard? In other
14 words, even in the exercise of due diligence and having
15 made a reasonable inquiry, they don't know that something
16 is there and therefore don't turn it over to the
17 prosecutor. Is the same standard applicable if that later
18 turns up?

19 MS. HARDESTY: The - - - the standard of due
20 diligence and reasonable inquiry?

21 JUDGE HALLIGAN: Yes, as opposed to perfection,
22 which is basically, I think, a strict liability standard.

23 MS. HARDESTY: So, it would be somewhat context
24 and case-specific - - -

25 JUDGE TROUTMAN: So would the requirement then

1 be, when it's challenged that the police come in, and as
2 part of the - - - whether there was appropriate due
3 diligence and assessment made as to the credibility as to
4 what they did or didn't do, would that be factored in as
5 opposed to - - -

6 MS. HARDESTY: That certainly could be. A
7 circumstance like if a police officer fails to complete
8 their police report in a timely fashion because they're in
9 the hospital, and they literally cannot complete the
10 report, that could fall under a special circumstance,
11 where, again, the certificate of compliance wouldn't
12 necessarily be invalidated on that ground. However, what
13 the People cannot do is erroneously insist that the items
14 don't exist when they've never conducted any due diligence
15 or reasonable inquiries into determining whether they've
16 existed, which is exactly what happened in this case.

17 JUDGE SINGAS: And where, if anywhere - - - at
18 what stage does prejudice to the defendant enter into it,
19 if at all?

20 MS. HARDESTY: It does not enter it at all with
21 regard to speedy trial. Prejudice is only relevant to the
22 245.80 sanctions and discretionary dismissal under those
23 grounds. So prejudice, as far as a speedy trial
24 determination, does not come into effect at all. It's
25 irrelevant.

1 CHIEF JUDGE WILSON: Thank you.

2 MS. HARDESTY: Thank you.

3 MR. PERFETTI: Good afternoon. May it please the
4 court. District Attorney Patrick Perfetti in and of the
5 county of Cortland.

6 JUDGE GARCIA: Counsel, why isn't your
7 adversary's process a reasonable one?

8 MR. PERFETTI: For several reasons, Your Honor.
9 First of all, though, she espouses that perfect compliance
10 isn't the requirement, essentially, she is advocating for a
11 strict standard liability.

12 JUDGE GARCIA: In what way?

13 MR. PERFETTI: Well, I think it bears noting, and
14 it is in the factual record of this case, that the
15 objection that was raised by her was, quite frankly, an
16 eleventh-hour objection. There has been much case law on
17 the lower case - - - in the lower courts relative to this
18 practice of laying of weight to bring these challenges on
19 the eve of trial, as occurred in this case. In fact, the
20 challenge is - - -

21 JUDGE SINGAS: Well, I mean, I think that this
22 case is a little different, because from the beginning, the
23 defense attorney was asking for a DIR and a 911 tape on a
24 domestic case.

25 MR. PERFETTI: And what is shown in the record in



1 this case is that the prosecutor handling the case for my
2 office was not just aware of this case, but was also aware
3 that there was pending a violation of probation and three
4 other criminal contempt cases, all involving the same
5 victim, who was his mother. And I would assert very much
6 as Judge Halligan has assessed that he - - - he very well
7 may have conflated one of the cases with another relative
8 to whether there was a walk-in complaint concerning this
9 particular case.

10 JUDGE GARCIA: Why isn't there a burden on that
11 prosecutor to come in and explain that?

12 MR. PERFETTI: I - - - well, should the court
13 demand an explanation, I think - - -

14 JUDGE GARCIA: Okay. I'll return. Why isn't
15 there a burden on the court to ask for an explanation from
16 the prosecutor?

17 MR. PERFETTI: Well, I - - - I think, certainly,
18 the court can exercise that. The court certainly should be
19 left with that level of discretion to make these inquiries.
20 The court did make certain inquiries and there's - - -

21 JUDGE HALLIGAN: Does the record - - - does the
22 record indicate whether the prosecutor, in the first
23 instance, did anything to confirm?

24 MR. PERFETTI: I don't believe the record does
25 indicate that.

1 JUDGE HALLIGAN: I didn't see anything. I just
2 wanted to make sure.

3 MR. PERFETTI: No. And I don't - - - and I
4 didn't see anything in that regard, either. And obviously,
5 I don't need to inform this court that - - -

6 JUDGE TROUTMAN: And so are you saying that
7 they're not required to?

8 MR. PERFETTI: Say again.

9 JUDGE TROUTMAN: Are you saying that the
10 prosecution isn't required to confirm that there is
11 compliance?

12 MR. PERFETTI: No. I'm not saying that at all.
13 In fact, there - - - what is not reflected in the record is
14 that there is a standing order from my office to all seven
15 of the law enforcement agencies in my county, directing
16 that they are to provide to my office the file.

17 JUDGE TROUTMAN: So is it - - - is it because the
18 court didn't make the inquiry so that the record could have
19 been established? Is - - - is that the problem?

20 MR. PERFETTI: I - - - I wouldn't say necessarily
21 that that's the problem. That could be - - -

22 JUDGE TROUTMAN: Here in this case.

23 MR. PERFETTI: Oh, that definitely could be a
24 problem in this case. And if it comes down to a fact-
25 finding issue, I certainly don't need to advise this court

1 of its limited judicial or jurisdiction relative to fact
2 finding. And perhaps that's something that this court
3 decides needs to be done as a further fact finding in that
4 regard. But in the - - -

5 JUDGE TROUTMAN: We don't take the record as it
6 exists today and make a decision.

7 MR. PERFETTI: Oh, I - - - I certainly like it
8 too. And I think the decision ought to be that my - - -

9 JUDGE TROUTMAN: I - - - I just - - -

10 MR. PERFETTI: - - - agent acted very reasonably.
11 And we were sanctioned - - -

12 JUDGE TROUTMAN: But accepting what you said - -
13 -

14 MR. PERFETTI: - - - appropriately.

15 JUDGE TROUTMAN: - - - with respect to you're
16 taking proactive measures to ensure that there is
17 compliance. But you understand when appellate courts are
18 reviewing, they need a record.

19 MR. PERFETTI: Absolutely.

20 JUDGE TROUTMAN: And so that's the issue here.
21 Is the record sufficient to support an affirmance?

22 MR. PERFETTI: I - - - I believe the record is
23 sufficient. And had the record not been sufficient, I'm
24 pretty certain, having practiced in front of Judge Campbell
25 as long as I have, she would have felt quite free within

1 her authority to ask for - - -

2 JUDGE HALLIGAN: So why - - -

3 MR. PERFETTI: - - - additional facts.

4 JUDGE HALLIGAN: Why is that the case? Where, in
5 the record, do you find the support for an affirmance?

6 MR. PERFETTI: There are a couple of places.
7 First of all, the disclosure ultimately was made.

8 JUDGE HALLIGAN: Okay. But - - -

9 MR. PERFETTI: It was made prior to trial.

10 JUDGE HALLIGAN: If I may. So - - - so is it
11 your view that - - - that if it's made at some point, but
12 after there is an initial COC file that turns out to be
13 incomplete and the 30.30 clock - - - did - - - did the 30.30
14 clock not run because of the supplemental disclosure? How
15 is that - - -

16 MR. PERFETTI: I - - - I would say that the 30.30
17 clock isn't - - - hasn't expired. The defense itself - - -

18 JUDGE HALLIGAN: Because the trial - - -

19 MR. PERFETTI: - - - does anticipate the filing
20 of supplemental certificates at - - -

21 JUDGE HALLIGAN: Okay.

22 MR. PERFETTI: - - - this point.

23 JUDGE HALLIGAN: So if - - - if I were to
24 disagree with you that you can file a initial COC that is
25 not valid because, in fact, due diligence was not

1 exercised, and I understand you're saying it was exercised
2 here, that's what I want to understand more about. But - -
3 -

4 MR. PERFETTI: Right.

5 JUDGE HALLIGAN: But that a supplemental
6 disclosure after the clock has run doesn't cure that
7 problem. What I'm - - - what I'm interested in
8 understanding is, on the facts here, why, in your view, was
9 due diligence exercised, if that's your position.

10 MR. PERFETTI: Well, ultimately, when defense
11 counsel, in this case, asserted the reason why the 911
12 recordings and the DIR, in their belief, were there,
13 additional inquiries were made, they were discovered, and
14 they were turned over the very next day.

15 JUDGE HALLIGAN: That's after - - - after the
16 initial COC.

17 MR. PERFETTI: Right.

18 JUDGE HALLIGAN: Is there anything you can point
19 to before that initial COC is filed?

20 MR. PERFETTI: I think that question premises
21 that the initial COC, because of those failings, then
22 becomes invalidated or - - - or insufficient. There are
23 many times - - -

24 JUDGE SINGAS: Why doesn't it? I mean, why
25 doesn't it? You're supposed to have moved forward with

1 reasonable effort of what you did before you announced
2 ready in court. And there's nothing on this record to say,
3 you know what? There's a standing order from my office to
4 all the law enforcement entities that they should produce
5 all discovery as soon as possible. I spoke to Sergeant X,
6 Y, and Z, who told me, blah, blah, blah. I then called
7 the, you know, first responding officer who said this. I
8 called the 911 entity, and - - - and dropped a subpoena to
9 see - - - like, there's nothing on this record for us to
10 establish what's reasonable and what's due diligence. And
11 I think that's the point of 245.

12 MR. PERFETTI: Well, I - - - I would agree,
13 Judge, that the - - - that 245 sets out a reasonableness
14 standard and a good faith standard. And I - - - and I
15 would assert that my agent did act in good faith. The
16 initial materials - - -

17 CHIEF JUDGE WILSON: Don't we have to have both -
18 - -

19 MR. PERFETTI: - - - handed over within a day.

20 CHIEF JUDGE WILSON: Don't we have to meet both
21 incident standard that it's good faith and reasonable
22 efforts?

23 MR. PERFETTI: Yes. Right. Yeah.

24 CHIEF JUDGE WILSON: And good faith doesn't seem
25 to be an issue here. I don't hear anybody saying that you

1 acted in bad faith.

2 MR. PERFETTI: Okay. And - - - and I would say
3 that even if we say that's satisfied, that the, you know,
4 reasonable efforts were made, in that, the materials that
5 we did have that were produced were produced within a day
6 of defense counsel assuming responsibility for the case.
7 Many times we have those materials in advance of defense
8 counsel coming on to - - -

9 CHIEF JUDGE WILSON: But that seems to be a
10 strange argument to say there's something obvious that was
11 missing. Because we produced the rest of the stuff
12 quickly, our efforts were reasonable.

13 MR. PERFETTI: Well, I think that has to factor
14 into that. The reasonableness test would, obviously, look
15 into a multitude of things. And I think the initial
16 provision of discovery is a very significant factor. It
17 allows defense counsel to make, certainly, the initial
18 consultation with their client meaningful and allows them
19 to decide how they're going to proceed.

20 JUDGE CANNATARO: Counsel, it sounds to me like
21 that argument - - - and I agree with the Chief, there's
22 something off about that. That would maybe go more to good
23 faith. In other words, since you can show that you
24 reasonably turned over a number of things, even a lot of
25 things in a timely or early manner, that you're not - - -

1 you're not acting in bad faith. But I don't understand how
2 it says anything about the effort to locate the thing that
3 wasn't disclosed.

4 MR. PERFETTI: Well, I mean, ultimately, the - -
5 - the prosecutor did locate it and did turn it over. So in
6 the end - - -

7 JUDGE CANNATARO: I'm obviously talking about
8 what happened prior to the filing of this case.

9 MR. PERFETTI: Right. And - - - and to that, I
10 would say, he was mistaken.

11 JUDGE SINGAS: But had the defense attorney never
12 requested that material, according to your analysis, that
13 would have never been turned over. Because you would have
14 relied on your assistant saying that there was no DIR.
15 There was no 911 tape. There - - - and those existed.

16 MR. PERFETTI: Those - - -

17 JUDGE SINGAS: So - - -

18 MR. PERFETTI: Those did exist in - - -

19 JUDGE SINGAS: If the defense attorney had never
20 asked for it, were you ready?

21 MR. PERFETTI: The prosecution was ready.
22 Ultimately, in the end, those materials were not used by
23 either party in the litigation of the matter.

24 CHIEF JUDGE WILSON: Well, partly because you
25 were precluded from using one of them.

1 MR. PERFETTI: Correct. And - - - and the
2 defense didn't choose or find it useful for them to utilize
3 either. And - - - and that would be my point, is that we
4 did suffer a sanction relative to that, a sanction that,
5 quite frankly, I think was appropriate. And the
6 intermediate appellate court, as well, felt was
7 appropriate.

8 JUDGE RIVERA: That - - - that's not what 245
9 allows for to - - - when it comes to questions of readiness
10 for speedy trial purposes under 30.30. I mean, regardless
11 of this prejudice argument that I think you're making, the
12 statute is very clear. You cannot deem that the
13 prosecution state is ready if they have not complied with
14 245. And there are automatic discovery obligations. And
15 245 requires that the prosecutor have had act - - -
16 exercised due diligence, not reasonableness, due diligence,
17 right? In identifying the material and turning it over.

18 MR. PERFETTI: And if I may address that. The
19 statute does require that. The statute also requires the
20 reciprocal discovery, which never occurred in this case, to
21 the admission of defense counsel herself. And I think as
22 well, the court did address the issue of the - - - in fact,
23 Your Honor addressed the issue of actual possession as
24 opposed to constructive possession. The 911 tapes, the - -
25 - those recordings are clearly not in the possession of a

1 law enforcement agency.

2 I think the case law is clear that emergency call
3 centers are not law enforcement agencies. They are an
4 enumerated discovery item. So I don't dispute that, and
5 that they are appropriate to be turned over in that
6 instance. However, it is very often the case where the
7 People are deemed ready, where not everything even exists
8 or is - - - been turned over to the prosecutor itself. So
9 in that regard - - -

10 JUDGE RIVERA: I understand that. But it sounds
11 to me like you're saying the prosecutor takes whatever
12 they've got, and they sit back, and they say that's what I
13 have. That's it. And I don't know that the statute
14 permits the prosecutor to do that now. In any particular
15 case, even counsel concedes that it's for the judge to
16 decide whether or not, under the circumstances of that
17 case, the prosecutor's actions or inactions are satisfying
18 the requirements of the statute.

19 MR. PERFETTI: And - - - and I would assert that
20 - - - I think the record is clear that the judge - - - the
21 trial judge did make inquiries and made inquiries of both
22 parties.

23 JUDGE RIVERA: But the inquiry was what - - -
24 what's your answer to this? And the answer was, it's not
25 there, without any way of exploring or confirming that the

1 prosecutor has done something that complies with the
2 statute to ensure that it's true, it's not there.

3 MR. PERFETTI: And to that extent, I can't - - -
4 I can't answer for something that's not in the record, Your
5 Honor.

6 JUDGE RIVERA: But the - - - the burden is on, it
7 strikes me, given the statute - - -

8 MR. PERFETTI: Right.

9 JUDGE RIVERA: - - - on the People to come
10 forward with - - - right? The - - -

11 MR. PERFETTI: I think there's - - -

12 JUDGE RIVERA: - - - whatever they're going to
13 present as their argument - - -

14 MR. PERFETTI: I think there's - - -

15 JUDGE RIVERA: - - - of how they are in
16 compliance.

17 MR. PERFETTI: I think there's also a duty on the
18 court to make the appropriate and relevant inquiry, which
19 the inquiry that was made was made.

20 JUDGE RIVERA: And if they fail to do - - - and
21 if they fail to do that, who bears the burden or the - - -
22 who has to deal with the consequences of that?

23 MR. PERFETTI: Well, I think it's within this
24 court's authority to remand the matter for the further
25 inquiry there by the court.



1 JUDGE HALLIGAN: But isn't the point to conduct
2 that inquiry in the moment so that it can be addressed then
3 as opposed to down the road when, you know, enough time has
4 elapsed, that if your initial certificate is invalidated
5 and a supplemental certificate doesn't cure it, your clock
6 has run?

7 MR. PERFETTI: I would agree. Ideally, it should
8 be done in the moment. However, I think, as we all
9 concede, this is - - - this is case of first impression on
10 this particular issue by this court. Thank you.

11 CHIEF JUDGE WILSON: Thank you.

12 MS. HARDESTY: Just to address a few points made
13 by my adversary. In this case, there was no eleventh-hour
14 objection or laying in wait. The items of discovery that
15 were missing were brought to both the court and the
16 People's attention at the very first court appearance after
17 their certificate of compliance was filed. That was within
18 the speedy trial time frame. Speedy trial had not even
19 elapsed at that time.

20 The People still did nothing to try and obtain
21 those items. And as far as when the speedy trial motion was
22 made, that was made the day after receiving the police
23 report and the domestic incident report. So there was no
24 laying in wait in this case.

25 With regards to the standing order to the police

1 regarding items that need to be disclosed to the People, I
2 would argue that a standing order is not good enough. The
3 order should be made on each case. The police should be
4 receiving that order that on this particular case, with
5 these arresting officers, everything from this case needs
6 to be turned over to this office.

7 CHIEF JUDGE WILSON: Would that have been enough
8 here?

9 MS. HARDESTY: Potentially. We don't know
10 because we don't have enough information about when the
11 People received the police report - - - the domestic
12 incident report from the police. Good Faith alone is not
13 sufficient as far as the standard goes for a proper
14 certificate of compliance or the People's discovery
15 obligations. And again, 245.51(a), which was amended in
16 2022, specifically includes due diligence - - - good faith
17 and due diligence as being the standard in assessing the
18 propriety of a certificate of compliance.

19 JUDGE TROUTMAN: And with respect to the remedy
20 crafted by the court here?

21 MS. HARDESTY: So it wasn't really a remedy
22 because the People didn't voice any intention to introduce
23 the 911 call into evidence. So - - - and that wasn't the
24 relief requested. The relief requested in this case was
25 dismissal on speedy trial grounds. Sanctions were never

1 requested. And the court erred in assessing sanctions - -
2 -

3 JUDGE TROUTMAN: Does the statute provide short
4 of dismissal if the time has run out?

5 MS. HARDESTY: I'm sorry.

6 JUDGE TROUTMAN: Does the statute allow for the
7 court to have done what it did if the People had asked for
8 it?

9 MS. HARDESTY: So if the speedy trial time - - -

10 JUDGE TROUTMAN: I'm sorry. If the defense - - -
11 if they - - - does what was done here, is that something
12 that was provided for when the statute was amended to take
13 30.30 and the discovery statute, and - - - and join them
14 together?

15 MS. HARDESTY: So if the speedy trial time had
16 not elapsed, then certainly a sanction would have been
17 appropriate. But because the speedy trial time in this
18 case had already elapsed, it should have been dismissed on
19 those grounds.

20 JUDGE TROUTMAN: So once it expires, you can't
21 just say, well, preclusion is enough?

22 MS. HARDESTY: Right.

23 JUDGE HALLIGAN: Regarding - - -

24 JUDGE SINGAS: Just to push back on you a little
25 bit on the standing order, because doesn't that really

1 depend on the characteristics of the individual office, DAS
2 office vis-a-vis their law enforcement entities, right?

3 Because I could envision a very large district
4 attorney's office that has a standing order with thirty law
5 enforcement entities that they deal with routinely. And
6 there's a front office, an intake bureau, a case assessment
7 bureau that regularly looks at those standing orders, looks
8 at the discovery as it comes in, calls police departments
9 to do a checklist, and - - - and sometimes the ADAs don't
10 get that information until, you know, a week or two later.

11 And then at that point, they make an assessment
12 of what they have and what they're missing before they file
13 a certificate of readiness. So there could be
14 circumstances where a standing order is entirely
15 appropriate. But the point is, we need a record to
16 actually establish what was done and how the discovery was
17 collected. I mean, I don't think that the order itself is
18 the issue, do you?

19 MS. HARDESTY: That's right. And no, it's not
20 the issue. I would just say with regards to a standing
21 order versus a specific order, a specific order, on each
22 case, could contribute to due diligence or could be an
23 argument that the People have exercised due diligence if
24 they can show that they've made that specific order on a
25 specific case.

1 With regard to the related discovery and curing
 2 an improper certificate of compliance, that related
 3 disclosure of discovery does not cure an improper
 4 certificate of compliance that was filed from the outset
 5 without due diligence or reasonable inquiries. There must
 6 be some demonstration of the due diligence and reasonable
 7 inquiries exercised from the outset, particularly because
 8 the People's continuing duty to - - - to disclose pertains
 9 to items of discovery that were not supposed to be not
 10 previously known to the disclosing party.

11 Despite the fact that the people were notified
 12 multiple times about the missing discovery in this case,
 13 they repeatedly erroneously insisted that it didn't exist.
 14 And the belated revelation that it does exist, does not - -
 15 - is not akin to learning of new discovery for which a
 16 supplemental certificate of compliance would be
 17 appropriate.

18 Additionally, because the - - - the items of
 19 discovery in this case were in the possession of the
 20 police, they are deemed to be in the possession of the
 21 People.

22 If I could - - - I see my time's up. If I could
 23 just make one more.

24 CHIEF JUDGE WILSON: Of course.

25 MS. HARDESTY: Thank you. I just want to speak

1 very briefly about the no adverse consequence language in
2 245.50(1) and (2). This - - - 245 was intentionally
3 connected to the speedy trial statute to incentivize
4 compliance, or risk the repercussion of the People's case
5 being dismissed. There has been some argument that no
6 adverse consequence language means that a speedy trial
7 dismissal cannot occur or that an illusory statement of
8 readiness cannot occur. That's not the case.

9 No adverse consequences - - - and we know that's
10 not the case because that language is present in both
11 245.50(1) which pertains to the People's certificate of
12 compliance and 245.50(2), which pertains to the defense's
13 certificate of compliance. And because speedy trial is not
14 - - - dismissal of the case in speedy trial grounds would
15 not be an adverse consequence that could pertain to the
16 defense, that would give different meanings for the same
17 thing within the same statute.

18 JUDGE RIVERA: Let me - - - let ask you this. Do
19 - - - do we have to even consider that if 245.50, paragraph
20 3, which is specific to speedy trial, talks about trial
21 readiness, begins with, "Notwithstanding the provisions of
22 any other law."

23 MS. HARDESTY: Right. So you're exactly right,
24 Judge, that, no, you wouldn't need to. And in fact, if no
25 adverse consequence meant speedy trial, you would think

1 that that would be included in that section, which is
2 specifically called trial readiness. The no adverse
3 consequence pertains to personal sanctions against
4 individual litigants as 245 has the forced effect of a
5 court order. For the - - -

6 CHIEF JUDGE WILSON: Thank you.

7 MS. HARDESTY: - - - foregoing reasons and the
8 reasons - - - thank you, Judge.

9 CHIEF JUDGE WILSON: Thank you, Counsel.

10 (Court is adjourned)

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

I, Brandon Deshawn, certify that the foregoing transcript of proceedings in the Court of Appeals of The People of the State of New York v. Michael Bay, No. 92 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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