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COURT OF APPEALS

STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

No. 13

WILLIAM FLANAGAN,

Appellant.

20 Eagle Street
Albany, New York 12207
January 12, 2017

Before:

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

Appearances:

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Official Court Transcriber

1 CHIEF JUDGE DIFIORE: Okay. Good
2 afternoon, everyone. The first matter on today's
3 calendar is appeal number 13, the People of the State
4 of New York v. William Flanagan.

5 Counsel.

6 MS. ALDEA: Good morning, Your Honor. I'd
7 like to reserve three minutes rebuttal time, if I
8 may.

9 CHIEF JUDGE DIFIORE: Three minutes?

10 MS. ALDEA: Yes, please.

11 CHIEF JUDGE DIFIORE: You may.

12 MS. ALDEA: May it please the court. My
13 name is Donna Aldea, and I represent Appellant
14 William Flanagan.

15 Your Honors, there cannot be a crime when an act
16 that is committed is authorized. There cannot be a crime
17 for official misconduct when an act that is not performed
18 is discretionary.

19 This court has recognized it, and every
20 commentator that has addressed the statutes that are at
21 issue in this case - - -

22 CHIEF JUDGE DIFIORE: Counsel, do the
23 police have unlimited discretion to determine to not
24 go forward with a felony investigation?

25 MS. ALDEA: Yes. The criminal - - - well,

1 yes and no. The Criminal Procedure Law, specifically
2 Section 140.10, provides that there are instances
3 where arrest is not mandatory, and provides that
4 there are instances where arrest is mandatory. So
5 pursuant to those sections, an officer has a
6 mandatory obligation to arrest.

7 In many of the cases actually cited by my
8 opposing counsel in her brief, where there are
9 domestic violence incidents or other things that
10 require - - -

11 CHIEF JUDGE DIFIORE: What about where
12 there is sufficient evidence, and there is a willing
13 complainant?

14 MS. ALDEA: Then, the Statute provides that
15 an officer may arrest.

16 It is a good thing for police officers - - -

17 CHIEF JUDGE DIFIORE: And what is that
18 Statute?

19 MS. ALDEA: That Statute is Criminal
20 Procedure Law Section 140.10.

21 There - - - it is a good thing for police
22 officers to have discretion. The discretion can be
23 exercised in individual cases to help people that are
24 poor, as well as people that are rich, and in fact, it
25 often is. It is a good thing, for that matter, not just

1 for police officers to have discretion, but for
2 prosecutors to have discretion to drop charges when they
3 don't think the charges should be pursued, sometimes, in
4 the interest of justice.

5 JUDGE GARCIA: But that's really not all
6 what's happening here. Right. I mean, what's
7 happening here, and we all know the record, is that
8 it's back and forth, your client is involved with the
9 school, and ultimately, the property which isn't
10 properly vouchered is returned to the school, there
11 are the other issues surrounding that, and
12 ultimately, he receives gift cards and a watch.

13 So it's not, I go out there and I see a crime
14 being committed, or I don't know if I have enough
15 evidence, it's a discretionary call; this is very
16 different. And I think to analogize it to a discretion in
17 making arrest, is misleading, in a way. It - - - it's not
18 the analogy here.

19 MS. ALDEA: Well, Your Honor, the question
20 before this court, first and foremost, is whether
21 each of the statutory elements was proven. So the
22 statute has, it's true, an element of a mens rea
23 element, which is what Your Honor is getting to. In
24 other words, the - - - the motive for performing the
25 actions or not performing actions.

1 But it - - -

2 JUDGE GARCIA: With the expectation that
3 you're going to receive something, and isn't that
4 critical?

5 MS. ALDEA: Well, that's the mens rea
6 element. But in addition to that - - -

7 JUDGE GARCIA: But haven't we said you
8 can't separate those out with such a bright line?

9 MS. ALDEA: No, Your Honor. Actually, this
10 court has said the opposite. And the Supreme Court
11 has said the opposite as recently as six months ago
12 in its McDonald decision. It has repeatedly been
13 held that the mens rea and the actus reus are
14 separate, and they must be evaluated separately.

15 The mens rea element in this case deals
16 with the intent to obtain a benefit, or in this case,
17 the intent to confer a benefit upon a friend. But
18 the question here is, did the People satisfy the
19 actus reus. For the portion of a Statute under
20 Subdivision (1) that charges the malfeasance, that
21 Statute specifically requires that an unauthorized
22 act be committed.

23 In this case, the only unauthorized act
24 defined by the Penal Law as a bodily movement is, in
25 this case, according to the indictment, the return of

1 the property. But the return - - -

2 JUDGE ABDUS-SALAAM: But counsel, could you
3 have an authorized act that was done for an improper
4 or unauthorized purpose?

5 MS. ALDEA: And that's exactly where we
6 differ. If you have an unauthorized act that is
7 committed, and additionally, it is committed for an
8 illicit purpose, you have a crime. If you have an
9 authorized act, which is what we have here, the
10 return of property when the defendant wants it back,
11 when the complainant wants it back, then you don't
12 have one of the elements that the statute satisfied.

13 And it is a fundamental tenet of statutory
14 construction that you cannot simply ignore one of the
15 elements of a crime. What the prosecution is asking
16 this court to do is to conflate the mens rea element
17 with the actus reus, and it is fundamental criminal
18 law that that cannot be done.

19 Our whole system of justice is premised on
20 the principle that we do not punish someone for their
21 thoughts, but that's what the prosecutor seeks to do.
22 The prosecutor seeks to say, the Statute requires an
23 unauthorized act, practice commentaries, treatises,
24 cases have also held the act has to be unauthorized
25 in addition, separately, in addition to being

1 performed with the intent for a benefit.

2 And the prosecutor is asking this court to
3 fundamentally change all of criminal law, to simply
4 excise the actus reus - - -

5 JUDGE RIVERA: But isn't - - -

6 MS. ALDEA: - - - in the statutory element.

7 JUDGE RIVERA: - - - isn't the point that -
8 - - that you're not authorized to act corruptly, that
9 you're not authorized to do something for a reason
10 that's not lawful under the law, and it is corrupt to
11 do this, because you're trying to help the father of
12 the suspect?

13 MS. ALDEA: Again, that's a conflation of
14 the mens rea element into the element - - -

15 JUDGE RIVERA: Well, that's an expression
16 of what is and isn't authorized.

17 MS. ALDEA: But, Your Honor, what I would
18 say is, more fundamentally, we're bound by the
19 indictment and the crimes that were charged in this
20 case. The indictment in this case charged that the
21 unauthorized act was the return of property to the
22 school.

23 And I would note that that act was
24 absolutely one hundred percent authorized. In fact,
25 the People, in their brief now, have reverted to a

1 theory that was never addressed in the trial, never
2 charged in the accusatory instrument, never before
3 the trial court, which was that this was a violation
4 of Penal Law 450.10 because there was a failure to
5 comply with the technical requirements.

6 And I believe Your Honor asked whether the
7 property was vouchered, or whether the property was
8 photographed, first thing I would say is Penal Law
9 450.10 was complied with. Penal Law 450.10 is
10 designed to protect criminal defendants, not
11 prosecutors, criminal procedure law 450 - - - I'm
12 sorry, Penal Law 450.10 is designed to ensure that a
13 defendant can view property and examine it before
14 it's released to the complainant. Where the
15 complainant asked for the property back, and the
16 defendant is asking for it back after he's examined
17 it, the provision is inapplicable.

18 Additionally, that provision, if you look
19 at it, requires only that notice be given to the
20 defendant of when the property will be returned.
21 Here, that notice was provided. That's what all the
22 emails between Flanagan and Parker showed. It
23 provided notice of this is when the property is going
24 to be returned.

25 CHIEF JUDGE DIFIORE: So let's get back to

1 this whole issue, which I can't get beyond right now.
2 You have a willing complainant who wants to go
3 forward and press a charge.

4 MS. ALDEA: Correct.

5 CHIEF JUDGE DIFIORE: The police have
6 sufficient evidence to conduct their investigation,
7 and even make an arrest here. What is it that - - -
8 I'm not going to ask what motivates, but what is it
9 that allows the deputy commissioner to be involved,
10 to say - - - to halt any forward movement on that
11 investigation.

12 I'm not following what your reasoning is.

13 MS. ALDEA: Well, the first thing. So this
14 goes under the second element - - - the second
15 defense, which is the nonfeasance, the failure to
16 arrest.

17 So first of all, the deputy commissioner
18 himself, as the People conceded at trial, never had
19 an obligation to make an arrest. Secondly, the
20 deputy commissioner, in this case, specifically
21 Flanagan, was - - -

22 CHIEF JUDGE DIFIORE: He runs the
23 department though.

24 MS. ALDEA: Actually, no. The people who
25 were involved in the arrest, at the time he first

1 became involved in this case, he was in charge of the
2 Asset Forfeiture Bureau, and actually, contained
3 within the record in this case - - -

4 CHIEF JUDGE DIFIORE: He had supervisory
5 authority on that department.

6 MS. ALDEA: Yes, and contained within the
7 record in this case is the chain of command. And
8 that chain of command very show - - - very clearly
9 shows that both, in that role and after he was
10 promoted to the second deputy commissioner in charge
11 of special projects, the squad which makes the arrest
12 was never within his chain of command.

13 So he never had the authority to order that
14 squad to do anything. But more importantly, in this
15 case, there's never been any proof by the People that
16 Flanagan ordered a nonarrest. There has never been
17 any email for all of the hundreds of emails,
18 thousands of pages of testimony that this court has
19 before it - - -

20 JUDGE RIVERA: There's no evidence - - -

21 MS. ALDEA: - - - not one - - -

22 JUDGE RIVERA: - - - from which you could
23 have a reasonable inference?

24 MS. ALDEA: No, Your Honor, there is none.
25 Because he was involved in this case for a very, very

1 brief period of time. His involvement in this case,
2 and again, we're limited to the indictment. The
3 indictment charges that he was involved in this case
4 only from June of 2009 until September 1st of 2009,
5 when the property was returned.

6 Now, during that period of time, what was
7 going on is, Principal Poppe had clearly expressed
8 that she wanted the police department to hold off.
9 Principal Poppe had clearly expressed that she wanted
10 the property back to the school. The property,
11 initially, two coconspirators, charged coconspirators
12 wound up trying to coerce her to sign a withdrawal of
13 prosecution form as a precondition to getting back
14 the property, which was illegal, and was
15 impermissible, under the Criminal Procedure Law and
16 the Penal Law, because there is no such precondition
17 required. You can return the property to a
18 complainant without them dropping the charges.

19 And so, during the time that Flanagan got
20 involved, far from joining that conspiracy, what he did is
21 he got a call, or he - - - he was approached by Gary
22 Parker and said, hey, the school wants the property back,
23 I want to give them the property back, they may decide not
24 to prosecute my son if they get the property back. Why
25 can't we give it back to them? I don't understand.

1 CHIEF JUDGE DIFIORE: Does the district
2 attorney have a role in this process?

3 MS. ALDEA: Not at all, because, at this
4 point, there was not yet a prosecution. At this
5 point, there was not yet an arrest, and so the
6 District Attorney's Office wasn't involved. There
7 was no accusatory instrument that had yet been filed,
8 which would have then involved the courts.

9 JUDGE ABDUS-SALAAM: So counsel, I just
10 want to go back to the malfeasance again, about an
11 authorized act. Not an unauthorized act, but an
12 authorized act, and then you have a problem later
13 because the police, for example, are doing something
14 that is unauthorized.

15 For example, police officers escort a drunk
16 individual back to her apartment. Now, that's
17 authorized, right, they should do that.

18 MS. ALDEA: Right.

19 JUDGE ABDUS-SALAAM: And then they get to
20 the apartment, and then they want to make a date of
21 it. Is that prosecutable as misconduct?

22 MS. ALDEA: Well, so there's actually a
23 case that dealt with that scenario, that I think is
24 addressed. But the unauthorized act that was charged
25 there was actually that the officer failed to report

1 where he was going, and entered the apartment without
2 it being part of his assignment to do it.

3 So the unauthorized act was not conflated
4 with the mens rea element; it was separate from it.

5 He wasn't authorized to enter the apartment, and
6 he committed that unauthorized act for the illicit purpose
7 of attempting to obtain sexual relations. That's what has
8 always been required.

9 And I just want to note on that point that
10 there's another problem with the prosecution's theory on
11 all of this, which is this.

12 The prosecution necessarily assumes that there
13 is - - -

14 JUDGE RIVERA: Is he authorized to try and
15 return it if - - - if other police have determined
16 it's not appropriate to return it?

17 MS. ALDEA: The property?

18 JUDGE RIVERA: Yes.

19 MS. ALDEA: He is. Because the Penal Law
20 absolutely confers authority to the police - - -

21 JUDGE RIVERA: But if - - -

22 MS. ALDEA: - - - to return property.

23 JUDGE RIVERA: - - - but if that conflicts
24 with - - - you say it's discretionary, another
25 discretionary determination, not - - - not to return

1 the property.

2 MS. ALDEA: Actually - - -

3 JUDGE RIVERA: Is he authorized then, to go
4 beyond that discretion and exercise his own?

5 MS. ALDEA: Actually, the return of
6 property is not discretionary; it is mandated that
7 property be returned. An arrest is discretionary,
8 but the return of property is not.

9 JUDGE RIVERA: But if there's a
10 disagreement about whether or not that should be
11 returned.

12 MS. ALDEA: Then, in that case, if there's
13 ever a discretion that can be exercised, it cannot
14 constitute a crime, as this court announced in People
15 v. LaCarrubba. Because to find that there is
16 criminal - - - criminal liability for failing to do
17 something that is discretionary is to create an
18 unconstitutionally vague statute. And that is never
19 provided.

20 CHIEF JUDGE DIFIORE: Thank you, counsel.

21 MS. ALDEA: That's what LaCarrubba was
22 about.

23 CHIEF JUDGE DIFIORE: Thank you.

24 Counsel.

25 MS. LEVY: Good afternoon, Your Honors.

1 Yael Levy for the Office of the Nassau County
2 District Attorney.

3 Your Honors, this defendant, as second deputy
4 commissioner of the Nassau Police Department, had an
5 obligation to investigate and enforce the law without fear
6 or favor.

7 JUDGE STEIN: Are you saying he, himself,
8 had that obligation, or those under him, or over whom
9 he had authority, had that obligation?

10 MS. LEVY: He had as much as an obligation
11 to make sure that the law was enforced without any
12 favor, as any other officer in the department. Every
13 police officer has that obligation.

14 JUDGE STEIN: Well, how - - - how does - -
15 - how does a police officer know when an arrest must
16 be made? In other words, you know, I can think of
17 several scenarios, one in which maybe there are
18 multiple reasons why an officer decides to not make
19 an arrest. Some of which may be appropriate, and
20 some of which may not be.

21 But how - - - how - - - how does he or she
22 know, for example here, where he, sort of, indirectly
23 had information from the complainant, as the record
24 indicates, not - - - he - - - he wasn't directly
25 involved with Ms. Poppe, and there was some

1 indication that she had asked that it be - - - that
2 the investigation be put on hold, and - - - and they
3 clearly wanted the property back. So how does - - -
4 how does the officer know that it is unauthorized for
5 him to return that property or to fail to arrest?

6 MS. LEVY: Okay. In this scenario, because
7 I can't answer the question in the abstract, because
8 each of these scenarios turns on the facts.

9 In this scenario, this defendant had unambiguous
10 notice that it was unauthorized to return this property.
11 First of all, he was getting his information exclusively
12 from Gary Parker. He wasn't getting information from
13 Poppe directly, or even indirectly, that she wanted this
14 put on hold.

15 And she did send an email - - -

16 JUDGE ABDUS-SALAAM: Counsel - - -

17 MS. LEVY: - - - to - - -

18 JUDGE ABDUS-SALAAM: - - - I'm sorry to
19 interrupt you - - -

20 MS. LEVY: Yeah.

21 JUDGE ABDUS-SALAAM: - - - but you said
22 it's unauthorized to return the property. Under what
23 statute or what - - -

24 MS. LEVY: I'm not saying that it's
25 unauthorized in general to return stolen property to

1 a complainant who wants it back. I'm saying it was
2 unauthorized in this scenario, because of the purpose
3 for which it was undertaken. I was going to - - -
4 getting to that, Your Honor. So - - -

5 JUDGE ABDUS-SALAAM: So you're - - - you're
6 saying that there are not two elements to the crime;
7 that there has to be an unauthorized act on its own,
8 and then the mens rea to - - - for an un - - -
9 unauthorized purpose. You're saying those two things
10 are hand-in-hand, they go together, they're stitched
11 together - - -

12 MS. LEVY: No.

13 JUDGE ABDUS-SALAAM: - - - and they can't
14 be set apart?

15 MS. LEVY: You - - - okay. I'll - - - I'll
16 explain.

17 First of all, Your Honor, the purpose here was
18 to suppress the arrest of Zach Parker. The benefit was to
19 make his father happy. So the mens rea, with the intent
20 to confer a benefit, is different than the unauthorized
21 purpose here, which the - - - was the return of property
22 in - - -

23 JUDGE STEIN: But where does the Statute
24 refer to unauthorized purpose? The Statute refers to
25 intent to benefit and - - - and by an authorized act.

1 MS. LEVY: The Statute, actually, doesn't
2 say for the actus reus element unauthorized act. It
3 actually says an act relating to his office, but
4 constituting an unauthorized exercise of his official
5 functions.

6 With regard to the knowledge element, it
7 then says, knowing that the act is unauthorized.
8 With act? The act relating to his office, but
9 constituting an unauthorized exercise of a function,
10 an official function which he is generally authorized
11 to perform. You can't exercise - - -

12 JUDGE STEIN: Well, that sounds to me more
13 like the - - - the officer that escorts the woman
14 back to her apartment. The officer is authorized, at
15 times, as part of his function, to enter into
16 people's apartments. But in this particular case, he
17 wasn't authorized because he hadn't called ahead, and
18 he hadn't - - - that - - - that seems - - -

19 MS. LEVY: Okay.

20 JUDGE STEIN: - - - to be a different
21 scenario.

22 MS. LEVY: Let me give you a different
23 scenario that - - -

24 JUDGE RIVERA: Wait - - - wait a minute.
25 Am I understanding that your argument is that an

1 officer is never authorized, so it can never be an
2 authorized act, to exercise their duties and
3 obligations under the law to benefit someone, to
4 gather benefit for themselves?

5 MS. LEVY: I'm saying, when an officer
6 commits an act that the officer is generally
7 authorized to perform, for an unauthorized purpose,
8 coupled with the intent to confer a benefit, or
9 deprive someone of a benefit, that is official
10 misconduct by malfeasance. And - - -

11 JUDGE FAHEY: So - - - so - - - so our
12 purpose here then, is not to look at the act, because
13 the act was clearly authorized. The return of
14 property - - - it's authorized. You're saying it's
15 unauthorized totally?

16 MS. LEVY: I'm saying that the way - - -

17 JUDGE FAHEY: I thought you were saying - -
18 - and just so I'm clear, and you can explain it to me
19 then. I thought you were saying that his intent was
20 to obtain a benefit in violation of the Statute, but
21 the act itself was not unauthorized.

22 MS. LEVY: The act of returning stolen
23 property, in a vacuum, is an authorized act.

24 JUDGE STEIN: But didn't - - - I thought
25 they wanted the property back. Maybe I read the

1 record wrong, but I - - - the way I read it is they
2 wanted their property back. They kept - - - they - -
3 - they were at the point where they needed it back.

4 MS. LEVY: The school certainly wanted the
5 property back, but not so badly that the school did
6 not want Zach arrested. In fact - - -

7 JUDGE FAHEY: No, I understand that. But
8 they did want the property back; that is clear.

9 MS. LEVY: Of course they wanted their - -
10 -

11 JUDGE FAHEY: Okay.

12 MS. LEVY: - - - stolen property back.

13 JUDGE FAHEY: All right.

14 MS. LEVY: I'm not disputing that. But
15 what I am saying is that when an act is undertaken,
16 even if it's generally authorized for a purpose which
17 is completely unauthorized - - -

18 JUDGE FAHEY: So it's the purpose, not the
19 act then, because the act is authorized. It was
20 requested by the person who had the property taken
21 from them, and the - - - there doesn't seem to be any
22 violation of any statute or regs, and that he's
23 supposed to give it back. So we're really talking
24 about his intent, right?

25 MS. LEVY: We are talking about two

1 different things when we say intent and purpose.
2 Because the intent to benefit is to benefit Gary
3 Parker. The purpose is to suppress an arrest.

4 I'm not conflating purpose and intent to
5 confer a benefit. They are independent of each
6 other, and - - - and let me just pause it, for
7 example, the Bridgegate scenario. Okay.

8 CHIEF JUDGE DIFIORE: Before you go there -
9 - -

10 MS. LEVY: Sure.

11 CHIEF JUDGE DIFIORE: - - - is there an
12 authorized way in which to return property - - -

13 MS. LEVY: There is.

14 CHIEF JUDGE DIFIORE: - - - to a victim?

15 MS. LEVY: Absolutely. There is an
16 authorized way, and it's actually set forth in
17 450.10. And the - - - the Statute requires notice
18 upon fifteen days to the defense, and it presumes
19 notice to the prosecution. And the best evidence
20 that it presumes notice to the prosecution, aside
21 from the practice commentary, where Judge Donnino
22 said it does, is the fact that the prosecution, if
23 you look at paragraph 2 of the Stat- - -

24 JUDGE STEIN: Did you raise this issue in -
25 - - in your - - - in the indictment, or in the bill

1 of particulars, or - - -

2 MS. LEVY: Which issue, Your Honor?

3 JUDGE STEIN: The issue about this Statute
4 450.10.

5 MS. LEVY: Well, the judge ended up giving
6 a 450.10 charge. We didn't indict him for not
7 complying specifically with 450.10, but we did indict
8 him for not performing do - - - well, okay. For the
9 malfeasance count, we - - - we indicted him very
10 specifically for directing a subordinate to return
11 recovered stolen property to a cooperative
12 complainant in an open criminal investigation.

13 JUDGE STEIN: Is there any evidence that he
14 directed whoever was going to return this property
15 not to comply with the Statute in doing so?

16 MS. LEVY: There is plenty of evidence that
17 he communicated the nonarrest objective. And because
18 he communicated the nonarrest objective to - - - to
19 the sergeant who oversaw the squad, that was Sharpe,
20 who, in turn, communicated it to Koffi (ph.), Koffi
21 understood, as he testified, that there was not going
22 to be an arrest, because higher-ups were not
23 interested in seeing an arrest.

24 There was testimony to that effect; there
25 were emails to that effect. And because Koffi

1 understood that there would never be an arrest in
2 this case, he did not undertake to comply with the
3 normal protocols for preserving property for a future
4 case.

5 So that is how detective - - - excuse me.
6 That is how Deputy Commissioner Flanagan gave the
7 direction. He gave it to Sharpe. He made very clear
8 the nonarrest objective.

9 And I can go through the evidence, Your Honor,
10 if you'd like. I've done it in my brief, and I'd be happy
11 to do it here. Would you like me to do that, to go
12 through the dates and - - - and the particular emails,
13 because - - -

14 CHIEF JUDGE DIFIORE: I don't think - - -

15 JUDGE FAHEY: No.

16 CHIEF JUDGE DIFIORE: - - - that's
17 necessary.

18 JUDGE FAHEY: No, I don't - - -

19 MS. LEVY: Okay. Because I'd be happy to.

20 But I - - - I just want to get back to the
21 Bridgegate scenario error, because the act of closing
22 lanes on a public road is a generally authorized act. The
23 purpose to punish the mayor of Fort Lee, it makes the act
24 unauthorized. The benefit is to the Governor of the State
25 of New Jersey. It's not the same as the purpose; the

1 purpose is to punish somebody. So you can't define - - -

2 JUDGE STEIN: Is that statute the same as
3 this statute, under which that Governor was - - -

4 MS. LEVY: I couldn't say. I could - - -

5 JUDGE STEIN: Well, isn't that - - - isn't
6 that - - -

7 MS. LEVY: But what I'm saying is, if we
8 define - - -

9 JUDGE STEIN: I'm not saying that this may
10 or may not be illegal.

11 MS. LEVY: Um-hum.

12 JUDGE STEIN: The question is, is whether
13 the elements of the crime, as set forth in our Penal
14 Law have been established.

15 MS. LEVY: They have been established, Your
16 Honor, because the act has to relate to the officer's
17 official function. It has to be an exercise of an
18 official function. Which means that generally, under
19 certain circumstances, the public official has the
20 authority to perform the act.

21 And it's only by reference to the purpose
22 for which the act is being performed, that it can
23 become unauthorized.

24 The actus reus element, in the indictment,
25 incorporates that purpose to justify the nonarrest. It's

1 separate from the benefit, which we said was in order to
2 benefit the target's father. We're not conflating purpose
3 with intent. And that's true in so many cases that were
4 decided by the Appellate - - -

5 JUDGE RIVERA: Let me clarify again - - -

6 MS. LEVY: Okay.

7 JUDGE RIVERA: - - - the - - - the
8 difference between intent and purpose. The intent
9 was to do what, and the purpose was to do what?

10 MS. LEVY: The intent was to benefit Gary
11 Parker, who was a benefactor of the police
12 department, and a personal friend of this defendant,
13 who had raised int - - -

14 JUDGE RIVERA: And the purpose?

15 MS. LEVY: And the purpose was to suppress
16 an arrest.

17 JUDGE STEIN: Isn't that the same thing?

18 MS. LEVY: It's not the same thing, Your
19 Honor, because suppose - - -

20 JUDGE STEIN: The suppression of the arrest
21 is the benefit to Parker.

22 MS. LEVY: Supposed instead of trying to
23 benefit Parker - - - suppose - - - suppose this
24 defendant had no relationship with Gary Parker, but
25 he - - - he had some animosity toward the principal

1 of this school. Okay. Just didn't want to do what
2 she wanted the police to do.

3 So he suppressed the arrest, instead, to
4 deprive the principal, Principle Poppe, of a benefit,
5 the benefit being, seeing that this person, whom she
6 asked to be arrested, be arrested.

7 You see, I've changed the benefit, but the
8 purpose is still un - - - makes the act unauthorized.
9 Suppressing an arrest for no legitimate discretionary
10 purpose is an unauthorized act. And this defendant was
11 not exercising discretion. There's not a shred of
12 evidence in the record that he was exercising discretion.
13 In fact, he completely abdicated his discretion. He
14 wasn't considering whether this was an individual, the
15 seventeen-year-old Zach, who was worthy of some sort of
16 lenity. That's not why he did this.

17 JUDGE ABDUS-SALAAM: In what capacity was
18 he the arresting officer? Any officer anywhere can
19 just arrest someone who's not in their precinct, not
20 - - - you know, they may not even be even - - - they
21 may not even be related to this crime, they just - -
22 - they hear about it and they're supposed to go make
23 the arrest; is that it?

24 MS. LEVY: That's further evidence of how
25 unauthorized his act was, because he stepped into a

1 case where he had no business stepping in. He - - -

2 JUDGE ABDUS-SALAAM: Yeah, but my - - - my
3 point is, he stepped into a case, you're saying he
4 had no business stepping into it, but - - -

5 MS. LEVY: Um-hum.

6 JUDGE ABDUS-SALAAM: - - - yet, he should
7 have arrested this young man. So - - -

8 MS. LEVY: If he's - - -

9 JUDGE ABDUS-SALAAM: - - - doesn't that
10 suggest your - - - your - - - you want your - - - you
11 want to eat your cake and - - -

12 MS. LEVY: I understand.

13 JUDGE ABDUS-SALAAM: - - - have it too.
14 Right. I mean - - -

15 Tarsia, right, People v. Tarsia.

16 He - - - he stepped into a case where he was not
17 in the chain of command and was not involved. But once he
18 got involved, he had an obligation, as does every police
19 officer on the force, and that obligation was to exercise
20 sound discretion and reasonable judgment, and he knew that
21 his subordinates would do as he asked they would, in this
22 hierarchical bureaucratic system that is the Nassau Police
23 Department, and they did. They were all concerned - - -

24 JUDGE STEIN: So are you - - - are you
25 suggesting that when an act is discretionary, we - - -

1 - we determine based on - - - we make a distinction
2 based on whether the discretion is a - - - a
3 reasonable exercise of discretion?

4 MS. LEVY: I'm saying, Your Honor, that
5 it's a case-by-case determination. These cases turn
6 so much on their facts, it's impossible to say under
7 every circumstance, you know, an act is or is not a
8 proper exercise of discretion. It depends. Under
9 these circumstances, the evidence - - -

10 JUDGE STEIN: But doesn't - - - doesn't the
11 actor, doesn't the defendant need to know?

12 MS. LEVY: Yes.

13 JUDGE STEIN: And knowledge is certainly a
14 part of this.

15 MS. LEVY: And how did - - -

16 JUDGE STEIN: So how did he know?

17 MS. LEVY: I'm glad you asked.

18 JUDGE STEIN: How did you prove that he
19 knew?

20 MS. LEVY: Okay. I've been waiting to get
21 to this part of argument, Your Honor. He knew for
22 many reasons. First of all, he did know, from the
23 Policy 4001, and from the Procedure 8105, that it was
24 the duty of all members of the force, all members, to
25 detect and arrest offenders, and that they will

1 conduct investigations, and those investigations have
2 to be complete and thorough, and that they must - - -
3 it says, effects a summary arrest.

4 The manual, actually says, with regard to the
5 procedures, even though it says they provide - - -

6 JUDGE STEIN: Well, doesn't that talk about
7 also reaching another acceptable resolution?

8 MS. LEVY: An acceptable one. One that is
9 acceptable to all the parties involved, which I would
10 imagine would involve reaching out to those parties
11 directly, and ensuring that this is, in fact, the
12 result, the resolution that they want. There's no
13 evidence that he ever reached out to the school to be
14 sure that this was the resolution that the school was
15 seeking.

16 CHIEF JUDGE DIFIORE: Was there any
17 evidence that the police did take any investigative
18 steps in this?

19 MS. LEVY: None. None, Your Honor. There
20 was a video, a surveillance video of Zach on the
21 premises of the school, they didn't collect it.
22 There was a custodian who saw him on the premises,
23 they never interviewed the custodian or took the
24 custodian's statement. There was another dean of
25 students on the premises at the time, he was not

1 interviewed, his - - - his statement was not taken.

2 The did not - - - when they were notified that
3 Kathy Parker (ph.) was returning her other stolen property
4 to the school, Poppe notified the police that that stolen
5 property was being returned, they had an obligation to
6 make - - - to preserve that property, by, at the very
7 least, photographing it and recording its serial numbers.

8 Nobody showed up to do that when Kathy Parker
9 returned that property. They didn't interview anybody
10 involved in this case, except for the first officer who
11 showed up, that was Samantha Sullivan (ph.), who
12 interviewed Poppe and - - - and wrote the 32-B out, and
13 the 32-B said that Poppe wanted an arrest.

14 That was never withdrawn. And she made that
15 arrest objective clear again and again, every time she
16 spoke with officers from the 7th Squad. Vasterino (ph.)
17 came to return property, he put a decline to prosecute
18 under her nose, the property was sitting there in front of
19 her in a box, she could have had it back at that moment,
20 if she wanted it so badly. She didn't sign that decline
21 to prosecute, she let the detective take the property back
22 to the precinct.

23 CHIEF JUDGE DIFIORE: Thank you, counsel.

24 MS. LEVY: Thank you.

25 CHIEF JUDGE DIFIORE: Ms. Aldea, what about

1 your co-counsel's representation that there weren't
2 any investigative steps taken?

3 MS. ALDEA: Your Honor, this investigation
4 was complete by day three. Long before William
5 Flanagan got involved, this investigation was
6 complete.

7 CHIEF JUDGE DIFIORE: Did they get the
8 videotape and look at the videotape and talk to the
9 witnesses?

10 MS. ALDEA: They - - - they looked at the
11 videotape, not only that, the property was shown to
12 the suspect's father, the suspect's father said that
13 he recognized it, the suspect made a full confession
14 to the school, which is memorialized in the - - - in
15 the emails that are provided. The only question here
16 was whether an arrest, in addition - - -

17 CHIEF JUDGE DIFIORE: Then why didn't they
18 - - -

19 MS. ALDEA: - - - to a suspension.

20 CHIEF JUDGE DIFIORE: - - - go forward and
21 make the arrest?

22 MS. ALDEA: Your Honor, I - - - I'm not - -
23 - the court's job is not, in this case, to determine
24 whether that was wise or unwise. The question is
25 whether it violated - - - whether it constituted a

1 crime.

2 CHIEF JUDGE DIFIORE: Correct.

3 MS. ALDEA: Not whether it violated a
4 policy or procedure, which are not rules, which are
5 not mandatory, which are couched in discretion. And
6 what I'd like to say is - - -

7 CHIEF JUDGE DIFIORE: Well, doesn't that go
8 toward whether it was an "unauthorized" act?

9 MS. ALDEA: No, Your Honor, it does not.
10 Because the unauthorized act has to be unauthorized
11 for violating some provision that makes it mandatory.

12 450.10, in this case, was completely
13 complied with. And I didn't get a chance to say it
14 before, but in this case, there was an inventory that
15 noted the serial number of all the property that was
16 returned. It's provided in the record for this
17 court.

18 There was a signed receipt by the
19 complainant saying, we got this property back. There
20 were photographs taken of the items with serial
21 numbers that are reproduced in the appendix. They're
22 not as clear in the reproduced version as the
23 original, but they're there. The inventory,
24 everything was complete.

25 To say that a prosecution could not go

1 forward because there was a return of property is, on
2 its face, ridiculous. Prosecutions go forward all
3 the time without the property ever been recovered,
4 and every single police witness called by the People
5 in this case said that they understood that the
6 return of the property had nothing to do with the
7 ability to arrest. And that's what I wanted to say,
8 critically, before.

9 JUDGE ABDUS-SALAAM: Could you address - -
10 - could you address your adversary's point that
11 intent and purpose are two different things, and that
12 the act only has to relate to the official act of the
13 - - - it only has to relate to the official duties of
14 the - - - of the defendant, not that it has to be
15 "unauthorized"?

16 MS. ALDEA: Well, Your Honor, the statutory
17 language is clear that there does need to be
18 knowledge that the act was unauthorized, and there is
19 an element that this court has interpreted, that the
20 act has to be an authorized.

21 It is true that the Statute has two mens
22 rea requirements, as this court identified in People
23 v. Feerick. One, an intent to obtain a benefit, and
24 one, that it be knowing, in other words, that also
25 being a mens rea or a mental state. But there's no

1 question that there's still a need for an actus reus.

2 What - - - what I wanted to say, critically, is
3 that the flaw - - -

4 JUDGE RIVERA: So you're saying, he - - -
5 he believed that he was totally authorized as an - -
6 - as an officer to seek to have this property
7 returned with the intent that the charges are dropped
8 so that the father's son is not prosecuted? He
9 understood that that was his role as an officer, that
10 that is what an officer does. Is that your argument?

11 MS. ALDEA: Well, Your Honor, the act was -
12 - -

13 JUDGE RIVERA: No, no - - -

14 MS. ALDEA: - - - authorized.

15 JUDGE RIVERA: - - - is that - - -

16 MS. ALDEA: He - - - he understood that it
17 was - - -

18 JUDGE RIVERA: - - - listen to my question.

19 MS. ALDEA: - - - authorized. He also
20 understood.

21 JUDGE RIVERA: He understood that he could
22 pursue conduct in an effort to have property
23 returned, in the hopes that charges would not be
24 pursued - - -

25 MS. ALDEA: No, Your Honor.

1 JUDGE GARCIA: - - - wait. So they go
2 there, they try to get the school to sign a release,
3 and say, okay, we're giving you the property back,
4 you're not going to prosecute, they won't do that,
5 and that's clearly unauthorized.

6 But then, it seems, and the jury can
7 reasonably conclude this, that they decide that
8 giving the property back will make it easier for us
9 to shut this case without an arrest, and that's what
10 happens. So what - - - I don't understand why you
11 have to directly link it to, you could or you could
12 not legally prosecute them without that evidence.

13 MS. ALDEA: Because the Statute requires
14 it, and the indictment - - -

15 JUDGE GARCIA: Where in the Statute - - -

16 MS. ALDEA: - - - was drafted that - - -

17 JUDGE GARCIA: - - - does it require - - -

18 MS. ALDEA: The Statute requires that the
19 actus reus, in this case, the return of property, be
20 - - - be performed with the intent to obtain a
21 benefit.

22 JUDGE GARCIA: Right.

23 MS. ALDEA: Now, this court - - -

24 JUDGE GARCIA: The benefit there was, it's
25 more likely they won't go forward with the

1 prosecution if we can shut them up and give them
2 their property back.

3 MS. ALDEA: But here's the problem with
4 that. There's a difference between getting a signed
5 withdrawal, which means the case is dead, and between
6 - - -

7 JUDGE GARCIA: It's a degree - - -

8 MS. ALDEA: - - - hoping - - - no.

9 JUDGE GARCIA: It's a - - - it's a degree
10 issue.

11 MS. ALDEA: It's not, Your Honor. And
12 People v. Bac Tran, and I will read you the quote,
13 and this is the case - - - the case that was cited by
14 the prosecution. This court specifically said that
15 in that case, the defendant's hope - - - the
16 prosecution argued that the defendant's hope that the
17 benefit bestowed would induce a forbidden favor, this
18 court said, a mere hope does not furnish criminal
19 liability. Because a mere hope is different than
20 actually procuring the result.

21 What the prosecution has done on appeal is
22 they've tried - - - tried to say that ensuring a
23 result, guaranteeing a result is the same thing as
24 performing an authorized act, which they've conceded
25 as authorized, an authorized act with the hope that

1 maybe it'll induce the school to drop the charges.
2 And that is not permissible.

3 And the last thing I want to say is that my
4 - - - my adversary has now transformed the argument
5 before this court into a question as to whether
6 discretionary acts can be criminalized. The United
7 States Supreme Court in Grayned v. City of Rockford
8 said, a vague statute impermissibly delegates basic
9 policy determinations to the police, and eventually
10 to judges and juries, "for resolution on an ad hoc
11 and subjective basis with the attendant dangers of
12 arbitrary and discriminatory application."

13 If there is discretion to act, then the act
14 cannot be criminal. If there is discretion to act,
15 according to LaCarrubba, according to the United States
16 Supreme Court in Grayned v. City of Rockford, then it
17 would be unconstitutionally vague to predicate criminal
18 liability on that act.

19 So whether we think that Flanagan acted
20 commendably or contemptuously, the fact - - -

21 JUDGE RIVERA: But counsel, if - - -

22 MS. ALDEA: - - - is the actus reus - - -

23 JUDGE RIVERA: - - - there was - - -

24 MS. ALDEA: - - - is not satisfied.

25 JUDGE RIVERA: - - - a clear express policy

1 that says, an officer cannot exercise discretion in
2 order to gain favor or to grant a favor to someone
3 else - - -

4 MS. ALDEA: If there was a clear - - -

5 JUDGE RIVERA: - - - would that - - - and -
6 - - and they did that - - -

7 MS. ALDEA: If their - - -

8 JUDGE RIVERA: - - - is that authorized?

9 MS. ALDEA: If there was a clear rule - - -

10 JUDGE RIVERA: Yes, that's what I'm asking.

11 MS. ALDEA: - - - not a policy, because the
12 policies and procedures are, just like the code of
13 ethics was in LaCarrubba, discretionary, couched with
14 discretion. But if there was a mandatory rule which
15 said that, then I would agree with Your Honor, that
16 violation of that rule could constitute the finding
17 of - - -

18 JUDGE RIVERA: And again - - -

19 MS. ALDEA: - - - for an authorized act.

20 JUDGE RIVERA: - - - your - - - your
21 argument is that this officer could believe that an
22 officer could do exactly what I said, and that is
23 wholly within the authority that they have.

24 MS. ALDEA: This officer, not only could
25 believe, but knew that when property is requested by

1 a complainant in a case, and the defendant wants it
2 returned, it can and should be returned.

3 And this officer, further, properly exercised
4 discretion during the period in which he was involved in
5 returning the property, and waiting to see what the
6 complainant would do next.

7 We're talking about charges limited to the
8 indictment. Not charges - - - now, the prosecutor is
9 claiming he should be - - - he should be prosecuted or
10 found guilty for the police not inventorying property that
11 never came within their possession. That was never
12 charged; that was never even litigated at trial. And
13 that's how this prosecution has evolved.

14 It's not all bluster for the trial - - - for the
15 trial attorney to have argued in this case that he was
16 literally playing whack-a-mole throughout this
17 prosecution, because he was. The prosecution's theory
18 changed at every point. When their indictment collapsed
19 because they couldn't prove the elements that they
20 alleged, which include that the compl - - - included that
21 the school never asked for the property, when all of that
22 was revealed false and it collapsed, they changed their
23 theory, and were permitted to do it below.

24 And then on appeal, in the Appellate Division,
25 they changed their theory. And then again, before this

1 court, they changed their theory. And now, in oral
2 argument, they change their theory again.

3 CHIEF JUDGE DIFIORE: Thank you, Ms. Aldea.

4 MS. ALDEA: We're stuck to the indictment.

5 Thank you.

6 (Court is adjourned)

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

I, Meir Sabbah, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. William Flanagan, No. 13 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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