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COURT OF APPEALS
STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

NO. 19

STEVEN SIDBURY,

Appellant.

20 Eagle Street
Albany, New York
May 16, 2024

Before:

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

Appearances:

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Official Court Transcriber



1 CHIEF JUDGE WILSON: Next case on the calendar is
2 Number 19, People v. Steven Sidbury.

3 MR. STROTHER: Good afternoon, Your Honors.
4 Stephen Strother, from the Office of the Appellate Defender
5 on behalf of Steven Sidbury. I'm going to begin by
6 addressing our sufficiency claim. Your Honors, this case
7 is about whether a metal box attached to a door, outside of
8 which a fire could not spread, is a building, as that term
9 is defined in the Penal Law. It's not. We are asking this
10 court to construe the term building such that items
11 attached to a building are considered a part of the
12 building only when setting fire to them would pose a risk
13 to the larger structure or the people inside. We believe
14 that lines up with the text and purpose of the statute far
15 better --

16 JUDGE TROUTMAN: So in this prison, the box was
17 permanently attached to the cell door?

18 MR. STROTHER: I don't actually think it was
19 necessarily permanently attached. It can certainly - - -
20 can be detached from the door. So - - - and I also - - -
21 so it's not - - -

22 JUDGE TROUTMAN: It wasn't - - - was it - - - so
23 are you suggesting it was meant to be taken on and off on a
24 regular basis? It wasn't fixed or screwed or something?

25 MR. STROTHER: Oh, it's screwed into the door.

1 Yes. I'm just saying that it is detachable. It can be
2 removed.

3 JUDGE TROUTMAN: There are things in your home.
4 They - - - they can be - - - you have mirrors that are on -
5 - - fixed to a wall. They can be taken down, but they're -
6 - - they're meant - - - in a bathroom, for instance,
7 they're usually meant to be there for a period of time.
8 Are you saying in this instance because it can't catch fire
9 because of the metal nature, is that what makes it not?

10 MR. STROTHER: That's a major part of it. So we
11 want - - - we're arguing that - - - so the purpose of the
12 arson statute is to protect buildings and people inside of
13 them from dangerous fires. This under - - - if you look at
14 the testimony on appendix pages 608 and 609, the officer
15 makes clear that a fire set within one of these ports can't
16 spread outside of it.

17 JUDGE TROUTMAN: So it could be a part of the
18 building, but it just can't catch fire, arguably?

19 MR. STROTHER: So I would argue that if something
20 cannot spread - - - it's an object attached to the door.
21 Objects in buildings are not necessarily a part of the
22 building under New York Law, because New York only goes by
23 the ordinary definition, which is a structure with roof and
24 walls. So there's always an open question about whether
25 objects in a building are a part of a building. This is an

1 object, a piece of jail property. It has been attached to
2 the door, but a fire within it can't spread to the door,
3 the cell walls, the floor.

4 JUDGE SINGAS: But it's more than attached to the
5 door. It becomes part of the door, at least from the
6 pictures that I've seen.

7 MR. STROTHER: So I think that's a semantic
8 distinction, Your Honor, that - - -

9 JUDGE SINGAS: Well, if you remove it, then the
10 door has a hole in it.

11 MR. STROTHER: If you remove it, of course,
12 that's true. But - - -

13 JUDGE CANNATARO: But the purpose of installing
14 it is to put a hole in the door, isn't it?

15 MR. STROTHER: What is that?

16 JUDGE CANNATARO: The purpose of installing it is
17 to put a hole in the door so that you could pass things
18 through the port, right?

19 MR. STROTHER: That's correct. Yes. You put it
20 there so you could pass things through. I do want to make
21 clear that in this case, there's no testimony that it's
22 ever removed from the door. Actually, the testimony is
23 that the fire happened around 5:00 in the afternoon. Mr.
24 Sidbury is taken out briefly and brought right back to the
25 same cell later that day. So all of the concerns that are

1 raised in respondent's brief that, oh, no, there's a hole
2 in the door, it's no longer usable as a door, doesn't
3 really seem to --

4 JUDGE CANNATARO: Counsel, before you leave your
5 first point about what's the building and what's not the
6 building, I know where you stand on the cuffing port. You
7 said that that's not part of the building. Where do you
8 stand on the door that the cuffing port is used on?

9 MR. STROTHER: So counsel - - - defense counsel
10 at trial conceded that the door was a part of the building,
11 and we are bound by that concession. I'm not saying we
12 would ever - - - we would agree with that if we were
13 arguing it afresh. But - - -

14 JUDGE CANNATARO: So if the defendant here had
15 set the door on fire, I don't know, poured an accelerant on
16 the door and set the door on fire and the same concessions
17 had been made, this would be a very different case?

18 MR. STROTHER: It would be a different case for a
19 very specific reason, though. And that's because if you
20 pour accelerant on a door and set it on fire, the fire
21 spreads throughout the building. The people inside of it
22 are now at risk of death.

23 JUDGE CANNATARO: Well, this is magic accelerant.
24 It stays on the door. The thing that's - - - this fire
25 might spread, but the thing that lights on fire immediately

1 is just the door. Is that the same case as this one or a
2 different one?

3 MR. STROTHER: I believe that because we are
4 bound by trial counsel's concession, yes, that that would
5 be -- that would be the building, the door there in that
6 circumstance. But we want to make clear that we believe
7 that the hypothetical can't be limited to magical
8 accelerant. The entire purpose of the statute is that it's
9 protecting the people inside the building.

10 JUDGE RIVERA: So -- -- so you agree that a
11 bathtub inside a home is part of the building?

12 MR. STROTHER: No. No, I don't.

13 JUDGE RIVERA: Oh, you don't? Okay.

14 MR. STROTHER: No, I -- -- I actually think you
15 would need to prove that -- -- I think that under our rule,
16 yes, it would be. I actually take that back. Yes.

17 JUDGE RIVERA: Thank you.

18 MR. STROTHER: Because -- --

19 JUDGE RIVERA: Okay. So then someone starts a
20 fire in the bathtub. No curtains around it, nothing around
21 it.

22 MR. STROTHER: So -- --

23 JUDGE RIVERA: That -- -- that would not fall
24 under the arson statute because it won't spread beyond the
25 -- -- the bathtub?

1 MR. STROTHER: No, because the bathtub is not the
2 building. This is similar to like other cases. We've had
3 cases in the state where someone sets a PlayStation on fire
4 in a living room. It doesn't spread past the PlayStation.
5 That's arson in the fifth degree. It's fire to property.
6 Just because it's inside of a building, doesn't mean that
7 it counts as the building because the State defines that as
8 its ordinary meaning, which - - -

9 JUDGE RIVERA: But you told me you agreed that
10 the bathtub is part of the building?

11 MR. STROTHER: Only - - - only if it spreads to
12 the rest of the building, actually. The bathtub - - - if
13 it gets put out while it's in the bathtub, that's just the
14 burning of an object in a building.

15 JUDGE SINGAS: Okay. But we've held that
16 charring is sufficient. We don't say it has to spread for
17 damage. Charring, right?

18 MR. STROTHER: Well, sure. Charring of the
19 building itself would be sufficient to - - - to be arson in
20 the second degree.

21 JUDGE SINGAS: So in this case, in Judge Rivera's
22 example, charring of the bathtub, you'd say not part of the
23 building?

24 MR. STROTHER: Not a part of the building. No,
25 it's an object inside the building. You can't - - - you

1 can't say that every - - - a fire to every single object
2 within a building is the building. Our - - - our request
3 here - - -

4 JUDGE RIVERA: What things then in the bathroom
5 are not part of the building? Are you saying nothing?
6 Fixtures? Nothing is the building? It's only the
7 structure itself? Nothing that's attached to it?

8 MR. STROTHER: We would -- we would say the
9 structure itself. And then anything that's attached to the
10 structure.

11 JUDGE RIVERA: Okay.

12 MR. STROTHER: That if you set that on fire, it
13 could spread to the rest of the building and harm people in
14 it. That would also count as the building.

15 JUDGE RIVERA: So a tub that is attached to the
16 walls of that bathroom, you still say - - -

17 MR. STROTHER: If the bathtub is attached to the
18 walls - - -

19 JUDGE RIVERA: Yes.

20 MR. STROTHER: - - - and then you set the bathtub
21 on fire, then, yes.

22 JUDGE RIVERA: Not standing on the four legs.
23 That's pretty, but that's not what I'm talking about.

24 MR. STROTHER: If you're talking about a bathtub
25 attached to the walls - - -

1 JUDGE RIVERA: Yes.

2 MR. STROTHER: - - - then yes. I agree with you
3 that that would be a part of the building.

4 JUDGE RIVERA: Okay. So if it was charred?

5 MR. STROTHER: If the bathtub was charred - - -

6 JUDGE RIVERA: Yes. I'm now following Judge
7 Singas' hypothetical just to kind of get it all the way
8 through.

9 MR. STROTHER: Sure. I think that that would
10 count. I think our rule accounts for that. We're asking
11 for a rather narrow rule. We're asking for - - -

12 JUDGE RIVERA: So if the cuffing port or the door
13 was charred in this case?

14 MR. STROTHER: Only - - - if only - - - if the
15 door was charred, just the cuffing port, and the door here
16 wasn't charred. And indeed, no court below ever found that
17 it was.

18 JUDGE RIVERA: If we disagree with you that the
19 cuffing port is integral to the door, and is thus part of
20 the door. The door is not functional given that it's a
21 prison without that cuffing port and it is charred; do you
22 lose?

23 MR. STROTHER: I don't think so. And here's why.
24 I think that the prosecution makes a lot out of the concept
25 of integrality, or critical to the structure. The problem

1 there is that they can't actually define what that means,
2 and they know that, which is why they go to the real
3 property concept of fixtures as the way they're going to
4 define what counts as integral or critical to the
5 structure. This court cannot go down that road because it
6 creates major problems. The purpose of the real property
7 concept of fixtures is to determine the value - - - money
8 value of real estate for the purposes of saying - - -

9 JUDGE RIVERA: Well, you agree that a door is
10 part of the building? Yes?

11 MR. STROTHER: Yes. A door is part of the
12 building.

13 JUDGE RIVERA: Okay. So is a doorknob part of
14 the building?

15 CHIEF JUDGE WILSON: Oh wait, I'm sorry. I
16 thought you said you didn't agree that a door was part of
17 the building, but you were constrained into this case
18 because it was admitted below.

19 MR. STROTHER: Yes. So I was saying that I have
20 - - - I think I'm forced to agree that a door is a part of
21 a building. Yes.

22 CHIEF JUDGE WILSON: Okay. All right.

23 JUDGE RIVERA: Or this door?

24 MR. STROTHER: This - - - yeah - - -

25 JUDGE RIVERA: I think that's a clarification.

1 This door. But if I'm saying generically a door, you would
2 say no and you would say the doorknob is also not, correct?

3 MR. STROTHER: I would say that a door, it is
4 detachable. It is movable. I do think that a door just
5 like the bathtub example, it's something that's attached to
6 the larger structure. And if you light it on fire, it can
7 spread and harm people. So I think our rule accounts for
8 that being arson 2. This is why I say we're asking for a
9 narrow rule. We're asking only for when an item, a piece
10 of property, is attached to a structure and you set a fire
11 inside of it that can't spread.

12 JUDGE TROUTMAN: So if, hypothetically, prison
13 doors were wooden doors capable of spreading beyond the
14 door itself, then it would be a part of the building?

15 MR. STROTHER: No, I think my point was that a
16 door that's attached to the building, right? At that
17 point, I think it's pretty clear to anyone that if you set
18 that door on fire, there's a risk of it spreading to the
19 rest of the building and hurting people. I think our rule
20 would say, yes, that is arson 2.

21 JUDGE TROUTMAN: But it doesn't apply here
22 because it's a metal - - - because it's metal and metal
23 doesn't - - -

24 MR. STROTHER: Well, it doesn't apply for two
25 reasons. One, it doesn't apply because it's not the door.

1 It's a - - - it's a piece of jail property attached to the
2 door designed to contain fires. That's the whole idea, is
3 that it's been designed for that purpose. It's a piece of
4 metal that fire can't escape from it. An example we want
5 to give is something like a wall safe. You install a metal
6 wall safe into your wall. You put some papers inside of
7 it. You set that - - -

8 JUDGE TROUTMAN: So when they start the fire here
9 - - -

10 MR. STROTHER: What's that?

11 JUDGE TROUTMAN: When they start - - - a fire
12 started in that cuffing port, it's not arson. What is it?

13 MR. STROTHER: It's actually - - -

14 JUDGE TROUTMAN: Criminal mischief?

15 MR. STROTHER: No, it's arson in the fifth
16 degree. The arson statute already - - - already has a
17 mechanism for dealing with this.

18 JUDGE TROUTMAN: It's just the degree?

19 MR. STROTHER: That's correct. Arson in the
20 fifth degree deals with intentional fires set to property
21 of another.

22 JUDGE CANNATARO: So this is just burning
23 property?

24 MR. STROTHER: Yes, this is burning jail
25 property.



1 CHIEF JUDGE WILSON: So you're not arguing that
2 Mr. Sidbury lacked the intent to set a building on fire?
3 To cause damage to a building by fire?

4 MR. STROTHER: I actually think I'm arguing that
5 our question really isn't about his intent.

6 CHIEF JUDGE WILSON: Okay.

7 MR. STROTHER: It's about whether he, in fact,
8 damaged a building.

9 CHIEF JUDGE WILSON: That's what I want to clear
10 up. You're not arguing anything about his intent?

11 MR. STROTHER: That's correct. We're only
12 arguing whether he did, in fact, damage the building.

13 CHIEF JUDGE WILSON: Well - - -

14 MR. STROTHER: Because this isn't a building is
15 what we're arguing.

16 CHIEF JUDGE WILSON: Well, you're really - - -
17 not even that. You're really arguing, what is a building?

18 MR. STROTHER: Correct.

19 CHIEF JUDGE WILSON: That's the limit of your
20 argument.

21 MR. STROTHER: That's correct. It's about what
22 is a building. And in this instance, it's not because fire
23 cannot spread outside of it to the larger structure or the
24 people inside. And I think this is why we brought up the
25 wall safe example.

1 JUDGE RIVERA: Can it spread if they're trying to
2 put it out?

3 MR. STROTHER: I mean, I don't - - - I can answer
4 - - -

5 JUDGE RIVERA: I mean, if it's sealed, don't they
6 have to open it and risk the flames - - -

7 MR. STROTHER: Well - - -

8 JUDGE RIVERA: - - - flying out?

9 MR. STROTHER: Interestingly enough, in this
10 case, no, because there were no flames. If you look at
11 records A, appendix 2, 725, 726, there were no flames in
12 this case. It was just a small bit of smoke on - - -

13 JUDGE RIVERA: So let's take this hypothetical.

14 MR. STROTHER: If there were flames inside of it
15 - - -

16 JUDGE RIVERA: You get to it in time to open it,
17 and there are flames, I understand it's supposed to
18 contain, right?

19 MR. STROTHER: I think that that might be a
20 question for a fact finder at a trial, right? They could
21 they - - - the - - - the prosecution could certainly call a
22 witness to say that when this opens, the flames could
23 escape, and the judge could then give an instruction that
24 under those circumstances, this is a building. If the
25 court issues a rule that says that closed containers

1 attached to structures are not a part of the building, then
2 obviously there could be exceptions to that worked out in
3 future cases.

4 JUDGE RIVERA: But if it just damages the cuffing
5 court, you say that's arson 5?

6 MR. STROTHER: Yes, that's correct. And this is
7 just a cuffing port. I think I want to get back to - - - I
8 want to make sure I get that wall safe example.

9 CHIEF JUDGE WILSON: Suppose -- but somebody
10 asked about a doorknob before. Suppose he instead had - -
11 - had, you know, held some fire under the doorknob. Same
12 answer?

13 MR. STROTHER: I think that because - - - if - -
14 - if it's possible that setting a, you know, putting a
15 piece of - - - lighting a doorknob on fire could spread to
16 the rest of the building, then I think our rule accounts
17 for that, because our rule only includes - - - it's very
18 narrow. It only includes closed containers attached.

19 CHIEF JUDGE WILSON: No, but that isn't - - - my
20 question is, is the doorknob part of the door? That is,
21 here you've conceded the door is the building.

22 MR. STROTHER: So I think actually the answer to
23 your question is in the rule we've proposed. So in our
24 rule we say anything - - - that the word building should be
25 limited to those things that are attached - - - if they are

1 attached to a structure - - -

2 CHIEF JUDGE WILSON: That's your - - - that your
3 general rule. But in this case, I think you said you're
4 stuck with the proposition that this door is a building.

5 MR. STROTHER: That's correct.

6 CHIEF JUDGE WILSON: So is the doorknob the door?
7 Or is it a fixture like the cuffing port?

8 MR. STROTHER: I think that the doorknob would be
9 because if you set the door on - - - if you set the
10 doorknob on fire, it could easily spread to the door, the
11 walls, the floor, the ceiling, and it could harm the people
12 inside. The difference between the doorknob and the
13 cuffing port, the cuffing port is designed to contain the
14 fire inside of it. A doorknob is not. A doorknob is not
15 like that. You set the doorknob on fire. It could spread
16 all over the place. That's the big difference.

17 JUDGE CANNATARO: What -- excuse me. What do you
18 mean when you say the cuffing port is designed to contain
19 the fire inside of it? Is the primary purpose of a cuffing
20 port to contain fires?

21 MR. STROTHER: No, no, no, no.

22 JUDGE CANNATARO: I thought it was to cuff
23 people.

24 MR. STROTHER: No, no. Sorry. I think maybe I'm
25 - - - to be a little more precise, the design of the

1 cuffing port is such that fires are contained within it
2 when it's closed. That's the testimony from Officer Arias
3 on pages 608 and 609 of the appendix.

4 JUDGE CANNATARO: So it's designed with some sort
5 of fire preventative mechanism. It's got like a little
6 metal wall that comes down or something like that?

7 MR. STROTHER: So it's - - - it's all metal. And
8 then there's a thick plexiglass lid. And the officer says
9 if - - - if it's closed, a fire can't get outside of it.

10 CHIEF JUDGE WILSON: I just want to try one more
11 time, and then I'll give up. I think it seemed to me, from
12 what you've said so far, that it matters greatly to you
13 that the cuffing port is a fixture and is not part of the
14 door; right or not?

15 MR. STROTHER: So I think it's - - - I'm sorry, I
16 thought I had answered, but let me make it clear. I think
17 that the - - - the question of whether it's part of the
18 door is somewhat semantic when you look at the rule we've
19 proposed. So that's why I'm trying to give the answer I'm
20 giving.

21 CHIEF JUDGE WILSON: So what - - - what was
22 everything - - - can you explain then, what you meant by
23 it's a fixture?

24 MR. STROTHER: No, no, no. I'm saying that they
25 are arguing that it's a fixture, and therefore, it should

1 be - - -

2 CHIEF JUDGE WILSON: And you say it's not a
3 fixture?

4 MR. STROTHER: I'm saying that using fixture as a
5 concept has significant issues.

6 JUDGE HALLIGAN: So what is it then?

7 MR. STROTHER: What is it? It's a piece of jail
8 property attached to a larger structure.

9 JUDGE HALLIGAN: But not a fixture?

10 MR. STROTHER: I mean, maybe it is. The problem
11 is that the test for fixture is this multi-pronged test for
12 Matter of Metromedia. And if this court was to decide - -
13 - to decide today, in line with what the prosecution argues
14 that - - - that fixtures are now incorporated, that law,
15 Matter of Metromedia, is incorporated into the arson
16 statutes, and anything that meets it is a part of the
17 building. Even then, we would have to remand.

18 JUDGE RIVERA: So if I've got a door with a
19 window. Is the window part of the door? Is it the door,
20 also?

21 MR. STROTHER: I believe the window would be in
22 most circumstances, yes. And I think the difference
23 between a window or a doorknob or anything else is that
24 none of those are piece - - - separate, detachable pieces
25 of property that, when closed, contain fires. That's why I

1 keep bringing up a wall safe. You could install a wall
2 safe into a wall, correct? It's - - -

3 JUDGE SINGAS: But can I - - - can I ask you,
4 though, if you remove that cuffing port, is there - - - are
5 you saying there's something else there that keeps the door
6 closed in prison?

7 MR. STROTHER: I mean, yes, there's a lock on the
8 door. There's no way for anyone - - -

9 JUDGE SINGAS: That hole?

10 MR. STROTHER: Yes.

11 JUDGE SINGAS: That still exists if the cuffing
12 hole wasn't there?

13 MR. STROTHER: The hole would be there if you
14 remove the cuffing port. Yes, there would be a hole there.

15 JUDGE SINGAS: Okay. So like the same example,
16 if it's a door and a window, like a window in the door, if
17 you suddenly took out that window, you'd have a hole in the
18 door. And I think we'd argue that the door has now - - -
19 its integrity has been damaged because rain would get in or
20 whatever. That wouldn't be your door anymore.

21 MR. STROTHER: And this is why I think it's very
22 important that you also pay attention to the facts in this
23 case, which is that in this case, they didn't remove the
24 cuffing port, they didn't remove it, they just left it
25 there.

1 JUDGE SINGAS: Yeah, but I'm - - - we're trying
2 to figure out how intrinsic it is to this door. And if
3 it's actually the door or if it's like you say something
4 that's just attached that could be easily removed and you
5 walk away with it and it doesn't impact the functioning of
6 that door.

7 MR. STROTHER: I understand the question, but I
8 think that it -- that it gets away from the purpose of
9 statutory interpretation. Statutory interpretation text's
10 purpose. Text doesn't answer this. Text just says a
11 structure with roof and walls. We look to purpose to
12 protect buildings and the people inside of them from
13 danger. That's arson in the second degree.

14 JUDGE CANNATARO: Can we - - - can we look to
15 analogy? You talked about a Nintendo before. You said the
16 Nintendo on the living room floor is just property in the
17 building. It's not part of the building. How is the
18 cuffing port like a Nintendo machine?

19 MR. STROTHER: I mean, they're - - - they're not
20 necessarily that similar. I think the biggest - - - the
21 biggest distinction would be that the cuffing port, if you
22 - - - I mean, actually the most interesting thing is that
23 you set fire - - -

24 JUDGE CANNATARO: Relative to Judge Singas' line
25 of questioning, if you pick the Nintendo up from the living

1 room floor, it leaves behind no trace that it was ever
2 there. The integrity of the building is completely intact,
3 and unless you had a videotape, you wouldn't know. If you
4 take the cuffing port out of the door, I hate to repeat
5 what she said, but then you have a big hole in the door.
6 That makes it seem like a very different thing, even if you
7 could call them both property.

8 JUDGE HALLIGAN: Because its functionality is
9 impaired in the - - - in the - - - in the circumstance
10 where you take it out of the - - - of the door, you know?
11 Which is completely different than the PlayStation,
12 Nintendo, whatever you have.

13 JUDGE CANNATARO: Oh, was it a PlayStation?

14 JUDGE HALLIGAN: I don't know. But anyway.

15 MR. STROTHER: So I actually, I don't think
16 that's necessarily the right way to go in terms of
17 functionality. For one thing, because there's certainly no
18 language in the statute that says functionality is the test
19 for how we determine a building. One example of this, and
20 we cite in our briefs, is that there's a case in which
21 someone set - - - tried to set an oven on fire. It was put
22 out before it spread to the rest of the kitchen. But in
23 that circumstance - - -

24 JUDGE HALLIGAN: Yeah, but the oven, like the
25 bathtub or the PlayStation can certainly be removed in a

1 way that's different from taking a cuffing port out or
2 taking a window out of the window frame.

3 MR. STROTHER: That's true that you wouldn't have
4 a hole in the kitchen if you removed the oven. I
5 understand where Your Honor is coming from. I still think
6 the court has to be focused on the purpose of the statute,
7 which is to prevent danger to people and - - -

8 JUDGE HALLIGAN: So - - - so am I understanding
9 your argument turns on the fact that because the cuffing
10 port is intended to be at least relatively fireproof, that
11 it poses less danger?

12 MR. STROTHER: Absolutely. I mean, I believe
13 that is the exact testimony from the case. Is that - - -
14 is that the cuffing port, it's unusual. And the rule we're
15 proposing is quite narrow for that reason. We're asking
16 that a person not be convicted of B violent felony content
17 and get twenty-five years in prison for lighting a small
18 bundle of papers on fire in a box designed to prevent - - -
19 that is designed in such a way that the fire can't spread
20 outside of it. That stretches so far past here - - -

21 JUDGE TROUTMAN: Okay. But that's not what it
22 was stated earlier. It's a cuffing port. It wasn't
23 designed to thwart fires.

24 MR. STROTHER: No, no. I think - - - I'm sorry.
25 I don't - - - I feel like I'm being misunderstood. I'm not

1 saying that when they designed it, they thought, let's
2 design a fireproof cuffing port, although I do think that's
3 part of it.

4 JUDGE TROUTMAN: Okay. I'm interested in the
5 preclusion of the psychiatric evidence.

6 MR. STROTHER: Oh, I was going to ask if I could
7 reserve some time to address that in rebuttal in a few
8 minutes.

9 JUDGE TROUTMAN: Because your light - - - your
10 light is on. So I was wondering if you were interested in
11 that argument?

12 MR. STROTHER: Sure. I would love to address it
13 for a couple minutes, if, Your Honors would be fine?

14 CHIEF JUDGE WILSON: You can take a couple
15 minutes.

16 MR. STROTHER: Yes. So that claim, we believe,
17 comes down to this court's decision in People v. Berk,
18 which incorporates the Supreme Court's decision in Illinois
19 v. Gates, I believe. I'm sorry. 250.10 erects a sort of
20 structure for dealing with late notice, but the Supreme
21 Court has held that you cannot preclude the entirety of
22 someone's defense under a state notice statute without
23 first making a determination of whether there's prejudice
24 to the other side from that late notice. Berk holds that
25 explicitly. Berk says - - -

1 JUDGE TROUTMAN: Was there any analysis done by
2 the court as to prejudice?

3 MR. STROTHER: No. There was - - -

4 JUDGE TROUTMAN: Or anything?

5 MR. STROTHER: No. There was no claim of
6 prejudice made by the prosecution below. The court never
7 mentioned the word prejudice in its ruling. It never comes
8 up. There is no - - -

9 JUDGE TROUTMAN: Did the court seek an inquiry
10 from the people or just summarily denied?

11 MR. STROTHER: No. The court asked the
12 prosecution for its response and the prosecution did not
13 give a response. They just said it's late. And it
14 shouldn't be allowed.

15 JUDGE HALLIGAN: This seems basically to me like
16 a protective or prophylactic notice because there's no
17 specification yet because the doctor hasn't done the exam.
18 Is that a fair characterization?

19 MR. STROTHER: So I think that the - - - the
20 actual piece of paper is, you know, doesn't specify - - -

21 JUDGE HALLIGAN: No. But I mean, when - - - when
22 asked I don't - - - I didn't think I saw anything that
23 elaborated. And that was because I took the record to
24 suggest that that was because the doctor had not had an
25 opportunity to examine the - - - the defendant yet; is that

1 right?

2 MR. STROTHER: Slightly. I want - - - that's
3 true, basically, but I want to make a couple
4 clarifications. I think it's more than that. So the
5 doctor they hired, Doctor Goldsmith, had examined Mr.
6 Sidbury for the purposes of competency.

7 JUDGE HALLIGAN: Yes, previously. I mean, in
8 regard to the - - - the - - -

9 MR. STROTHER: That's correct. He had reviewed
10 all of his records going back to his day care when he had
11 his first psychiatric appointments. And he had said to the
12 attorney, based on the review and these other exams, I do -
13 - -

14 JUDGE HALLIGAN: Didn't - - - didn't the attorney
15 basically say, I can't provide any more detail now because
16 I need the other lawyer to come back, and I need the doctor
17 to do another examination?

18 MR. STROTHER: Yeah. So Doctor Goldsmith said,
19 despite these conclusions, I do need to examine him one
20 more time.

21 JUDGE HALLIGAN: That's what I mean by saying - -
22 -

23 MR. STROTHER: So yes.

24 JUDGE HALLIGAN: - - - it is protective in that
25 it doesn't provide perhaps complete specificity; is that



1 fair?

2 MR. STROTHER: I think it's fair to say that
3 there was going to have to be more done before he could
4 iron out the defense. Although, I do want to make the
5 point that once again, the statute, and even the court in
6 Almonor has said that, you know, adjournments are
7 appropriate to allow this development to happen when
8 there's no prejudice to the other side. And again, the
9 Constitution places a limit on the court's power to
10 preclude the entirety of a defense when there is no
11 prejudice. And that's because the point of the notice
12 statute is to prevent prejudice. That's the sole purpose
13 of it, is to prevent prejudice to the other side.

14 JUDGE RIVERA: I thought that counsel had - - -
15 correct me if I've misremembered the record, had made a
16 representation that the doctor was going to make a
17 particular diagnosis, but would not finalize that until he
18 again interviewed the defendant. So there's more than
19 just, I may want to put this kind of defense before the - -
20 - before the court, but rather a representation that the
21 doctor, more likely than not, is going to back up this
22 particular position that we're going to argue. But he
23 needs to have this interview to finalize it and prepare a
24 report.

25 MR. STROTHER: That's why I was somewhat

1 reluctant to say it was just a protective application,
2 because he has examined Mr. Sidbury. He's looked at his
3 records. He says, yes, I prepared to testify to this, but
4 it's almost like a matter of professional thoroughness. I
5 want to do an exam specifically for that purpose, prepare a
6 report. And then I will be done. And it's - - - it's - -
7 - I want to make clear also that counsel stands up in front
8 of the judge and lists here are Mr. Sidbury's diagnoses,
9 here are the fact that his medical record, his psychiatric
10 conditions go back to preschool. He has bipolar disorder,
11 personality disorders, post-traumatic stress disorder.
12 It's not like the bare bones representations that have been
13 precluded in the past where counsel refuses to give any
14 detail late in the game.

15 JUDGE TROUTMAN: In this case, trial was still
16 some six weeks or so away?

17 MR. STROTHER: That's correct. Yes, it was prior
18 to trial. There would have been no prejudice to the
19 prosecution here. Because Mr. Sidbury had not yet - - -
20 actually, Berk speaks exactly to this scenario, has said -
21 - - this court has said when the notice is late, but the
22 defense is not yet actually had their client examined for
23 the purposes of the defense, both sides are on equal
24 footing. They're both going to be examining.

25 JUDGE SINGAS: Yeah, but isn't this a little

1 different because we're not talking about a late notice. I
2 mean, the statute says thirty days. This was four years
3 later. It was the same institutional provider. Two 730
4 exams had been done alerting everyone about issues. So I
5 feel like these particular facts are a little different
6 than how you're presenting them.

7 MR. STROTHER: We don't deny that the delay was
8 extensive. We don't. The difference, though, is that just
9 the number itself does not establish anything, right? They
10 still have to make a claim that it prejudices their case.
11 They never did. And the reason why is they would both
12 still be examining Mr. Sidbury at the exact same time.
13 There's no advantage to the defense in this circumstance.
14 If they had had Mr. Sidbury examined a week after the
15 incident and then waited four years to give the prosecution
16 the results of that examination, now, that would be
17 prejudice. There are cases where preclusion happens in
18 those cases, but Berk explicitly holds, and it mentions an
19 example of no prejudice when the exams are happening at the
20 same time.

21 CHIEF JUDGE WILSON: Let's hear from the ADA.
22 I'll give you like a minute to give a rebuttal at the end.

23 MR. STROTHER: Sure. Thank you.

24 MS. FARRINGTON: Good afternoon, Your Honors.
25 Lori Farrington, for the People. Your Honors, to start

1 with the first point regarding the jail cell door, viewing
2 the evidence here in the light most favorable to the
3 People, the Appellate Division's decision that there was
4 legally sufficient evidence of damage to the building
5 should be affirmed. Defendant set fire to the cuffing port
6 of his jail cell door, which was a built-in, integral part
7 of the door, as the defense concedes.

8 JUDGE TROUTMAN: What do you say to the claim of
9 the defense about its being readily capable of spreading?

10 MS. FARRINGTON: There was no evidence that a
11 fire could not spread beyond the cuffing port. In fact,
12 when Officer Arias was asked about that, his answer was,
13 well, it depends if the plexiglass lid breaks. And then he
14 was asked, well, in this specific situation where it did
15 not break, would the fire spread? And that is when he said
16 he did not believe so. However, Officer Elserafy, as a
17 result of this fire, was treated for smoke inhalation. The
18 plexiglass lid was burned to the point that there were two
19 holes in it through which smoke could escape. So to say
20 that this fire could not endanger the inhabitants of the
21 building is simply untrue, especially when you are dealing
22 with a jail building where there are hundreds of vulnerable
23 people locked inside that cannot escape.

24 JUDGE HALLIGAN: Can the endangerment include the
25 smoke or fumes, and not just the risk of the fire itself

1 spreading to other parts of the building?

2 MS. FARRINGTON: Well, the legislature, as my
3 adversary states, was concerned with the danger posed to
4 the inhabitants of the building.

5 JUDGE HALLIGAN: So - - - so if the cuffing port
6 is such that the fire itself can't spread, but there's
7 smoke or fumes that can dissipate through the building and
8 affect the folks that are inside, is that sufficient?

9 MS. FARRINGTON: Yes. In terms of - - -

10 JUDGE HALLIGAN: And why is that if - - -

11 MS. FARRINGTON: - - - the intent of the
12 statute, yes.

13 JUDGE HALLIGAN: Yeah, that's what I mean. And -
14 - - and - - - and - - -

15 MS. FARRINGTON: Well, there has - - - in terms
16 of the statute, there has to be damage. And there was
17 damage here. But defense's argument is predicated on a
18 factual notion that is incorrect, that this fire could pose
19 no danger to those inside because it could not spread.
20 That is not true. And in fact, the trial court asked trial
21 counsel, how can you claim that this fire could not spread
22 beyond the cuffing port to the door? And trial counsel
23 said, I could not do that, Your Honor. So yes, these
24 cuffing ports are made of metal and in fact - - -

25 CHIEF JUDGE WILSON: But there can - - - but

1 there can be fires that are set inside an inhabited
2 building that could injure people, even though there's no
3 damage to the building, right?

4 MS. FARRINGTON: That is correct, Your Honor.
5 Yes.

6 CHIEF JUDGE WILSON: So that - - - wouldn't - - -
7 in that circumstance, that wouldn't be arson in the second?

8 MS. FARRINGTON: It depends on - - -

9 CHIEF JUDGE WILSON: No damage to the building.

10 MS. FARRINGTON: It depends on the items that
11 were set on fire. And for example, I'll use the same case
12 that my adversary cited where there was a fire set in an
13 oven. That was found sufficient for attempted second
14 degree arson, despite the fact that there was no damage to
15 anything.

16 CHIEF JUDGE WILSON: Well, attempt doesn't
17 require actual damage - - -

18 MS. FARRINGTON: Right. But - - -

19 CHIEF JUDGE WILSON: So but - - -

20 MS. FARRINGTON: Setting the fire in the oven
21 that resulted in no damage anywhere - - -

22 CHIEF JUDGE WILSON: Right.

23 MS. FARRINGTON: - - - was attempted second-
24 degree arson. Here we have damage.

25 CHIEF JUDGE WILSON: Leave - - - leave - - -

1 attempt out for a minute. The second-degree arson statute
2 requires damage to a building, yes?

3 MS. FARRINGTON: Yes.

4 CHIEF JUDGE WILSON: You can set a fire inside a
5 building that is inhabited, let's say a huge garbage can.

6 MS. FARRINGTON: Correct.

7 CHIEF JUDGE WILSON: That does not damage the
8 building at all.

9 MS. FARRINGTON: Correct.

10 CHIEF JUDGE WILSON: And that injures a lot of
11 people through smoke inhalation.

12 MS. FARRINGTON: Through smoke inhalation? Yes.
13 However - - -

14 CHIEF JUDGE WILSON: It would not be arson in the
15 second.

16 MS. FARRINGTON: That is correct.

17 CHIEF JUDGE WILSON: Okay.

18 MS. FARRINGTON: Because there is a qualitative
19 difference between an item, such as a garbage pail, that
20 can readily be brought outside to minimize the damage to
21 the building and to minimize the risk to those inside of
22 the building. Here that situation is not present, and that
23 is why we felt that the law regarding fixtures was
24 instructive. And to be clear, we're not asking that the
25 laws - - - real property law be wholesale incorporated into

1 this, but it's instructive in discerning the legislative
2 intent - - - intent, given the legislature's focus on the
3 damage, the risk of injury to those inside the building.

4 So a garbage can fire inside a building can much
5 more readily be extinguished, brought outside, stopped from
6 spreading to minimize the danger of smoke inhalation, in
7 addition to minimizing the danger that the flames
8 themselves will spread. So yes, that presents a very
9 different scenario, and that is the type of situation the
10 legislature attempted to address when it included in 2001
11 the misdemeanor charge of fifth-degree arson, which is
12 setting fire to the property of another or damage - - - and
13 damaging the property of another.

14 And those are two very different circumstances.
15 And to use the example that was brought up before of a
16 bathtub, obviously, a fire in a bathtub presents a far
17 greater danger to the structure itself, as well as to those
18 inside than would a fire in a garbage can that happened to
19 be inside of a building.

20 JUDGE SINGAS: Can you get to the psychiatric
21 defense? What was the People's prejudice?

22 MS. FARRINGTON: Yes. Here, the trial court
23 absolutely did not abuse its discretion in declining to
24 accept the egregiously late notice. In fact, it was
25 defense counsel who brought the issue of prejudice to the

1 People up before the trial court, before the People even
2 had an opportunity to - - -

3 JUDGE TROUTMAN: So what was that prejudice
4 specifically to the People?

5 MS. FARRINGTON: Here, the prejudice - - - the
6 prejudice here would be that any exam that the People could
7 conduct four years after the crime would be neither in
8 close temporal proximity to the crime, nor meaningful, nor
9 reliable.

10 JUDGE HALLIGAN: And where is that set forth in
11 the record that that - - - that that point was made by
12 People in the moment?

13 MS. FARRINGTON: Your Honor, it wasn't - - - that
14 point was not specifically addressed, but the issue of
15 prejudice was raised and therefore considered by trial
16 board.

17 JUDGE TROUTMAN: But don't you have to specify
18 what the prejudice is for the court to determine if whether
19 perhaps he should be granted the opportunity to have that
20 exam done?

21 MS. FARRINGTON: Well, Your Honor, the prejudice
22 is, first of all, is inherent in the delay itself. Second
23 of all, the trial court in - - -

24 JUDGE TROUTMAN: So you're saying the court did
25 assess prejudice and identify a prejudice to the People?

1 MS. FARRINGTON: The court did assess prejudice.
2 Yes, it did assess - - -

3 CHIEF JUDGE WILSON: What did it say about - - -
4 what did it say about prejudice?

5 MS. FARRINGTON: The court assessed the - - -
6 well, first of all, it assessed under the statute the good
7 cause and the interest of justice. Interest of justice
8 incorporates prejudice. So any analysis - - -

9 JUDGE HALLIGAN: An implicit - - - there's
10 nothing explicit; is that correct? But you're arguing
11 there's an implicit assessment of prejudice?

12 MS. FARRINGTON: Absolutely, yes.

13 JUDGE HALLIGAN: But nothing - - - nothing
14 explicit?

15 MS. FARRINGTON: Explicitly, the trial court did
16 not say I find no prejudice in those explicit words, no.

17 JUDGE HALLIGAN: Or ask the People to identify
18 prejudice, correct?

19 MS. FARRINGTON: No. But again the issue was
20 raised.

21 CHIEF JUDGE WILSON: Did the People say we are
22 prejudiced, even if they didn't explain how?

23 MS. FARRINGTON: The People did not raise the
24 issue of prejudice. First, the issue was raised by counsel
25 who said the People are going to claim there is prejudice.

1 Where is the prejudice? So the issue was before the trial
2 court - - -

3 CHIEF JUDGE WILSON: And then did the People - -
4 -

5 MS. FARRINGTON: The People did not reiterate it,
6 no.

7 CHIEF JUDGE WILSON: They said nothing? They
8 said nothing in response to that?

9 MS. FARRINGTON: The People did not reiterate
10 that, no. That is correct.

11 JUDGE CANNATARO: Not just reiterate, but did
12 they make out a case for prejudice? I mean, it's one thing
13 for counsel to give the court a warning that the People are
14 going to argue prejudice, but I'm sure defense counsel,
15 nowhere in the record makes out the People's case on
16 prejudice for them. So my question is, is there anywhere
17 where the People get up and say, yes, here's the promised
18 prejudice argument, and this is what it is?

19 MS. FARRINGTON: Based on the trial court's - - -
20 the colloquy between trial court and counsel, that record
21 was not necessary in that - - -

22 JUDGE HALLIGAN: You mean between defense
23 counsel?

24 MS. FARRINGTON: I'm sorry, between counsel - - -
25 defense counsel.

1 JUDGE HALLIGAN: Okay. But not the People?

2 MS. FARRINGTON: No.

3 JUDGE HALLIGAN: Okay.

4 MS. FARRINGTON: There was a very lengthy
5 colloquy back and forth between defense counsel and the
6 trial court.

7 JUDGE TROUTMAN: So the People never identified
8 or articulated specific prejudice as to this delay.

9 MS. FARRINGTON: No. And as this court has found
10 and has addressed that the statute - - - the notice statute
11 itself incorporates that notion of prejudice, that the
12 reason for the thirty-day time limit is so that the People
13 have the opportunity to conduct a meaningful - - -

14 JUDGE TROUTMAN: But even if there is a delay and
15 you're outside that thirty days, the reason there's a
16 discussion about prejudice is whether one should exercise
17 discretion and still allow the exam to take place, correct?

18 MS. FARRINGTON: Correct. And here - - -

19 JUDGE TROUTMAN: So if you don't identify what
20 your actual prejudice is, how can you say it's not an
21 abuse?

22 MS. FARRINGTON: The trial court had the
23 opportunity - - - the issue was raised. Granted, it was
24 raised first by defense counsel who stated they are going
25 to say there was prejudice. The trial court had the

1 opportunity to consider that. The trial court considered
2 all of the factors.

3 JUDGE RIVERA: But - - - but - - - but not
4 knowing the parameters of the claim. I think that's what
5 the Chief Judge and Judge Cannataro, in part, are getting
6 to when they say just saying they're going to raise
7 prejudice is not telling the court what is the argument
8 from the People's side as to the nature of that prejudice.

9 MS. FARRINGTON: That is correct. And here - - -

10 CHIEF JUDGE WILSON: And suppose the - - -
11 suppose the People had then said at trial, the prejudice is
12 we're fifty-two days away from trial, and we can't hire and
13 retain an expert and have that person review the other
14 side's expert in that time. And the prejudice to us is we
15 can't do this. And the court then might say, well, then
16 we'll put the trial off for another two months. That would
17 address that prejudice, if that's what the People's
18 prejudice was.

19 MS. FARRINGTON: Right. But pursuant to this
20 court's precedent in Berk and Almonor, the statute provides
21 for a timely and meaningful exam. This exam could not be
22 timely, it could not be meaningful. And there's - - -

23 CHIEF JUDGE WILSON: And if the People had said
24 that, that would be different from the hypothetical I gave
25 you, but the court at least would then know what argument

1 it was addressing, right? We normally ask people to
2 preserve arguments so that in a situation where the court
3 is called on to rule on arguments and make a decision and
4 see how something can be mitigated or not. If you don't
5 know what you're trying to mitigate, how can you do it?

6 MS. FARRINGTON: Well, as Your Honors are aware,
7 preserving the argument requires that the trial court be
8 informed of the general nature of the argument - - -
9 prejudice. Here, the trial court was well aware of that,
10 it addressed - - -

11 JUDGE CANNATARO: No, but if you agree with Judge
12 Troutman that the purpose of the showing of prejudice is to
13 give the court an opportunity to exercise its discretion,
14 to make an effort to ameliorate the prejudice and allow a
15 defense that, you know, defendant might be entitled to
16 bring or not. Then, you have to really articulate what the
17 prejudice is. If the argument is, look, it's four years
18 after the fact now, there's no way that even if you let us
19 hire our own psychiatrist, there's no way they're going to
20 gain meaningful insight into what this defendant's state of
21 mind was four years ago. You know, that would at least
22 tell the court something about whether it could exercise
23 its discretion or not. Don't you think by not saying
24 anything, you deprive the court of that opportunity?

25 MS. FARRINGTON: No, because the court did

1 address, not in those exact words, but the court did
2 address the delay repeatedly. It did address - - -

3 JUDGE TROUTMAN: Do you agree that the court has
4 to balance that against the defendant's constitutional
5 right to present a defense?

6 MS. FARRINGTON: Yes. In terms of the
7 defendant's due process rights, of course. And that's one
8 reason that the court found a lack of prejudice.

9 JUDGE TROUTMAN: But even with that - - -

10 MS. FARRINGTON: But yes, of course.

11 JUDGE TROUTMAN: Even without the People
12 specifying what their prejudice is, what was done here was
13 fine? That's what you're saying?

14 MS. FARRINGTON: Absolutely. Yes. Because the
15 court considered it. The court considered the delay. The
16 court considered the effects of the delay on both parties.
17 The court considered whether counsel had shown good cause
18 or that the interest of justice required the late notice.

19 JUDGE HALLIGAN: Can I ask you about the good -
20 - - the good cause and a different point?

21 MS. FARRINGTON: Sure.

22 JUDGE HALLIGAN: I was struck by the fact that
23 defense counsel supervisor came in and said on the record,
24 it looked to me that there had been malfeasance,
25 apparently, in - - - in putting this defense - - -

1 providing notice of this defense or perhaps examining it, I
2 couldn't quite tell previously. And the judge seemed to me
3 to - - - to brush that aside relatively quickly.

4 MS. FARRINGTON: Well, the trial - - -

5 JUDGE HALLIGAN: Should - - -

6 MS. FARRINGTON: Oh, I'm sorry.

7 JUDGE HALLIGAN: I was just going to ask, what's
8 your response to that? Should we be concerned about that?

9 MS. FARRINGTON: The trial court repeatedly
10 asked, where is the malfeasance? This was a reasoned and
11 rational decision by the prior attorney from the same
12 organization. That question could not and was not
13 answered. The mere utterance of malfeasance cannot by
14 itself suffice to establish good cause without getting that
15 requirement.

16 JUDGE HALLIGAN: That's a pretty unusual - - -
17 that's a pretty unusual word, I would think, to be used
18 particularly by a supervisor who is with an organization
19 that appears with some frequency in a court.

20 MS. FARRINGTON: I would agree, Your Honor. But
21 under the statute to show good cause, there needs to be
22 some indication that the malfeasance was not merely a
23 disagreement in strategy. Perhaps Ms. Felber, who was the
24 supervisor, disagreed with Ms. Mardoff's conclusion.

25 JUDGE TROUTMAN: Does the record say that?

1 MS. FARRINGTON: No, because when the trial court
2 asked, where was the malfeasance, what was the malfeasance.
3 That question could not be answered.

4 JUDGE TROUTMAN: Our office failed - - - our
5 office failed the client here. We're taking responsibility
6 for it. Give him his chance. You're saying that's not
7 what the supervisor was acknowledging? That was their
8 fault?

9 MS. FARRINGTON: No, Your Honor.

10 JUDGE TROUTMAN: And don't - - - don't - - -
11 don't allow the client's constitutional rights to suffer as
12 a result thereof?

13 MS. FARRINGTON: Again, Your Honor, the mere
14 utterance of the word does not establish good cause. Had
15 there been - - - for example, had the initial - - -

16 JUDGE TROUTMAN: The mere utterance of the words,
17 where is the malfeasance established that it wasn't, in
18 fact, that - - - that - - - you know what? It also seems
19 that the saying to the lawyer, you're lying.

20 MS. FARRINGTON: No. No. It does not hinge on
21 counsel having been untruthful or lying, nor does it in any
22 way - - -

23 JUDGE TROUTMAN: But they're not - - -

24 MS. FARRINGTON: - - - impugn the integrity.

25 JUDGE TROUTMAN: So you're saying that the court

1 didn't take the attorney at her word? This is - - - now
2 that there was malfeasance. But you're saying because
3 there wasn't a sufficient articulation of the specifics of
4 it?

5 MS. FARRINGTON: No. The court, by asking the
6 question, where was the malfeasance, what was the
7 malfeasance, was saying, I need some information to
8 determine good cause. I need you to tell me why this is
9 not merely a change in strategy, which does not suffice to
10 be good cause. I need you to explain to me how this was
11 malfeasance versus change in strategy. That question could
12 not be answered and was not answered. And I'm not saying
13 that they had to provide extensive detail, but some
14 indication that Ms. Mardoff was going to serve notice, and
15 forgot some type of malfeasance beyond a change in
16 strategy.

17 And there was no evidence of that. And it
18 appears from the record that the supervisor had not spoken
19 to the initial attorney and did not know whether it was
20 merely a change in strategy, because she asked the court,
21 has previous counsel stated that the defendant is
22 malingering. So yes, for good cause under the statute, the
23 trial court was well within its discretion to say, tell me
24 why this was not a change in strategy. For four years he
25 had active and engaged counsel who requested two 730 exams.

1 Tell me how this is not just a change in strategy
2 in a case that I have been presiding over for four years,
3 that I have been the judge throughout both 730 exams where
4 this doctor that they now retained after four years, had
5 been examining the defendant for two years already. Yes,
6 the trial court was well within its discretion to say, I
7 need a little more information than that, and that
8 information could not be provided.

9 CHIEF JUDGE WILSON: Thank you, Counsel.

10 MS. FARRINGTON: Thank you very much, Your
11 Honors.

12 CHIEF JUDGE WILSON: Counsel. You got - - -
13 you're way over your time, but you can have one minute.

14 MR. STROTHER: I'm going to correct a couple of
15 factual inaccuracies. The first, the court never once
16 asked counsel to say, what was the malfeasance? That
17 sentence doesn't exist in the record. Instead, what the
18 court said is, "Everything I've said about your client over
19 the last few years, there is no psychiatric issue. There
20 is a malingering issue. Your client can call a
21 psychiatrist all he wants. He has been established
22 repeatedly to be fit."

23 JUDGE GARCIA: Counsel, didn't the court also
24 say, though this could have been a rational and reasonable
25 decision made by the attorneys in this case that there was

1 no psychiatric defense?

2 MR. STROTHER: Yeah, but the reason he's - - -

3 JUDGE GARCIA: But what if Legal Aid supervisor
4 comes in and says, you know, we should have made this
5 motion. It was ineffective assistance of counsel. Does
6 the court have to accept that, or should that attorney have
7 to come in and say, yeah, I just, you know, there's no - -
8 - I had no strategy here for this?

9 MR. STROTHER: I do think the court needs to
10 accept the statement - - -

11 JUDGE GARCIA: So in effect - - - can come in at
12 any time and say, you know, the lawyer we had on this case
13 before was ineffective, constitutionally ineffective, we
14 should have done this. And you've got to let us do it now.

15 MR. STROTHER: I think in the - - -

16 JUDGE GARCIA: And you have to say yes.

17 MR. STROTHER: In the absence of any prejudice to
18 the other side. Yes. Because the constitutional right to
19 present a defense and call witnesses requires prejudice.

20 JUDGE GARCIA: You see how there could be abused,
21 though, right?

22 MR. STROTHER: I think the way that it's not
23 abused is to assess prejudice and also - - - and to make
24 sure that if there is no prejudice to the other side, then
25 you aren't abusing - - -

1 JUDGE GARCIA: So there's no prejudice. We can
2 come in and we can say, the guy had this before was
3 ineffective. So you got to let us do this?

4 MR. STROTHER: No, no, no. Actually, the law
5 also has a mechanism that if a court believes that someone
6 is willfully subverting the purpose of the statute, they
7 can preclude. Multiple Supreme Court cases, Second Circuit
8 cases that we cited.

9 JUDGE GARCIA: Question. If we agree with you on
10 this notice issue but disagree on the arson issue, what
11 comes next?

12 MR. STROTHER: It's a remand for a new trial.

13 JUDGE GARCIA: And can the People then argue
14 prejudice on the prior late notice that now it's four years
15 and we didn't have a chance to examine this person closer
16 to the event?

17 MR. STROTHER: I mean, I think I would need to do
18 some research on law of the case before I could
19 definitively answer that question for you. I think that if
20 counsel at that point makes a motion to bring in a
21 psychiatric expert, they would still have to articulate how
22 it hurts their case to not - - - and I want to make clear
23 that the prejudice that's claimed here, for what it's
24 worth, is unpreserved. It's raised only in the brief here.
25 I also want to make clear, the counsel saying that the

1 court did consider prejudice is false. The court did not
2 ever consider prejudice at any point in this case. And
3 saying implicitly consider just means it wasn't considered.

4 CHIEF JUDGE WILSON: Thank you, Counsel.

5 MR. STROTHER: So thank you.

6 (Court is adjourned)

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

I, Christy Wright, certify that the foregoing transcript of proceedings in the court of Appeals of Steven Sidbury v. People, No. 19 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Signature: Christy Wright

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