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COURT OF APPEALS

STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

No. 15

KEVIN FISHER,

Appellant.

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

Before:

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

Appearances:

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Official Court Transcriber

1 CHIEF JUDGE DIFIORE: Next matter on the
2 calendar is appeal number 15, the People of the State
3 of New York v. Kevin Fisher.

4 Counsel.

5 MR. WASSERMAN: Good afternoon. I'd like
6 to reserve two minutes for rebuttal.

7 CHIEF JUDGE DIFIORE: Three minutes, you
8 said?

9 MR. WASSERMAN: Two minutes.

10 CHIEF JUDGE DIFIORE: Two minutes. Yes,
11 you may.

12 MR. WASSERMAN: Matthew Wasserman, Office
13 of Appellate Defender for Kevin Fisher. May it
14 please the court.

15 Without any underlying felony committed by
16 someone else, they can be no crime of hindering
17 prosecution. In this - - -

18 JUDGE RIVERA: So counsel, how is this not
19 a claim of insufficient evidence that's foreclosed by
20 the plea?

21 MR. WASSERMAN: It's a claim of collateral
22 estoppel because what's really driving it is the
23 jury's decision in Roche's case, in that it's not
24 actually - - -

25 JUDGE STEIN: How can you apply collateral

1 estoppel if it hasn't happened, you know, you're
2 applying it sort of retroactively here. I - - - I'm
3 not aware of any cases in which that's happened,
4 particularly in criminal matters.

5 MR. WASSERMAN: Well, collateral estoppel
6 is a forward-looking document, but it bars the entry
7 of the judgment after Roche has been acquitted. That
8 - - - that is the sequence. That judgment is where
9 the proceeding becomes complete below.

10 A 440 motion is - - -

11 JUDGE STEIN: So you - - - you couldn't
12 make this, if sentence had already been imposed; is
13 that what you're saying?

14 MR. WASSERMAN: No, collateral estoppel
15 would not apply in that case. Maybe there'd be some
16 other recourse, but that's not a question for this
17 court.

18 CHIEF JUDGE DIFIORE: But isn't the
19 defendant convicted upon the entry of the plea and
20 the acceptance of the plea of guilty? Does that
21 matter to your argument?

22 MR. WASSERMAN: That's not where the bright
23 line lies. A 440 motion is a post-judgment motion,
24 an appeal is from a judgment, a judgment is where the
25 proceedings are complete. I recognize that

1 collateral estoppel is forward looking, and I believe
2 there actually is no authority on the question of
3 whether collateral estoppel applies at this juncture
4 between conviction and judgment being entered.

5 JUDGE GARCIA: I have a more fundamental
6 problem here, as well is, the verdict is, the People
7 didn't prove their case beyond a reasonable doubt in
8 that particular proceeding. It isn't, he didn't do
9 it.

10 Your client stands up in court and takes a
11 plea, part of which is, this defendant committed the
12 particular felony. He's in the room, he has personal
13 knowledge of what the defendant did. He's in - - -
14 as I understand the record, he's in the room when the
15 shooting occurs.

16 So how is that not a valid plea? I wasn't
17 there, I saw what happened, and now I'm pleading to,
18 he committed X type of felony, and I, you know, to
19 the following acts. So isn't this a particularly bad
20 case to apply that in?

21 MR. WASSERMAN: As a factual matter, if you
22 look at the grand jury testimony from the
23 prosecution's key witness, which is in the
24 respondent's appendix, it actually states that Mr.
25 Fisher entered the room after the shooting happened.

1 And so he wouldn't have witnessed whether it was
2 self-defense, whether it was an accident, which were
3 the defenses raised at trial, Clovis Roche.

4 JUDGE RIVERA: But in Chico, didn't the
5 court say that the defendant's own statements of the,
6 in that case, an intentional homicide satisfied the
7 requirement?

8 MR. WASSERMAN: Sure.

9 JUDGE FAHEY: So why isn't that true here?

10 MR. WASSERMAN: Well, again, as a factual
11 matter, if you look at the voluntary disclosure form,
12 Kevin Fisher didn't make any statements; Clovis Roche
13 made the statements, but nonethe - - -

14 JUDGE RIVERA: No, no, at his plea.

15 MR. WASSERMAN: Oh.

16 JUDGE RIVERA: He takes a plea; he admits
17 to all the elements of the crime, including the
18 commission of the offense by the person assisted, Mr.
19 Roche.

20 MR. WASSERMAN: Well, this is where we have
21 to get to the particularly of hindering prosecution,
22 which is unlike any other substantive crime in the
23 Penal Law, as it requires, as an element, that
24 someone else committed a crime.

25 And in fact, all the other derivative

1 responsibility statutes in the Penal Law specifically
2 state that acquittal is not a defense. That's true
3 of the conspiracy, that's true of the criminal
4 facilitation, that's true of the accomplice
5 liability. This is different, and that has its roots
6 in the Common Law, where the crime of accessory - - -

7 JUDGE RIVERA: Well, isn't it also a
8 difference because - - - because the - - - the more
9 effective the hinderer is at hindering, the less
10 likely it is you're going to be able to convict
11 someone, the person who is assisted? Isn't it
12 different that way also?

13 MR. WASSERMAN: I understand that would
14 also be the case with criminal facilitation, or other
15 potential crimes, but I would analogize this to the
16 situation because what's really crucial is that Mr.
17 Fisher can't know for a fact that someone else
18 committed the crime. This analogizes to a situation
19 where someone enters a guilty plea - - -

20 JUDGE STEIN: So are you saying that it - -
21 - that a - - - let's say that the - - - the person
22 who committed - - - who allegedly committed the
23 murder isn't found, has skipped town. So you're
24 saying that - - - that a plea could never be taken in
25 a hindering case because a person could never say

1 that they knew that - - - that this murder had
2 occurred?

3 MR. WASSERMAN: No, of course not. I'm
4 saying that when evidence emerges that conclusively
5 shows that someone can't be prosecuted before
6 judgment has been entered, they have to have the
7 right to get that plea back. Because of the doctrine
8 of collateral estoppel, in O'Toole and Acevedo, this
9 court has said that a not-guilty verdict precludes
10 the prosecution from litigating the same issue. The
11 precise issue - - -

12 JUDGE STEIN: Well, they didn't litigate -
13 - - they are not litigating that issue. I think
14 that's part of the - - - the sense that, you know,
15 the litigating of the factual issues took place
16 during the plea. That was the litigation here in
17 this case.

18 MR. WASSERMAN: I respectfully disagree.
19 The prosecution had a full and fair opportunity to
20 litigate the guilt of Clovis Roche.

21 JUDGE STEIN: So why wouldn't anybody ever
22 take a plea to hindering, if - - - if we make this
23 rule, before the underlying crime is - - - is tried?

24 MR. WASSERMAN: Well, as a practical
25 matter, our - - - our position is that collateral

1 estoppel doesn't bar judgment, and after judgment has
2 been entered, collateral estoppel simply doesn't
3 apply. I'll also note that these concerns about
4 destabilizing the law - - -

5 JUDGE STEIN: Well, wouldn't somebody say,
6 all right, I'll - - - I'll take a plea, but only if
7 sentencing is postponed until after the trial.

8 MR. WASSERMAN: The prosecution could
9 refuse to offer a plea under those circumstances.

10 And I'll note that this is the only case that's
11 reported that deals with this factual circumstance. This
12 is not something with a great potential to destabilize the
13 law.

14 Even in People v. Jones, it's not clear that it
15 deals with exactly the same circumstances, which is the
16 unreported appellate term or decision that the prosecution
17 requires. And that's the case were it actually states
18 that the codefendant was acquitted but was not - - -
19 eventually was convicted of a misdemeanor, I apologize,
20 and not a felony.

21 But the thing with that is it's not clear. It's
22 perhaps possible that the codefendant, in that case, took
23 a plea to a misdemeanor, rather than a felony. We
24 wouldn't say that if Mr. Roche took a plea to a
25 misdemeanor, it's still possible he committed a felony.

1 What's crucial is that the jury had a chance to look at
2 this issue, they had a chance to look at the guilt of
3 Clovis Roche, and they made their decision.

4 And in O'Toole and in Acevedo, this court said
5 that the jury's finding of not guilty has preclusive
6 effect. That - - - that is a - - -

7 JUDGE RIVERA: But this is my point about
8 hindering prosecution. Isn't - - - isn't it possible
9 to be so successful at hindering prosecution, that
10 even though the People go ahead with the prosecution
11 of the assisted person, the assisted person is
12 acquitted, in part, if not solely because of the
13 efforts of a defendant who hindered the prosecution.

14 MR. WASSERMAN: That isn't the case here.
15 I recognize that's a possibility - - -

16 JUDGE FAHEY: That seems to be the People's
17 - - - what the point that Judge Rivera seems to be
18 the People's strongest argument, which is that the
19 defendant who hindered prosecution contributed to the
20 acquittal by destroying evidence, a gun, destroys a
21 gun, gets rid of it, we'd have a nonsensical result
22 where someone who destroys the evidence that could
23 have convicted someone else would also, and - - - and
24 as a result, as an acquittal there, for insufficient
25 evidence.

1 And then this person could never be
2 prosecuted for hindering the prosecution in the first
3 place that created the acquittal. So there's an
4 incentive for destroying evidence.

5 MR. WASSERMAN: That isn't this case
6 though. What Clovis Roche was acquitted of was
7 either a self-defense theory - - -

8 JUDGE FAHEY: Right.

9 MR. WASSERMAN: - - - or an accident
10 theory. And the People have never argued that they
11 didn't have a full and fair opportunity to litigate
12 Clovis Roche's guilt at his trial.

13 JUDGE FAHEY: You understand, here, though,
14 we have to look at the effect in other cases too.

15 MR. WASSERMAN: Certainly.

16 JUDGE FAHEY: Sure.

17 MR. WASSERMAN: But I would suggest that,
18 as a limiting principle, if the People don't have a
19 full and fair opportunity to litigate the precise
20 issue, then collateral estoppel doesn't apply. Here,
21 they did.

22 JUDGE FAHEY: Right.

23 JUDGE RIVERA: And your position is once
24 they lose, they can't try again.

25 MR. WASSERMAN: Exactly. I think that's

1 the precise issue.

2 JUDGE RIVERA: But here, they're not trying
3 again, is the point. Your - - - your client chose to
4 risk that if Mr. Roche went ahead with his trial, he
5 might actually be acquitted. Right?

6 MR. WASSERMAN: My position - - -

7 JUDGE RIVERA: And he may have done that
8 for ver - - - your client may have done that for very
9 good reasons. Why does that make his guilty plea one
10 that should - - - he should be permitted to withdraw?

11 MR. WASSERMAN: My position is that
12 collateral estoppel operates to bar further
13 prosecution of facts that - - - and issues that have
14 been decided.

15 And I'll just note that if they could get a
16 second bite of the apple, which is what this court says
17 they don't get, they could strategically sever; they could
18 get an acquittal in the case of Clovis Roche, and then go
19 after Kevin Fisher, which would be actually turning the
20 Common Law doctrine of necessity after the fact, directly
21 on its head.

22 And I see my red light is on. Unless there is -
23 - -

24 CHIEF JUDGE DIFIORE: Yes. Thank you, Mr.
25 Wasserman.

1 Mr. Morales.

2 MR. MORALES: May it please the court.

3 Luis Morales for the People.

4 If I may pick up where Judge Rivera was, with
5 respect to defendant knowing the possibilities that he was
6 facing when he took the plea, he decided to take the most
7 favorable outcome available at the time, which was to
8 plead guilty to a lesser sentence and to a lesser included
9 offense. Of course, he was aware that there was a
10 possibility that if he put - - - put himself before the
11 jury, that he would have been acquitted, or even that - -
12 - what did end up happening, is that Roche was acquitted,
13 this - - -

14 JUDGE STEIN: Do you concede that if this
15 was all taking - - - this conversation was all taking
16 place before the plea, that collateral estoppel could
17 be applied?

18 MR. MORALES: Just to clarify, meaning if
19 Roche is acquitted - - -

20 JUDGE STEIN: Roche is acquitted before the
21 plea. Collateral estoppel, you can't prosecute.

22 MR. MORALES: Absolutely not. I mean, to
23 start with Chico - - -

24 JUDGE STEIN: Absolutely not, you don't
25 agree with that?

1 MR. MORALES: Absolutely - - - I - - - I do
2 not agree with that proposition. I - - - I do not
3 think the People - - -

4 JUDGE RIVERA: So Roche is acquitted, they
5 decide not to take the plea, your position is, you
6 could try again to show that the underlying felony
7 had indeed been committed by Roche.

8 MR. MORALES: Yes, Your Honor. And - - -
9 and, I mean, to begin, I think that's where the
10 Bruton hypo (ph.) that we offer, and - - - and also
11 this court's discussion in Berkowitz about why one
12 acquittal does not apply to another acquittal. There
13 are issues of dissimilarities of evidence. There's
14 the full and fair litigation aspect to it, and even
15 beyond that, there - - - there are things such as - -
16 -

17 JUDGE STEIN: Well, on the element of
18 whether Roche committed murder or not, there - - -
19 why wouldn't - - - under the circumstances of this
20 case, why wouldn't there be a full and fair
21 opportunity to litigate that, on behalf of the
22 People?

23 MR. MORALES: Well, I mean, for the simple
24 fact - - -

25 JUDGE STEIN: I mean, there might be other

1 elements, but on that element - - -

2 MR. MORALES: Oh, absolutely. But, I mean,
3 on - - - with respect to that element, the People
4 could bring - - - bring the evidence, it's a little
5 unclear exactly who was called in the - - - in the -
6 - - in Roche's case, and so it's a little tricky to
7 establish exactly if there would be the distinctions
8 in the quantum of proof between the defendants.

9 But the People could prove, as - - - as in
10 Chico, by calling Lamar and using - - - that they
11 could call Lamar, they could - - - they could call
12 the detectives and - - - and put on a case with
13 respect to that - - - to that murder. That's exactly
14 what happened in Chico. There was a prosecution of a
15 defendant in the absence of any conviction.

16 JUDGE RIVERA: So let's - - - let's say you
17 have a different kind of case. Let's say you have a
18 case where it - - - it's not that you tried and maybe
19 there's reasonable doubt, that the - - - but the
20 People are persuaded that the assisted person - - -
21 that they're wrong, that the assisted person is - - -
22 is completely innocent, did not commit this crime.

23 Could you still go after the person who you
24 thought had been hindering?

25 MR. MORALES: I'm so - - - the Peop - - -

1 JUDGE RIVERA: If there's - - - but this is
2 not - - - if it's not a case where perhaps the
3 assisted person has committed the crime, it's just
4 not reasonable doubt - - -

5 MR. MORALES: Right.

6 JUDGE RIVERA: Okay. But instead, that
7 you, the People, are persuaded of innocence, or the
8 person really proves innocence at trial.

9 MR. MORALES: An actual innocence - - -

10 JUDGE RIVERA: Actual innocence - - -

11 MR. MORALES: The videotape shows - - -

12 JUDGE RIVERA: - - - did not commit the
13 crime.

14 MR. MORALES: - - - he's - - - has in the
15 store.

16 JUDGE RIVERA: I'll - - - I'll give you - -
17 - I'll give you a good one.

18 MR. MORALES: Yeah.

19 JUDGE RIVERA: Okay. So let's say you're
20 prosecuting someone for murder, but you don't have
21 the body.

22 MR. MORALES: Right.

23 JUDGE RIVERA: During the trial, the person
24 walks in, who you thought was dead - - -

25 MR. MORALES: Right.

1 JUDGE RIVERA: - - - and there you go.

2 MR. MORALES: No. I mean, there has to be

3 - - -

4 JUDGE RIVERA: But - - - but someone did
5 try to hinder this. Let's assume you have someone
6 who really thought, I think they killed him, proceed
7 with this.

8 MR. MORALES: In - - - in - - - in there,
9 you would not have a pro - - - a hindering
10 prosecution.

11 JUDGE RIVERA: Okay.

12 MR. MORALES: You do have to have an
13 underlying B or C felony committed. If he walks in
14 on - - - on an episode of Law & Order, and takes a
15 prop, and runs off, no. Absolutely not.

16 JUDGE RIVERA: So - - - so there's an
17 exception, you would say, if there's true innocence,
18 as opposed to reasonable doubt that a crime is
19 committed.

20 MR. MORALES: I - - - I think if there was
21 a finding of true innocence, it would - - - it would
22 have presented a very unique situation - - -

23 JUDGE RIVERA: Um-hum.

24 MR. MORALES: - - - before the sentencing
25 jud - - - if the plea had been taken, and there's a

1 finding, defendant would certainly be entitled to
2 bring a post-relief motion for actual innocence, I -
3 - - I think there, that the judge would - - - would
4 have discretion to entertain that - - -

5 JUDGE RIVERA: So how - - - how - - - what
6 about cases where it's not so obvious that that may
7 be the reason why a jury acquits, that they believe
8 the person is innocent?

9 MR. MORALES: Well, I - - -

10 JUDGE RIVERA: Here, it's different, right,
11 because - - -

12 MR. MORALES: Well, here - - -

13 JUDGE RIVERA: - - - this person admitted
14 and said, we were struggling for the gun, so you
15 don't have innocence in the sense of, I didn't shoot
16 someone.

17 MR. MORALES: Right. Well, and, I mean, I
18 think that's the whole program with beginning to peer
19 behind the verdict itself, and to try to draw
20 conclusions about what a jury was thinking in an
21 independent case.

22 It could - - - there are - - - there are so
23 many possible factors, those outlined in Berkowitz,
24 down to how the evidence itself was presented by a
25 specific prosecutor, and there - - - there are so

1 many factors, which is why - - -

2 And I did just want to get back to something, I
3 believe, Judge Stein was discussing, with respect to no
4 defendant is ever going to be - - - no hindering defendant
5 is ever going to be offered a split plea in this
6 situation.

7 And I think I heard in an earlier case, the
8 instance of have your cake and eat it too, because that's
9 exactly what a rule of a prospective acquittal would lead
10 to, a case where a defendant can take a plea to hindering
11 prosecution, and then wait and see, and disturb that plea
12 in a later case.

13 With respect to collateral estoppel, again,
14 there - - - there is ample discussion on the other side.
15 It certainly does not run backwards.

16 JUDGE RIVERA: Can I - - - can I ask you to
17 respond to, what I think I understand part of his
18 argument is, which is that his client could not admit
19 to the element. Right.

20 MR. MORALES: In - - -

21 JUDGE RIVERA: That - - - that - - - Roche
22 didn't commit this crime.

23 MR. MORALES: Well, in - - - in - - -
24 there's absolutely no reason why he could not. I
25 mean, he - - - he knows what happened. Justice

1 Bergmann found - - - made a finding below, with
2 respect to the grand jury testimony, we could put on
3 evidence, in fact, with respect to calling witnesses
4 to establish that as well. There's no reason he
5 cannot admit that the B is - - - just as Chico - - -

6 JUDGE FAHEY: Well, I guess the argument
7 would be, how can you admit to having hindering
8 prosecution for a B or a C felony, if the person has
9 been acquitted of the B or the C felony.

10 MR. MORALES: How - - - how could you admit
11 it?

12 JUDGE FAHEY: Right.

13 MR. MORALES: I mean, the same - - - the
14 same way as if Ms. Chico - - -

15 JUDGE FAHEY: Um-hum.

16 MR. MORALES: - - - had successfully
17 hindered the prosecut - - - had successfully hindered
18 the rest of her hus - - - of her common-law husband,
19 in that case, or - - - or - - - I'm supposing that
20 would be a case where you would have no arrest, but
21 in a similar situation, had done something, had been
22 a very successful hinderer, and - - - and as I - - -
23 I'm forgetting who brought it up, the more successful
24 the hinderer, the more likely that the underlying
25 offense, but there's nothing perverse about holding

1 that person responsible, particularly if they're
2 going to admit that they helped that person get away
3 with murder.

4 JUDGE FAHEY: So - - - so there should be
5 no effect then, between - - - for an acquittal.
6 There's a difference between committed an acquittal,
7 I grant you that, but the acquittal can have no
8 effect, under your theory.

9 With respect to - - -

10 JUDGE FAHEY: Hindering prosecution.

11 MR. MORALES: - - - a future plea or with
12 respect to - - -

13 JUDGE FAHEY: Yeah.

14 MR. MORALES: - - - a future trial.
15 Absolutely not.

16 JUDGE RIVERA: Do you want to address the
17 Brady issue?

18 MR. MORALES: I mean, just - - - I mean,
19 very briefly with respect to the Brady issue, the - -
20 - the notes, they just simply don't say what
21 defendant said they do.

22 Roche never faced deadly for - - - the
23 notes didn't establish that Roche - - - Roche faced
24 deadly force, so there's no way that these notes were
25 going to - - - we're going to go into the calculus

1 for defendant's plea, which was, in turn, based on
2 his perception of what occurred in the - - - in the -
3 - - in the underlying case.

4 And - - - and I think it's particularly telling
5 that Clovis Roche's attorney, whose client was at jeopardy
6 for - - - for murder at the time, agreed with the trial
7 court that this was not - - - not Brady material.

8 So really, I mean, all the People are asking
9 here is just that you hold the defendant to his choice, to
10 his knowing choice. He knew - - - the inquiry is not
11 whether he knew what was going to happen in Roche's case,
12 but rather whether he knew the possible outcomes, and
13 decided to take a plea based on - - - on that, and that's
14 a knowing and voluntary plea, there's nothing about a
15 subsequent acquittal that would require this court to
16 disturb - - - to disturb that decision.

17 CHIEF JUDGE DIFIORE: Thank you, counsel.

18 MR. MORALES: Thank you.

19 CHIEF JUDGE DIFIORE: Counsel.

20 MR. WASSERMAN: So initially, I'd like to
21 say that my adversary's position that collateral
22 estoppel would not apply in this case just flies in
23 the face of this court's jurisprudence in O'Toole and
24 Acevedo.

25 If Mr. Fisher had taken a plea after his

1 codefendant had been acquitted, I believe that would
2 be an invalid plea, and if Kevin Fisher had gone to
3 trial with Clovis Roche, and Kevin Fisher had been
4 convicted of hindering prosecution, and Clovis Roche
5 had not been convicted of any felonies, that would
6 have been a repugnant verdict, and that's
7 fundamentally unfair for Mr. Fisher to be - - - have
8 judgment entered in for a crime that he couldn't have
9 been convicted of otherwise.

10 I'll also just note - - -

11 JUDGE STEIN: But you - - - your - - - your
12 argument, in this particular circumstance, depends
13 upon our finding that this distinc - - - that there's
14 a distinction between the plea having been taken and
15 accepted versus sentencing having occurred, and
16 judgment entered.

17 That - - - that's really the crux of your
18 collateral estoppel argument, correct?

19 MR. WASSERMAN: Timing is crucial, and
20 collateral estoppel is forward looking. So yes, as I
21 believe - - -

22 JUDGE STEIN: But if we disagree with you
23 on that, then you lose that argument.

24 MR. WASSERMAN: That's correct. That - - -
25 after my position is, after judgment, collateral

1 estoppel just doesn't apply. And that's where the
2 bright line lies.

3 I'll also note that my adversary mentioned a
4 concern about - - -

5 JUDGE RIVERA: I thought you were also - -
6 - maybe I'm not understanding your argument that you
7 have a straight innocence claim. Is it - - - your
8 client is innocent because the person who was
9 assisted was not found guilty.

10 MR. WASSERMAN: I'm arguing as a matter of
11 collateral estoppel, my client has - - -

12 JUDGE RIVERA: I understand your other
13 point, which is, then they can't proceed against your
14 client, but - - - but for purposes of being able to
15 withdraw the plea, I thought you were also arguing
16 that this is a straight innocence claim.

17 MR. WASSERMAN: I believe that my client
18 could not be convicted, yes, in that sense - - -

19 JUDGE RIVERA: Um-hum.

20 MR. WASSERMAN: - - - and it's possible
21 that Mr. Fisher would have a 440 motion after our
22 judgment, but that's not the question before the
23 court today.

24 My adversary also mentioned the concern about
25 peering behind verdict. I want to just note that, unlike

1 O'Toole and Acevedo, other cases where this court has
2 applied collateral estoppel, there's no requirement to
3 look at what the necessary findings are.

4 What we're looking at is just the jury's verdict
5 itself. That's what has preclusive effect. We don't have
6 to look and see what do they think about - - - and this
7 has to do with this specific nature of hindering
8 prosecution in the statute.

9 There aren't other statutes like this, where
10 someone else having committed a crime is an element. And
11 we don't have to look at what factual findings happened,
12 we don't have to look - - - even in codefendant cases,
13 there's always this question of different mens rea,
14 different proof, different defenses, none of that applies
15 here.

16 Effectively, Clovis Roche having committed a
17 felony is a lesser included of Kevin Fisher being
18 convicted of hindering prosecution.

19 CHIEF JUDGE DIFIORE: Thank you, Mr.
20 Wasserman.

21 MR. WASSERMAN: Thank you.

22 (Court is adjourned)

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

I, Meir Sabbah, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Kevin Fisher, No. 15 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Signature:  _____

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