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COURT OF APPEALS

STATE OF NEW YORK

PEOPLE,

Respondent,

(Papers Sealed)

-against-

No. 68

JONATHAN J. CONNOLLY,

Appellant.

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

Before:

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

Appearances:

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Sara Winkeljohn
Official Court Transcriber

1 CHIEF JUDGE DIFIORE: Next on the calendar
2 is number 68, People v. Jonathan Connolly.

3 Counsel.

4 MR. WILLIAMS: Chief Judge DiFiore, thank
5 you. And may it please the court, Alan Williams of
6 Legal Aid, on behalf of Mr. Connolly, here with Mr.
7 Timothy Murphy, my boss. Might I reserve two minutes
8 of my time for rebuttal, Your Honor?

9 CHIEF JUDGE DIFIORE: Of course, sir.

10 MR. WILLIAMS: Thank you, Your Honor.

11 CHIEF JUDGE DIFIORE: You're welcome.

12 MR. WILLIAMS: If the order of the
13 Appellate Division in this case is affirmed, it
14 necessarily follows, no sentencing judge ever will
15 have to attend the part of a restitution hearing
16 where witnesses testify.

17 JUDGE GARCIA: But counsel, as I understand
18 what happened here, there's a hearing in the
19 beginning; the judge sends it to this judicial
20 hearing officer, right?

21 MR. WILLIAMS: Yes, Your Honor.

22 JUDGE GARCIA: And there's a hearing, live
23 testimony. And then that's appealed, goes up to the
24 Appellate Division, reverses, sends it back, and the
25 trial judge then says okay, and takes the transcript,

1 and there are some proceedings we can talk about, I'm
2 sure we will, and renders a slightly different
3 decision on - - - on the restitution, I think 31- to
4 33,000.

5 So is it your position that it's because
6 the Appellate Division sent it back that something
7 should have happened, or if this procedure would have
8 been followed - - - if there had never been an appeal
9 and the judge had followed a proceeding where he sent
10 this judicial hearing officer, they took testimony,
11 judicial hearing officer renders an advisory opinion,
12 judge takes it, looks at the transcript, renders his
13 own decision, that would have been bad too?

14 MR. WILLIAMS: The latter, Your Honor,
15 correct. Yes, that's right.

16 JUDGE GARCIA: So what would the rule be?

17 MR. WILLIAMS: The rule would be that when
18 a hearing for the purpose of determining the
19 defendant's restitution obligations is conducted,
20 that hearing has to be conducted by the court. And
21 when it is not, when the court - - -

22 JUDGE GARCIA: What does "conducted by the
23 court" mean? I mean, you can conduct a hearing and
24 not have to take live testimony, right?

25 MR. WILLIAMS: That is true, but when - - -

1 JUDGE GARCIA: So where is the authority
2 for having to take live testimony?

3 MR. WILLIAMS: It's not that live testimony
4 in and of itself is required. It's that when the
5 prosecution presents live testimony in support of its
6 case, rather than solely documentary evidence, the
7 body that is required by Penal Law Section 60.27(2)
8 to conduct the hearing has to be there for that
9 evidence to be elicited. Now, this would be the same
10 regardless of whether there even is live testimony.
11 It's just that the addition of live testimony creates
12 an additional problem because simply receiving a
13 transcript in lieu of attending the hearing that the
14 court was required to attend, by statute, deprives
15 the court of information that must be significant
16 because there is so much case law - - -

17 JUDGE ABDUS-SALAAM: Well, these hearings,
18 counsel, go on - - - not - - - not necessarily
19 reparations or restitution hearings go on all the
20 time, but hearings are conducted daily in the - - -
21 in the court system, and many of them are conducted
22 by judicial hearing officers or even special
23 referees. Of course, that's by statute. But you're
24 saying that only the judge who is going to make the
25 decision on the hearing is the individual who has to

1 conduct the hearing?

2 MR. WILLIAMS: The hearing, yes. This is
3 not to repudiate any portion of the Fuller precedent,
4 because this court in Fuller drew a distinction
5 between preliminary fact-finding and conducting a
6 hearing. In Fuller, this court said any hearing - -
7 - hearing that is thought necessary for the purpose
8 of establishing the restitution obligation has to be
9 conducted by the court.

10 JUDGE STEIN: But here you - - - you agree
11 that - - - that the transcript of a prior hearing,
12 some prior proceeding, could be considered on - - -
13 in a restitution hearing, correct?

14 MR. WILLIAMS: I - - -

15 JUDGE STEIN: Again, if this was the
16 initial hearing and there had been some prior - - -
17 you know, not the JHO but some reason why this
18 testimony was taken and the People sought to offer
19 this transcript into evidence, that would be
20 permissible under the statute, right?

21 MR. WILLIAMS: Insofar as a prior delegated
22 restitution hearing is concerned, I avoided taking
23 any position on that, stating so in the briefs,
24 because it is submitted that whether or not the
25 transcript was admissible is not dispositive at all

1 of whether or not the proceeding in February 2013 was
2 appropriate, because if this court holds that because
3 the transcript was admissible, assuming it is,
4 therefore, it was acceptable for the judge to use
5 that transcript instead of attending the live
6 testimony that he was required to attend, since - - -

7 JUDGE STEIN: Well, but that doesn't that
8 presume that there has to be live testimony?

9 MR. WILLIAMS: No, Your Honor. It doesn't.
10 It presumes only that when the prosecution chooses to
11 present live testimony at the type of proceeding
12 where the court is required to preside, which is to
13 say a restitution hearing, the court has to be
14 present for that, and if the court is not present for
15 that, then receiving a transc - - - a transcript in
16 substitution for that and allowing this completely
17 negates the significance, or at least - - -

18 JUDGE STEIN: Well, it does. I mean
19 Consalvo, right, says that the defendant has to have
20 a reasonable opportunity to contest the People's
21 evidence or supply evidence on his own behalf, right?

22 MR. WILLIAMS: Yes, Your Honor.

23 JUDGE STEIN: Okay. So here the defendant
24 presents evidence, and it happens to be a transcript
25 - - - I'm sorry, the People present evidence and it -

1 live testimony.

2 MR. WILLIAMS: The court did not require
3 live testimony in the Connolly II decision. However,
4 what it did say was that the hearing was improperly
5 delegated; the court had to be there. And the - - -
6 the fact is that when - - - if the court takes the
7 position that it is permissible to use a transcript
8 of an impermissibly delegated hearing in substitution
9 of a hearing where the court was supposed to be there
10 in the first place - - -

11 JUDGE ABDUS-SALAAM: Well, but - - - sorry,
12 counsel. Didn't the court give you an oppor - - - or
13 your client an opportunity to call witnesses, either
14 subpoena them or - - -

15 MR. WILLIAMS: Yes.

16 JUDGE ABDUS-SALAAM: - - - call witnesses
17 and - - - and then the case was adjourned, correct?

18 MR. WILLIAMS: That's correct.

19 JUDGE ABDUS-SALAAM: And there was no
20 attempt to get any subpoenas or to call any witnesses
21 when the case came back on again. So isn't - - - and
22 I'm - - - I'm just piggybacking on what Judge Stein
23 said about the opportunity. Didn't your client have
24 an opportunity to address the transcript that was
25 used by the judge?

1 MR. WILLIAMS: Well, assuming that the
2 witnesses were, in fact, available but he just chose
3 not to call them, yes, he did, in fact, have that
4 opportunity. But the difficulty is that it still
5 hasn't cured the lingering effect of the error from
6 Connolly II. And forcing the defense - - -

7 JUDGE PIGOTT: You keep saying error. I'm
8 - - - I'm missing it. What's - - - what's the error?

9 MR. WILLIAMS: The error in Connolly II was
10 the delegation of the original - - -

11 JUDGE PIGOTT: I understand that. But what
12 - - - what I'm saying is I - - - I thought, you know,
13 when - - - when I first looked at this you're saying
14 that Mr. Jay (ph.) made the award and that's wrong.
15 I can get that argument except the judge looked at
16 this and confirmed that award. And - - - and as
17 everyone keeps saying, and you could have said wait a
18 minute, you know, the person, you know, wasn't put
19 under oath or the documents that were entered, you
20 know, we objected to on - - - on these grounds. And
21 - - - but in the record you say, "We do not contest
22 the findings of the report at all."

23 MR. WILLIAMS: Yes, Your Honor. That's
24 true. However, there are a couple things I would
25 quickly try to say in regard to that. Number one,

1 the defense was only raising the delegation issue
2 despite the fact that at the hearing, the defense - -
3 - almost everything the defense was in some way
4 relevant to contesting the amount - - -

5 JUDGE PIGOTT: Would it - - - would it be a
6 hearing if - - - if you appear in front of the judge
7 and the People say, here's a - - - here's a
8 transcript of a - - - of a deposition we took, you
9 know, by consent, you know, the two parties to get
10 this done? We had the - - - we had the insurance
11 adjuster in and he said this is what the cost was,
12 and we rest. And you say well, that's great. You
13 know, there's no - - - we don't - - - we don't
14 contest that. What we're saying is that the window
15 that the landlord broke shouldn't be part of this.
16 In which case the judge would say okay, I'll - - -
17 I'll throw out the window. Now you owe 30,000
18 dollars instead of 31-, or whatever. You're saying -
19 - - you're saying this could be the most truthful,
20 the most conceded, C-E-D-E-D, hearing, period, and
21 it's still wrong.

22 MR. WILLIAMS: Well, in the case of the
23 deposition I would that's different because that's
24 not the same as the hearing. However, procedural - -
25 -

1 JUDGE PIGOTT: Well, don't say that so
2 quickly. I - - - what I'm saying is that - - -

3 MR. WILLIAMS: Sorry.

4 JUDGE PIGOTT: - - - you have a - - - you
5 have somebody who takes testimony under oath,
6 everybody says the testimony is true, but we have
7 this one technicality, Judge. You were sitting in
8 the back doing research on some other case and the
9 hearing's going on in your courtroom and you had to
10 be sitting up on the bench doing your research. Then
11 it would have been okay. But - - - I mean, I'm
12 looking at that type of a technicality; am I wrong?

13 MR. WILLIAMS: The law places great value
14 on the - - -

15 JUDGE PIGOTT: I understand that. Am I
16 wrong? Yes or no.

17 MR. WILLIAMS: It is a procedural
18 technicality but - - -

19 JUDGE PIGOTT: Yes? Yes, I'm wrong?

20 MR. WILLIAMS: Well, I'm - - - I'm sorry,
21 Your Honor.

22 JUDGE PIGOTT: I just need that. I - - -
23 you can say "no, you're not wrong, but", or you can
24 say yes, you're wrong; the judge has to sit up in the
25 front even if he's doing something else. But he has

1 to be sitting up in the front when the JHO is in
2 front of him doing this hearing.

3 MR. WILLIAMS: Yes, Your Honor. The judge
4 has to preside at the hearing, and there is great
5 importance in the requirement of having the person
6 vested with this responsibility being the one com - -
7 - to whom it is committed by statute. It shouldn't
8 be chipped away at.

9 CHIEF JUDGE DIFIORE: Thank you, counsel.
10 Counsel.

11 MR. ZICKL: Thank you, Your Honor. And may
12 it please the court, my name is Will Zickl, and I
13 work in the Genesee County District Attorney's
14 Office. I notice we didn't spend much time in the
15 Appellate's argument talking about the 380.30 issue
16 or the preservation thereof. So if the court is not
17 particularly interested in that, I will move to page
18 2.

19 The claim of the appellant fundamentally is
20 that what occurred in February of 2013 was not a
21 hearing or not a proper hearing, and I submit to the
22 court that that is simply not true. A hearing does
23 not presume that there's going to be testimony, that
24 there's going to be cross-examination, there's going
25 to be a live witness put on the stand. A hearing is

1 an opportunity to be heard for both sides.

2 JUDGE ABDUS-SALAAM: Counsel, once - - -
3 once the People chose to put live witnesses on the
4 stand, presumably because they couldn't prove their
5 case without the live witnesses, wouldn't it make
6 sense to have the individual who's going to decide
7 the issue of what the reparations were have to
8 conduct the hearing?

9 MR. ZICKL: Well, whether or not it makes
10 sense is - - - is - - -

11 JUDGE ABDUS-SALAAM: Isn't that what the
12 statute says?

13 MR. ZICKL: - - - one question. And I
14 suppose, in the abstract, I would say, yes, that's
15 the best case scenario. But that - - - it doesn't
16 follow - - -

17 JUDGE ABDUS-SALAAM: Isn't that what the
18 statute says?

19 MR. ZICKL: The statute says the court must
20 conduct the hearing, not Judge A or Judge B. As you
21 all know, cases are transferred between judges at
22 various points of litigation, sometimes including or
23 having - - - having included testimonial proceedings
24 or hearings that a judge to whom the case has been
25 transferred must then render a decision. And there

1 is no jurisprudence which says okay, if you're taking
2 over a case in midstream, then you have to do all
3 those evidentiary hearings all over again, call all
4 the witnesses back, and put on the proof just as
5 though - - -

6 JUDGE PIGOTT: What - - - what - - -

7 MR. ZICKL: - - - it hadn't happened.

8 JUDGE PIGOTT: How do you define "must be
9 conducted"?

10 MR. ZICKL: The - - -

11 JUDGE PIGOTT: Isn't that what 60.27 says?

12 MR. ZICKL: Yes.

13 JUDGE PIGOTT: "Must be conducted" - - -

14 MR. ZICKL: The court must conduct the
15 hearing, yes. That doesn't mean that a particular
16 judge must conduct the hearing. That means it must
17 be part of the court proceedings.

18 JUDGE ABDUS-SALAAM: But doesn't it mean a
19 judge must conduct the proceeding?

20 MR. ZICKL: That is certainly what the
21 Fourth Department has found, yes. So I will answer
22 that question in the affirmative. But - - -

23 JUDGE ABDUS-SALAAM: And is that what
24 happened here?

25 MR. ZICKL: What happened here was there

1 was a referral to a judicial hearing officer based
2 upon an order that was issued by the administrative
3 judge of the Eighth Judicial District. That means
4 that that person, that entity, the judicial hearing
5 officer, was acting under the authority of that order
6 as a judge in the Genesee County Court. It wasn't
7 Judge Noonan, but it doesn't have to be. It has to
8 be that the court conducts the hearing. Fourth
9 Department found that that wasn't quite up to snuff
10 in terms of the statute.

11 JUDGE PIGOTT: So are we making the
12 argument that - - - that it's the question of the
13 powers of the JHO?

14 MR. ZICKL: That's what the Fourth
15 Department said so absolutely, yes. They said that
16 the delegation to the JHO lacked authority, but Judge
17 Noonan, I think, could not have divined that at the
18 time that he made the referral.

19 JUDGE RIVERA: Well, under the statute,
20 what's - - - what's the minimum conduct that the
21 judge who decides this issue would have to - - -
22 would have to exercise? What's the least thing that
23 they have to - - -

24 MR. ZICKL: The same process that is
25 conducted when any matter is referred to a judicial

1 hearing officer. That is they make findings of facts

2 - - -

3 JUDGE RIVERA: Um-hum.

4 MR. ZICKL: - - - and they submit them to
5 the judge and the judge reviews it, calls the party
6 back - - - calls the party back in and say do you
7 wish any argument on this - - - on the findings of
8 fact of the judicial hearing officer, hears their
9 argument, and then renders his decision.

10 JUDGE RIVERA: But it doesn't have to - - -

11 MR. ZICKL: Which is exactly - - -

12 JUDGE RIVERA: And so if there's live
13 testimony, doesn't have to observe the live
14 testimony?

15 MR. ZICKL: Absolutely not. And it - - -
16 it happens in numerous contexts.

17 JUDGE RIVERA: The judge would have
18 discretion, though, to determine, I'd like to have
19 the witnesses actually called before me?

20 MR. ZICKL: I believe the - - -

21 JUDGE RIVERA: Or are you saying they're
22 foreclosed from doing that once you've had the
23 hearing?

24 MR. ZICKL: I think a court would have the
25 inherent power to say - - - and keep in mind that in

1 this case, and in most other cases like it, it's the
2 risk of the People in putting in a transcript as
3 opposed to calling those witnesses again that the
4 judge might say I'm sorry, I can't make a
5 determination based on this cold record.

6 But that's not what happened here. The
7 judge found that the transcript was sufficient and
8 significantly, the Fourth Department whose part the
9 appellant takes on in much of his brief, reviewed
10 that process, the process of submitting the
11 transcript for the hearing, and the judge making - -
12 - Judge Noonan making his determination based upon
13 that record, that transcript, and found that it was
14 perfectly okay.

15 JUDGE PIGOTT: Yeah, the trouble with that
16 - - -

17 MR. ZICKL: The Fourth Department had no
18 qualm with that.

19 JUDGE PIGOTT: The trouble with that, at
20 least in my mind, is he's the one that assigned the
21 JHO, so he said to this JHO go do this for me. The
22 Appellate Division says, you shouldn't have done
23 that. He said okay, sorry. Mr. Jay, send me your -
24 - - your transcript, and I'll confirm it.

25 MR. ZICKL: Well, again - - -

1 JUDGE PIGOTT: I mean, it - - -

2 MR. ZICKL: - - - the - - - the Fourth
3 Department had - - - had every opportunity to say we
4 don't like what you've done here, and they didn't.
5 And that's because, at that point, Judge Noonan had
6 presided over the hearing, as we - - - the lessons
7 learned from Bunnell and those other earlier cases,
8 and Connolly II.

9 JUDGE STEIN: Would it have been a
10 different story if the judge here didn't offer the
11 defendant an opportunity to subpoena witnesses or
12 bring in witnesses or offer additional proof or
13 arguments, even?

14 MR. ZICKL: I think that that's a very
15 significant issue, because the original hearing date
16 was adjourned from December of '12 to February of '13
17 for this specific purpose. We announced our
18 intention to submit the transcript in December at
19 that hearing, and there was some argument about the
20 propriety of that before Judge Noonan. And Judge
21 Noonan said look, I'll give you an adjournment. If
22 you want live testimony, you can call any witnesses
23 you want. You can call the witnesses that were at
24 the hearing in 2009; you can call other witnesses if
25 you want. That's what a hearing is. It is the

1 opportunity to be heard.

2 JUDGE STEIN: And the defendant didn't come
3 back and say, you know, Your Honor, we - - - we
4 wanted to bring in these witnesses but we couldn't
5 find them, they weren't available, or anything like
6 that? There's nothing on the record to indicate
7 that.

8 MR. ZICKL: Certainly not. There is - - -

9 JUDGE RIVERA: Whose burden is it at the
10 hearing?

11 MR. ZICKL: Appears to be an element of
12 calculation going on.

13 JUDGE RIVERA: But whose burden is it at
14 the hearing?

15 MR. ZICKL: Well, clearly, according to the
16 statute, it's the People's burden.

17 JUDGE RIVERA: It's yours; so what - - -
18 why is the judge telling them to put on your case?

19 MR. ZICKL: Well - - -

20 JUDGE RIVERA: And saying you can call the
21 witnesses they called if you want.

22 MR. ZICKL: He didn't - - - he didn't
23 specifically say, you put on the People's case.

24 JUDGE RIVERA: Well, I'm sure not.

25 MR. ZICKL: But he - - - he wanted the

1 defendant to have the opportunity to call not just
2 the witnesses that appeared at the prior hearing - -
3 -

4 JUDGE RIVERA: But that's what I'm saying.
5 Isn't that essentially - - -

6 MR. ZICKL: - - - any witnesses.

7 JUDGE RIVERA: But isn't that essentially
8 what's going on; if the judge is not going to have a
9 hearing with live testimony, which is the way the
10 People presented the case - - - he's basically saying
11 to the defendant if that's the kind of hearing you
12 want, you're going to have to call their witnesses
13 and proceed from there. Why isn't that - - - I agree
14 with you, that's not what's on the record. He didn't
15 say go put on their case, but isn't that essentially
16 what's happened?

17 MR. ZICKL: That is - - - that is what
18 happened. That is the process of what went on in
19 this case.

20 JUDGE RIVERA: But I - - - I - - -

21 MR. ZICKL: But that doesn't mean that a
22 hearing, a hearing, needs to be of the type where
23 there is live testimony and adversarial proceedings.
24 It can be made into such a proceeding given the
25 defendant's opportunity, given the People's

1 opportunity. The People chose, in this case, to
2 submit the transcript. It was part of the record.
3 And the statute also says - - -

4 JUDGE RIVERA: So may a defective hearing -
5 - -

6 MR. ZICKL: - - - if there's not - - -

7 JUDGE RIVERA: So they - - - so the People
8 can submit a transcript of a defective hearing as
9 part of what you're now calling the hearing; is that
10 what you're saying?

11 MR. ZICKL: The - - - the transcript wasn't
12 what was defective about that hearing.

13 JUDGE RIVERA: I didn't say the transcript.
14 I said the hearing.

15 MR. ZICKL: The transcript itself had
16 nothing - - -

17 JUDGE RIVERA: Let me ask you this; what do
18 you interpret the Appellate Department's
19 determination to be regarding that first hearing
20 before the GH - - - JHO?

21 MR. ZICKL: They said - - -

22 JUDGE RIVERA: What - - - what would that
23 be under the statute?

24 MR. ZICKL: They said it was without
25 authority that - - -

1 JUDGE RIVERA: Right, so it's null.

2 MR. ZICKL: - - - the - - -

3 JUDGE RIVERA: Is it not null?

4 MR. ZICKL: The result was null. They
5 reversed and remanded it.

6 JUDGE RIVERA: Well, the hearing is null,
7 but what does that mean for anything that is
8 developed during the course of something that is
9 defective and - - - and as you say, is without
10 authority? What - - - what could it possibly be?

11 MR. ZICKL: It is - - -

12 JUDGE RIVERA: Are you saying it's valid
13 evidence?

14 MR. ZICKL: It absolutely is, because the
15 process by which that evidence was elicited had
16 nothing to do with the decision of the Fourth
17 Department with respect to the error that was
18 committed. It wasn't a problem with - - -

19 JUDGE RIVERA: Was done, as - - - as you've
20 just said, without any authority.

21 MR. ZICKL: It was - - -

22 JUDGE RIVERA: You - - - you're saying it's
23 not meaningless?

24 MR. ZICKL: It is certainly not
25 meaningless. It is part of the record, and it is not

1 part of the defect in procedure.

2 JUDGE RIVERA: Yeah, but now you're begging
3 the question, the record of what?

4 MR. ZICKL: The record of the - - -

5 JUDGE RIVERA: A defective proceeding that
6 has no meaning. I know you say it has meaning - - -

7 MR. ZICKL: I - - - I was going to say - - -

8 -

9 JUDGE RIVERA: - - - but the AD said it has
10 no meaning.

11 MR. ZICKL: - - - we've - - - we've gotten
12 to the - - - to the basis of our disagreement.

13 JUDGE RIVERA: Yeah, yeah.

14 MR. ZICKL: I say it certainly does - - -

15 JUDGE RIVERA: It has meaning.

16 MR. ZICKL: - - - have meaning. The
17 statute - - -

18 CHIEF JUDGE DIFIORE: Counsel - - -

19 MR. ZICKL: - - - itself says if there is
20 insufficient evidence in the record, and here, after
21 that hearing, there was sufficient evidence in the
22 record.

23 CHIEF JUDGE DIFIORE: Counsel, with respect
24 to the underlying conviction that gets us here, was
25 that - - - was the plea to the attempted arson an

1 Alford plea?

2 MR. ZICKL: Well, I'm not - - - I'm not
3 certain. It wasn't - - -

4 CHIEF JUDGE DIFIORE: Well, then - - - then
5 my next question is what was the evidence in the
6 restitution hearing that connected this defendant,
7 Mr. Connolly, to the damage that was caused?

8 MR. ZICKL: You mean the identity of the
9 person who caused the damage?

10 CHIEF JUDGE DIFIORE: Correct.

11 MR. ZICKL: Well, the witnesses at the
12 hearing came in after the fact. They testified that
13 Mr. Connolly certainly was a tenant of the building.
14 But the fact is, I don't think that an Alford plea -
15 - - and I apologize for not having looked at that
16 issue prior to arguing here, but just because it's an
17 Alford plea - - - an Alford plea is exactly the same
18 as any other sort of plea if it - - - taken in the
19 proper way, and there's no allegation in this case it
20 wasn't, for purposes of later litigation. It can
21 serve as the basis of a second felony offender
22 proceeding or anything like that. It is the same
23 thing. It is tantamount to an admission but without
24 the admission for whatever tactical reasons defense
25 counsel and defendant might put forth.

1 CHIEF JUDGE DIFIORE: Thank you, sir.

2 MR. ZICKL: Thank you.

3 CHIEF JUDGE DIFIORE: Counsel.

4 MR. WILLIAMS: Thank you, Your Honor. To
5 affirm on the theory that the defense could have
6 called witnesses because the judge was willing to
7 allow this to happen just would erode, very, very
8 significantly, the practical significance of the fact
9 that the court has to conduct the entire hearing.

10 Not - - -

11 JUDGE PIGOTT: If in - - - if instead of -
12 - -

13 JUDGE RIVERA: Well, - - - sorry.

14 JUDGE PIGOTT: - - - testimony the - - -
15 the people that handed up the seven documents that
16 everybody was stipulating to and rested, would that -
17 - - would that satisfy you as far as having a
18 hearing?

19 MR. WILLIAMS: In the event that the - - -
20 if I understand Your Honor's question correctly, the
21 - - - the issue is whether or not, if the hearing had
22 had no testimony, the delegation of it to a JHO would
23 have been improper, or just that the - - -

24 JUDGE PIGOTT: No, I'm saying you go to the
25 second one.

1 MR. WILLIAMS: Oh.

2 JUDGE PIGOTT: And they hand up the
3 transcript, and you don't like that. So they say
4 okay, we won't hand up the transcript. Here's the
5 seven documents, including the adjuster's estimate of
6 damage, and we rest. Would that be okay?

7 MR. WILLIAMS: Yes, Your Honor, I believe
8 that that would not - - -

9 JUDGE PIGOTT: Why - - - what are we
10 fighting over? I'm - - - I'm still missing this.
11 You don't - - - you don't dispute the documents;
12 we're not fighting over the amount. You were given
13 an opportunity, your - - - your client, to testify,
14 and you're saying doesn't make any difference. The
15 fact that it was held on a day that was an odd number
16 instead of an even number means we've got to do it
17 all over or some other insignificant thing. I - - -
18 I'm just - - - I - - - I would I could find some way
19 to say yeah, this isn't fair. You just can't put in
20 \$30,000 worth of damage and rest. But yes, you can.
21 And you're saying well, you went farther than that
22 and therefore, we're going to do it again?

23 MR. WILLIAMS: Well, the - - - the reason
24 is that the - - - the transcript, the testimony of
25 the adjuster, was considered important by the judge

1 because it was one of the pieces of evidence that he
2 cited in reaching the determination. Now, at the
3 final proceeding of January 2010, where the defense
4 is making its legal arguments to the judge, the
5 defense was no longer, you know - - -

6 JUDGE PIGOTT: What's going to happen?
7 Let's assume we agree with you and we send it back.
8 What's going to happen?

9 MR. WILLIAMS: If the case is remitted for
10 a new hearing, then evidence would be presented,
11 presumably, with regard to the amount of damage that
12 - - - for - - - for which Mr. Connolly could be held
13 liable. But it is very important, the - - - the
14 process, not just the result but how we get there,
15 because there's - - -

16 JUDGE PIGOTT: They put in the seven
17 documents. As Judge Noon - - - Noonan, pointed out
18 under CPL 400, you don't have - - - you know, there's
19 - - - the rules of evidence don't necessarily apply.
20 And he accepts those seven and says, what do you got,
21 and you say I've got nothing, we agree with those
22 seven. And he makes the same judgement that he - - -
23 that he's done now twice. Where are we?

24 MR. WILLIAMS: With - - - with respect, I
25 don't know actually that it still wouldn't be

1 disputed, because both at the Connolly I and II
2 hearings and in my weight of the evidence point in
3 the Appellate Division brief, there was argument
4 about the amount of restitution that could be
5 authorized.

6 JUDGE PIGOTT: How much of that? What was
7 that, the broken window?

8 MR. WILLIAMS: Well, insofar as the
9 deviation between the Connolly II and III orders was
10 concerned, it would be two broken windows, but the
11 defense had also argued in the Connolly III
12 proceedings that there was more damage, supposedly,
13 accounted for than could be proven, casually
14 traceable, to Mr. Connolly's arson.

15 JUDGE RIVERA: If - - - if he had heard - -
16 - held the kind of hearing that you are saying is
17 required by statute, was he foreclosed from also
18 considering the transcript material?

19 MR. WILLIAMS: If the transcript was to be
20 admitted at all - - - and I have taken no position on
21 that because of the admissibility of the transcript,
22 if conceded, would not mean - - -

23 JUDGE RIVERA: Um-hum.

24 MR. WILLIAMS: - - - the procedure was
25 therefore proper when it omitted information the

1 judge would have gotten by being there and hearing
2 and seeing the witnesses' testify, there would at
3 least have to be some sort of other remedy so that we
4 would not completely ignore the significant fact that
5 the judge has avoided - - - has not heard the
6 significant advantages of hear - - - hearing and
7 seeing the witnesses testify.

8 JUDGE RIVERA: But I'm saying but even if
9 it had held the hearing, as you say the statute
10 requires, and the People said, well, we also want you
11 to have this transcript?

12 MR. WILLIAMS: If the transcript was to be
13 considered at all, if it was - - - and if it was
14 admissible - - -

15 JUDGE RIVERA: Um-hum.

16 MR. WILLIAMS: - - - there would have to be
17 some other remedy, bringing in the witnesses or, if
18 not that, the - - -

19 JUDGE PIGOTT: I know your light's on, but
20 I'm missing that. I mean this is sworn testimony
21 under oath subject to cross-examination. There's no
22 hearsay exception to it. I would think that it would
23 come in. I don't know how you could object to it
24 except to say well, Judge, you didn't know that the -
25 - - that the adjuster happens to be 400 pounds and I

1 think his - - - his attitude when he came in would
2 have made you - - - would have turned you off and
3 therefore you may not have believed him.

4 MR. WILLIAMS: Well, Your Honor, I would
5 just say - - -

6 JUDGE PIGOTT: Demeanor's not a big deal in
7 this.

8 MR. WILLIAMS: Well, whether or not the
9 court deprives itself of information that - - -

10 JUDGE PIGOTT: No, and you even agreed that
11 the amount was fine. You said all of these documents
12 are fine.

13 MR. WILLIAMS: I don't believe that that is
14 a concession as to the - - -

15 JUDGE PIGOTT: 83. Well, go ahead; I'm
16 sorry.

17 MR. WILLIAMS: Oh, I'm sorry, Your Honor.

18 JUDGE PIGOTT: 43, you consented to all the
19 documents being received into evidence.

20 MR. WILLIAMS: Yes, Your Honor. The
21 defense - - - the - - - the defense did make that
22 with regard to admissibility, but the defense did,
23 after February 2013 proceeding, say however, there's
24 this problem, there's this problem with the amount
25 that they're asking for versus how much they can

1 prove was cause. And the defense did raise
2 credibility at the February 2013 proceeding as a - -
3 -

4 JUDGE ABDUS-SALAAM: So counsel, if - - -
5 if the judge had credited what your objections were
6 and given less money to - - - or have you pay - - -
7 or have your client pay less money, would we be here?

8 MR. WILLIAMS: That would be a closer case,
9 but I would still say there would be a violation
10 because the court was permitting its decision to be
11 influenced by information that fell short of that
12 which the court was required by statute to absorb in
13 the original proceedings.

14 CHIEF JUDGE DIFIORE: Thank you, counsel.

15 MR. WILLIAMS: Thank you, Your Honor.

16 (Court is adjourned)

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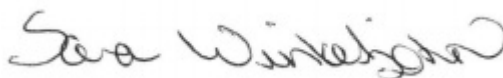
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C E R T I F I C A T I O N

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Jonathan J. Connolly, No. 68 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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