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COURT OF APPEALS

STATE OF NEW YORK

PEOPLE,

Appellant,

-against-

No. 103

GLENN S. SMITH,

Respondent.

PEOPLE,

Respondent,

-against-

No. 104

NORMAN E. RAMSEY,

Appellant.

20 Eagle Street
Albany, New York 12207
May 31, 2016

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA

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Appearances :

ANDREW R. KASS, ADA
ORANGE COUNTY DISTRICT ATTORNEY'S OFFICE
Attorneys for Appellant
18 Seward Avenue
Middletown, NY 10940

RICHARD N. LENTINO, ESQ.
RICHARD LENTINO LAW OFFICES
Attorneys for Respondent Smith
138 West Main Street
Middletown, NY 10940

ROBERT N. GREGOR, ESQ.
ROBERT GREGOR LAW OFFICES
Attorneys for Appellant Ramsey
3 Lake Avenue
Lake George, NY 12845

BRANDON P. RATHBUN, ADA
WASHINGTON COUNTY DISTRICT ATTORNEY'S OFFICE
Attorneys for Respondent
383 Broadway, Building C
Fort Edward, NY 12828

1 CHIEF JUDGE DIFIORE: The first two matters
2 are related cases. We'll start with number 103,
3 People v. Glenn Smith.

4 MR. KASS: May it please the court, I'm
5 Andrew Kass; I represent the People in this matter.
6 I would request two minutes for rebuttal time.

7 CHIEF JUDGE DIFIORE: You have two minutes,
8 Mr. Kass.

9 MR. KASS: Thank you.

10 CHIEF JUDGE DIFIORE: You're welcome.

11 MR. KASS: This appeal - - - defendant's
12 appeal was rendered jurisdictionally defective by his
13 failure to file a timely affidavit of errors. And
14 there's certain flaws in the Appellate Term's order.
15 The filing here, the required filing of an affidavit
16 of errors, was a jurisdictional nonwaivable defect.

17 CHIEF JUDGE DIFIORE: Mr. Kass, are there
18 any circumstances under which the Appellate Court can
19 dispense with the filing of the affidavit of errors?

20 MR. KASS: I don't believe so because in
21 this case, we're - - - we're dealing with a court
22 that did not have a court stenographer. And
23 therefore, under the statute, under the plain terms
24 of the statute, it was required. Now there could
25 conceivably be an instance, for example, where an

1 appellate attorney or trial counsel, in filing the
2 notice of appeal, fails to file a timely affidavit of
3 errors and then, down the line in a separate
4 proceeding, just un - - - as we recognize with the
5 failure to file a timely notice of appeal, the
6 defense could move under 460.30 or, conceivably under
7 coram nobis, to file a late affidavit of errors. But
8 in this case, because we're - - - our view of the
9 statute is that it's a jurisdictional requirement,
10 under the plain meaning of the statute, in this case,
11 an affidavit of errors would be required.

12 JUDGE STEIN: Counselor?

13 MR. KASS: Yes.

14 JUDGE STEIN: Who prepares the transcript
15 from the recording or maybe I should ask who - - - do
16 we know who did it in this particular case? Was it a
17 - - - was it a court stenographer or was it somebody
18 else?

19 MR. KASS: It's - - - it's a - - - the
20 person is a certified stenographer.

21 JUDGE STEIN: Um-hum.

22 MR. KASS: But - - -

23 JUDGE STEIN: Well, would they - - - would
24 that person fit within the definition in the statute
25 of - - - of a court stenographer?

1 MR. KASS: No, because the proceeding
2 itself, the underlying proceeding, was not recorded
3 by a court stenographer.

4 JUDGE STEIN: No, I understand that. I'm
5 just talking about the - - - the position of the
6 person. So in one case, you have a person sitting in
7 the courtroom taking down what's going on real time
8 and then - - - and then preparing a transcript. In -
9 - - in this case, we have a - - - a court - - - I'm
10 sorry, a recorder, an electronic recorder, and then
11 somebody has to transcribe what's on that recording.
12 Is that somebody a person in the same type of
13 position as the somebody who sits in the courtroom?

14 MR. KASS: The person in this case was a
15 court reporter.

16 JUDGE STEIN: Okay.

17 MR. KASS: There's no - - - no dispute
18 about that. I don't know whether or not in another
19 case that would be required. It might be possible
20 that, you know, somebody - - - a member of the
21 district attorney's staff or somebody who is an
22 administrator or a secretary in a private law firm
23 could equally listen to the transcript and prepare
24 it. So I don't know whether there's that legal
25 requirement.

1 JUDGE ABDUS-SALAAM: Is that what happens
2 in the usual case, counsel? I - - - I saw a form
3 online for affidavits of error, and there's a - - - a
4 little listing at the bottom that says you can choose
5 from a list of transcribers, please tell us which one
6 you chose. So how - - - how - - - is that how it
7 actually occurs?

8 MR. KASS: I - - - I can't say because,
9 again, it's individual. In our - - - my experience,
10 we have somebody who we've used in the past. So when
11 we've taken a People's appeal, we felt comfortable
12 that a person did a professional and a quality job,
13 so we've hired that same person by pro - - - making
14 sure that they're provided with the copy of the
15 electronic recording from the underlying court
16 proceedings. So I can't speak for other people, if
17 there's a list, if there's not. You know, obviously
18 and - - - and I know this case, as I have said, it
19 was somebody who is a reporter.

20 JUDGE PIGOTT: So if - - - if - - - you
21 said when you appeal, so if - - - if you appeal, you
22 don't do an affidavit of errors? You do - - - you -
23 - - you get this - - - this transcribed thing?

24 MR. KASS: No. We - - - if - - - if - - -
25 had this been a People's appeal, we would file an

1 affidavit of errors and then in the - - - as part of
2 sharing the record for the return, we would - - - if
3 there is an available electronic recording, we would
4 then submit the copy or arrange from the local court
5 to supply the court reporter with - - -

6 JUDGE PIGOTT: But you would still - - -
7 you would still expect a return from the - - - from
8 the court on top of that, right?

9 MR. KASS: Yes. And - - - and in that
10 case, we would - - - if the transcript itself is
11 sufficient, we - - - we've had many instances where
12 then, pursuant to this - - - this court's decision in
13 Robinson, the transcript itself would place the - - -
14 take the place of an old-fashioned typed out or
15 handwritten return.

16 JUDGE PIGOTT: Who certifies that? Does
17 the - - - does the judge make that determination that
18 I don't have to do a return because the transcript is
19 okay?

20 MR. KASS: Yes, because, generally, it's
21 been my experience that the parties then would
22 arrange to have a settlement conference on the record
23 and the court would ask, you know, and determine
24 whether or not there were any proposed changes and
25 would otherwise look to confirm the acc - - - overall

1 accuracy.

2 JUDGE PIGOTT: But your position is that
3 the tran - - - the recording is sort of a belt-and-
4 suspenders thing. It's not necessary, but it can be
5 helpful. But jurisdictionally, you're saying you
6 still need either the court stenographer or the
7 affidavit of errors?

8 MR. KASS: Yes, because what we're looking
9 for are two things. One is a bright-line rule so
10 that in every case there's not a question as how an
11 appellant from a local criminal court order or
12 judgment takes an appeal. I don't think that would
13 be fair to the defense or fair to the People. Right
14 now we have a bright - - - we have a statute and it's
15 pretty clear that either you have a courtroom
16 stenographer or you don't. That - - - that's the way
17 in which I've always read the statute.

18 JUDGE STEIN: Well, if we - - - if - - -
19 but if we were to read the statute to also apply
20 where there's an electronic recording that's
21 transcribed in the same manner as - - - as if
22 somebody was in - - - in the courtroom, that would -
23 - - couldn't that also be a bright-line rule?

24 MR. KASS: We - - - we are certainly
25 looking for clarity, but I also think that when you

1 look at the statute, what you're then making is
2 essentially a legislative change to the statute, and
3 that's more properly a matter for the legislature. I
4 also believe that there are certain policy things
5 that we - - - that the legislature would be in a
6 position to better judge, for example, the overall
7 success of having electronic recordings in the court.

8 JUDGE FAHEY: Well, it seem - - - it seems
9 to be in both these appeals here today at the
10 beginning of our agenda, there's a common theme on
11 the digital versus the court reporters' function in
12 the court. It seems that - - - in - - - in my mind
13 you have three problems, and they affect defendants
14 differently. But you have the - - - the issue of the
15 correction of defects without an affidavit, I don't
16 know how you can do that without an affidavit,
17 forgetting your positions; secondly, whether or not
18 the Appellate Term or the Appellate Division has an
19 accurate record, which is, of course, at the core of
20 the right to appeal and to have a proper review; and
21 then there's a third question whether or not the
22 court, the Chief Judge itself, had authority to - - -
23 to actually do this in conflict with - - - with the
24 legislative language.

25 But that applies to both cases, but in your

1 case, you have some issues of the deficiency in the
2 court charge and - - - and the Appellate Term, I
3 guess it was, exercised interest of justice
4 jurisdiction. Does that make it any different that
5 they exercised interest of justice jurisdiction and -
6 - - and it is clear by the record that there were
7 deficiencies in the court charge so the fundamental
8 purpose of the statute was met?

9 MR. KASS: Working backwards, the People
10 would concede that there were errors below, and as
11 noted by the limited scope of the issue that we've
12 raised on appeal - - -

13 JUDGE FAHEY: Um-hum.

14 MR. KASS: - - - we're not challenging the
15 error in the - - - in the jury instruction that was
16 reached by the Appellate Term. I - - - I see my time
17 is up.

18 JUDGE FAHEY: Well, so - - - so I guess my
19 question to you then is is if the deficiencies in the
20 core charge are - - - are clear in the record and
21 this was an interest of justice determination, should
22 this even be in front of us?

23 MR. KASS: The answer is yes, because it's
24 jurisdictional. You know, just the statute as its
25 written is - - - is very clear what's required, same

1 way in which the statute says when you file a notice
2 of appeal, you have to file a notice and a copy and
3 case law has also held that to be a jurisdictional
4 defect.

5 JUDGE FAHEY: Yeah - - -

6 JUDGE PIGOTT: But you're - - - you - - -

7 JUDGE FAHEY: I can see it's - - - your
8 argument for it to be jurisdictional. I mean that's
9 a - - - a clear argument. But - - -

10 CHIEF JUDGE DIFIORE: Thank you, counsel.

11 MR. KASS: Thank you.

12 MR. LENTINO: Good afternoon; thank you for
13 the privilege after thirty-nine years of addressing
14 this court. You can tell I'm an old man. Now I've
15 just wasted thirty seconds of my time. I don't
16 lecture the court. I throw thoughts out for the
17 court to think about. If justice is a truth seeking
18 process, in my particular case where I represented a
19 man who was convicted and sentenced to the maximum
20 time, I would think that an electronic transcription
21 would be a better way of ascertaining the truth than
22 me spinning an affidavit of errors and a return by a
23 judge who may have been annoyed with the defendant
24 after a doing trial that he felt should never have
25 been tried.

1 CHIEF JUDGE DIFIORE: But, counsel, how do
2 we get around that plain statutory language?

3 MR. LENTINO: Judge, there's no doubt must
4 is must. What I suggest to the court is that you can
5 look at the legislative history, the commission staff
6 notes of 1970 through '71 appear to refer to the fact
7 that the legislature was considering that there would
8 be an advent - - - an increase in technology and that
9 this would be an archaic approach. That's - - -

10 JUDGE RIVERA: But - - - but how - - - but
11 going back to the Chief Judge's point, don't we only
12 turn to the history if there's some ambiguity in the
13 language, and if the language is plain, isn't that
14 what we have to render a decision on?

15 MR. LENTINO: Your Honor, there's no doubt
16 that the word must is the worse - - - word must.
17 What I suggest to this court is that what was must in
18 1970 may not be must in 2016.

19 JUDGE PIGOTT: Yeah, but we can't change
20 that, can we? I mean - - -

21 MR. LENTINO: Well, I believe you do have -
22 - -

23 JUDGE PIGOTT: Let me - - - let me just
24 finish this thought. Do - - - do we anticipate now
25 that they're going to require videos in five years

1 and therefore, the fact that they are asking for
2 audio now, we can ignore that as well?

3 MR. LENTINO: Well, my opening thoughts,
4 which I did not use, if we borrow from Oliver Wendell
5 Holmes, is the life of the law is not logic, it is
6 experience. And technology and law have had a very
7 tenuous relationship.

8 JUDGE PIGOTT: In other words, you're
9 conceding that if we go by the law, you lose.

10 MR. LENTINO: Absolutely, must is must.

11 JUDGE PIGOTT: And your argument is that at
12 the time that they passed that, they were building in
13 some elasticity that would allow a - - - an
14 administrative judge to amend the legislature's law
15 to say audio instead of an affidavit of errors?

16 MR. LENTINO: Correct, Your Honor. And I
17 believe that there was an administrative order of
18 2009 that lapsed. I'm not sure why, that I have no
19 information. Your resources are probably greater
20 than mine, but there was an intent to have everything
21 electronically transcribed. And without instructing
22 the court, as you know, you can look beyond the plain
23 language. There's a cite from a civil case I gave,
24 Banker Trust, it's in the brief, that allows you to
25 look beyond is must must or with the legislative

1 intent based on the history, can you come to a
2 different conclusion.

3 JUDGE RIVERA: What do you do when the
4 electronic recording has gaps? It's inaudible?

5 MR. LENTINO: I'm sorry, Your Honor?

6 JUDGE RIVERA: What - - - what happens when
7 the electronic recording, the transcription has gaps,
8 you - - - you don't know what it says? Aren't you
9 left then with trying to get that record for
10 appellate review with some kind of corrective action
11 which, at a minimum, might be this affidavit of
12 errors?

13 MR. LENTINO: Well - - -

14 JUDGE RIVERA: Aren't you still settling
15 that?

16 MR. LENTINO: That could be - - - that
17 could be a circumstance that it would be of use.
18 There could be matters outside of the record that
19 would want - - - someone want to raise on appeal.
20 Having limited - - -

21 JUDGE RIVERA: Wouldn't that explain why
22 the legislature hasn't done anything about this?

23 MR. LENTINO: Because it hasn't been
24 brought before this court for you to either defer it
25 or define it, Your Honor. That's all I can say.

1 question becomes must is must, is must
2 jurisdictional? You can also look at it in that
3 fashion, Your Honor.

4 JUDGE STEIN: Well, must is must, but what
5 about recording? Could recording be recording what
6 was taken off of a - - -

7 MR. LENTINO: Well, what - - -

8 JUDGE STEIN: - - - an electronic - - -

9 MR. LENTINO: What I point out in my brief,
10 Your Honor, is that the statute talks about court
11 stenographers but within the commission staff notes,
12 they talk about - - - they've used different words.
13 I'm looking for where that was. I think one is
14 electronic stren - - - stenographers and there was
15 another word if I can find it, quickly. Oh, yes,
16 statute refers to court stenographer. The
17 legislative notes refer to recording stenographers
18 and stenographic recording. Now if you're asked to
19 rule on that, was the legis - - - is that a
20 legislative function or are you interpreting when
21 there's three different words used for the same
22 problem that's before you?

23 CHIEF JUDGE DIFIORE: Counsel, how
24 difficult is it for defense counsel to prepare an
25 affidavit of errors?

1 MR. LENTINO: Your Honor, it's not
2 difficult at all, and in thirty-nine years I never
3 did one because I always operated from the
4 stenographic transcript, the electronic transcript
5 or, in felony matters, we would have a court
6 stenographer.

7 CHIEF JUDGE DIFIORE: Well - - -

8 MR. LENTINO: But in this local court, the
9 several I've done, never questioned it, never filed
10 for it.

11 CHIEF JUDGE DIFIORE: Thank you, counsel.

12 JUDGE FAHEY: I just want to testify to the
13 other judges, in City Court that was my experience,
14 too, that we didn't get returns but that was only
15 during the time, this was in the nineties, when the
16 transition first took place. I don't know if other
17 experience has been different. It's maybe something
18 that the court should look at. But - - - and of
19 course, the quality of the transcripts was
20 consistently awful and you couldn't tell - - - I
21 think every lawyer who has dealt with this can - - -
22 can say - - - and every judge who's dealt with it can
23 - - - can testify to that because people move around
24 and that's what happens. It - - - there's no ill
25 will, but a difficult statute to get around,

1 noneththeless.

2 CHIEF JUDGE DIFIORE: Thank you, counsel.

3 MR. LENTINO: Thank you.

4 CHIEF JUDGE DIFIORE: Mr. Kass.

5 MR. KASS: Thank you, Your Honor, very,
6 very briefly. It - - - it's clear it's not the
7 functional equivalent because there are quality con -
8 - - control issues that do arise and frequently
9 arise. The - - -

10 JUDGE STEIN: But it's better than a re - -
11 - a re - - - affidavit of errors and return, isn't
12 it?

13 MR. KASS: It - - - it's better than the
14 complete absence of any record in that sense.
15 However, consistent with the - - - the administrative
16 order that was cut, I believe that the order was cut
17 to implement a goal of ensuring a better record.
18 However, it could - - - the - - - the order itself
19 could not amend the statute. Also, I think the - - -
20 the thing is the point of a bright-line rule, as the
21 court is suggesting, is - - - is very important
22 because there are many different scenarios that arise
23 where, you know, in many cases where parts of
24 transcripts may be recorded by a court stenographer
25 and parts of proceedings, including separate days of

1 a hearing, for example, may not be within the same
2 proceeding itself. And - - - and that's why a
3 bright-line rule tells us what needs to be done.
4 Thank you.

5 CHIEF JUDGE DIFIORE: Thank you, sir.
6 Thank you.

7 The next matter is number 104, People v.
8 Norman Ramsey.

9 MR. GREGOR: Thank you, Your Honor; may it
10 please the court, I would like to reserve two minutes
11 time for rebuttal, please.

12 CHIEF JUDGE DIFIORE: Your appearance for
13 the record, sir?

14 MR. GREGOR: Oh, Robert Gregor on behalf of
15 Mr. Ramsey. I apologize.

16 CHIEF JUDGE DIFIORE: Thank you. And two
17 minutes?

18 MR. GREGOR: If you - - - if you would,
19 please.

20 CHIEF JUDGE DIFIORE: You may.

21 MR. GREGOR: First, let me - - - let me
22 again, just say, Your Honor, thank you for this
23 amazing opportunity. All - - - this is truly an
24 experience for an attorney. And on to business,
25 counsel on both sides have made interesting

1 arguments. I'm going to purport something a little
2 more theoretical, I think, for the court. Concept of
3 words themselves - - - I've given a lot of thought to
4 this. Think of words as a vessel and through which
5 in this vessel we deliver our meaning. So the vessel
6 stay the same. Stenographic minutes is still
7 stenographic minutes. But that which is what is
8 contained in that term has shifted. In 1970, 1971,
9 stenographic minutes were the most efficient, most
10 effective, most economical way of delivering - - -

11 JUDGE PIGOTT: You think - - - do you think
12 the - - - the Chief Judge's Court Administration
13 could say I think we ought to do away with all court
14 stenographers and have it electronic from now on?

15 MR. GREGOR: I don't think so. But I
16 think, as a practical matter, to have a stenographer
17 at every local court - - - I mean I think - - - I
18 practice law in the North Country, Your Honor. In
19 Moriah Town Court where there's horrible snowfalls
20 and it takes me an hour-and-a-half to get there from
21 Lake George, I'm one of the only defense attorneys
22 who will drive there, I think, you know, to have a
23 court stenographer at a local court just isn't
24 practical, especially when you have the financial and
25 economic benefits of electronic recording, imperfect

1 as it is. And this - - -

2 JUDGE PIGOTT: Why not - - - why not have
3 an affidavit of errors?

4 MR. GREGOR: The aff - - - the problem with
5 the affidavit of errors is you have - - - let's take
6 Moriah, for example. You'll have forty-something
7 cases in there on any given evening. You may have an
8 attorney who doesn't really recall what's going on.
9 You may have an attorney who - - - if this is just on
10 a regular procedural matter, a public defender is way
11 overburdened and may not remember exactly the
12 specific errors. There are more effective and more
13 efficient ways.

14 JUDGE ABDUS-SALAAM: So what if the
15 electronic recording equipment doesn't work at all -
16 - -

17 MR. GREGOR: I think, Your Honor - - - I
18 think that's when - - -

19 JUDGE ABDUS-SALAAM: - - - and you have
20 nothing?

21 MR. GREGOR: And I think that's when you -
22 - - either you do a reconstruction hearing or the
23 affidavit of errors which effectively is a paper
24 version of somewhat of what a reconstruction hearing
25 would be. And - - - and none of these are perfect

1 solutions, but we don't live in a perfect world and
2 our justice system isn't perfect.

3 JUDGE PIGOTT: No, but I - - - I've done a
4 bit of this work, and if you do an affidavit of
5 errors - - - and I didn't do a lot of them, no one -
6 - - I don't think anybody has. I don't think it's
7 that common. But when you do, you - - - you put - -
8 - you said, you know, as in one case, the charge was
9 inadequate because he didn't advise thus and so or
10 the - - - the evidence is insufficient, you know,
11 witness didn't show. And then the court responds and
12 you're done.

13 MR. GREGOR: I think - - - I think the - -
14 - the other problem with the affidavit of errors, and
15 it's one that - - - and - - - and this isn't an
16 excuse, however, that is something that we see a lot
17 in the criminal defense world. You have indigent
18 clients, you have overburdened attorneys, and a lot
19 of defenders, trial counsel, don't even know that
20 this section of the statute exists, and it's their
21 own fault, I grant you that. However, I think that
22 raises also a due process issue.

23 I guess I look at it from the other side.
24 And no - - - no disrespect, but the other side of
25 this coin is if you have a - - - a somewhat more

1 efficient system, which electronic recording is,
2 imperfect, again, as - - - as it may be, and you have
3 a situation where our goal in the justice system,
4 where due process mandates that we protect these
5 people's rights and the right to a fair trial, the
6 right to actually be heard, and whatever other
7 deficiencies there may have been, why not just go
8 with the electronic and the more efficient means and
9 - - -

10 JUDGE FAHEY: I guess that's the
11 presumption. The presumption is, I think, and this
12 was the presumption administratively, that digital
13 recording systems would be more efficient and in
14 time, more accurate than stenographers, but that
15 isn't true.

16 MR. GREGOR: Correct. I think - - - I
17 would add one more thing - - -

18 JUDGE FAHEY: That's the - - - that's the
19 core reality here is the more expensive system, the
20 system that relies on people, gets a better record
21 and preserves all the parties' rights in a better
22 way, and that's why our own experience is is that the
23 more serious crimes, we always make sure there's a
24 court reporter there, because in point of fact, the
25 digital recordings are simply not as accurate and - -

1 - and they - - - they invite error.

2 MR. GREGOR: Agreed, a court reporter would
3 be - - - would be more efficient and more effective,
4 you know.

5 JUDGE FAHEY: Just costs more.

6 MR. GREGOR: Precisely, and that's - - -
7 yeah, I think back to law school in products
8 liability class, Professor Henderson says, you know
9 what, if you want to build the perfect car that will
10 protect everybody, you can. No one's going to want
11 to drive it because it's too darn heavy and it's too
12 darn ugly and it costs us money.

13 JUDGE FAHEY: And that's the problem.

14 MR. GREGOR: We can make it - - - we can
15 make it perfect, but it's going to cost you a lot
16 more.

17 JUDGE FAHEY: Your point - - -

18 MR. GREGOR: And I think that's what Your
19 Honor is really raising is, you know, the question is
20 balancing economic interests, which we don't like - -
21 -

22 JUDGE RIVERA: But isn't - - - isn't the
23 point then that's for the legislature not for this
24 austere - - -

25 MR. GREGOR: I don't necessarily - - - and

1 - - - and certainly, certainly to make economic
2 decision is - - - yeah, this court should not be
3 making economically - - - economic decisions based
4 on, you know, what's going to what's going to cost
5 the taxpayers more. I agree with that, Your Honor.
6 However, what I would say this court is able to do is
7 to realize that the meaning of words shift and change
8 throughout time.

9 JUDGE PIGOTT: But in 2013 the legislature
10 tried to do this and they didn't get there.

11 MR. GREGOR: It never - - - it never came
12 up, though. It never even got out of committee.

13 JUDGE PIGOTT: That's not our problem,
14 though.

15 MR. GREGOR: I - - - I recognize that.

16 JUDGE PIGOTT: In other - - - in other
17 words, for some reason the legislature chose not to -
18 - - not to do it. So is - - -

19 MR. GREGOR: Respectfully, Your Honor - - -

20 JUDGE PIGOTT: So - - - so the - - -

21 MR. GREGOR: - - - I mean the legislature
22 may not - - - I'm sorry.

23 JUDGE PIGOTT: So the suggestion that
24 because they didn't do it and it didn't get out of
25 committee we should undertake that job and - - - and

1 amend the law to say that - - - that the transcript
2 is okay seems to me to be ultra vires.

3 MR. GREGOR: I - - - not at all, Your
4 Honor. I - - - I don't see you as amending the law.
5 I see you as just continuing the law. You're
6 interpreting the law. Those words had - - - let - -
7 - let me pause at this story I want share with - - -

8 JUDGE RIVERA: But - - - but where is there
9 room for interpretation I think is the point here.

10 MR. GREGOR: Exactly, Your Honor.

11 JUDGE RIVERA: Are - - - are not the words
12 clear on their face?

13 MR. GREGOR: I would say no. I would argue
14 actually no.

15 JUDGE RIVERA: What's not clear about - - -

16 MR. GREGOR: The - - - the - - -

17 JUDGE RIVERA: - - - about stenographer in
18 the courtroom?

19 MR. GREGOR: I go back to my old Polish
20 grandmother. Give me a second, Your Honors.

21 JUDGE PIGOTT: Well, before - - - before
22 your Polish grandmother gets here, if - - -

23 MR. GREGOR: I've got a good one, Judge.

24 JUDGE PIGOTT: If - - - I can't wait to
25 hear it. But if - - - if the legislature - - -

1 JUDGE RIVERA: You won't leave without
2 sharing.

3 JUDGE PIGOTT: Why would the legislature
4 say we don't have to do this? I mean they didn't.
5 They said we should do this and then they elected not
6 to. Anyway, your Polish grandmother.

7 MR. GREGOR: Your Honor, in 30 - - -

8 CHIEF JUDGE DIFIORE: Isn't there a
9 definition in the Judiciary Law that applies here?

10 MR. GREGOR: Of stenog - - - stenographic
11 minutes?

12 CHIEF JUDGE DIFIORE: Of stenographer.

13 MR. GREGOR: Of stenographer, there is.
14 However, though, we don't even use the term
15 stenographer anymore, right. We use court reporters
16 now as our lingo.

17 JUDGE PIGOTT: Well - - -

18 MR. GREGOR: That isn't a term we use.

19 JUDGE PIGOTT: - - - it depends on how old
20 you are, you know.

21 MR. GREGOR: Words have meaning, though.
22 Again, this goes back - - - that's - - - that's
23 precisely it. So the thirty - - - the Polish
24 grandmother, my - - - my grandparents are immigrants
25 from Poland, obviously. I grew up being raised by

1 them. Basically, I learned enough Polish. I learned
2 the word for the meaning of the word bathroom. My
3 family immigrants here in around 1895, 1905, whatever
4 it is. Years later, I'm dating a young Polish girl,
5 I start using the word bathroom. She looks at me and
6 she says Rob, why do you keep on saying you're going
7 to go to the outhouse? I was using the word for
8 outhouse in Poland. Now I learned it as bathroom
9 because that's what a bathroom was in 1890 or 1900.
10 We didn't have indoor plumbing. We were poor.
11 Nowadays, outhouse is an outhouse. A bathroom is a
12 bathroom.

13 JUDGE ABDUS-SALAAM: So you disagree with
14 the - - - the defense counsel in the other case where
15 must is not must; is that what you're saying?

16 MR. GREGOR: As brazen as it sounds, Your
17 Honor, and this is amazingly esteemed counsel, I
18 think I do, and yes, I do, actually. And I think
19 words are much more fluid. And is I see my time is
20 almost time. I see that word - - - I see words as
21 much more fluid. I see definition and meaning as
22 much more fluid.

23 JUDGE RIVERA: I - - - I thought your point
24 is it is must but it's what the must is that matters,
25 right?

1 MR. GREGOR: Okay, that's true too.

2 JUDGE RIVERA: That you're - - - you're - -
3 -

4 MR. GREGOR: Actually, yes, the word
5 stenographic minutes, yes.

6 JUDGE RIVERA: Stenographer is this other
7 thing.

8 MR. GREGOR: Correct, right.

9 JUDGE RIVERA: You must have something - -
10 -

11 MR. GREGOR: Right.

12 JUDGE RIVERA: - - - and you're fighting
13 over what's the must that you got to have.

14 MR. GREGOR: And what I'm saying is we do
15 have stenographic minutes. We have that preserved
16 record, that which - - - that the court - - - or that
17 the commission or the legislature was trying to get
18 at it in 1970 but just wasn't economically or
19 financially feasible, and I think that's what really
20 this comes down to is that we meet that requirement
21 in substance. The words are going to shift. The
22 words are always going to change. That's humanity.
23 We develop things. It's not - - -

24 JUDGE RIVERA: And I'm sorry, what - - -
25 how do you deal with the gaps?

1 MR. GREGOR: Gaps, I think you do either a
2 reconstruction hearing or that's when you do revert
3 back to the affidavit of errors.

4 JUDGE RIVERA: Reconstruction hearing.

5 MR. GREGOR: I think there are mechanisms
6 in place, again, imperfect as it is. But ours is not
7 perfect.

8 CHIEF JUDGE DIFIORE: How difficult is the
9 affidavit of errors to prepare?

10 MR. GREGOR: It depends on who prepares it.
11 If it's me - - -

12 JUDGE PIGOTT: It shouldn't.

13 MR. GREGOR: - - - preparing it because I
14 wasn't trial counsel and my client had just gotten
15 out of jail and I couldn't find them, impossible, and
16 that was actually what happened here. He'd gotten
17 out of jail. He didn't give a forwarding address;
18 trial counsel didn't even remember the - - - didn't
19 even remember the matter in the case. What's - - -
20 what's appellant counsel to do legitimately? I mean
21 - - -

22 JUDGE RIVERA: Well - - - well, what - - -
23 as I said in the prior case, opposing counsel
24 mentioned the opportunity to seek an extension of
25 time or coram nobis. Was not that available in your

1 case?

2 MR. GREGOR: In my motion, I did file a
3 request also for the extension of time. That was
4 denied. Coram nobis, we didn't get that far, to be
5 honest. I actually filed and you granted me leave to
6 appeal so - - -

7 CHIEF JUDGE DIFIORE: Thank you, counsel.

8 MR. GREGOR: Thank you, Your Honor.

9 MR. RATHBUN: Good afternoon; Brandon
10 Rathbun for the People of the State of New York,
11 respondent. May it please the court, there's been a
12 lot of talk here today about the ease in which this
13 appeal has taken. The purpose of appeals isn't ease.
14 It's to get it right. The only way to get it right
15 is with a complete and accurate record.

16 JUDGE STEIN: Well, but - - - so are you
17 saying that an affidavit of errors and a return is
18 more accurate than a transcript of - - - of a
19 recording?

20 MR. RATHBUN: If done correctly, yes.
21 Because when you file an affidavit of errors, there's
22 nothing precluding you from also using the transcript
23 to create that affidavit of errors. There's nothing
24 precluding the judge in his return to get that
25 transcript and send it with his return or adopt the

1 transcript as his return. Both appellate and the
2 judge have the ability to do that. The way - - -

3 JUDGE ABDUS-SALAAM: So what comes first,
4 counsel, the affidavit of errors or the transcript?
5 That's a little confusing.

6 MR. RATHBUN: It would be up to the
7 attorney. If he wanted to get the transcript before
8 he did the affidavit of errors, that's a possibility.
9 He could request an extension. I believe he could
10 have up to sixty days if he would file the notice of
11 appeal first, then would give him thirty days to do -
12 - - or, sorry, wait thirty days, file the notice of
13 appeal, then he'd have an additional thirty days to
14 get the affidavit of errors prepared. I believe
15 sixty days is enough to get a transcript provided
16 from the mechanical recording.

17 JUDGE PIGOTT: Do - - - do you have to pay
18 for the recording?

19 MR. RATHBUN: I believe so, Your Honor,
20 yes.

21 JUDGE PIGOTT: And is it - - - is it
22 automatically transcribed or do you have to ask that
23 it be transcribed?

24 MR. RATHBUN: I believe you have to ask to
25 have it transcribed.

1 JUDGE PIGOTT: Because most aren't
2 appealed, right, so they - - - the just get recorded
3 and probably get recorded over, I assume. So - - -

4 MR. RATHBUN: I believe you have to ask the
5 local court to send it to, you know, a transcription
6 of your - - - a transcriptionist of your choice and
7 pay that person to provide the transcript, and I
8 believe that's what was done by Mr. Gregor in this
9 case.

10 JUDGE GARCIA: Counsel, you get - - - you
11 ask for their recording, you get the recording now.

12 MR. RATHBUN: Yes.

13 JUDGE GARCIA: And you can get that fairly
14 quickly?

15 MR. RATHBUN: Yes.

16 JUDGE GARCIA: And then you can make your
17 affidavit of errors off of their recording?

18 MR. RATHBUN: Absolutely, yes. And based
19 on what I'm hearing, the - - - the statute is clear
20 on its face. You know, for 120 years now since
21 Hunter v. - - - or Tompkins v. Hunter, this court has
22 ruled that if the - - - if the verbiage is clear and
23 concise and it's not ambiguous then you must adhere
24 to those words.

25 JUDGE PIGOTT: Who does the return? Is it

1 - - - is it the court or the - - - do you do as the
2 district attorney do it for and on behalf of the
3 court?

4 MR. RATHBUN: The court. From my
5 understanding, the court has done it. In the three
6 appeals I've done out of local courts, the judge has
7 always done that return. And again, he can use the
8 transcript or the recording itself to do that return.
9 I believe the process we have now is good. It is
10 better than what I'm hearing about having it - - -
11 the court change the law. And as was mentioned, the
12 senate has taken this up. They took it up in 2013,
13 and I believe they took it up again last year, and
14 again, it sits in committee, I would assume, because
15 they've decided what we have now is the best that's
16 available. I will draw the court's attention to
17 1970. Tape recorders were available, and they were
18 used in courtrooms at time. Yet, the Bartlett
19 Commission, and then later the legislature, decided
20 not to put anything within the statute that permitted
21 the use of tape recordings and to overcome the need
22 to do an affidavit of errors.

23 CHIEF JUDGE DIFIORE: So when you say the
24 process is improved, is that because you're
25 suggesting that the affidavit of errors with the

1 incorporation of the transcription is a better
2 process? Is that what you're - - -

3 MR. RATHBUN: I - - -

4 CHIEF JUDGE DIFIORE: - - - arguing?

5 MR. RATHBUN: I think it's the best process
6 we have right now, yes. And again, based on the
7 plain language, I believe - - - I don't believe that
8 the terms recorded by court stenographer can be
9 interpreted to mean someone who wasn't there and
10 present, someone who could cut parties off when
11 they're speaking over each or when someone answers a
12 question with um-hum, they can say, I'm sorry, what
13 was that instead of someone weeks later listening to
14 a recording was that um-hum or huh-uh.

15 JUDGE STEIN: That goes to the question of
16 - - - of deficiencies in the recording and - - - and
17 isn't there - - - aren't there ways, as have been
18 discussed, that they can be corrected?

19 MR. RATHBUN: Yes, they can. Re - - - with
20 reconstruction hearings, but I think it would be best
21 for the court in their return to get that transcript.
22 And if there's - - - as you can see in our transcript
23 in this matter, inaudible - - -

24 JUDGE STEIN: But - - -

25 MR. RATHBUN: - - - I mean replete

1 throughout - - -

2 JUDGE STEIN: If - - - so if the recording
3 - - - let's say - - - well, in this case there's a
4 question of - - - of whether it's - - - it's missing
5 some - - - some important parts, but let's say the
6 recording is otherwise just fine and - - - and then
7 all you need for the return or the reconstruction is
8 - - - is that one part that's - - - that's lacking.
9 Isn't that more efficient and effective?

10 MR. RATHBUN: If that's the case, but
11 that's not always the case. All it takes is one
12 time, like we have in this case right here, that
13 shows that it's not always that simple. Now - - - so
14 I believe we should follow the way the statute is
15 written. And whether someone believes it's fair or
16 not fair, there's a lot of things that are fair and
17 unfair in our system. But we have to work within the
18 rules that the - - -

19 JUDGE STEIN: Well, I - - - I mean I don't
20 think that any of us sitting on this bench would - -
21 - would really be anxious to just say well, if, you
22 know, the statute says this and there's no two ways
23 around it, but we're going to change it anyway. I -
24 - - I don't think that's what any of us are - - - are
25 thinking. You know, the question is is whether

1 there's room for interpretation, which, you know,
2 sometimes we do find, based on a statute and - - -
3 and a change in times and a different end processes.
4 So why not here?

5 MR. RATHBUN: In 2007, this court said in
6 People v. Litto the plain mean - - - or sorry, "The
7 plain meaning of the language in a statute must be
8 interpreted in the light and the conditions existing
9 at the time of its passage and construed as the
10 courts would have construed it soon after its
11 passage." These recordings didn't exist in 1970, so
12 there's no way they could have presumed that recorded
13 by court stenographer could be a transcribed minutes
14 from a recording that didn't exist in 1970.

15 In Litto, the court ruled that intoxication
16 under 1192(3) of the VTL doesn't include intoxication
17 by drugs even though I think it's fair to say that
18 many people nowadays would include drugs under the
19 term of intoxication, but when the statute was
20 enacted, intoxication mainly meant inebriated by
21 alcohol. And again, here, in 1970, recorded by court
22 stenographer meant recorded by an individual present
23 in court who is a officer of that court and has taken
24 an oath of office. So I believe looking at the plain
25 language, again, in 1970, would require this court to

1 leave the statute as it is and interpret it to mean a
2 stenographer present there.

3 JUDGE STEIN: You've got the stenographer
4 and the oath. Do we - - - do you have any additional
5 information about there's this list of authorized
6 transcribers, as I understand it. Are they court
7 stenographers that - - - who are under oath, or do we
8 know that?

9 MR. RATHBUN: I do not believe so. I
10 believe it is Section 295 of the Judiciary Law that
11 requires the stenographer to take - - - "shall take
12 complete stenographic notes of each ruling, decision
13 of the presiding judge, and when a trial is by jury,
14 each and every remark, comment of such judge during
15 the trial when requested to do so by either party
16 together with each and every exception taken to any
17 such ruling, decision, remark, or comment by or on
18 behalf of any party in the action." A recording
19 can't do that. You know, a court stenographer knows
20 if he or she got down what each party was saying.
21 We're not going to know that from a recording until
22 much, much later. And again, as I mentioned before,
23 a court stenographer who is present in the courtroom
24 can shut people down, like they've done to me several
25 times, slow me down. You know, that is the purpose

1 of a court stenographer. And again, until there's
2 judicial action, I believe this section needs to be
3 read as it would have in 1970. If there's no other
4 questions, I will rely on my brief.

5 CHIEF JUDGE DIFIORE: Thank you, counsel.

6 MR. RATHBUN: Thank you.

7 CHIEF JUDGE DIFIORE: Counsel.

8 MR. GREGOR: Just to respond to - - - just
9 to respond to just a couple things that Mr. Rathbun
10 brought up. With respect to the bill that was
11 proposed in the senate, there's no record of any
12 discussion one way or another. There's no evidence
13 that - - - other than it getting there, that there
14 was any legislative, really, discussion on - - -

15 JUDGE ABDUS-SALAAM: But we do know that
16 the legislature didn't change the statute. That's -
17 - -

18 MR. GREGOR: That is absolutely correct,
19 Your Honor. And - - - what I'll say is this and this
20 is no dis - - - disrespect to our legislature, but
21 this is a really technical procedural law for a lot
22 of attorneys. I'm trying to imagine people who
23 aren't of the legal world really finding this at all
24 interesting, issue-bound, or even worth voting on or
25 discussing, especially considering the wide panoply

1 of issues facing the state. Now again, that's rank
2 speculation.

3 JUDGE ABDUS-SALAAM: But there was a - - -
4 an amendment to the statute which allowed a thirty-
5 day time frame for filing the notice or - - - or
6 filing the affidavit of errors after the notice of
7 appeal. So it must have been on somebody's radar at
8 some point.

9 MR. GREGOR: Correct, Your Honor. And I -
10 - - I haven't seen any real discussion on it either
11 way and certainly not - - - what was - - - what was
12 proposed in this legislative statute was effectively
13 what I'm arguing for. So I'm not - - - you know, in
14 - - - in all fairness to Mr. Rathbun, at the same
15 point and time, there's no evidence at all this was
16 ever taken up. And as with respect to Mr. Rathbun's
17 comment about the fact that tape recorders were
18 available in the seventies, anybody who's from - - -
19 you know, who - - - who remembers growing up with a
20 tape recorder, that hissing, loud noise. Digital
21 quality has far surpassed anything. Again, not
22 perfect, not a perfect world.

23 JUDGE FAHEY: But even assuming that, is -
24 - - am I correct in saying that the core of your
25 argument is the functional equivalent argument?

1 MR. GREGOR: Absolutely.

2 JUDGE FAHEY: The digital - - - that's the
3 core of your argument then?

4 MR. GREGOR: Absolutely, Your Honor. Yes.

5 JUDGE FAHEY: Okay.

6 MR. GREGOR: And that is all I have unless
7 the court has something for me.

8 CHIEF JUDGE DIFIORE: Thank you, counsel.

9 MR. GREGOR: Thank you very much.

10 (Court is adjourned)

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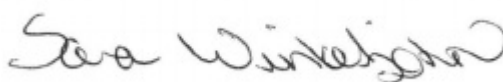
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C E R T I F I C A T I O N

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Glenn S. Smith, No. 103, and People v. Norman E. Ramsey, No. 104 were prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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Agency Name: eScribers

Address of Agency: 700 West 192nd Street
Suite # 607
New York, NY 10040

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