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COURT OF APPEALS  
STATE OF NEW YORK

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PEOPLE,

Appellant,

-against-

No. 6

CASIMIRO REYES,

Respondent.

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20 Eagle Street  
Albany, New York  
January 3, 2018

Before:

CHIEF JUDGE JANET DIFIORE  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE LESLIE E. STEIN  
ASSOCIATE JUDGE EUGENE M. FAHEY  
ASSOCIATE JUDGE MICHAEL J. GARCIA  
ASSOCIATE JUDGE ROWAN D. WILSON  
ASSOCIATE JUDGE PAUL FEINMAN

Appearances:

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1 CHIEF JUDGE DIFIORE: Appeal number 6, People of  
2 the State of New York v. Casimiro Reyes.

3 MR. ROSS: May I request two minutes rebuttal,  
4 please?

5 CHIEF JUDGE DIFIORE: How many - - - how much  
6 time, sir?

7 MR. ROSS: Two minutes.

8 CHIEF JUDGE DIFIORE: Yes, you may.

9 MR. ROSS: Okay. May it please the court, my  
10 name is Thomas Ross. I represent the appellant in this  
11 case. The evidence here was legally sufficient to prove  
12 that the defendant was part of an agreement that shared the  
13 intent of his fellow co-conspirators in the gang that the  
14 arson at Fifty-seventh Street - - -

15 CHIEF JUDGE DIFIORE: So what is the concrete and  
16 unambiguous expression of his intent to commit a crime  
17 here?

18 MR. ROSS: Well, the evidence showed a sequence  
19 of events which targeted Juan Kuang beginning - - - it  
20 lasted several days. It started with him retaliating over  
21 him just trying to leave the gang and eventually when he  
22 stabbed someone they were retaliating for that. It was a  
23 series of - - - the defendant was involved in every - - -

24 JUDGE WILSON: The indictment doesn't charge him  
25 with a series, though. The indictment charges him with a



1 specific arson on a specific date, right?

2 MR. ROSS: It charges him with conspiracy. He  
3 wasn't charged with the arson itself.

4 JUDGE WILSON: The conspiracy to commit that  
5 arson?

6 MR. ROSS: To commit - - - to commit - - - yeah,  
7 that's true. But the - - - the one event that is most  
8 telling is the fact that there was evidence he was - - -  
9 participated in the attempted arson on the Eighteenth  
10 Avenue Apartment.

11 JUDGE FAHEY: Right, but that's not what the  
12 evidence shows on this date. The evidence shows on this  
13 date that he was on his way to take revenge against another  
14 gang, Patrias I believe they were - - - were called. Isn't  
15 that correct?

16 MR. ROSS: That's true, but - - -

17 JUDGE FAHEY: All right. So - - - so that being  
18 the case then I guess the - - - it seemed that he may have  
19 been involved in a conspiracy to commit an assault, but I  
20 guess I'm finding a hard time to point in the record where  
21 you can say that there was an agreement by him to - - - to  
22 commit an arson or to participate or engage in an arson  
23 that's concrete and unambiguous.

24 MR. ROSS: Well, it - - - there's no one  
25 particular - - -



1 JUDGE FAHEY: Well, how about this. I understand  
2 that because clearly there's a criminal conspiracy. People  
3 aren't signing a contract and agreeing to go out and commit  
4 a crime. We understand that, but I - - - you need to point  
5 in the record to a particular spot and say where it is or  
6 say - - - you argue that there are a series of five points,  
7 I believe, right?

8 MR. ROSS: Yes.

9 JUDGE FAHEY: Okay. They - - - they all seem to  
10 involve presence, not agreement, except for the false  
11 confession. Would you agree with that?

12 MR. ROSS: Well, not just the - - - the false  
13 confession but his earlier confession where he says I'm a  
14 part of something but I didn't do it. I mean he's  
15 basically saying I'm a part of this agreement but I didn't  
16 do the - - -

17 JUDGE WILSON: Well, maybe he's saying I'm part  
18 of the gang but I didn't do it? And this is - - -  
19 remember, this is the police - - - this isn't his word.  
20 This is the police officer saying he said something like  
21 I'm a part of it but I didn't do it.

22 MR. ROSS: Well, the police officer was saying I  
23 want to speak to an incident that happened the night  
24 before. And then the defendant eventually said, well, I  
25 was a part of something but I didn't do it. And - - -



1 JUDGE RIVERA: And in his written confession,  
2 isn't there a line about him not agreeing with what the  
3 head of the gang hoped would be the consequences of this  
4 attack?

5 MR. ROSS: It was not that he didn't agree. It's  
6 just that - - -

7 JUDGE RIVERA: Well, at least there's some  
8 ambiguity. I mean you have language more than once that  
9 the man is saying I don't agree.

10 MR. ROSS: It's not that he didn't agree. He  
11 just said he was sorry that it happened.

12 JUDGE FAHEY: So - - - so let me ask this. If -  
13 - - if you don't have the confession, is your proof legally  
14 sufficient?

15 MR. ROSS: Yes, it still - - -

16 JUDGE FAHEY: Okay. So let's say the confession  
17 is taken out, you only have four points you rely on. How  
18 so is your proof legally sufficient then?

19 MR. ROSS: Well, first, we have to look at the  
20 context of the fact that he belongs to this gang, and there  
21 are just certain assumptions that don't need to be spoken  
22 of.

23 JUDGE STEIN: So - - - so are one of them that if  
24 you are part of a gang then - - - then you essentially  
25 agree with anything that any members of that gang might do?



1 MR. ROSS: Under certain circumstances that might  
2 well be. That's - - - that's not what we have here. We  
3 have - - - like I say, we have more. But just the  
4 membership of the gang. It - - - it was explained that,  
5 you know, if you agree to follow the orders of the Crowns.  
6 That's just understood. It's also understood - - -

7 JUDGE STEIN: But then if - - - if that's true is  
8 there any indication that he was ordered to do this?

9 MR. ROSS: Not the Fifty-seventh Street. He  
10 wasn't ordered to do that.

11 JUDGE FAHEY: Well, that's the one we're talking  
12 about, though.

13 MR. ROSS: But his presence at the Prospect Park  
14 meeting just was not superfluous. There was a purpose to  
15 that presence.

16 JUDGE FAHEY: So is everyone who was present at  
17 that meeting part of the Fifty-seventh Street arson  
18 conspiracy?

19 MR. ROSS: Yes, everyone was charged with that  
20 conspiracy. I mean you don't have to - - -

21 JUDGE STEIN: But doesn't that contradict federal  
22 law?

23 MR. ROSS: No - - - well - - -

24 JUDGE STEIN: I mean not federal law but federal  
25 case law?



1 MR. ROSS: No, because all you need to be  
2 convicted of conspiracy is to be part of the agreement and  
3 then have an overt act in furtherance of it. That - - -  
4 that overt act doesn't have to be the crime itself. It  
5 doesn't have to be - - -

6 JUDGE STEIN: Well - - -

7 MR. ROSS: - - - the attempt of the crime.

8 JUDGE STEIN: But what I - - - what I'm having  
9 trouble seeing is what - - - where is the evidence of  
10 agreement beyond mere presence? Doesn't there have to be  
11 something, some verbal or other manifestation that you  
12 agree with what is being discussed?

13 MR. ROSS: Not - - - not under the circumstances  
14 here because it's just understood that - - -

15 JUDGE RIVERA: Well, generally, is that the rule?

16 MR. ROSS: Generally, not necessarily because,  
17 yes, it's better - - -

18 JUDGE FAHEY: Well, I think part of the problem  
19 here is - - -

20 MR. ROSS: - - - if it's overt and say I agree  
21 but - - -

22 JUDGE FAHEY: Hold on - - - hold on a second.  
23 Part of the problem is perhaps we need to clarify what  
24 constitutes agreement in New York. There is a Second  
25 Circuit case that - - - that's been relied on, U.S. v.



1 Ceballos. Are you familiar with that?

2 MR. ROSS: Yes.

3 JUDGE FAHEY: Okay. And some of the language  
4 there says that: "You need more than mere knowledge,  
5 approval, or acquiescence. There need - - - there needs to  
6 be a need to make an affirmative attempt to further its  
7 purpose" - - - the conspiracy's purpose. So if that was  
8 the New York standard, would you say that you met it in  
9 this instance?

10 MR. ROSS: In this instance, yes, because it is  
11 participate - - - even though the Eighteenth Avenue attacks  
12 that he took part in weren't part of the overt acts for the  
13 Fifty-seventh Street, it still showed his intent, that he  
14 shared the intent of this co-conspiracy.

15 JUDGE WILSON: Do you - - - do you think there  
16 were two Eighteenth Street attacks? Is that right?

17 MR. ROSS: Yes, it was somewhat ambiguous but - -  
18 -

19 JUDGE WILSON: And you think there's evidence  
20 that he participated in both of those directly? He was  
21 there for both of them?

22 MR. ROSS: Yes, he confessed as part of his  
23 confession he was part of a rock-throwing - - - where they  
24 threw rocks and bottles and - - -

25 JUDGE WILSON: The first one, right?





1 MR. ROSS: The first one.

2 JUDGE WILSON: It's the rock-throwing bottle.

3 MR. ROSS: And then there was evidence from Juan  
4 Burkette's statement at the pizzeria that was testified to  
5 by Jose Brand that defendant was one of the five people who  
6 was in the group that threw two Molotov cocktails at the  
7 Eighteenth Avenue apartment. So the fact that, you know,  
8 he's willing to take part in this Eighteenth Avenue - - -

9 JUDGE STEIN: He was acquitted of - - - of  
10 charges with regard to that event, wasn't he?

11 MR. ROSS: That - - - well, that was just for  
12 criminal mischief. Yes.

13 JUDGE RIVERA: So - - - because, counsel, let me  
14 ask you, given - - - given gang culture and the gang  
15 hierarchy with respect to this gang, but it seems to be  
16 similar to gang hierarchy.

17 MR. ROSS: Yes.

18 JUDGE RIVERA: But anyway, with respect to this  
19 gang, when - - - when would someone who's not part of that  
20 top branch, the decision-making branch of - - - of the gang  
21 be a co-conspirator - - -

22 MR. ROSS: Well, under - - -

23 JUDGE RIVERA: When they - - - right, they attend  
24 a meeting. They don't speak. They're not asked a  
25 question. When - - - when do they, because of the



1 membership in the gang, from - - - from the People's  
2 position, when are they co-conspirators in the actions of  
3 the gang?

4 MR. ROSS: Actually, when they - - -

5 JUDGE RIVERA: If they are not the actor. I  
6 understand someone else is the actor.

7 MR. ROSS: Right. When they find out about that  
8 this gang is going to commit this - - - this - - - the  
9 object crime and they - - -

10 JUDGE RIVERA: So how is that not, as Judge  
11 Fahey's already pointed out, mere acquiescence which isn't  
12 enough, at least in the Second Circuit?

13 MR. ROSS: Because, like I say, his - - - his  
14 presence at the Prospect Park meeting was not superfluous.  
15 If it was just some private thing from the - - - the Crowns  
16 wanted done they could have just gathered the four people  
17 they assigned to the mission and told them. But by having  
18 everybody in the gang there in the - - - at the park, they  
19 could show that this is not just their private little  
20 thing. This is a whole gang. This is on behalf of the  
21 gang. This is something that we all agreed to.

22 JUDGE FAHEY: Well, I - - - I had thought that  
23 they were - - - the people that were ordered to do it were  
24 ordered to do it as a punishment for not having fulfilled  
25 the responsibilities to the gang membership and the other



1 members of the gang were not ordered or required to do  
2 that.

3 MR. ROSS: Yeah, but that just shows that those  
4 who - - - even though it was punishment for them for  
5 neglecting their gang duties they still went ahead and did  
6 it.

7 JUDGE STEIN: So if they showed up at this  
8 meeting, they had no idea what the meeting was going to be  
9 about, and - - - and all of a sudden they're talking about  
10 some - - - some arson that - - - that they're going to do,  
11 the only way to avoid being a co-conspirator would be to  
12 say - - - raise your hand and say I don't agree or get up  
13 and leave? Is that - - -

14 MR. ROSS: Under these circumstances yes, because  
15 it's just understood that when somebody in this gang is  
16 attacked or someone just simply tries to leave as Juan  
17 Kuang did, there's going to be retaliation against that  
18 person. They don't have to - - - they have to talk about  
19 that. That's just understood.

20 JUDGE STEIN: But it seems to me that - - -

21 MR. ROSS: That's part of the culture.

22 JUDGE STEIN: - - - the evidence, in this case,  
23 shows that - - - that this guy was a friend of his. That  
24 he - - - that there was no indication that he would have  
25 wanted to - - - I mean he actually went against the gang in



1 some ways by not telling them certain things he knew about  
2 his friend and so on and so forth. So, you know, I - - -

3 MR. ROSS: But at the latest by the time of the  
4 stabbing, the - - - the defendant had a choice. You know,  
5 either I'm loyal to my friend or I'm loyal to the gang. He  
6 chose loyalty to the gang, and furthermore - - -

7 JUDGE GARCIA: Chief, may I ask - - -

8 JUDGE RIVERA: Well, he stayed in the gang. How  
9 is that loyalty an agreement to this particular act?

10 MR. ROSS: The - - - well, the fact that he - - -  
11 he tried to commit the act itself just the day - - - the  
12 night before by - - - by throwing Molotov cocktails and  
13 being part of the - - -

14 CHIEF JUDGE DIFIORE: Judge Garcia.

15 JUDGE GARCIA: What - - - what's your evidence of  
16 his participation in the earlier attempt at arson? What  
17 was the evidence at trial on that?

18 MR. ROSS: The - - - it was the statement that  
19 Juan Burkette made at the pizzeria that was testified to by  
20 Jose Brand. He said that - - - that defendant was one of  
21 five people who threw Molotov cocktails but that failed  
22 because they didn't break the windows. That was  
23 corroborated by - - - by Soria's testimony that when he was  
24 going to the Prospect Park meeting Desmond Blount related  
25 to him the Eighteenth Avenue arson and Blount told him that

1           there were five people involved. He didn't mention the  
2           defendant. He couldn't remember who that fifth person was.  
3           But the four people that he did remember were the four  
4           people that Burkette had remembered. So in a sense,  
5           Soria's testimony corroborated Brand's testimony.

6                   JUDGE GARCIA: I - - - I see. And so going back  
7           to something Judge Stein said on that conduct underlying  
8           that earlier attempt, I - - - it's somewhat confusing.  
9           One, I don't think the charging document is in this record  
10          that you provided. Is that right?

11                   MR. ROSS: No, we didn't - - -

12                   JUDGE GARCIA: But it seems at some part in the  
13          transcript that information about the earlier arson comes  
14          in only as background or as proof of this agreement. But  
15          as Judge Stein says, it seems that there's a criminal  
16          mischief and misdemeanor charge that actually charges that.  
17          So it seems inconsistent in the record to me.

18                   MR. ROSS: Well, it was - - - it was based  
19          largely on his - - - his statement there. The - - -

20                   JUDGE GARCIA: Was it charged or was it not  
21          charged? Because somewhere in the record the prosecutor  
22          and the defense lawyer are arguing and it's the defense  
23          lawyer for Mr. Reyes about this coming in and it's only  
24          coming in for this limited purpose. But it seems like it  
25          was actually also charged as a basis for a criminal



1 mischief count.

2 MR. ROSS: No, well, the criminal mischief, there  
3 were two separate attacks on the Eighteenth Avenue. One  
4 was the - - - the attempt at arson. The other was when  
5 defendant confessed to throwing rocks and bottles and - - -

6 JUDGE GARCIA: I see.

7 MR. ROSS: And - - - and there was evidence that  
8 there were two. When Lawrence Tranese, the owner of the  
9 Eighteenth Avenue, he - - - when he found - - -

10 JUDGE GARCIA: So the criminal mischief count is  
11 based on the rocks and bottles and not on the attempted  
12 arson?

13 MR. ROSS: Right.

14 JUDGE GARCIA: Okay.

15 MR. ROSS: The - - - the attempted arson came in  
16 and the - - - the judge charged the jury that that was to  
17 be considered only to show that defendant and the co-  
18 defendants' intent for the Fifty-seventh Street arson and  
19 to reflect their agreement.

20 JUDGE GARCIA: Understood.

21 CHIEF JUDGE DIFIORE: Thank you, counsel.

22 MR. ROSS: Thank you.

23 MR. FALLEK: Good morning, Your Honors. My name  
24 is Allen Fallek. I represent respondent.

25 CHIEF JUDGE DIFIORE: Counsel, why isn't



1 membership in a gang, knowledge of the crime, presence at  
2 the - - - I think it's Prospect Park meeting, connection to  
3 the prior arson attempt at the Eighteenth Avenue location,  
4 and - - - and the defendant's statements to the police, why  
5 isn't that enough to get us there?

6 MR. FALLEK: That's not enough because none of  
7 that evidence, separate or apart, actually connects  
8 respondent in this case to the agreement for which he is  
9 charged. The - - -

10 CHIEF JUDGE DIFIORE: What would it take to  
11 connect him to that agreement if not all of those disparate  
12 things?

13 MR. FALLEK: You know, that - - - that's a  
14 difficult question. Actually, the control of the - - - of  
15 the gang by - - - by the leaders is so all-controlling.  
16 They - - - they plan, they're the ones who select who's  
17 going to be part of it. Nobody's allowed to speak about  
18 it.

19 CHIEF JUDGE DIFIORE: But they need soldiers - -  
20 -

21 MR. FALLEK: And in fact ultimately - - -

22 CHIEF JUDGE DIFIORE: - - - to execute the plan,  
23 right?

24 MR. FALLEK: They - - - they select who's going  
25 to - - yeah, right. And they actually exclude all the



1 others so it's hard to even imagine what someone would have  
2 to do. They're almost precluded from being - - -

3 JUDGE WILSON: Let's say he - - - let's say the  
4 defendant showed up at the Prospect Park meeting, which he  
5 did, and all the gang members put their names into a hat  
6 understanding that whoever's name was drawn out was going  
7 to go commit the arson. Would that be sufficient?

8 MR. FALLEK: If - - - if his name was among  
9 those?

10 JUDGE WILSON: If he - - - yeah, if he - - - if  
11 they - - -

12 MR. FALLEK: If he was unfortunate enough to be  
13 selected - - -

14 JUDGE FEINMAN: I don't think that's what he's  
15 asking.

16 JUDGE WILSON: It's not whether he's selected.  
17 It's - - - it's whether he sat there while his name was put  
18 into a hat knowing that if it's drawn he was going to go  
19 commit this arson. Is that sufficient to show agreement?

20 MR. FALLEK: I don't think so. The reason being  
21 that, yes, by - - - by being a member he agrees - - - so he  
22 agrees to - - - to follow orders so he would have to comply  
23 with - - - with that method and he would have to ultimately  
24 comply with the order. And by unfortunately being selected  
25 and - - -





1 JUDGE RIVERA: Is that because you think he could  
2 change his mind?

3 MR. FALLEK: Well - - -

4 JUDGE RIVERA: Is that because you're saying even  
5 if he's picked he could change his - - - change his mind or  
6 he put his name in so he didn't get beat that day and maybe  
7 he won't get picked and he's hoping for the odds to work in  
8 his favor? Is that the argument you're making?

9 MR. FALLEK: No, my - - - my argument is that if  
10 he were selected either by that means or deliberately  
11 selected he would probably, unfortunately, like these  
12 participants who were selected, be - - - be forced at the  
13 risk of maybe just having to leave the gang or just getting  
14 up and facing the consequence for leaving, they'd be forced  
15 to be - - - commit the arson and thereby being involved in  
16 the planning as these selected co-conspirators were at the  
17 pizzeria. They sat down and unless one of them got up - -  
18 -

19 JUDGE RIVERA: You lose some standing of forced,  
20 right, because he has agency, he has volition. He can  
21 choose not to be in the gang, choose not to show up, choose  
22 to walk away. At his peril, I understand that, but  
23 nevertheless, he has some choice.

24 JUDGE FAHEY: Well, some. It seems to me,  
25 listen, part - - - being part of an organization, I'm part



1 of the Catholic Church, part of the Democratic Party, I'm a  
2 part of the Ancient Order of Hibernians. I - - - I don't  
3 agree with every principle or every action that any of  
4 those groups take. And whether it's a criminal conspiracy  
5 or not, the part - - - being part of an organization really  
6 can't be enough. I go to mass. That doesn't mean I - - -  
7 I subscribe to every - - - everything that Pope Francis  
8 says. Presence isn't - - - isn't clearly enough. It would  
9 take an agreement with a specific act, and I think we  
10 should focus in a little bit on the Eighteenth Street  
11 attack. I think that you need to focus in there because  
12 that seems to be - - - now the - - - the - - -

13 MR. FALLEK: Yeah - - -

14 JUDGE FAHEY: Let me finish. The People say that  
15 this criminal mischief acquittal does not involve an  
16 attempted arson, only involving - - - or only involves  
17 throwing of rocks and bottles. I thought that was all one  
18 event that took place simultaneously. Some people throw  
19 rocks and bottles, some people attempt to commit an arson.  
20 What do you say about it?

21 MR. FALLEK: Apparently - - - apparently based on  
22 respondent's statement, the videotaped statement, some  
23 other gang members, not - - - he didn't include himself,  
24 went back as part of that mission - - - the same mission  
25 and threw Molotov cocktails. So - - -



1 JUDGE WILSON: On a different day?

2 MR. FALLEK: On a - - - it's not as clear, yes.  
3 I think he said a day or two later, right. I think the  
4 important - - -

5 JUDGE FAHEY: What is the - - - what is the  
6 acquittal on the criminal mischief charge - - -

7 MR. FALLEK: Yeah - - -

8 JUDGE FAHEY: - - - an acquittal for?

9 MR. FALLEK: Well, the - - - okay, the acquittal  
10 on the - - - on the mischief charge is sort of irrelevant  
11 in that the Molineux - - - according to the Court's  
12 Molineux determination and its charge, it was the - - - the  
13 evidence of his purported involvement in the Molotov  
14 cocktail-throwing that made that an arson. I would preface  
15 that by adding our - - - our position is that the evidence  
16 is not reliable enough to show that he was actually  
17 involved in that. And that - - - and that's even in the  
18 light most favorable to - - -

19 JUDGE GARCIA: Counsel, I guess just to go to  
20 Judge Fahey's point, there's some confusion in the record,  
21 without the charging document, whether the criminal  
22 mischief count included the earlier attempted arson, and it  
23 seems that the People's point is it did not. It was rocks  
24 and bottle throwing. And it seems from the transcript  
25 there is argument by defense counsel and the prosecutor



1 that the evidence of the earlier arson was only coming in  
2 to show agreement or other types of things.

3 MR. FALLEK: Yeah.

4 JUDGE GARCIA: Do you agree with that or not?

5 MR. FALLEK: I - - - I actually - - - the  
6 evidence is not clear enough. You're - - - you're correct  
7 that the indictment actually - - - which doesn't charge  
8 appellant in that arson, that separate arson, actually  
9 charged - - - charges that that occurred on the same day  
10 that the evidence showed the rock throwing occurred whether  
11 it's the same or not.

12 But I just wanted to point out for Molineux  
13 purposes that it was the arson and - - - and we'll assume  
14 that - - - that appellate was involved, I mean just  
15 assuming argument that he was involved, I think that the -  
16 - - the Molineux evidence here, the evidence of those prior  
17 incidents have become very clouded analytically. The  
18 Molineux evidence was - - - was admitted for a particular  
19 purpose, only to show state of mind, that is to infer state  
20 of mind from respondent's involvement in the - - - in this  
21 past crime to show his state of mind with respect to his  
22 purported involvement in this agreement. So we're - - -  
23 we're going way beyond the bounds of that Molineux purpose  
24 when we - - - when we start to argue that because he was  
25 involved in Crime A he was involved in Crime B.



1 JUDGE GARCIA: No, no, understood. But I think  
2 the - - - it seemed to me the purpose was to show the  
3 agreement later by showing he was involved in the earlier  
4 arson.

5 MR. FALLEK: No, no. To show - - - it was to  
6 show his state of mind with respect to an agreement - - -

7 JUDGE GARCIA: Right.

8 MR. FALLEK: - - - which presumably was - - - was  
9 established by other evidence, not the Molineux evidence.  
10 So with - - - in that regard because our position is that  
11 there was no other evidence of his agreement. There was no  
12 evidence personally as opposed to based on his association  
13 with - - - with a gang personally involving him in any  
14 agreement with others. And with others is very important.

15 JUDGE WILSON: Let me go to the - - - let me go  
16 to the confession for a moment, right. We - - - we agree -  
17 I think everybody agrees he was not actually at the March  
18 1st arson, right?

19 MR. FALLEK: That - - - that's correct.

20 JUDGE WILSON: Okay. So a part of his confession  
21 is clearly false, but there are details in his confession  
22 that are true, right, that he clearly evidenced his  
23 knowledge of the plan. He knew when it was going to  
24 happen.

25 MR. FALLEK: I think that's true.



1 JUDGE WILSON: He knew where it was going to  
2 happen. There are a variety of things like that. So - - -  
3 and then his confession as to his own participation is  
4 false, right?

5 MR. FALLEK: Right.

6 JUDGE WILSON: So why doesn't the fact that he  
7 falsely confessed to a plan where - - - where he was not  
8 present, itself provide evidence of his agreement?

9 MR. FALLEK: Well, that he - - - that he knew  
10 about these - - -

11 JUDGE WILSON: No, no. Not that he knew about  
12 it. He could have said I know about some details but I  
13 wasn't there. But instead he said I was there. Why  
14 doesn't his - - - his falsely putting himself at the arson  
15 - - -

16 MR. FALLEK: Oh, I see.

17 JUDGE WILSON: - - - provide evidence that he  
18 agreed?

19 MR. FALLEK: It doesn't because it's just so  
20 wildly speculative to say that it - - - it might provide  
21 evidence. There are so many other -- I would say  
22 speculative evidence is that much more plausible than that  
23 speculative conclusion.

24 JUDGE GARCIA: But isn't this an appeal of a  
25 guilty verdict, so don't the People get any reasonable



1 inference?

2 MR. FALLEK: They - - - they certainly benefit  
3 from the - - - the deference that the sufficiency analysis  
4 affords, but even based on that evidence, the inferences  
5 that they draw, they have to be reasonable. Our position  
6 is that an inference like that, for instance, is just  
7 patently unreasonable.

8 JUDGE STEIN: What - - - what about a statement  
9 that he - - - that he was part of something?

10 MR. FALLEK: That - - - that too. As Judge  
11 Wilson pointed out, one, it's not necessarily what was  
12 said. It's what the police officer said he said. And he  
13 said he said something to that effect. And also, what - -  
14 - even in the context is - - - is not clear. He didn't say  
15 that in direct response to what were you doing, were you  
16 involved in this arson last night? The original question  
17 was do you know something about this arson? And I - - -  
18 the record is very clear that it was three or four minutes  
19 later in the course of that conversation when he - - - he  
20 says this, so we don't even know what it is that triggered  
21 that as far as - - -

22 JUDGE FAHEY: I thought it was he said I was part  
23 of something but I didn't do it. I thought that was the  
24 phrase that's - - -

25 MR. FALLEK: Yeah, I mean we're - - - we're just



1 talking, again, about wild speculation. But - - - but it's  
2 interesting that that particular statement, unlike the  
3 other statement, comes in for its truth, and we know what  
4 the truth is that he was out looking for the Patrias at  
5 that time.

6 JUDGE FAHEY: The - - - the more important point  
7 is whether or not a lie, a false confession, a lie, can be  
8 evidence of an agreement.

9 MR. FALLEK: The - - - the short answer is no. I  
10 mean possibly if the People had called an expert to  
11 describe how, but I - - - I would say that most people from  
12 any objective standard would not know what a voluntary  
13 inculpatory statement really meant. I would - - - I would  
14 guess that - - - that he had been led by the People - - -  
15 the police officers and the fire marshals to provide more  
16 and more evidence. Possibly he felt that he'd be released  
17 afterwards. It's just not clear.

18 JUDGE RIVERA: But - - - but - - -

19 MR. FALLEK: Liars we also speculate in our brief  
20 - - -

21 JUDGE RIVERA: Isn't - - - isn't the real answer  
22 it depends? It depends.

23 MR. FALLEK: Certainly.

24 JUDGE RIVERA: It depends on all the other  
25 circumstances - - -





1 MR. FALLEK: In my - - -

2 JUDGE RIVERA: - - - that may otherwise confirm  
3 or corroborate - - -

4 MR. FALLEK: Right.

5 JUDGE RIVERA: - - - that indeed this individual  
6 agreed.

7 MR. FALLEK: Individuals and whatever would be  
8 contingent - - - that would be contingent upon is certainly  
9 not present here. We really don't know what that possibly  
10 could mean. And as I said, and with respect to I was part  
11 of something, he was part of a mission to find these  
12 Patrias. That we know and this evidence - - - this  
13 statement came in for its truth, so that's the - - - it's  
14 much more likely that that's what he meant. Ultimately,  
15 it's just wild speculation. It's not competent evidence of  
16 his agreement.

17 CHIEF JUDGE DIFIORE: Thank you, counsel.

18 Mr. Ross.

19 MR. ROSS: When he made his confessions, the  
20 police didn't know anything about this Patrias mission.  
21 They were asking about an incident and they were asking  
22 about the arson - - -

23 JUDGE FAHEY: Yeah, but - - - but the proof seems  
24 to be pretty consistent that by their own work, the fire  
25 marshal's work, they're looking at the videos, guy wasn't



1 telling the truth. The videos confirmed that. So your  
2 argument is we want to say this part of his false  
3 confession proves a positive fact. These other parts that  
4 prove that he might have been with the Patrias committing  
5 some other act, we don't want you to count that on - - - on  
6 the conspiracy. You're asking us to parse it in - - - in a  
7 - - -

8 MR. ROSS: Well, we're not - - -

9 JUDGE FAHEY: Well, let me finish. In - - - as  
10 the key lynchpin in establishing these other four points,  
11 and that's why I'm having the difficulty with it. Go  
12 ahead.

13 MR. ROSS: Okay. Well, as far as the Patrias, it  
14 still shows that even though he found out about this arson  
15 mission he wasn't so repulsed by the fact that this gang -  
16 - - his - - - was going to do this.

17 JUDGE WILSON: Well, repulsion's not the standard  
18 for conspiracy.

19 MR. ROSS: I - - - I know it's not the standard  
20 but it just shows everything all along the line. The fact  
21 that he's sitting there the day - - - the night before - -  
22 - probably the night before, he's - - - he's part of a  
23 group throwing Molotov cocktails at the Eighteenth Avenue.  
24 There's just no need for the gang to ask him, well, are you  
25 - - - do you agree to this Fifty-seventh? It's just

1 understood.

2 JUDGE GARCIA: Counsel, you didn't - - - the  
3 People didn't make an argument in this trial - - - it seems  
4 from reading the record that the Patrias incident comes up  
5 when the team that's going to go commit the arson goes out  
6 on the street after this meeting and they see this rival  
7 gang and they report in and another team comes in to deal  
8 with the rival gang, including allegedly this defendant,  
9 right?

10 MR. ROSS: Yes.

11 JUDGE GARCIA: Did the People ever argue that  
12 that mission itself was furthering the arson mission  
13 because there was a gang on the street that was interfering  
14 with their ability to accomplish that?

15 MR. ROSS: No, it wasn't charged as an overt act.  
16 And there was nothing that said that it would be  
17 interference because the people who went on that mission  
18 weren't the ones who were on the arson mission, so it  
19 didn't really inhibit them.

20 JUDGE RIVERA: So - - - so counsel, let me - - -  
21 let me just clarify is - - - is the key point of your  
22 argument this participation - - - what you claim is his  
23 participation in an arson that - - - an attempted arson  
24 that looks very much like the arson that's been the basis  
25 for the conspiracy charge. So if that's - - - if that's



1           your point, then, let's try this hypothetical. Let's say  
2           he's ordered to go out and find Patrias, and in the  
3           interim, they decide they're not going to use Molotov  
4           cocktails because that didn't work out so well the last  
5           time. They decide they're going to - - - they're going to  
6           get back at him, JT, JK, whatever his name is, in a  
7           different way. Would his participation beforehand in an  
8           arson to get back at Kuang make him now a conspirator in a  
9           different type of action because is that the agreement to  
10          get back at Kuang?

11                       MR. ROSS: Not if he didn't know - - - wasn't  
12          aware of this different type of action. Now if - - - if he  
13          had agreed to do the arson and there had been an overt act  
14          for that arson, say they went and bought their bottles of  
15          iced tea to use as Molotov cocktails and then they changed  
16          their minds, he still would be guilty of the arson because  
17          he still agreed to that.

18                       JUDGE RIVERA: So - - - so if the agreement was  
19          merely we're going to get Kuang without specifying how - -  
20          -

21                       MR. ROSS: Yes.

22                       JUDGE RIVERA: - - - could he be a conspirator -  
23          - -

24                       MR. ROSS: I think - - -

25                       JUDGE RIVERA: - - - regardless of the method



1 that's used if he's not a participant in the actual method  
2 that's used?

3 MR. ROSS: It depends on what you mean - - - how  
4 they're going to get Kuang. Because here the agreement was  
5 for a Class A - - - that a Class A felony be committed  
6 which was second-degree arson. Now if it was just how to  
7 get it, it was just to beat him up, well, then it would be  
8 a lower level of conspiracy because there would - - - it  
9 would - - - the object crime would be a lesser  
10 classification of crime.

11 Just one thing about the - - - the charge, the  
12 charge for the criminal mischief was on or about February  
13 22nd through February 26th. So that clearly refers to the  
14 rock-throwing because the evidence showed that the  
15 Eighteenth Avenue attempted arson most likely occurred on  
16 February 28th which was the Saturday. And it was - - - it  
17 was - - - there was some evidence it might have occurred a  
18 day or two earlier. But - - - and there - - - there was  
19 discussion about amending the indictment because the rock-  
20 throwing incident, there were various dates and - - - and  
21 so we needed to amend the indictment, and there was  
22 discussion on that and the Court allowed that. So that had  
23 the - - - so definitely the - - - the mischief was about  
24 the rock-throwing and not the Eighteenth Avenue arson.

25 But even though they acquitted on that, there was



1 still evidence that showed that he was still - - - you  
2 know, had this - - - shared the - - - the gang's antipathy  
3 towards Kuang. So basically what this case just comes down  
4 to is do you always have to have an - - - you know, an  
5 expressed agreement to be a member of a conspiracy or can  
6 just the totality of the circumstances show that you  
7 implicitly agreed? And I think when you look at his  
8 confessions, his participation, the nature of the gang, you  
9 know, his presence at the meeting, like I say, which was  
10 not superfluous, and - - - and all of the - - - all of what  
11 it meant just to be a part of this gang and his actions  
12 showing that he shared their intent. This was legally  
13 sufficient to show an implicit agreement, and I ask that  
14 you reverse the order of the Appellate Division and send it  
15 back to consider the rest of the claims. Thank you.

16 CHIEF JUDGE DIFIORE: Thank you, counsel.

17 (Court is adjourned)

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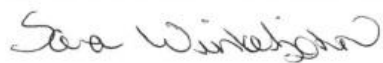
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C E R T I F I C A T I O N

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Casimiro Reyes, No. 6 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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