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COURT OF APPEALS  
STATE OF NEW YORK

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PEOPLE,

Appellant,

-against-

No. 42

KERRI ROBERTS,

Respondent.

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PEOPLE,

Respondent,

-against-

No. 43

TERRIE J. RUSH,

Appellant.

-----

20 Eagle Street  
Albany, New York  
March 22, 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



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Official Court Transcriber



1 CHIEF JUDGE DIFIORE: Number 42, the People of  
2 the State of New York v. Kerri Roberts.

3 Counsel.

4 MR. MORROW: May it please the court, Philip  
5 Morrow for the people. I'd like to reserve two minutes of  
6 rebuttal time, please,

7 CHIEF JUDGE DIFIORE: Yes, sir.

8 MR. MORROW: This case provides a perfect example  
9 of the type of conduct that the legislature intended to  
10 target when it enacted the identity theft statutes.  
11 Defendant used someone else's credit card account number to  
12 try to purchase more than 1,000 dollars' worth of sneakers  
13 and hats. Defendant's effort to defraud the victim did not  
14 depend upon his using the victim's name. Instead, the key  
15 to defendant's scheme was his having obtained the victim's  
16 personal identifying information, in this instance, her  
17 credit card account number - - -

18 JUDGE RIVERA: So, counsel, let me ask you, your  
19 interpretation and your construction of this statute, what,  
20 if anything, does - - - assumes the identity of another  
21 person - - -

22 MR. MORROW: Assuming - - -

23 JUDGE RIVERA: - - - add to this statutory  
24 prohibition?

25 MR. MORROW: That phrase doesn't change the way



1 that the statute is applied but it provides a definition  
2 for what it means to assume someone's identity within the  
3 meaning of the identity theft statutes. This was a new  
4 crime that the legislature was addressing. It wasn't in  
5 existence before these statutes and at one - - -

6 JUDGE WILSON: Well, but taking - - - taking  
7 someone else's credit card number and using it before the  
8 identity theft statute was still a crime, no?

9 MR. MORROW: It was still a crime. It would  
10 likely be covered - - -

11 JUDGE WILSON: So I'm wondering about how you  
12 started by saying this is exactly an example of what the  
13 legislature was trying to attack through this new statute.  
14 I mean is that right? Really, it's just taking somebody's  
15 credit card number and using it to buy sneakers?

16 MR. MORROW: If the - - - if you look at the  
17 legislative history that's cited in our brief, the  
18 legislature was concerned by the massive amounts of  
19 consumer's public identifying information that was being  
20 stored on servers and was being accessed by criminals to -  
21 - -

22 JUDGE WILSON: To buy sneakers?

23 MR. MORROW: Well, to buy sneakers, to open  
24 credit, to do all sorts of things. And the big difference  
25 between the identity theft statutes and criminal



1 impersonation is that you don't have to engage in acts of  
2 impersonation that would cause another person to think that  
3 you are that particular person because with the criminal  
4 impersonation statutes there's a requirement that, you  
5 know, you deceive or you convince another person. And here  
6 if you take someone's credit card number and, you know, you  
7 don't say that you were that person it might not be covered  
8 by the criminal impersonation statute so a - - - it's a  
9 different type of conduct that they intended to target.  
10 And as the Fourth Department has recognized - - -

11 JUDGE RIVERA: But I - - - I'm still not clear -  
12 - - I see what you're saying. But I'm still not clear,  
13 given that the statute says you're guilty of identity  
14 theft, why this other language, based on your construction,  
15 right, the assumption of the identity of another isn't  
16 superfluous.

17 MR. MORROW: What's - - - it provides a  
18 definition for what it means to assume the identity in the  
19 context - - -

20 JUDGE RIVERA: But what I'm saying is why does  
21 one need that?

22 MR. MORROW: Because the legislature was defining  
23 identity theft, and as the - - - the decisions from the  
24 First Department indicate, there is a common assumption of  
25 what it might mean for a person to assume the identity of



1 another, you know, within the core meaning - - -

2 JUDGE FAHEY: I - - - I thought the core of your  
3 argument was that there are three in - - - in - - - there  
4 are three specific instances of - - - or three specific  
5 acts that are set out: presenting yourself as another  
6 person, acting as another person, or using another person's  
7 personal ID. And that those acts themselves, when you  
8 perform those acts, mean that you've assumed the identity  
9 of that person.

10 MR. MORROW: That's correct.

11 JUDGE FAHEY: I - - - that's - - - that's the way  
12 I understood your argument. The problem with that is - - -  
13 is the common sense of what assumption of identity would be  
14 - - - would be I give my wife my check and I say would you  
15 deposit that for me? I'm going to be in Albany for a week  
16 - - - and when people still got checks, you know. But in  
17 that instance, would she be assuming the identity?

18 MR. MORROW: She would be assuming the identity,  
19 but I think - - -

20 JUDGE FAHEY: And would that be distinct from  
21 breaking 190.80 of the Penal Law - - - Penal Law, breaking  
22 that particular law?

23 MR. MORROW: It would not be identity theft  
24 because if you're - - -

25 JUDGE FAHEY: Is that because of intent?



1 MR. MORROW: She would not have the intent to  
2 defraud.

3 JUDGE FAHEY: So - - - so then wouldn't that make  
4 assuming the identity a separate element?

5 MR. MORROW: It doesn't make it a separate  
6 element. It provides the - - - you have to do - - - one of  
7 the three acts alone is an element of the crime. You don't  
8 have to - - - you know, based on the statutory construction  
9 you don't have to use another person's personal identifying  
10 information and present yourself as that person or act as  
11 that person. If that was what the legislature wanted to do  
12 it could have written the statutes in a way that achieved  
13 that, but it avoided that and treated each of the three  
14 methods equally. There's no - - -

15 JUDGE RIVERA: True, but isn't presenting  
16 yourself as that person or acting as that person the same  
17 as assuming the identity of that person? So again, I'm - -  
18 - I'm not understanding how you get around this language is  
19 superfluous under your construction.

20 MR. MORROW: Well, presenting yourself or acting  
21 as yourself are examples under the common understanding of  
22 the term of what it would mean to assume the other person's  
23 identity, but the legislature was targeting a new type of  
24 crime that's based on personal identifying information.  
25 And here, as the - - - the facts of this case illustrate,

1 defendant knew that he didn't need to say that he was Kelly  
2 Fermoyle, the victim in this case. The key was that he had  
3 her credit card number, and when he was interacting - - -

4 JUDGE RIVERA: But all I'm saying is under your  
5 construction you don't need assume the ID, right? Would  
6 not, under your construction, his conduct have violated the  
7 statute if you don't have assumes the identity of another  
8 person?

9 MR. MORROW: Yes, it doesn't - - - it doesn't  
10 change the application of the statute. It provides a  
11 definition for a new term. And I think that, you know,  
12 what we have here is there's a - - -

13 JUDGE RIVERA: The new term being identity theft?

14 MR. MORROW: Well, identity theft is the overall  
15 crime, but what it means to assume the identity of another  
16 person because like other statutes in the Penal Law if you  
17 talk to someone on the street they would think a burglary  
18 is someone going into a house at night and stealing things.  
19 But as we know from the Penal Law, burglary can be a lot of  
20 things that don't fit that common understanding.

21 JUDGE RIVERA: But if that was the case wouldn't  
22 assumes the identity of another person precede - - - I'm  
23 sorry, using personal ID information?

24 MR. MORROW: When it - - -

25 JUDGE RIVERA: Since presenting yourself or





1 acting as the other person is - - - is assuming the  
2 identity of someone?

3 MR. MORROW: Would it precede it - - -

4 JUDGE RIVERA: Wouldn't - - - wouldn't the  
5 legislature have simply taken the phrase that I'm asking  
6 you about and put it before the personal ID because that's  
7 the one that - - - I thought you were arguing that's the  
8 one that perhaps is not so obvious?

9 MR. MORROW: Well, I think that they - - - they  
10 wanted to make sure that this would be the - - - use of  
11 personal identifying information would fall within this  
12 statute, that there was no need - - -

13 JUDGE RIVERA: Okay.

14 MR. MORROW: - - - to deceive so it set it out  
15 very clearly that this is a way that under the statutory  
16 meaning you can assume the identity of another person.

17 JUDGE GARCIA: Counsel, I - - - maybe I'm wrong  
18 or maybe I'm just not following this back and forth, but I  
19 thought your argument is assume the identity of another  
20 person can be done by any of those, I think it's three  
21 ways, that are listed beyond that, right. Can do it by  
22 this, by this, or by that, right?

23 MR. MORROW: Yes.

24 JUDGE GARCIA: And I think it's - - - it's hard  
25 to read the statute and - - - where it says you can do that



1 by - - - by acting as that other person, right, or by  
2 presenting himself or herself as that other person. And  
3 how can you assume the identity - - - what - - - what could  
4 assume the identity mean if it doesn't mean one of those  
5 three things?

6 MR. MORROW: Well, I don't - - -

7 JUDGE GARCIA: I guess that's a question for your  
8 adversary here, but I'm having some trouble understanding  
9 what it could possibly mean other than those three things.

10 MR. MORROW: I think you're correct. I don't - -  
11 - I don't think it's possible to engage in conduct that  
12 would constitute - - -

13 JUDGE FAHEY: You know, to follow up on that, on  
14 Judge Garcia's question, could the statute have been  
15 written - - - and this is what I was reading and I was  
16 thinking this, could the statute have been written without  
17 the phrase assuming the identity or assumes the identity?

18 MR. MORROW: As I - - - I said to Judge Rivera,  
19 it could be - - - it - - - the application of the statute  
20 wouldn't change by taking out that language, but it was  
21 providing a definition. And I think in contrast, the  
22 interpretation by the First Department renders the use of  
23 personal identifying information prong superfluous because  
24 in order to assume the identity under their interpretation  
25 you'd also have to act as the other person or present



1           yourself as the other person so that language in the  
2           statute would have no meaning. And that was clearly  
3           something that the legislature intended to target here.

4                   JUDGE RIVERA: Well, let - - - let's say we agree  
5           with you about that, but we also think that your  
6           construction, again, leaves us with parts of this statute  
7           that seem superfluous. What do the canons of construction  
8           tell us to do in that case?

9                   MR. MORROW: Well, the canons of construction,  
10          you look at first the text of the statute, then the  
11          statutory scheme, and then the legislative history. And  
12          applying all those things together it's clear that the  
13          legislature was concerned about this type of crime. If you  
14          look at the other - - - the other statutes that were  
15          enacted at the same time, they wanted to have a very broad  
16          definition of personal identifying information and what it  
17          means to be a victim of this crime.

18                   JUDGE STEIN: So what you're saying is that  
19          there's no ambiguity here?

20                   MR. MORROW: No, there's no ambiguity. The  
21          statutes could have been written in a way that forecloses  
22          some of the challenges made to the statute, but there's no  
23          ambiguity in this provision of the statute. As the Fourth  
24          Department recognized, you do any one of the three things  
25          you assumed the identity of another person under the



1 statute. I see my time is up so - - -

2 CHIEF JUDGE DIFIORE: Thank you, counsel.

3 MR. MORROW: Thanks.

4 CHIEF JUDGE DIFIORE: Counsel.

5 MR. VANG: Yes. Good afternoon, Your Honors.

6 May it please the court, my name is John Vang, and I  
7 represent the defendant Kerri Roberts. The problem with  
8 the People's interpretation is that it would permit  
9 prosecution for certain type - - - for certain kinds of  
10 conduct as identity theft that don't advance the  
11 legislative intent. We look simply at the statute at 190 -  
12 - -

13 JUDGE STEIN: Like what? Like what?

14 MR. VANG: 190.77 defines personally identifying  
15 information, Your Honor. It includes things like an  
16 address, a telephone number, a place of employment - - -

17 JUDGE STEIN: But - - - but you have to have a -  
18 - - have a fraudulent intent. You have to have an intent  
19 to commit a crime to - - - to obtain goods or something  
20 like that, so it's not just the innocent - - - I mean we -  
21 - - sure, we use - - - we deposit each other's checks and  
22 things all the time.

23 MR. VANG: Let's - - -

24 JUDGE STEIN: But that's not what this statute  
25 has prohibited.



1 MR. VANG: Let's say someone lives in New Jersey  
2 and then wants to use Grandma's address in Queens because  
3 they want to have their child attend one of the major New  
4 York City high schools, right? They're using Grandmother's  
5 address. They're disavowing Grandma's identity. However,  
6 under the People's interpretation, the mere use of an  
7 address would automatically result in the assumption of  
8 Grandma's identity. Same thing for a telephone number.  
9 Let's say someone uses the telephone number for this Court  
10 of Appeals Hall. Under the People's interpretation, the  
11 mere use of that telephone number, which is defined as  
12 personally identifying information under 190.77 would  
13 automatically result in the assumption of the identity.

14 JUDGE GARCIA: But that doesn't mean they're  
15 guilty of a crime. I think their point was, yes,  
16 technically you would be assuming the identity, but you  
17 still need the intent to commit the crime to be guilty  
18 under the statute. So that's kind of, yeah, they would be  
19 but what's the result?

20 MR. VANG: The intent to defraud, in this  
21 instance of the example of the person who lives in New  
22 Jersey and is trying to use Grandmother's address, the - -  
23 - you know, the intent to defraud modifies the conduct  
24 which is - - - includes assumes the identity of another as  
25 well as using personal identifying information - - -



1 identifying information of another. The intent to defraud  
2 could be intending to defraud the City of New York. That  
3 might be a crime in certain instances but the mere use - -  
4 -

5 JUDGE GARCIA: So then if it was an assumption of  
6 an identity with an intention to defraud then, yes, it  
7 would be a crime. But I don't understand what the problem  
8 with that is.

9 MR. VANG: The problem is that the purpose of the  
10 identity theft statute is to - - - was to prosecute certain  
11 kinds of crimes that were resulting in damaged reputations,  
12 damages to credit reports, those kinds of things. The  
13 legislature then defines - - -

14 JUDGE GARCIA: So like using someone else's  
15 credit card.

16 MR. VANG: But in referring to 190.77. 190.77  
17 defines personally identifying information. That's a  
18 critical point. In that statute, it lists over twenty  
19 types of identifying information, some of which on its own  
20 if used could automatically result in the assumption of the  
21 - - - another person's identity.

22 JUDGE STEIN: Well, let - - -

23 MR. VANG: But it also - - - go ahead.

24 JUDGE STEIN: Let me ask you this. When we look  
25 at a statute, we look for symmetry and how - - - how it's



1 constructed. And here it says: "Assumes the identity of  
2 another person by doing - - - presenting himself or  
3 herself, by acting as another person, or" - - - and I'm  
4 sorry, all - - - they're all or by: "Or by using personal  
5 identifying information." How could - - - how could the  
6 third thing be treated differently under this statute from  
7 the first two things?

8 MR. VANG: That's - - - I think that's the  
9 problem with this statute, Your Honor. And I think - - - I  
10 think what the legislature did in including - - -

11 JUDGE STEIN: But what's the problem? It's  
12 clear.

13 MR. VANG: The problem is that it's - - - it's -  
14 - - the interpretation of the People's - - - of the statute  
15 consistent with the People's interpretation would result in  
16 prosecutions that don't advance legislative intent.  
17 Legislative intent needs to guide this court's  
18 interpretation of the statute. And again, I ask the court  
19 look at 190.77. It sweeps in a broad array of - - - of  
20 types of personal identifying information, which if used on  
21 its own - - -

22 JUDGE GARCIA: But - - -

23 MR. VANG: - - - would not result in - - -

24 JUDGE GARCIA: But the legislature knew that.

25 When they passed this law they knew what those definitions



1 were. They included the term here. They added an intent  
2 to defraud. But it seems your argument is we should read  
3 it so that despite what they did and the clear language I  
4 think of this statute, it doesn't advance what they were  
5 trying to do.

6 MR. VANG: It's not with despite - - - I think  
7 it's simple - - - look, let me use another example of a  
8 credit card number. Let's say someone uses a credit card  
9 number but disavows the identity of the person. Under the  
10 People's interpretation the person has used a credit card  
11 number, and on its own that would have resulted in the  
12 assumption of - - - of that person's identity of the  
13 commission of the offense, but that cannot be the case - -  
14 -

15 JUDGE GARCIA: No, it results in the - - -

16 MR. VANG: - - - if they disavow their identity.

17 JUDGE GARCIA: Wait, wait, wait.

18 MR. VANG: Sure.

19 JUDGE GARCIA: It results in the assumption of  
20 the identity. It doesn't result in being guilty of the  
21 offense because you still need an intent to defraud. So if  
22 my daughter uses my credit card and gets on Amazon and I'm  
23 there and she logs in and she buys something then she's not  
24 guilty under this even though she's using my number because  
25 she doesn't have the intent to defraud I think.





1 MR. VANG: Your Honor, with all due respect,  
2 she's intending to defraud with respect to her  
3 authorization to use that card.

4 JUDGE GARCIA: No, I'm sitting right there, and I  
5 said go ahead and use it.

6 MR. VANG: Well, then - - - then she has the  
7 authorization. There is no intent to defraud.

8 JUDGE GARCIA: Right, but she's still assuming my  
9 identity.

10 JUDGE STEIN: Well, I mean, isn't the converse to  
11 your argument also true that if we take out this - - - the  
12 commission of the crime by merely using the identity, the -  
13 - - the identifying information of somebody else then  
14 aren't - - - doesn't the statute fail to cover a lot of  
15 very common crimes that one would think was definitely  
16 within the intent of this - - - of this - - -

17 MR. VANG: I'm not sure - - -

18 JUDGE STEIN: - - - of this statute?

19 MR. VANG: - - - if I quite understand Your  
20 Honor's question. I mean - - -

21 JUDGE STEIN: Well, let - - - let me - - -

22 MR. VANG: - - - if - - - go ahead.

23 JUDGE STEIN: - - - give you an example. An  
24 example is exactly this.

25 MR. VANG: Right.



1 JUDGE STEIN: Somebody walks in to a store,  
2 attempts to buy goods, okay, using the identifying  
3 information, the credit card number of a third-party, but  
4 doesn't pretend to be that person and by doing so gets that  
5 person involved in having their credit destroyed or other,  
6 you know, consequences which is exactly what this statute  
7 was intended to address.

8 MR. VANG: That - - - well, actually it would be  
9 - - - it would be under the unlawful use of personal  
10 identification information which was - - - would be covered  
11 - - -

12 JUDGE STEIN: Which is a misdemeanor.

13 MR. VANG: - - - under that. Which is different.

14 JUDGE STEIN: Right?

15 MR. VANG: But in that - - -

16 JUDGE STEIN: Which is a misdemeanor.

17 MR. VANG: Which is a misdemeanor but it's still  
18 - - - but the point about it is that victims would still be  
19 eligible for - - - for, you know, various kinds of  
20 restitution. The person would be guilty of criminal  
21 possession of stolen property, criminal possession of  
22 forged instrument, as here, which are felonies. The point  
23 about it is that the People's interpretation on the - - -  
24 on the face of the definition statute alone - - - I'm  
25 looking - - - I'm - - - I'm asking Your Honor to look at



1 190.77. The categories there are very broad. The People  
2 are saying that if you use someone else's address on its  
3 own without their authorization to use that address that  
4 automatically constitutes identity theft and that doesn't  
5 advance the legislative's intent - - - legislature's  
6 intent.

7 JUDGE FAHEY: That's - - - I - - - that's not  
8 exactly the way I read it because I still think you need  
9 the element of intent. That's my problem with that  
10 analysis. Taking a step back for one second, I can't think  
11 of a circumstance where you would use someone's personal  
12 identifying information and that not be an assumption of  
13 the identity of that person.

14 MR. VANG: So - - -

15 JUDGE FAHEY: They - - - they seem to be co-  
16 equal. In other words, just the way the statute seems to  
17 be written is you assume the identity and we've - - - and  
18 these - - - and these three ways that you can assume  
19 identity, those are a violation of law is - - - if there's  
20 an intent to commit fraud. And that's why Judge Garcia's  
21 example is - - - is the most common and the most  
22 straightforward one. And I'm - - - I'm having a hard time  
23 seeing how they're not co-equal. Tell me how they're not.

24 MR. VANG: Well, Judge, Your Honor, the problem  
25 is - - - is 190.77 which defines that third one personal



1 identifying information, so it's more than three. It's  
2 over twenty different categories of - - - of information,  
3 ways in which - - - plus a catch-all category - - - ways in  
4 which if you use that - - - use any one of these types of  
5 information under the People's interpretation would result  
6 in the assumption of that person's identity. The problem -  
7 - - the problem is the way in which it was written. The  
8 legislature obviously wanted to - - -

9 JUDGE GARCIA: I don't understand what you're  
10 asking us. I guess I misunderstood in the briefs.

11 MR. VANG: Sure.

12 JUDGE GARCIA: Is to strike that last by  
13 provision as being unconstitutionally broad or only as to  
14 the last by on the personally identifying information read  
15 an additional element of assumes the identity into that  
16 subdivision only?

17 MR. VANG: You would have - - - Your Honor, the  
18 reality is that you would have to because if I use  
19 someone's address and I don't have the authorization to use  
20 their address - - - and unless the People have proven that  
21 - - - that I've assumed that person's identity, I wouldn't  
22 really be advancing the purposes of this statute.

23 JUDGE GARCIA: I - - - I had thought your  
24 argument - - - and perhaps I was wrong here.

25 MR. VANG: Right.



1 JUDGE GARCIA: I had thought your argument was  
2 you needed that as a separate element for all of the other  
3 three.

4 MR. VANG: To - - - that - it needs - - -

5 JUDGE GARCIA: That the assumes the identity was  
6 one element and then you had to prove one of the bys.

7 MR. VANG: Well - - - well, for the first couple,  
8 I mean, you can present yourself as someone else at a bank  
9 and then tender an identification card which then assumes  
10 that person's, you know, identity - - - a false one, a  
11 false identification card. So let's say I go to a bank - -  
12 -

13 JUDGE GARCIA: I just don't understand statutory  
14 rule or way of reading this statute that would let us do  
15 that.

16 MR. VANG: Well, the stat - - - the statutory - -  
17 - the - - - really, the issue is that it's - - - it's the  
18 statutory rule that requires that the court interpret a  
19 statute in the way that - - - that effectuates legislative  
20 intent here. And I - - - and I understand that oftentimes  
21 the presenting of oneself as another or even the second one  
22 would automatically result in the assumption of - - - of  
23 another person's identity. The real problem is that 190.77  
24 has such a broad list of - - - of types of information that  
25 if - - - that if used alone do not necessarily result in



1 the assumption of identity unless - - - unless the People  
2 are held to their burden and required to prove assumption  
3 of identity.

4 JUDGE GARCIA: The problem is it's - - - it's  
5 almost a fundamental conflict in your own argument because  
6 you're saying the first two are that and then you're saying  
7 the third one, the identifying information, you need  
8 something extra where the legislature seems to have said it  
9 is A, B, C.

10 MR. VANG: I - - -

11 JUDGE GARCIA: And so it's hard to follow how we  
12 could come to that conclusion.

13 MR. VANG: I'm saying it's hard to follow,  
14 understandably, because that's the way that the legislature  
15 drafted the statute. The legislature swept in a whole  
16 bunch of conduct, some of which if used on its own, like a  
17 Social Security number, would automatically result in the  
18 assumption of someone's identity. But it listed things  
19 like an address, telephone number, place of employment,  
20 calling card number - - -

21 JUDGE GARCIA: I'm sorry. Then would it depend  
22 on which sub-category of the definition whether or not you  
23 needed to read the extra element in it?

24 MR. VANG: I think that's the - - - that's the  
25 ambiguity in the statute, Your Honor. That's the problem



1 with this statute which is that there are ways - - -

2 JUDGE RIVERA: All right. So your light is off,  
3 so let me - - - let me ask you this.

4 MR. VANG: Sure.

5 JUDGE RIVERA: Let's - - - let's talk about the  
6 facts in this case.

7 MR. VANG: Sure.

8 JUDGE RIVERA: Given that the defendant here uses  
9 the credit card - - -

10 MR. VANG: Right.

11 JUDGE RIVERA: - - - but has ID with someone  
12 else's name on it and - - -

13 MR. VANG: Yeah.

14 JUDGE RIVERA: - - - two pieces of ID, but the  
15 card has - - - they had another name because it's a fake  
16 card with the - - - with someone else's number.

17 MR. VANG: Right.

18 JUDGE RIVERA: And a driver's license with that  
19 other name.

20 MR. VANG: Right.

21 JUDGE RIVERA: Okay. So then the logical - - -  
22 if I - - - if I were to adopt your approach and your  
23 analysis, it strikes me that the logical extension of that  
24 is exactly what the People argue which means the only way  
25 someone who is using a credit card fits under this statute



1 is that they have to say absolutely nothing, right, because  
2 then they haven't said I am - - -

3 MR. VANG: Right.

4 JUDGE RIVERA: - - - in this case Craig E.  
5 Johnson. I'm not.

6 MR. VANG: Right.

7 JUDGE RIVERA: Or they have to in some other way  
8 disavow the card as theirs.

9 MR. VANG: That - - - that - - -

10 JUDGE RIVERA: That strikes me as not what the  
11 legislature is intending.

12 MR. VANG: I think what the legislature intended  
13 was that, you know, the use of certain kinds of personal  
14 identifying information which were frequently happening at  
15 that time, if used, caused certain damages and harms to  
16 people. In this instance where the - - - where the  
17 victim's identity was assumed. In this case, what happened  
18 was although he used the victim's personal identifying  
19 information, which was the credit card number, he did not  
20 put himself out there as Kelly Fermoye. He did not put  
21 himself out there - - - his identity was not Kelly - - -  
22 Kelly Fermoye. He was Craig E. Jonathan.

23 JUDGE RIVERA: Well, but - - - but doesn't she -  
24 - - if it had gone through - - -

25 MR. VANG: Sure.





1 JUDGE RIVERA: - - - if it had gone through she's  
2 the victim either way.

3 MR. VANG: She would be a victim of criminal  
4 possession of a forged instrument which she was - - - which  
5 she was prosecuted for. She would be a victim of grand  
6 larceny.

7 JUDGE RIVERA: No, no, not the defendant he. I'm  
8 - - - I'm talking about the - - - the cardholder, the  
9 person on the card.

10 MR. VANG: The cardholder, yeah, she would be a  
11 victim.

12 JUDGE RIVERA: Right.

13 MR. VANG: Absolutely. I'm not saying that she's  
14 - - -

15 JUDGE RIVERA: She's the victim whether - - -  
16 whether he turns over the fake New Jersey ID - - -

17 MR. VANG: Right.

18 JUDGE RIVERA: - - - that's got some other name -  
19 - -

20 MR. VANG: Sure.

21 JUDGE RIVERA: - - - or not, right? If that  
22 store said just put - - -

23 MR. VANG: Yes.

24 JUDGE RIVERA: - - - the card through or if they  
25 said if he hadn't sought 1,000 dollars of sneakers - - -



1 MR. VANG: Right.

2 JUDGE RIVERA: - - - he sought 499.

3 MR. VANG: Right.

4 JUDGE RIVERA: Under their policy, they just  
5 could have put in the number manually and maybe it would  
6 have gone through and maybe he would have walked out - - -

7 MR. VANG: Right.

8 JUDGE RIVERA: - - - all those nice little  
9 sneakers and hats and whatever else, right?

10 MR. VANG: Yeah. Yeah.

11 JUDGE RIVERA: So she suffers either way.

12 MR. VANG: Right.

13 JUDGE RIVERA: So if the legislature's seeking to  
14 protect victims from that, right, use of the credit card to  
15 purchase and affect your credit rating and so forth your  
16 reading seems to me to undermine that legislative purpose.

17 MR. VANG: Well, no, Your Honor. The legislature  
18 - - - look, if it didn't result in her assumption of  
19 identity, if it didn't result in any damage to her then  
20 that's - - - you know, or where he - - - where - - - where  
21 Kerri Roberts was like I'm running out there and I'm - - -  
22 I'm Kelly Fermoyle and that's, you know, who I am and then  
23 it affects her credit report, if it did not result in that,  
24 which it didn't happen here, then the legislature wouldn't  
25 be protecting that. But the legislature was protecting her



1 in the - - - in the sense that - - - in other regards that,  
2 you know, Kerri Roberts here was found guilty of other more  
3 serious felony offenses, and she was definitely a victim of  
4 stealing. But the question is - - - but to - - - to call  
5 her a victim of identity theft - - - and to look more  
6 broadly, to call someone whose personal identifying  
7 information has been used, you know, without the - - - the  
8 person's identity - - -

9 JUDGE RIVERA: But you don't - - -

10 MR. VANG: - - - assumed - - -

11 JUDGE RIVERA: If I can ask one more question?

12 MR. VANG: Sure.

13 CHIEF JUDGE DIFIORE: Yes.

14 JUDGE RIVERA: I know your light - - - but do you  
15 disagree that - - - you say there's ambiguity.

16 MR. VANG: Right.

17 JUDGE RIVERA: But let's say the legislature  
18 actually intended what the People say the legislature  
19 intended. Is it your position they could not pass such a  
20 statute?

21 MR. VANG: I mean that's a - - - that's a  
22 difficult question. I mean if the legislature didn't  
23 intend that then that - - - that would be - - - that would  
24 answer the question.

25 JUDGE RIVERA: If they actually intended to - - -



1 MR. VANG: Right.

2 JUDGE RIVERA: - - - to capture the conduct that  
3 you have described.

4 MR. VANG: Right.

5 JUDGE RIVERA: Is there any reason they could not  
6 do that?

7 MR. VANG: Because - - - because in - - - because  
8 there are practical situations, practical applications, in  
9 the use of personal identifying information that ultimately  
10 would not advance the legislature's purpose that may - - -  
11 that they may not have thought about at the time that they  
12 enacted that.

13 CHIEF JUDGE DIFIORE: Thank you, counsel.

14 MR. VANG: Thank you.

15 CHIEF JUDGE DIFIORE: Mr. Morrow.

16 MR. MORROW: A critical component of the statutes  
17 is the intent to defraud. So, you know, innocent conduct  
18 that people engage in every day is not going to be swept up  
19 and - - -

20 JUDGE WILSON: All right. So - - - so let me ask  
21 you this. Suppose I see a sign on Baskin-Robbins that says  
22 free ice cream cones on your birthday, otherwise three  
23 dollars. I walk in and say today's my birthday. It's not.  
24 My birthday is in September. I have an intent to defraud.  
25 I have used somebody else's personal identifying



1 information, can I be prosecuted?

2 MR. MORROW: Technically, that conduct would have  
3 violated the identity theft statutes. But I think that you  
4 can - - -

5 JUDGE WILSON: No, no. I'm asking about this  
6 statute.

7 MR. MORROW: The identity theft statute?

8 JUDGE WILSON: I didn't - - - I'm sorry. I  
9 thought you said anti-theft.

10 MR. MORROW: No, no, no.

11 JUDGE WILSON: Identity theft? Yes. So it could  
12 be.

13 MR. MORROW: Yeah, identity theft statutes. But  
14 you can point to numerous examples with statutes where  
15 there's conduct that technically violates it but whether  
16 it's, you know, going to be subject to prosecution is  
17 another issue entirely. I'm an office employee. I forget  
18 my lunch. I know my coworker has a delicious sandwich in  
19 the fridge. I grab it without his permission and eat it,  
20 technically it's petit larceny, a Class A misdemeanor. But  
21 the police won't get involved in all likelihood, and the  
22 crime won't be prosecuted. I mean - - -

23 JUDGE RIVERA: So you mean it turn - - - it turns  
24 - - - this turns on prosecutorial discretion? This turns  
25 on the prosecutor determining whether or not the prosecutor



1 can establish these elements beyond a reasonable doubt?

2 MR. MORROW: Well, the - - -

3 JUDGE RIVERA: To - - - to distinguish between I  
4 guess what you want to say the innocent - - - what the  
5 legislature's not intending to criminalize.

6 MR. MORROW: The - - -

7 JUDGE RIVERA: Conduct that people may do every  
8 day.

9 JUDGE STEIN: But isn't there - - -

10 MR. MORROW: The legislature's not intending to -  
11 - -

12 JUDGE RIVERA: Can I get an answer to that one?

13 JUDGE STEIN: Sorry.

14 MR. MORROW: So - - -

15 JUDGE RIVERA: Please.

16 MR. MORROW: The legislature's not intending to  
17 criminalize conduct that doesn't constitute an intent to  
18 defraud. The legislature chose to enact these identity  
19 theft statutes to combat a rampant problem. And with, you  
20 know, most of the statutes in the Penal Law you could find  
21 an example that, you know, it seems like conduct that might  
22 not be subject to criminal prosecution. And, you know, it  
23 would likely depend upon the discretion of the - - - the  
24 police and the government.

25 And just quickly, the - - - the legislature



1 didn't require any harm to befall a victim in order to have  
2 a defendant violate the identity theft statutes. And  
3 ultimately if - - -

4 JUDGE RIVERA: Can I just ask - - - I know your  
5 light is off, the last question from me, is it - - - is it  
6 the People's position that in - - - in this fact pattern  
7 when he's using a different name from the owner of the card  
8 that the identity theft is related to the kind of fraud,  
9 the misleading information that's being perpetrated against  
10 that store and the cashier or in this case the credit card  
11 company, American Express?

12 MR. MORROW: Well, it's - - -

13 JUDGE RIVERA: Who is being deceived in that  
14 moment?

15 MR. MORROW: Who - - - well, the - - - the  
16 statutes require only a use of the victim's personal  
17 identifying information, so Ms. Kelly Fermoye's American  
18 Express account was used. There - - - there's no  
19 requirement that anyone in particular be deceived. And,  
20 you know, the - - - this case shows what happens in most  
21 credit card transactions. You go up to the terminal, you  
22 swipe your card. If it goes through you walk out with the  
23 merchandise. No one - - - it's rare for people to check  
24 that the name on the card and the - - - the name of the  
25 person using the card match. And here that's what



1 defendant knew. He knew he didn't have to use the victim's  
2 name, and he said punch the numbers in, punch the numbers  
3 in, this is my card. It was the numbers that controlled,  
4 and that's why the legislature required that use of  
5 personal identifying information constitutes an assumption  
6 of identity.

7 JUDGE STEIN: Isn't there a difference, too,  
8 between a name or a credit card number or an address or  
9 Social Security number and a date of birth? Whereas the  
10 first four that I mentioned can be attributed to someone  
11 whereas a date of birth can apply to millions of people.  
12 So you have to be able to identify a person whose  
13 identifying information was stolen, correct?

14 MR. MORROW: That's true, and I think that, you  
15 know - - -

16 JUDGE STEIN: Or used or possessed.

17 MR. MORROW: Well, you have also the requirement  
18 of an intent to defraud, and I think in those situations  
19 the legislature was concerned about, you know, verification  
20 procedures that banks and other places have when you call  
21 and you give your name and they ask for your Social  
22 Security number, your date of the birth, all this  
23 information. It was those kind of crimes that they were  
24 concerned with that somebody has a list of your - - - your  
25 details, as the defendant in this case had all of Ms.





1 Fermoyle's information, and they used that to defraud and  
2 commit crimes.

3 JUDGE RIVERA: Is - - - is then assumption - - -  
4 or assumes the identity of another mens rea or actus reus  
5 in this statute?

6 MR. MORROW: Assumes the identity of another,  
7 that would be the - - - the actus reus. The mens rea is  
8 knowingly and with the intent to defraud.

9 JUDGE RIVERA: Okay. Thank you.

10 CHIEF JUDGE DIFIORE: Thank you, counsel.

11 MR. MORROW: Thank you.

12 CHIEF JUDGE DIFIORE: Number 43, the People of  
13 the State of New York v. Terrie J. Rush.

14 MS. MUELLER-FUNKE: May it please the court, my  
15 name is Deena Mueller-Funke, and I represent the appellant,  
16 Terrie Rush. Before I begin, may I reserve one minute for  
17 rebuttal?

18 CHIEF JUDGE DIFIORE: One minute, rebuttal? Yes.

19 MS. MUELLER-FUNKE: I'd like to echo the words of  
20 counsel for Mr. Roberts but temper them a little bit by  
21 going back to this idea that was bounced around that the -  
22 - - the third prong of assumes the identity is being  
23 treated differently than the first two, I don't think it  
24 is. I think all of them require something in addition to  
25 proving that the person presented as, acted as, or used the



1 personal identifying information. And that additional  
2 thing that needs to be proven is that that person in doing  
3 so in fact assumed the identity of the other person.

4 JUDGE FAHEY: But - - - but the argument is is  
5 that any one of those acts are - - - or constitute assuming  
6 the identity. Presenting yourself as another person,  
7 acting as another person, or by personally using somebody's  
8 ID you are assuming the identity. That's the argument as I  
9 understand it.

10 MS. MUELLER-FUNKE: Right, Your Honor. We  
11 disagree obviously that assumes the identity is not a  
12 separate element, but I think the point is that the People  
13 are assuming that if you present yourself as somebody else  
14 you have assumed the identity automatically.

15 JUDGE GARCIA: Let's ask that - - - let's ask  
16 that a different way. So one of them is you can do it by  
17 presenting him or herself as that other person. What in  
18 addition to that would you need to assume the identity of  
19 another person?

20 MS. MUELLER-FUNKE: I think you need to prove  
21 that you actually assumed the identity of that person.

22 JUDGE GARCIA: Yeah, that's what the term says.  
23 But what thing could you possibly show in addition to  
24 presenting yourself as the other person or by acting as  
25 that other person that you assumed the identity? Let's say



1 presenting yourself as the other person. What is the  
2 additional thing they would need to show that you assumed  
3 the identity in addition to that?

4 MS. MUELLER-FUNKE: That there was in fact a  
5 taking on of that identity because if you don't take on the  
6 identity then you're just using a - - -

7 JUDGE GARCIA: But isn't - - - I presented myself  
8 as that other person. I don't understand what the  
9 additional factual proof would be.

10 MS. MUELLER-FUNKE: I think - - -

11 JUDGE GARCIA: Give me an example.

12 MS. MUELLER-FUNKE: I think there's an example if  
13 you go to the Barden case, right. There the - - - it was  
14 clear to everyone at the hotel that he was not the  
15 cardholder and therefore when he was saying charge it to my  
16 card he wasn't assuming the identity. What if he had said  
17 I am the cardholder, charge it to my card? Would that have  
18 changed the fact that everyone knew he was not the  
19 cardholder? He may have presented himself as the person,  
20 but did he take upon himself that identity? I think in all  
21 three of these factors you need to show that the person is  
22 in fact - - - the definition of assumes. It's simple. You  
23 take upon oneself. And unless you're taking upon the  
24 identity of somebody else, actually - - -

25 JUDGE GARCIA: But if you're acting or presenting



1           yourself as the other person - - - I think that case you  
2           referenced is a different case and very different facts  
3           about the card. But if I go into someplace and I say I'm  
4           Joe Smith and I have - - - you know, what else do I need to  
5           say - - - and I'm not, what else do I need to show that I  
6           assumed the identity in addition to that? Like give me a  
7           scenario. In that case, what else would I need? What  
8           would the People need to prove?

9                       MS. MUELLER-FUNKE: I think you need to prove  
10           that you're appropriating the identity. And if I could  
11           kind of swing you to the third prong and maybe clarify a  
12           little better. I think this is exactly why the decision  
13           was wrong in Yuson but right in Destin. So in both of  
14           those cases the defendants are trying to cash or deposit  
15           forged checks that are payable to themselves. They're  
16           using their own identification cards. They're signing  
17           their own signatures. They're trying to deposit into their  
18           own account. And they're being charged with identity theft  
19           based on the fact that they used the remitter's personal  
20           identifying information. Well, of course you did.  
21           Everyone who cashes a check has to use the remitter's  
22           personal identifying in - - - identifying information. But  
23           what is being lost is that they weren't appropriating that  
24           information onto themselves.

25                       JUDGE GARCIA: And again it seems to me you're



1 making the argument that counsel made already which is we  
2 should treat the third prong differently because you can't  
3 distinguish the first two prongs and your only real  
4 examples are in the third prong which you think there  
5 should be something else because it's too broad.

6 MS. MUELLER-FUNKE: I think - - -

7 JUDGE GARCIA: And I find that hard to come up  
8 with that type of principled analysis of the statute.

9 MS. MUELLER-FUNKE: Even the second prong I think  
10 lends itself to some examples. You're saying you're going  
11 to act as somebody else. I may act as somebody else, but  
12 if I'm unconvincing and no one believes that I'm taking on  
13 the identity of somebody else, have I assumed their  
14 identity? I think you have to prove something else, and I  
15 think that's what counsel's point was about how - - -

16 JUDGE STEIN: Well, but that - - - that relates  
17 to the effect on the - - - on the other party. That  
18 doesn't - - - that doesn't relate to the - - - we talked  
19 about actus reus, mens rea but that's - - - that's not the  
20 act. That's whether you've succeeded in doing it or not.

21 MS. MUELLER-FUNKE: Well, then maybe you would  
22 only have an attempt. If you're not successful in  
23 appropriating somebody else's identity, I don't know that  
24 you've assumed - - - you haven't assumed their identity and  
25 you haven't stolen their identity. But what I really want

1 to focus on - - -

2 JUDGE RIVERA: But, counsel, couldn't - - - I  
3 understand what you're trying to argue but are you taking  
4 the position that the legislature could not do this? You  
5 may disagree with this choice. You may disagree that the  
6 legislature has picked a category that is very broad and so  
7 forth. But you're not taking the position that the  
8 legislature could not do this. And if that's so doesn't  
9 the legislative history tell us that this is exactly what  
10 the legislature intended?

11 MS. MUELLER-FUNKE: Your Honor, I'm not taking  
12 the position that they couldn't define personal identifying  
13 information the way it is but I'm saying that if you don't  
14 temper it with assumes the identity, which is the next  
15 point I want to make, then you get these absurd results  
16 where you're calling a husband using his - - - depositing  
17 his wife's check an assumption of the identity. It's not  
18 an assumption of the identity. It's just a use of personal  
19 identifying information. They're separate. The People say  
20 that intent - - -

21 JUDGE RIVERA: Yeah, that's true but they may not  
22 be guilty of the crime, right, because they don't - - -

23 MS. MUELLER-FUNKE: Because of intent.

24 JUDGE RIVERA: - - - meet the other elements of  
25 this crime.



1 MS. MUELLER-FUNKE: Supposedly because of intent  
2 but we would argue that it's this independent element of  
3 assumes the identity that tempers the statute. That's what  
4 appropriates - - - that's where you tie the victim's  
5 identity to the defendant's actions.

6 JUDGE WILSON: Does - - - does Alec Baldwin  
7 sometimes appear to present himself as the President of the  
8 United States?

9 MS. MUELLER-FUNKE: Yes, certainly, Your Honor,  
10 an act - - -

11 JUDGE WILSON: Has he - - - has he appropriated  
12 his identity?

13 JUDGE FAHEY: We could only wish, but okay.

14 MS. MUELLER-FUNKE: Yeah, I think acting is a  
15 good example of where clearly you are acting in the way of  
16 another person, but how can we say that they're assuming  
17 the identity - - -

18 JUDGE GARCIA: No, but how can we say they're  
19 committing identity fraud is really the question because  
20 they have no intent to defraud. But they are assuming the  
21 identity. Someone goes on, they pretend they're Mark Twain  
22 or they assume the identity for a performance, sure, they  
23 do. But it's not an intent to defraud.

24 MS. MUELLER-FUNKE: So I would disagree then,  
25 Your Honor, that they're assuming the identity, and I



1 disagree that intent alone can temper the statute. Going  
2 back to the example where Judge Fahey said he's going to  
3 give his wife a check to deposit while he's in Albany, what  
4 if she goes in to deposit that check and it's her intent to  
5 defraud the bank? Subjectively that's her intent. You  
6 know, it doesn't matter why. Is she now guilty of identity  
7 theft? That doesn't make any sense. She never assumed the  
8 identity just because she used his personal identifying  
9 information.

10 And that's a point that I really want to make  
11 about Ms. Roberts' case, and I think it's different - - -  
12 I'm sorry, Ms. Rush's case I think is very different from  
13 Mr. Roberts' is that what Ms. Rush did with the personal  
14 identifying information of the victim in that case, Mr.  
15 Lawhorn, didn't require that she was Mr. Lawhorn. All she  
16 did was deposit a check that was payable to Mr. Lawhorn  
17 into an account that bore the name of Mr. Lawhorn.

18 JUDGE STEIN: She used his name to defraud the  
19 bank.

20 MS. MUELLER-FUNKE: No, she didn't. What did she  
21 defraud the bank of? She may have had intent - - - she may  
22 have been defrauding as to the validity of the check - - -

23 JUDGE STEIN: She put the money in so that  
24 someone could take it out that wasn't the person whose name  
25 she used.



1 MS. MUELLER-FUNKE: Respectfully, Your Honor, I  
2 don't think that that's what the legislature's getting at.  
3 The intent to defraud is a defrauding about the identity of  
4 who you are, and she didn't say I am Lawhorn. She didn't  
5 act as Lawhorn. And just because she used his personal  
6 information in a lawful way the same way - - -

7 JUDGE STEIN: But doesn't it get at what the  
8 intent of the statute is because Mr. Lawhorn was first - -  
9 - or at least could have been suspected of being the person  
10 who stole the checks and forged the checks and could have  
11 been subject to criminal prosecution and could have been  
12 subject to all kinds of things which is exactly what the  
13 statute is aimed at preventing.

14 MS. MUELLER-FUNKE: I disagree, Your Honor. All  
15 she did was deposit checks into his account. In fact,  
16 there's actually no harm to the victim here. This is  
17 another - - -

18 CHIEF JUDGE DIFIORE: And subsequently withdrew  
19 them - - - withdrew on them?

20 MS. MUELLER-FUNKE: That's not actually - - -  
21 that was never proven. It was never charged. It's  
22 implied, and it's been alleged that she later withdrew the  
23 money. But it doesn't matter. I don't think in this  
24 circumstance you need to be looking at what conduct  
25 happened after. Whether she assumed the identity was in



1 the moment that she used his personal identifying  
2 information. And because she was just doing what everyone  
3 else is able to do, use somebody's information to put it  
4 into their own bank account, I don't think her - - - her  
5 conduct later has any bearing on whether she's assuming the  
6 identity.

7 JUDGE RIVERA: Well, the bank itself doesn't - -

8 -

9 CHIEF JUDGE DIFIORE: That's not evidence of - -

10 -

11 JUDGE RIVERA: The bank itself - - -

12 CHIEF JUDGE DIFIORE: - - - her intent to  
13 defraud? That's not probative evidence of her intent to  
14 defraud?

15 MS. MUELLER-FUNKE: I think the intent to defraud  
16 is - - - is related to the identity. Are you intending to  
17 defraud somebody as to your own identity? And she wasn't.  
18 She didn't appropriate his identity in any way by using it  
19 on the checking deposit slip and putting it into his  
20 account.

21 JUDGE RIVERA: The bank - - - the bank itself  
22 doesn't treat someone who comes up to the teller and  
23 deposit someone's else bank - - - the check as - - - as  
24 presenting themselves as that person, correct?

25 MS. MUELLER-FUNKE: No. In fact, the testimony



1 was very clear. Pages 120 and 121, the prosecution's own  
2 witness said no, we don't check ID when you deposit.  
3 Nobody cares who puts money in.

4 CHIEF JUDGE DIFIORE: Counsel, do you care to  
5 spend a moment on the second issue?

6 MS. MUELLER-FUNKE: The thereby issue? Sure. I  
7 think that if this court were to determine that assumes the  
8 identity is one and the same with use of identifying  
9 information you don't have to - - - you can still reverse  
10 Ms. Rush's conviction because she didn't thereby commit the  
11 Class D felony. So I think we're arguing the first part of  
12 the statute's ambiguous but the second part is not.

13 JUDGE RIVERA: Can - - - can you address the  
14 closure of the courtroom?

15 MS. MUELLER-FUNKE: Sure. Your Honor, if I could  
16 only say one thing about the closure I would say - - -

17 JUDGE RIVERA: Yeah, because your light went off.

18 MS. MUELLER-FUNKE: Right. The word Gupta. If  
19 you give me another twenty-five seconds I would explain in  
20 that case the court held that if there's an intentional  
21 improper closure of the courtroom that lasts for the  
22 entirety of jury selection that is not trivial per se. And  
23 that's exactly what you have here.

24 JUDGE STEIN: So - - -

25 MS. MUELLER-FUNKE: It was an affirmative act.



1 It was - - -

2 JUDGE STEIN: Do we have to - - - do we have to -  
3 - - if there's support in the record for the court's  
4 finding that it was not closed for the entirety of jury  
5 selection, that it was only closed until the juror was  
6 seated in - - - the jurors were seated in the box, don't we  
7 have to accept that finding of fact?

8 MS. MUELLER-FUNKE: I think it was - - - I think  
9 that it's an improper application of law to say that the  
10 court was reopened because it's only reopened by an  
11 affirmative act on the court. And if you look at the  
12 record, this goes to the third point I wanted to make, it  
13 was an improper closure because the Waller factors weren't  
14 met and then the - - - it was for the entirety of jury  
15 selection because the court itself took no affirmative acts  
16 to reopen the court. Even if you - - -

17 JUDGE STEIN: So - - - so are you saying that if  
18 in this case the gentleman in question was waiting outside  
19 the door the court - - - the judge never said to the court  
20 officer please go open that door but the court officer took  
21 it upon herself to do so, the gentleman walked in, we would  
22 still have a violation of the right to a public trial  
23 because the - - - the judge didn't tell her to do that?

24 MS. MUELLER-FUNKE: I think even if you impute  
25 the deputy's conduct to the court and say that was the



1 court's action I think they fell short of their obligation  
2 to reopen the court. There's a heavy burden on the court  
3 when they close themselves to the public to reopen, and  
4 when they specifically include somebody and say we intend  
5 to come get you they need to follow through with that. So  
6 they either needed to post a guard at the door, make an  
7 announcement in the hallway, put a sign on the door, or do  
8 something more than make a half-hearted attempt to look for  
9 him in the hallway and then give up on it.

10 CHIEF JUDGE DIFIORE: Thank you, counsel.

11 MS. MUELLER-FUNKE: Thank you.

12 CHIEF JUDGE DIFIORE: Mr. Gross.

13 MR. GROSS: Good morning - - - or afternoon, and  
14 may it please the court.

15 CHIEF JUDGE DIFIORE: Good afternoon, sir.

16 MR. GROSS: Dan Gross on behalf of the People,  
17 Monroe County District Attorney's Office in the Matter of  
18 the People v. Terrie Rush. I'd like to begin by discussing  
19 the proper interpretation of the identity theft statute and  
20 why this court should adopt the Fourth Department's  
21 interpretation of it and then time permitting address the  
22 courtroom closure issue. The unique harm of identity theft  
23 is not that it allows a criminal to impersonate another but  
24 that it allows them access to their financial and - - -  
25 financial and credit information, and that's exactly what



1           happened in this case.

2                       To that end, the - - - the legislature defined  
3           assumes the identity admittedly very broadly to include the  
4           mere use of personally identifying information as well as  
5           presenting - - - presenting yourself as another and acting  
6           as the other person. Assumes the identity of another,  
7           although it's broad, is tempered by, as this court has  
8           recognized, the - - - the mens rea of the crime.

9                       I would analogize this crime to possession of  
10          burglar's tools or criminal possession of a weapon in the  
11          fourth degree. Although I may be walking down the street  
12          with a crowbar or a billy club, that in - - - in and of  
13          itself is legal. However, once I have the criminal intent  
14          then it becomes a crime. In this case, the harm which the  
15          statute aims to - - - the harm which the statute aims to  
16          prevent was present. Mr. Lawhorn's reputation and credit  
17          history were - - - were affected by - - - or could have  
18          been affected by this.

19                      JUDGE RIVERA: But, see, the actual act is one  
20          that happens all the time and the bank - - - there was  
21          testimony that the bank indeed sees no problem with this  
22          and recognizes that people do this all the time, doesn't  
23          object to it. Only - - - only asks for ID when someone  
24          wants to withdraw cash. That's their concern.

25                      MR. GROSS: Right. However - - -



1 JUDGE RIVERA: Could it be - - - how could it be  
2 that the legislature really is intending to cover this kind  
3 of conduct?

4 MR. GROSS: Well, these were stolen checks that  
5 were funneled through Mr. Lawhorn's account so although the  
6 deposit may not have raised too many red flags - - - and  
7 that is a very lax policy that they had and I think was  
8 part of the reason the Barden decision came out the way it  
9 did, the hotel had a very lax - - - apparently a very lax  
10 policy - - - however, the harm was still the same. Mr.  
11 Lawhorn's identification was used to funnel this stolen  
12 money into his account and then surreptitiously withdrawn  
13 over three days over the course of November. I - - - I  
14 would submit to this court the plain language of the  
15 statute couldn't be clearer.

16 JUDGE WILSON: So if I find Mr. - - - a check  
17 just like Mr. Lawhorn's on the subway and it says deposit  
18 to an account number and it's signed and I conclude that  
19 somebody dropped it and I go to the bank and say I found  
20 this on the subway, here it is, am I assuming that person's  
21 identity? I know I don't have fraudulent intent, but I'm  
22 not asking that.

23 MR. GROSS: Yes, under the statute you would be  
24 assuming their identity. However, again, that's just the  
25 actus reus. You have no intent to defraud. No crime has



1 occurred there by the mere deposit. But that's what  
2 distinguishes this case. Ms. - - - again, Ms. Rush was  
3 surreptitiously withdrawing money and - - -

4 JUDGE STEIN: Well, you're not saying that if I  
5 walk in with Mr. Lawhorn's check and I say hi, I'm Leslie  
6 Stein, I'm not Mr. Lawhorn, but I - - - but I want to put  
7 this in his account because, you know, it apparently is  
8 where it intends to be. That's not assuming the identity,  
9 is it?

10 MR. GROSS: Under the statute it is. Again, it's  
11 not an - - - an impersonation statute.

12 JUDGE STEIN: So you can't negate it by some  
13 affirmative act?

14 MR. GROSS: I don't - - - I believe that would  
15 result in an absurd loophole where if I go to Wegmans and  
16 there's a self-checkout versus a cashier and I use the same  
17 credit card, if I go to the cashier and say this is not  
18 mine, however, I have authority to use it, I'm not assuming  
19 the identity versus if I go to the self-checkout and use  
20 it, the same harm has occurred albeit it this - - -

21 JUDGE RIVERA: But then again that goes to what I  
22 was asking in the prior case. Isn't then this language  
23 superfluous based on the People's construction?

24 MR. GROSS: I would submit it's a term of art.  
25 Otherwise, to read assumes the identity in - - - as





1 requiring an impersonation element, you could get rid of  
2 the mere use of personal identifying information. It - - -  
3 it just couldn't be accomplished unless there - - - you  
4 were presenting yourself in one way or another or acting in  
5 one or another. So personal identification information  
6 would be rendered redundant.

7 JUDGE RIVERA: So you mean under that analysis  
8 you're always going to fall under the first two categories?

9 MR. GROSS: Correct.

10 JUDGE RIVERA: And the third one drops out?

11 MR. GROSS: Correct. And in addition to the  
12 plain language, I would - - - I would also point to Section  
13 190.77, which is the definition section, of personal  
14 identifying information. The last clause of it says that  
15 any piece of personal identify - - - excuse me, any piece  
16 of personal identifying information can be used by itself  
17 or in combination to assume the identity. So I think  
18 there's support there for the Fourth Department's  
19 interpretation of this statute. In addition, to that, I -  
20 - - the legislative intent has been talked by all of my  
21 colleagues already. I would submit that that is - - -

22 JUDGE RIVERA: Well, let me - - - let's go back  
23 to that definition, it can be but need not be. So isn't  
24 that still the problem with this - - - potentially with  
25 this statute, the identity theft statute because not

1 always.

2 MR. GROSS: Right, not always. And I think that  
3 goes to show that you can accomplish assumes the identity  
4 through impersonation, not merely through using personal  
5 identifying information. It does say you can use personal  
6 identifying information. However, it says it may be used  
7 alone to assume the identity. So I think that clarifies  
8 the interpretation of the statute.

9 JUDGE WILSON: But I think - - - I think Judge  
10 Rivera's question is because it says you can use one or  
11 some in combination the thought that you might need to use  
12 some in combination means necessarily that there are going  
13 to be times when using just one piece of information isn't  
14 enough. And so then figuring out when wasn't - - - one  
15 isn't enough and more are necessary requires something more  
16 than just the use of the information which maybe takes us  
17 back to the assumes the identity of as a - - - as a - - -  
18 actually a meaningful term.

19 MR. GROSS: I - - - I guess my reading of the  
20 statute is - - - is different. My reading is that may be  
21 used in combination prevents a prosecutor from charging a  
22 distinct count of identity theft for each piece of personal  
23 identifying information which can be used. So someone's  
24 name and address and checking account number may all appear  
25 on a check but that is still only one count of identity



1 theft under my interpretation of the statute. If the panel  
2 is all right with it, I'd like to move onto the definition  
3 of thereby.

4 CHIEF JUDGE DIFIORE: Please.

5 MR. GROSS: It is very difficult to argue to a  
6 learned panel about a - - - what a word means, but I would  
7 submit that thereby in this statute just means that the - -  
8 - any of the predicate offenses, whether it's larceny or  
9 criminal possession of a weapon - - - or excuse me,  
10 criminal possession of a forged instrument needs to be  
11 accomplished using the same means of the identity theft  
12 occurs in. So in this - - - for example, in this case the  
13 personal identifying information, again, the name was the  
14 way in which Ms. Rush was able to utter this check. A  
15 correct name still needed to be included on the check in  
16 order for a deposit to occur. Otherwise, there is no  
17 crime.

18 Moving on, I'd like to discuss the courtroom  
19 closure very briefly. The courtroom closure I would submit  
20 under these facts calls for the triviality exception to be  
21 adopted. This court has - - -

22 JUDGE RIVERA: Have we ever adopted that  
23 exception?

24 MR. GROSS: No, it has been referenced - - -

25 JUDGE RIVERA: This would be the first occasion



1 on which we'd do that - - - so?

2 MR. GROSS: Excuse me?

3 JUDGE RIVERA: This would be the first occasion  
4 on which we'd do so?

5 MR. GROSS: Yes, expressly.

6 JUDGE STEIN: Do we need to do that or can we  
7 just say that - - - that there was - - - there was nothing  
8 - - - no part of the trial was going on when the jury was  
9 being seated?

10 MR. GROSS: Right, I - - - I think that argument  
11 can occur in the alternative that this was I guess a de  
12 minis violation although the - - - the judge ordered Mr.  
13 Granville, I believe his name is, out of the courtroom,  
14 according to the record nothing occurred. It was just so  
15 the jurors could be moved into the box and then Mr.  
16 Granville could come back in and observe jury selection.

17 JUDGE RIVERA: Let me just say - - - explain what  
18 happened while - - - after the person left the courtroom?

19 MR. GROSS: You're correct.

20 JUDGE RIVERA: The prospective jurors come in and  
21 then what happens?

22 MR. GROSS: The respective jurors come in and  
23 then they're called into the box and seated and the  
24 preliminary instructions occurred and then - - -

25 JUDGE RIVERA: So the judge did start instructing



1 - - -

2 MR. GROSS: Correct. There - - -

3 JUDGE RIVERA: - - - the prospective jurors?

4 MR. GROSS: There were instructions given to - -  
5 - just - - - you know, in my experience it's more of an  
6 identifying the parties, maybe - - -

7 JUDGE RIVERA: Is it the People's position that  
8 the judge had decided that during those instructions people  
9 could not be in the courtroom?

10 MR. GROSS: Yes. Well, no, excuse me. I - - - I  
11 apologize. No. That - - -

12 JUDGE RIVERA: Thought you might want to.

13 MR. GROSS: No, that wasn't the court's decision.  
14 The court just wanted to move the jurors to the panel box  
15 so that seating could occur for any spectators, and I  
16 believe Mr. Granville was the lone spectator here.

17 JUDGE STEIN: Your - - - your position is is that  
18 the courtroom was opened before the court started  
19 instructing the jurors. Is it - - -

20 MR. GROSS: Correct.

21 JUDGE STEIN: Am I understanding that correctly?

22 MR. GROSS: Yes.

23 JUDGE STEIN: Okay.

24 MR. GROSS: When the judge instructed Mr.  
25 Granville, according to the record he said you need to step



1 outside for a minute just so I can move these people here  
2 and create seating for you.

3 JUDGE STEIN: Right. I think the question here  
4 is when did - - - when did the courtroom actually get  
5 reopened?

6 MR. GROSS: Well, I think it was all in the same  
7 instruction. There was no affirmative act where the judge  
8 paused everything and reopened it. The judge by his  
9 instruction made clear that although there may be a closure  
10 it's only going to be momentarily. It's not in the  
11 constitutional sense. Just wait outside and you can come  
12 back in.

13 JUDGE RIVERA: Where - - - where was the court  
14 clerk at the time?

15 MR. GROSS: The - - - the deputy - - -

16 JUDGE RIVERA: Yes.

17 MR. GROSS: - - - who retrieved him?

18 JUDGE RIVERA: Yes, yes, yes, yes.

19 MR. GROSS: Yeah, there were two deputies - - -

20 JUDGE RIVERA: While - - - people walking in  
21 while they're getting seated during these preliminary  
22 instructions, inside, outside, looking for people, what is  
23 - - - what is the person doing?

24 MR. GROSS: I believe the deputy who went to  
25 retrieve Mr. Granville went to get the jury panel and then



1           came back in with the jury panel before going out to get  
2           him.  And - - -

3                   JUDGE RIVERA:  At - - - at what point, after the  
4           instructions?

5                   MR. GROSS:  No, after - - - after the - - -

6                   JUDGE RIVERA:  So once they came in and were in  
7           the - - -

8                   MR. GROSS:  - - - the members were seated and - -  
9           -

10                  JUDGE RIVERA:  - - - box went out?

11                  MR. GROSS:  Correct.

12                  JUDGE RIVERA:  Okay.  Thank you.

13                  MR. GROSS:  Thank you.

14                  CHIEF JUDGE DIFIORE:  Thank you, counsel.  
15           Counsel.

16                  MS. MUELLER-FUNKE:  Very quickly without getting  
17           hung up on it I just want to address that last point about  
18           the closure.  I don't think it's clear on the record  
19           exactly when she goes out, and her testimony was not even  
20           clear exactly when she went out.

21                  JUDGE RIVERA:  Let me ask you this - - - let me  
22           ask you this.  Would it be an unconstitutional closure of  
23           the court if the following happened?  This is my  
24           hypothetical, so you've got - - - the prospective jurors  
25           are called up, they're starting to walk in, I show up.  I



1 want to go into the courthouse because I just want to sit  
2 and observe what's going on in that courtroom. And the  
3 clerk told - - - tells me just a moment, these people have  
4 to walk in. As soon as they walk in, you can walk in. Is  
5 that a courtroom closure?

6 MS. MUELLER-FUNKE: If you actually were able to  
7 walk in thirty seconds after they took the box?

8 JUDGE RIVERA: Correct.

9 MS. MUELLER-FUNKE: I - - - I think that we would  
10 be closer to triviality, but I don't think that the record  
11 discloses that's what happened here.

12 JUDGE RIVERA: Is that the standard we should  
13 apply? Are you advocating that we adopt that particular  
14 rule?

15 MS. MUELLER-FUNKE: I'm advocating that you don't  
16 adopt a standard of triviality at all because even if it  
17 was a trivial closure I think that this court has to - - -

18 JUDGE RIVERA: So how in my hypothetical is that  
19 a closure even though you're saying well, it may be  
20 trivial?

21 MS. MUELLER-FUNKE: Yes, it's still a closure.

22 JUDGE RIVERA: Because?

23 MS. MUELLER-FUNKE: It's closed to the public.

24 JUDGE RIVERA: The - - - the clerk is - - - what?  
25 - - - controlling the flow through the doors?





1 MS. MUELLER-FUNKE: That's correct.

2 JUDGE RIVERA: And said just wait one moment,  
3 I've got to let these people walk in?

4 MS. MUELLER-FUNKE: If you're preventing the  
5 public from going into the courtroom during a proceeding I  
6 think that's a closure. But if - - -

7 JUDGE RIVERA: So if I showed up and said I want  
8 to walk in before this person they have to let me walk in?  
9 Just a flow of people into the room.

10 MS. MUELLER-FUNKE: If it's purely  
11 administrative, which it wasn't here, then maybe it's not a  
12 closure.

13 JUDGE RIVERA: How is it not administrative here  
14 if the judge is saying I need to get these people in the  
15 seats? There's no room. Everybody's standing.

16 MS. MUELLER-FUNKE: I don't think that it was  
17 purely administrative because, first of all, that's not a -  
18 - - it's not a justification for closing the courtroom.  
19 But it wasn't just until the twenty-one people take the  
20 box. I mean it's very clear on the record when those  
21 twenty-one people have sat down, page 548, and then there's  
22 nothing on the record about what happens afterwards. And  
23 in fact, actually, on page 642 the judge says, oh, is there  
24 room in the back now? For those ninety-six pages, like,  
25 what's been going on in the court, and he's not sure if

1           there's room in the back? Has the - - - Mr. Granville even  
2           been - - - has anyone searched for him yet? We don't  
3           really know where this happens, and there should have been  
4           something on the record immediately after the courtroom's  
5           being - - -

6                     JUDGE RIVERA: Did they have to go search for the  
7           person?

8                     MS. MUELLER-FUNKE: I think you do. There's an  
9           affirmative burden - - - there's a burden. Only - - - I  
10          don't know which case it is, but I know I cited it. And it  
11          says that a courtroom is only reopened by an affirmative  
12          act in the same way it's only closed by an affirmative act.  
13          And I know I'm out of time but can I - - - one point - - -

14                    JUDGE RIVERA: Yes, but does that include having  
15          to look for the person?

16                    MS. MUELLER-FUNKE: I think it includes a burden  
17          beyond what search was done in this case. And I know I'm  
18          out of time but if I could make one point back to the  
19          identity theft issue, I don't think that the court even  
20          needs to get embroiled in all the arguments we made today.  
21          I think that the question is is it ambiguous? I think it  
22          clearly is. You have three cases in the First Department  
23          and three cases in the Fourth Department that come out  
24          differently. Reasonable minds are differing. If it's  
25          ambiguous the rule of lenity should apply.

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CHIEF JUDGE DIFIORE: Thank you.

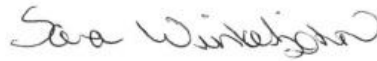
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C E R T I F I C A T I O N

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Kerri Roberts, No. 42, and People v. Terrie J. Rush, No. 43, were prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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Date: March 30, 2018

