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COURT OF APPEALS

STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

No. 6

SCOTT BARDEN,

Appellant.

20 Eagle Street
Albany, New York 12207
January 05, 2016

Before:

ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY

Appearances:

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Official Court Transcriber

1 JUDGE PIGOTT: Case number 6, People v.
2 Scott Barden.

3 Mr. Greenberg, how are you, sir?

4 MR. GREENBERG: I'm good. Thank you.
5 Richard Greenberg, Office of the Appellate Defender,
6 on behalf of Scott Barden. Good afternoon, Your
7 Honors. May I reserve two minutes, Judge?

8 JUDGE PIGOTT: Fine.

9 MR. GREENBERG: Thank you. Your Honors,
10 Scott Barden was denied a speedy trial and the
11 indictment should be dismissed for that reason alone.
12 But in any event, the evidence was clearly
13 insufficient to support a conviction for possession
14 of stolen property and theft of services. Now,
15 regardless of what you may think of Scott Barden or
16 what he did or did not do to pay his hotel bill, he
17 is simply not guilty of possessing stolen property in
18 this case.

19 JUDGE ABDUS-SALAAM: Could we - - - could
20 we deal with your first issue, the speedy trial issue
21 - - -

22 MR. GREENBERG: Sure.

23 JUDGE ABDUS-SALAAM: - - - Mr. Greenberg?

24 MR. GREENBERG: Yes, the - - -

25 JUDGE ABDUS-SALAAM: So if the People - - -

1 the People were never ready here.

2 MR. GREENBERG: Correct.

3 JUDGE ABDUS-SALAAM: So - - - but the - - -
4 but the trial judge said that only 179 days would be
5 attributed to the People, because he left off that -
6 - - I guess the last adjournment that the People
7 asked for - - -

8 MR. GREENBERG: Well - - -

9 JUDGE ABDUS-SALAAM: - - - and the defense
10 counsel wanted more time.

11 MR. GREENBERG: It's not quite that, Your
12 Honor. There - - - there are three specific
13 adjournments that we - - -

14 JUDGE ABDUS-SALAAM: Right.

15 MR. GREENBERG: - - - challenge here. One
16 on January 5th, 2011, February 9th, and March 2nd.
17 There were three consecutive adjournments - - -

18 JUDGE ABDUS-SALAAM: Is any time in those
19 three - - - in the - - - the two previous
20 adjournments attributed to the defendant?

21 MR. GREENBERG: Yes.

22 JUDGE ABDUS-SALAAM: Okay.

23 MR. GREENBERG: Yes, in each of those three
24 instances, the People said they were not ready and
25 they had never prior answered ready. So this is pre-

1 readiness delay. They have never been ready in this
2 case. On January 5th they come in and they say,
3 we're not ready, we're asking for January 26th.
4 Defense counsel says well, that's not a great day for
5 me; can we have February 8th or 9th.

6 JUDGE FAHEY: So is it your position that
7 those dates - - - that - - - that when defense
8 counsel asked that, that those dates count to the
9 People and not to you?

10 MR. GREENBERG: Correct, and that's based
11 on this court's decision in People v. Smith, which a
12 long-standing precedent and in that case this court
13 made it very clear that the rule is simply that when
14 in pre-readiness delay, the People are responsible
15 for all delays, now, unless there's a clear consent
16 by the defense.

17 JUDGE RIVERA: What - - - well, what if you
18 both - - - what if the date that the People had asked
19 for, he said okay, we're ready on that day, and the
20 court says, that day doesn't work for me?

21 MR. GREENBERG: I'm sorry? Both - - -

22 JUDGE RIVERA: What if the court had said
23 that date doesn't work, we have to do it - - -

24 MR. GREENBERG: Same thing.

25 JUDGE RIVERA: Um-hum, same thing.

1 MR. GREENBERG: It's court congestion.
2 This court has held that if it's court congestion,
3 whether it's based on the court's unavailability - -
4 -

5 JUDGE RIVERA: Um-hum.

6 MR. GREENBERG: - - - or defense counsel's
7 unavailability. Now, I'm not suggesting if the
8 People come in and say we're not ready - - -

9 JUDGE RIVERA: Well, either way it gets
10 counted against the People - - -

11 MR. GREENBERG: Yes.

12 JUDGE RIVERA: - - - is what you're saying.

13 MR. GREENBERG: Yes.

14 JUDGE RIVERA: Um-hum.

15 MR. GREENBERG: And - - -

16 JUDGE STEIN: But what does the "actively
17 participate" language mean? What does it mean?

18 MR. GREENBERG: Well, that's the problem
19 here.

20 JUDGE STEIN: Yeah, yeah.

21 MR. GREENBERG: In Smith, this court used a
22 phrase. Now, in Smith, this court said, "The
23 question is whether the People should be charged with
24 time beyond the dates to which they requested
25 adjournments." And since they never stated their

1 readiness, this court said yes, they should be
2 charged with all of that time. And - - - and the
3 only exception now - - -

4 JUDGE FAHEY: But you got some case law
5 that conflicts with that, though. People v. Worley -
6 - -

7 MR. GREENBERG: Correct. But - - -

8 JUDGE FAHEY: - - - conflicts directly with
9 that.

10 MR. GREENBERG: Well, in - - - in Smith
11 this court said the adjournments were precipitated by
12 the People's failure to be ready. Other than stating
13 that certain dates were not convenient, defense
14 counsel did not formally consent and did not
15 participate in setting a new date, so we - - - what
16 we're left with is, what is that word participate?

17 If - - - if you really want to create
18 gamesmanship, you would say that a defense lawyer
19 should say nothing. So when the People come in and
20 say we're not ready, we want two weeks, and the Judge
21 turns to defense counsel and says, is that date good
22 for you and she says no, that's not good for me, and
23 he says what date is good for you, counsel, defense
24 counsel should say nothing and wait until the judge
25 suggests another date, and then say if that's good or

1 not good.

2 Don't forget the point of it is - - -

3 JUDGE RIVERA: Well, what does happen if
4 the defense counsel says no, today is the day, today
5 is the day; and they're not ready, what should a
6 judge do?

7 MR. GREENBERG: I'm not sure what I - - -

8 JUDGE RIVERA: Well, because this question
9 about participating is the one we're trying to get
10 to, so in your prior example and what happened here -
11 - -

12 MR. GREENBERG: I think - - -

13 JUDGE RIVERA: - - - defense counsel says
14 the day that has been proposed by the People - - -

15 MR. GREENBERG: Doesn't - - -

16 JUDGE RIVERA: - - - does not work for me.

17 MR. GREENBERG: Correct.

18 JUDGE RIVERA: Here's an alternative date.

19 MR. GREENBERG: Correct.

20 JUDGE RIVERA: So if defense counsel comes
21 in - - -

22 MR. GREENBERG: Did she participate?

23 JUDGE RIVERA: You - - - your response was
24 well, what if - - - what if defense counsel just
25 stands mute - - -

1 MR. GREENBERG: Correct.

2 JUDGE RIVERA: - - - and doesn't respond.

3 But what if defendant counsel says, no day other than
4 today or the day that - - - that they're saying
5 they're not ready for it, only that day, we're
6 available. That's it.

7 MR. GREENBERG: Well, that doesn't make any
8 sense, obviously. Defense counsel has to be ready at
9 some point. I think the question here is - - -

10 JUDGE RIVERA: Well, no. I'm saying you're
11 saying you're ready at the time that - - - that you
12 understood the - - -

13 MR. GREENBERG: Right, and the People are
14 saying - - -

15 JUDGE RIVERA: - - - the People were going
16 to be ready.

17 MR. GREENBERG: - - - they're not ready.

18 JUDGE RIVERA: Right, but you say this is
19 the day that it's on, yeah.

20 MR. GREENBERG: I'm ready today.

21 JUDGE RIVERA: Correct.

22 MR. GREENBERG: The People say they're not
23 ready. The People want two weeks.

24 JUDGE RIVERA: You're not giving consent, I
25 guess you - - -

1 MR. GREENBERG: The People want two weeks
2 and on two weeks, I have to be in court in another
3 county that day, so I can't be here then.

4 JUDGE RIVERA: I understand. Then you're
5 not consenting, so you're only saying I'm available
6 now.

7 MR. GREENBERG: Correct.

8 JUDGE RIVERA: This is the day.

9 MR. GREENBERG: And then the judge says
10 well, when can you be here, counsel, and I say, well,
11 I can be here two days later. Why should I be
12 charged with those two days? It's all because the
13 People weren't ready in the first instance.

14 I think in - - - in the context of Smith,
15 participate means that defense counsel is herself
16 requesting additional time or consenting or in some
17 way extending the adjournment beyond the time period
18 that the People are asking for, not just setting a
19 date that's convenient.

20 JUDGE STEIN: Well, but isn't that what
21 happened here today?

22 MR. GREENBERG: No.

23 JUDGE STEIN: The - - - in a case, for
24 example, where - - - where the - - - the lawyer had
25 another trial that they were involved in.

1 MR. GREENBERG: But - - -

2 JUDGE STEIN: You know, I - - - I need time
3 to prepare for this other trial, and so on and so
4 forth, so this is - - -

5 MR. GREENBERG: She didn't say I need time
6 to do anything other than I can't be here on that day
7 because I have to be somewhere else that day.

8 JUDGE FAHEY: Well, she said I had a date
9 in the Second Circuit on the 8th, and I need to get
10 that done.

11 MR. GREENBERG: Correct.

12 JUDGE FAHEY: Right.

13 MR. GREENBERG: Okay.

14 JUDGE ABDUS-SALAAM: But the - - - the
15 other one was she had a trial and said I have to get
16 that trial done or I'll kill myself. So - - -

17 MR. GREENBERG: Right. And then the third
18 one, she said the People request - - - on March 2nd,
19 they request March 16th. She says, that's not a good
20 day for me; can we have the 28th? And the judge says
21 no, it has to be after April 8th, I'm going to give
22 you April 13th, so there's twenty-eight additional
23 days there, and that's not defense counsel's fault.

24 And - - - and keep in mind, the one thing
25 that can prevent all of this is the People being

1 ready. And they can not only answer ready on the
2 record in court, but they can answer ready anytime
3 they want - - -

4 JUDGE RIVERA: I know your - - -

5 MR. GREENBERG: - - - by serving a
6 certificate - - -

7 JUDGE RIVERA: Yeah, but counsel - - -

8 MR. GREENBERG: - - - of readiness.

9 JUDGE RIVERA: Yes, okay. But - - - but
10 then they're not ready, so those days are going to be
11 counted against them. And the question is the date
12 that you then got as the alternative day or the new
13 date is one that defense counsels says well, I'm not
14 - - - I'm not ready to move forward on that day
15 myself. So why shouldn't that be counted against the
16 defendant?

17 MR. GREENBERG: Because defense counsel
18 never said I'm not ready. She said I'm unavailable
19 that day. I - - - I need a different date because I
20 can't be here that day. So she didn't say I wasn't
21 ready. She was ready on all of these dates. The
22 People were never ready. Not only were they not
23 ready on these three dates, they weren't ready for
24 another six months after this.

25 JUDGE RIVERA: But ready contemplate - - -

1 MR. GREENBERG: So we have - - - we have a
2 - - -

3 JUDGE RIVERA: But ready contemplates
4 availability, doesn't that?

5 MR. GREENBERG: No, I don't think so. I
6 think that it's unfair to the defense if the People
7 say we're not ready and they keep coming in and
8 saying we're not ready, we're not ready, we - - -

9 JUDGE RIVERA: And those dates are counting
10 against them.

11 MR. GREENBERG: - - - and we want two
12 weeks, you can't expect a defense attorney - - -

13 JUDGE RIVERA: Yes, but those dates are
14 then counting against them. I get - - - I get your
15 point that every time they do that, they're really
16 getting more than that because they must anticipate
17 that defense counsel - - - or there's a likelihood
18 that defense counsel won't be available.

19 MR. GREENBERG: But they can't expect that
20 they have to get the exact date they're asking for or
21 else the defense should be charged.

22 JUDGE RIVERA: Well, I understand. You're
23 arguing that potentially they're gaming the system.

24 MR. GREENBERG: Correct.

25 JUDGE RIVERA: That they're coming and

1 saying I only want two weeks when they - - - they
2 potentially believe that the likelihood of two weeks
3 is almost zero. And - - -

4 MR. GREENBERG: And - - -

5 JUDGE RIVERA: - - - that it's really more
6 time, but do not want to come in and say give me four
7 weeks.

8 MR. GREENBERG: Right. And, you know what;
9 if they were ready in two weeks, all they have to do
10 is file a certificate of readiness.

11 JUDGE PIGOTT: Let's - - - let's do this.
12 Why don't we let Mr. Cohn address that and we'll get
13 you onto your substantive arguments. Your time is
14 almost up, but we'll - - -

15 MR. GREENBERG: Okay. Well, I think the
16 speedy trial is substantive and also the stolen
17 property is substantive.

18 JUDGE PIGOTT: You say it that way, yeah.

19 MR. GREENBERG: And - - - and the stolen
20 property is substantive. Your Honors, this is - - -
21 this should be a clear case of statutory
22 interpretation. On the one hand, first of all, as a
23 matter of evidence here, there was no stolen property
24 nor was there any evidence whatsoever that Scott
25 Barden possessed - - - either constructively or

1 physically possessed a credit card or a credit card
2 number. He never even knew the number. But in terms
3 of statutory interpretation - - -

4 JUDGE RIVERA: But he was authorized for
5 use of the number, right?

6 MR. GREENBERG: Well, the hotel was
7 authorized - - -

8 JUDGE RIVERA: He had permission
9 originally.

10 MR. GREENBERG: Right, the hotel had
11 permission.

12 JUDGE RIVERA: Then he had access to the
13 number.

14 MR. GREENBERG: Well, he never had the
15 number.

16 JUDGE RIVERA: I - - - but he has access to
17 the use of that number, right? He has - - - he has -
18 - -

19 MR. GREENBERG: Correct. Well - - -

20 JUDGE RIVERA: - - - the appearance of
21 authority to tell the hotel yes, charge it to that
22 number, correct?

23 MR. GREENBERG: Not quite, because what
24 happened is it's the third party, Catalfamo, who
25 interacts with the hotel, not Mr. Barden. The third

1 party says to the hotel, here's my card number, I'm
2 authorizing you, hotel, to charge his stay for X
3 amount of money and nothing beyond that. And then
4 when Mr. Barden comes back, the hotel has kept this
5 number on file and says should we put it on the same
6 card, and he said sure. Is that a good thing? Not
7 probably. But the question is, does he then possess
8 stolen property by merely saying yes, you can charge
9 it to the same card.

10 JUDGE FAHEY: Is - - - isn't the question
11 whether or not a credit card number is tangible
12 property?

13 MR. GREENBERG: That's one of the ways that
14 you can rule on this, Your Honor. And - - - and
15 clearly under - - -

16 JUDGE FAHEY: Let me ask this question.
17 Was that brought up below? Was that argued below,
18 the issue, is the credit card number tangible
19 property or can it be considered tangible property?
20 My understanding was it wasn't, and - - -

21 MR. GREENBERG: Well - - -

22 JUDGE FAHEY: - - - so I'm wondering how we
23 get to this.

24 MR. GREENBERG: During the charge
25 conference and the motion to dismiss, and I would

1 refer the court to page 437 of the appendix, defense
2 counsel said - - - and perhaps a little inartfully
3 she said "It seems to me by telling the jury that a
4 credit card means a credit card number, I don't know
5 what that means for commercial purposes, but I don't
6 see how for personal purposes we can talk - - - be
7 talking about permanently depriving the owner of a
8 credit card number."

9 And so she is making the point that a
10 credit card number is different from a credit card
11 and that the statute really should only apply to
12 stolen property - - - possession of stolen property
13 statute should only apply to a card and not a number.
14 She doesn't make specific reference to the General
15 Business Law, and - - - and that's the key here,
16 because the Penal Law refers - - -

17 JUDGE RIVERA: Well, the card is
18 meaningless without the number, right?

19 MR. GREENBERG: Well, - - -

20 JUDGE RIVERA: The only thing that's
21 meaningful for - - - for in this particular example -
22 - - is the number, because they're not even asking
23 for signatures.

24 MR. GREENBERG: Well, sure. If I have your
25 credit card number I can go and purchase things

1 online. I can go to Amazon - - -

2 JUDGE RIVERA: Correct.

3 MR. GREENBERG: - - - whatever.

4 JUDGE RIVERA: Correct.

5 MR. GREENBERG: And I'm committing a crime
6 if I do that. What I'm not doing is I'm not
7 possessing stolen property. I'm not possessing your
8 stolen credit card number, because your number is not
9 stolen. It's an intangible item. It can't be - - -

10 JUDGE FAHEY: So the 511-a, it's a
11 amendment that was made to 511 of the GBL. Why
12 doesn't that apply?

13 MR. GREENBERG: Well, 511-a is not an
14 amendment to 511.

15 JUDGE FAHEY: Okay, go ahead.

16 MR. GREENBERG: It's a separate additional
17 statute that is entitled "additional definition", and
18 it says for purposes of this article only, General
19 Business Law Article 29, credit card also includes
20 the number; that's all it said. And the legislature,
21 if they really wanted to just amend the - - - the
22 definition of credit card to include a number, all
23 they had to do was amend 511.

24 JUDGE ABDUS-SALAAM: But if - - - if - - -
25 Mr. Greenberg, if 511-a applies to the article GBL,

1 and the Penal Law says for the definition of property

2 - - -

3 MR. GREENBERG: Credit card.

4 JUDGE ABDUS-SALAAM: - - - you have to look

5 to the other section that wasn't - - -

6 MR. GREENBERG: 511.

7 JUDGE ABDUS-SALAAM: - - - 511 that wasn't

8 amended. But if - - - if - - - isn't it sort of a

9 backdoor way of making 511, amending 511,

10 essentially?

11 MR. GREENBERG: Well, it - - - it would be

12 a backdoor way, and when the legislature, if they had

13 wanted to do it, would have taken the front door.

14 They had - - - all they had to do was - - -

15 JUDGE ABDUS-SALAAM: Not necessarily.

16 MR. GREENBERG: - - - go in and - - - why

17 would they create a new separate statute specifically

18 limiting this new statute to the General Business Law

19 and - - -

20 JUDGE ABDUS-SALAAM: This is to this

21 article of the General Business Law.

22 MR. GREENBERG: Correct.

23 JUDGE ABDUS-SALAAM: Which - - - which

24 means that maybe they didn't want to go through each

25 section of that article. They amended the whole

1 article by - - -

2 MR. GREENBERG: It really doesn't make
3 sense bec - - -

4 JUDGE ABDUS-SALAAM: - - - making this one
5 amendment.

6 MR. GREENBERG: Well, Your Honor, it
7 doesn't make sense and - - - and it's worth keeping
8 in mind that the context of this is that this General
9 Business Law additional statute, 511-a, was enacted
10 at the exact same time that the legislature created a
11 host of new criminal offenses in the Penal Law under
12 Article 190 for identify theft and unlawful
13 possession of personal identifying data, and those
14 are in a different article.

15 It's a completely different part of the
16 Penal Law than the traditional stolen property and
17 larceny offenses under 155, 160, 165, which is what
18 we're talking about here. And that's why the - - -
19 the word possession requires that you possess
20 tangible property unless it's otherwise specified in
21 the Penal Law.

22 And for the personal identifying
23 information crimes under Article 190, that is an
24 exception to that requirement. In those sections, it
25 makes it very clear that just knowledge of the - - -

1 somebody's number or identifying data will be a crime
2 in those circumstances.

3 JUDGE PIGOTT: All right.

4 JUDGE RIVERA: So you're saying if I have
5 the card, right, if I have the card, I can not only
6 do the online, because I have the number because it's
7 on the card, but I can go into the store.

8 MR. GREENBERG: Correct.

9 JUDGE RIVERA: I can go into the store
10 because I've got something tangible.

11 MR. GREENBERG: Right.

12 JUDGE RIVERA: But if all I have is the
13 number, are you saying I can't go into the store too?

14 MR. GREENBERG: I'm not saying you can't go
15 into a store. If you have somebody's number and you
16 can make use of it, then you're committing a crime.
17 There's no question about it. But the mere knowledge
18 in your brain of someone's number is not in itself -
19 - -

20 JUDGE RIVERA: The likelihood of doing that
21 when you don't - - -

22 MR. GREENBERG: - - - possession of stolen
23 property.

24 JUDGE RIVERA: Yeah, I understand. The
25 likelihood of doing that when you don't have the card

1 and you have ID that may not match is what?

2 MR. GREENBERG: If - - - I'm sorry?

3 JUDGE RIVERA: I mean the number in
4 particular seems to have most meaning for
5 transactions where no one's necessarily looking at
6 the card.

7 MR. GREENBERG: I suppose. But, you know,
8 again, we're talking about different statutes.

9 JUDGE RIVERA: Um-hum.

10 MR. GREENBERG: And - - - and we're not
11 saying that - - -

12 JUDGE FAHEY: Let me say this, if a credit
13 card number isn't a credit card, then the entire
14 holiday season where everyone in America calls on the
15 phone and puts - - - and gives them their credit card
16 number and - - - and essentially conducts a
17 transaction every day in America that way, then
18 you're saying that in point - - - in point of fact
19 that none of those transactions are actually valid
20 because - - -

21 MR. GREENBERG: No.

22 JUDGE FAHEY: - - - they have to be using a
23 credit card.

24 MR. GREENBERG: Of course I'm not saying
25 that, Your Honor. What I'm saying is that if

1 somebody possesses somebody else - - - if - - - if
2 somebody has knowledge of someone else's credit card
3 number, just the number but not the card - - -

4 JUDGE FAHEY: The question before us is
5 whether or not - - -

6 MR. GREENBERG: - - - am I guilty of
7 possession of stolen property?

8 JUDGE FAHEY: Excuse me. The question
9 before whether or not it's effectively the same thing
10 as a credit card, that's the first question, which
11 clearly it is in point of fact in the way the economy
12 works. So the quest - - - second question is whether
13 or not the legislature has amended the law to reflect
14 that and whether the Penal Code accurately reflects
15 it, which is a different question you've got a
16 stronger argument on.

17 MR. GREENBERG: Well, - - -

18 JUDGE FAHEY: But the fact that a credit
19 card number is the equivalent to a credit card, it -
20 - - it's kind of hard to argue that it isn't.

21 MR. GREENBERG: Of course. From - - - from
22 a commercial point of view, of course - - - of course
23 it's the same thing, but we're not talking about
24 that.

25 JUDGE RIVERA: Well, actually - - -

1 actually it isn't, because you need some other
2 information.

3 MR. GREENBERG: Well, perhaps but - - -

4 JUDGE PIGOTT: Well, let's - - - let's see
5 if Mr. Cohn agrees with you and - - - and we'll save
6 your - - -

7 MR. GREENBERG: The last thing I will just
8 say is that the Second Department subsequent to this
9 case in Matter of Luis C., which is cited in our
10 reply brief, agrees exactly with the arguments we
11 make and disagrees with the First Department's ruling
12 on this issue.

13 JUDGE PIGOTT: Thank you, Mr. Greenberg.

14 MR. GREENBERG: Thank you.

15 JUDGE PIGOTT: Mr. Cohn.

16 MR. COHN: Thank you, Judge Pigott. May it
17 please the court, David Cohn for the People. I'll
18 start by responding to the 30.30 argument, and as
19 Judge Fahey pointed out, I - - - I think that this
20 court's decision in People v. Worley resolves this
21 issue. Worley drew a distinction between situations
22 where the People are responsible for the delay and
23 the defendant is responsible for the delay. And in
24 fact, CPL 30.30(4)(b) drew the same distinction, said
25 yes, it's a People readiness statute and the People

1 have the obligation to announce their readiness
2 within the statutory time frame - - -

3 JUDGE STEIN: Let me ask you this, how - -
4 - how are - - - how is the defendant responsible for
5 the delay between March 28th and April 13?

6 MR. COHN: Your Honor, under 30.30(4)(b) -
7 - - the - - - the defendant consented to the final
8 date is the short answer, and - - - and the long - -
9 - long answer is under 30.30 - - -

10 JUDGE STEIN: How did the defendant
11 consent? Did the defendant have a choice?

12 MR. COHN: The defendant approved the date.
13 The - - - the court - - -

14 JUDGE STEIN: Wait, the defendant said, I'm
15 ready on March 28th, or I'm - - - I'm available on
16 March 28th. The court said I'm sorry; we can't do it
17 until April 13th.

18 MR. COHN: Right.

19 JUDGE STEIN: How - - - how and when did
20 the defense agree to the April 13th date?

21 MR. COHN: Right, so, Your Honor, the - - -
22 the statute says two things. It says that the court
23 must exclude - - - must exclude, right - - - periods
24 of times that are either requested by the defense or
25 consented to by the defense. The defense requested

1 the March 28th date. When the court said that won't
2 work for me, how about - - - was it April 2 - - -
3 April - - - or requested April 8th, excuse me. It
4 was on March - - - the defense counsel said I'm on
5 trial starting March 14 and requested April 8, if
6 this is the adjournment that you're talking about,
7 and the court said April 13.

8 JUDGE PIGOTT: What - - - what should the
9 defendant had done in that case?

10 MR. COHN: The - - - well, the defendant
11 didn't have to request an adjournment at all; the - -
12 - the defendant could have just stood silent while
13 the People were asking for time. They could have
14 come back to court at the later date. If the People
15 weren't ready, then they would have announced not
16 ready, and the case would have been adjourned. But
17 when the defendant says - - -

18 JUDGE STEIN: Well, what if they were ready
19 and - - - and the - - - and the court said okay, go
20 ahead, and - - - and, you know, the defense wasn't -
21 - - you know, wasn't available, was on trial?

22 MR. COHN: Right. And - - - and, Your
23 Honor, the - - -

24 JUDGE STEIN: Isn't that - - - isn't that
25 sort of game playing too?

1 MR. COHN: Your Honor, I - - - I'm not sure
2 I understand what the game playing going on here by
3 the prosecution is. The prosecutor, in fact - - -

4 JUDGE STEIN: Well, why couldn't the
5 prosecution at any time along the way have stated
6 their readiness?

7 MR. COHN: Your Honor, the quest - - -

8 JUDGE STEIN: They didn't have to be in
9 court to do that, did they?

10 MR. COHN: They - - - they did not. On the
11 other hand the prosecutor is not - - - under Sibblies
12 - - - under People v. Sibblies, which this court
13 recently decided, the prosecutor should not and
14 cannot announce their readiness until they're
15 actually ready - - -

16 JUDGE STEIN: Well, that's right.

17 MR. COHN: - - - for - - - for trial. And
18 in fact, 30.30(4)(a) says this is not just you start
19 counting the days until People are ready.
20 30.30(4)(a) and (4)(b), here (4)(b), anticipate a
21 very different type of practice. It's - - - it's
22 really a give-and-take. If the People say we need
23 time, that's charged against the People. Pre-
24 readiness, if the - - - if the People ask for time,
25 and the court says court congestion, we need another

1 week, the - - - and defense counsel stays silent,
2 that's charged to the People. On the other hand, the
3 statute very clearly says if the defense requests or
4 consents to an adjournment, then that - - -

5 JUDGE ABDUS-SALAAM: Every time - - -

6 MR. COHN: - - - is not charged to the
7 People.

8 JUDGE ABDUS-SALAAM: Every time defense
9 counsel says the date that you're offering is not - -
10 - I'm not available, I need the next day or two days
11 later, you're saying the defense counsel is
12 participating and therefore consents?

13 MR. COHN: Yes, Your Honor, and - - -

14 JUDGE ABDUS-SALAAM: So the - - - any - - -
15 any defense counsel - - - we - - - if we decide that
16 way, then any defense counsel will just roll the dice
17 and say I'll just be quiet and - - - and see if I can
18 get my client off on 30.30 by just counting the days,
19 right?

20 MR. COHN: They could if they wanted to.

21 And what was really going on here is - - - is that
22 there were two separate requests. The prosecutor
23 made their request and - - - and stood silent, said
24 absolutely nothing after that point. After that
25 point, each of the three - - - of these three

1 calendar calls, the defense attorney then had a
2 colloquy with the court where it was just the defense
3 attorney and the court. The defense said, I want
4 this particular date. The court said either yes,
5 sure, or the court said well, it has to be a few more
6 days and - - - and the - - - the defense attorney at
7 that point says yes, that's fine with me. That's
8 consent to the delay.

9 What the defendant would like in this case
10 is an overly formalistic and unrealistic expectation
11 of how the busiest courts in New York State have to
12 operate. We have situations where there are judges
13 with tons and tons of cases on the calendar. There
14 are prosecutors carrying dozens - - -

15 JUDGE RIVERA: What - - - what about the
16 potential for - - - for gaming that - - - that your
17 adversary refers to, that - - - that the likelihood
18 of the - - - the ADA coming in and thinking that the
19 day they're actually requesting is the day they're
20 going to get, so in reality they're looking for more
21 time because they know defense counsel will push it
22 and even the court may push it further.

23 MR. COHN: Well, I - - - I don't think,
24 Your Honor, the prosecutors are thinking that far in
25 advance. They're thinking about they have calendars,

1 they don't know what's going to happen on this case
2 or that case, they know they need at least two weeks
3 here, they know they need at least three weeks there.

4 JUDGE STEIN: But doesn't that beg the
5 question that if the court - - - it's not a matter of
6 when the trial begins; it's a question of when the
7 People state their readiness. So if there's court
8 congestion and the People only need two weeks but the
9 court can't - - - can't accommodate them for another
10 four weeks, all they have to do is submit their
11 statement of readiness when they're actually ready.

12 MR. COHN: Your - - - Your Honor,
13 absolutely. On the other hand, 30.30(4)(b) also
14 states very clearly that if the defen - - - defense
15 requests an adjournment or consents to an
16 adjournment, then that adjournment is charged to the
17 defense and not to the People. This court - - -

18 JUDGE PIGOTT: These are knotty problems.
19 I know the - - - the People, at least in my
20 experience, are always ready for trial at arraignment
21 and all of a sudden, you know, the - - - and you know
22 they're not and - - - and yet, you know, all that
23 time gets - - - you know, it's not chargeable to
24 them. It's - - - it's - - - it's real - - - as
25 you're describing it, kind of an elastic thing that

1 goes from court to court, but we'll take a look at
2 it.

3 Did you want to be heard with respect to
4 Mr. Greenberg's - - -

5 MR. COHN: Yes, Your Honor. I would like
6 to talk about the stolen property issue as well. So
7 first, to address another concern raised by Judge
8 Fahey, two of the main arguments the defendant is
9 raising on this appeal with regard to the stolen
10 property statute are not preserved for this court's
11 review. First, defendant did not argue at trial that
12 a credit card does not include a credit card number.
13 There was some - - - some argument at the charge
14 conference about whether a person could permanently
15 deprive someone of a credit card, but again, you - -
16 - you don't need to permanently deprive someone to -
17 - - to steal property, you could also appropriate.

18 And more importantly, the defendant did not
19 argue that the General Business Law amendment 511-a
20 doesn't apply to the Penal Law. It never said those
21 words. And - - - and secondly, the defense attorney
22 at trial never argued that you cannot possess a
23 credit card number within the meaning of Penal Law
24 10.08(a) because it's intangible. That argument was
25 never raised at trial and is not preserved.

1 JUDGE PIGOTT: Didn't - - - didn't she say
2 at one point, I'm just looking here in my notes, that
3 when the court was going to charge constructive
4 possession, she said "Construction possession is the
5 card or the number, because the hotel is the one that
6 possessed the card number. There's no view of the
7 evidence that Scott Barden's possession of the card
8 number in the hotel is not - - - and the hotel is not
9 his codefendant." They're saying he never owned the
10 card. He never had it.

11 MR. COHN: Now that - - - there is a
12 preserved issue about whether the defendant actually
13 possessed the card and - - -

14 JUDGE PIGOTT: Well, isn't that the whole
15 point?

16 MR. COHN: That's - - - that's one of the
17 four arguments they're raising, and - - - and we - -
18 - we believe that the Appellate Division was correct
19 that - - - that there was sufficient evidence to
20 prove the defendant possessed the card.

21 JUDGE PIGOTT: How - - - how do you
22 distinguish theft of services and - - - and theft of
23 stolen property in a context like this? If - - - if
24 you use somebody's credit card number to steal
25 something, I would think you're stealing services.

1 If - - - you're not stealing the card because the
2 card - - - you know, the - - - the owner of the card
3 may have it securely in his wallet and he's
4 comfortable, but in the meantime, services are being
5 stolen in his name.

6 MR. COHN: Yeah. Here, Your Honor, you are
7 actually doing both. You are stealing services. If
8 you walk into a restaurant and sit down and eat a
9 meal and don't pay, you are stealing restaurant
10 services. If you go to a hotel room and give them a
11 card which is a phony made-up credit card not
12 belonging to anyone, and - - - and you end up not
13 paying your bill, you're guilty of theft of services.

14 JUDGE PIGOTT: Right.

15 MR. COHN: Mr. Barden here is certainly
16 guilty of theft of services, and that's conceded by
17 the defense. He's also guilty of possession of
18 stolen property here because he not only did not pay
19 a 50,000-dollar hotel bill, but he appropriated the
20 victim's account and used that - - - that first
21 victim's account and used that victim's account to -
22 - - to charge 10,000 dollars in unpaid expenses.

23 JUDGE PIGOTT: It's still services.

24 MR. COHN: That is true. He charged
25 services, but he appropriated the account, and that's

1 the theft. It wasn't just that he racked up a bill
2 on his word saying I'm going to pay, and didn't pay.

3 JUDGE ABDUS-SALAAM: It's not either the
4 credit card or the number, it's the account itself.

5 MR. COHN: It's - - - it's exercising
6 dominion and control over the account. Whether - - -
7 what - - -

8 JUDGE PIGOTT: What's - - - what's the
9 account? He stole this account. What is the
10 account?

11 MR. COHN: Well, it - - - it's the American
12 Express account which could be identified by the
13 physical card or by the account number. That account
14 number was provided to the hotel and the third party.

15 JUDGE RIVERA: It's only - - - it's only -
16 - - you only know it's the account when you look at
17 the number on the card, so you're still stuck with
18 the number.

19 MR. COHN: Right. And - - - and there's -
20 - - exactly, Your Honor. There's no - - - the - - -
21 the numbers - - -

22 JUDGE RIVERA: And a card without a number
23 is worthless.

24 MR. COHN: Right. There - - -

25 JUDGE RIVERA: Unless, I guess, you have

1 one of those platinum or black cards, right. Maybe
2 they have - - - I don't.

3 MR. COHN: Right, like some carte blanche -
4 - -

5 JUDGE RIVERA: I wouldn't know. I hear
6 stories about it, but I would not know.

7 JUDGE FAHEY: That's a good point, though.
8 Judge Rivera's point is, just thinking out loud, a
9 card without a number is worthless; a number without
10 a card, on the other hand, has value.

11 MR. COHN: Right. And - - - and, Your
12 Honor, that's - - -

13 JUDGE PIGOTT: I've got - - - I've a got
14 number in my head right now and I'm thinking Visa.
15 Have I stolen somebody's card?

16 MR. COHN: You do not know that that number
17 belongs to somebody else. You are not thinking that
18 number in your head with the intent to deprive
19 someone or appropriate their credit account.
20 Therefore, you have not committed the crime of - - -

21 JUDGE RIVERA: Did he know the number?

22 MR. COHN: Sorry? Sorry, Your Honor?

23 JUDGE RIVERA: Did he himself know the
24 number?

25 MR. COHN: He did not know the number. He

1 did not have to know the number.

2 JUDGE PIGOTT: That's what I - - - I get
3 the theft of services. I just don't get the theft.

4 MR. COHN: Your Honor, the - - - the theft
5 is appropriating the account. He exercised dominion
6 and control over the account for his own purposes.

7 JUDGE PIGOTT: Of a - - - of a number he
8 doesn't know on a card he doesn't have, he stole it.

9 MR. COHN: Your Honor, the defendant made
10 numerous assertions of his authority to charge to Mr.
11 Catalfamo's account and - - - and these are in our
12 facts of our brief. I'll just run them down very
13 briefly.

14 JUDGE STEIN: Well, that's clearly a crime.
15 I mean we know that. That's defined in other
16 sections of the Penal Law as a crime specifically.

17 MR. COHN: It's defined - - - you're
18 talking about possession of - - - of personal
19 information?

20 JUDGE STEIN: Yeah.

21 MR. COHN: Yes, that is a misdemeanor if -
22 - - if you possess somebody's personal information.
23 Now, the difference between that crime and the crime
24 of possession of stolen property is you don't have to
25 know that the number is stolen in order to be guilty

1 of unlawful possession of somebody's personal
2 information. The stolen property statute, the reason
3 it's a felony is because it's an offense related to
4 theft.

5 And the Penal Law defines stealing
6 property, it defines theft, as unlawfully exercising
7 dominion and control over somebody else's property
8 with the intent to appropriate that property. And
9 that's exactly what the defendant was trying to do
10 here when on numerous occasions, he told hotel staff
11 and management that he had the authority to charge
12 thousands and thousands dollars of penthouse suites
13 and room service to - - - to this man's account. He
14 said - - -

15 JUDGE PIGOTT: I've lost control of the
16 clock so could I ask you to sum up and then we'll get
17 Mr. Greenberg for his last couple?

18 MR. COHN: Absolutely, Your Honor. In
19 short, first as we explained in our brief, the speedy
20 trial adjournments, those last portions were
21 chargeable to the People because they were - - -
22 sorry, were not chargeable to the People because they
23 were discussions solely between the court and counsel
24 in which counsel requests and then agreed to the
25 ultimate adjourn dates.

1 And as the - - - as to the stolen property
2 counts, as the legislature has made clear in those
3 2002 amendments, a credit card number in this day and
4 age is absolutely the same as a credit card itself.
5 That was the - - - that was the entire intent of the
6 2002 amendments, and the defendant here knowingly
7 exercised dominion and control over the account. He
8 made numerous, numerous representations saying that
9 that money was - - - that account was as good as his.

10 JUDGE RIVERA: Even if he doesn't know the
11 number?

12 MR. COHN: Even if he doesn't know the
13 number. Let's say the number could have been stored
14 in the digital file. Here it was stored in the
15 hotel's file.

16 JUDGE RIVERA: He's never seen the number.
17 He has no idea what this number is.

18 MR. COHN: He doesn't know what the number
19 is but he knows that the number is on file with the
20 hotel. He tells hotel management over and over
21 again, I have the authority to charge my bills to
22 this person's account number, and do that for me. He
23 was appropriating an account for his own use. That
24 is - - - that is exercising dominion and control over
25 property that was converted to his use and therefore

1 it was stolen.

2 JUDGE PIGOTT: Thank you, Mr. Cohn. We'll
3 take a look at it.

4 Mr. Greenberg.

5 MR. COHN: Thank you.

6 MR. GREENBERG: I - - - I have to clear up
7 some of the - - - the record problems, playing a
8 little fast and loose with the record here. First of
9 all with respect to speedy trial, on the date that
10 Judge Stein was asking about, on April 2nd, here's
11 the record what happened and it's on page 63 of the
12 record. The People are asked, are you ready? They
13 say no. They ask for March 16th. Counsel, defense
14 counsel, says "I am going to be engaged in a civil
15 trial on March 16th. I have to finish it or I will
16 kill myself." The court says, what date do you want,
17 counsel. She says, how about March 28th. The judge
18 says it has to be after April 8th - - -

19 JUDGE PIGOTT: So you want to say the 16th
20 to the 28th may be hers, but after the 28th, it's
21 not?

22 MR. GREENBERG: No, I would not agree with
23 that but clearly anything after the 28th when she
24 said how about the 28th the judge says no, it has to
25 be after April 8th - - -

1 JUDGE PIGOTT: That's the court's, right?

2 MR. GREENBERG: - - - and the Judge says
3 April 13th, and her answer is "That should be fine."
4 And according to my adversary, if she had said
5 nothing when the Judge said April 13th, that would be
6 charged to the People, but because she answered the
7 court and said "That should be fine", she has now
8 participated and, according to him, consented to that
9 adjournment.

10 JUDGE RIVERA: But what if she said - - -
11 what if she'd said well, I'd be available but I don't
12 consent?

13 MR. GREENBERG: That would be better.

14 JUDGE RIVERA: What does that mean?

15 MR. GREENBERG: I don't know what that
16 means. The point of it is, as Judge Stein had - - -

17 JUDGE RIVERA: Don't know what that means.

18 MR. GREENBERG: - - - repeatedly said, all
19 the People have to do - - - the - - - the
20 gamesmanship here is that none of this time is
21 charged to the defense because the People were never
22 ready.

23 JUDGE ABDUS-SALAAM: What it means is - - -

24 MR. GREENBERG: This is a readiness
25 statute.

1 JUDGE ABDUS-SALAAM: - - - the court is
2 going to badger her until she says yes, that's okay.
3 That's what would happen.

4 MR. GREENBERG: I tell you if - - - the
5 next time I give a CLE to defense lawyers in the
6 City, which I do, I will tell them, do not
7 participate, do not open your mouth; when the People
8 request a date, just stand mute.

9 JUDGE RIVERA: It - - - it depends on what
10 - - - what we say.

11 MR. GREENBERG: Whatever date they pick,
12 you know, just show up in court on that day or don't
13 show up in court beca - - - I mean, it's a crazy way
14 to do things.

15 JUDGE RIVERA: Well, but if you say you're
16 available but I don't consent - - - I'm not sure what
17 that means, we haven't said - - - but that - - - that
18 - - - that is indicating - - -

19 MR. GREENBERG: It's clear she wasn't
20 consenting, Judge.

21 JUDGE RIVERA: - - - that is indicating an
22 unwillingness to participate - - -

23 MR. GREENBERG: Well - - -

24 JUDGE RIVERA: - - - in the extra time,
25 right?

1 MR. GREENBERG: She did not consent. She
2 did not come in and say yes, we're discussing a plea
3 bargain, we consent to an adjournment, or I can't be
4 ready that day I'm going to be on vacation for the
5 next three weeks.

6 JUDGE ABDUS-SALAAM: She's just
7 accommodating the court, in your view.

8 MR. GREENBERG: Exactly.

9 JUDGE ABDUS-SALAAM: The court says it has
10 to be a certain day so then it's fine.

11 MR. GREENBERG: And with respect to the
12 stolen property, let me just make something clear
13 here also. This is not a theft case. People are
14 talking about a theft. They're talking about
15 appropriation. None of that has anything to do with
16 this case. This is possession of stolen property, so
17 you need stolen property, which we don't have, and
18 you need possession by Scott Barden of some stolen
19 property.

20 The prop - - - property the People claim is
21 stolen is a credit card number, not a credit card. A
22 number which, as the court has noted, he never knew,
23 he never possessed. The hotel had it. Not once did
24 Scott Barden tell the hotel, as my adversary said,
25 oh, I have the authority to charge 10,000 doll - - -

1 he never said anything like that. He came there and
2 they said should we put it on the same Amex card, and
3 he said sure, go ahead.

4 JUDGE PIGOTT: Or he said talk to my
5 accountant.

6 MR. GREENBERG: You know, I'm not saying
7 he's not guilty of some crime here, and it may be
8 theft of services. The problem in this case is that
9 theft of service is a misdemeanor. If you jump into
10 the subway without paying your - - - you know, your
11 MetroCard fee, that's a theft of service. If you
12 stay in a hotel for six weeks and rack up a 50,000-
13 dollar bill and walk out without paying, that's a
14 theft of service. It's a - - -

15 JUDGE STEIN: Would it be different if the
16 - - - if - - - if Mr. Catalfamo wasn't able to
17 reverse the charges and he was out that money rather
18 than the hotel?

19 MR. GREENBERG: Well, then you might have
20 some other situation. You might have a claim of
21 larceny of some kind, but he wasn't out of the money.
22 Nobody was out of the money. In fact, Mr. Barden
23 never left the hotel. He was still scrounging trying
24 to pay this bill when they came and arrested him.
25 It's not like he walked out without paying his bill.

1 He was there. He thought it was being covered by one
2 credit card. He tried to get a different credit card
3 to cover it.

4 You know, again, I'm not - - - I'm not
5 condoning his conduct here, but the question is is he
6 guilty of criminal possession of stolen property
7 under these circumstances. And if the court says
8 yes, then we're opening up a big can of worms as to
9 what could be in someone's mind, possessing a number
10 that you never even knew in your life that somebody
11 else - - - you know, if he walked into the hotel and
12 said listen, my friend Catalfamo's going to pay for
13 this, charge it to him, is that possession of stolen
14 property? I - - - I don't think so.

15 JUDGE PIGOTT: We'll look at this further.

16 MR. GREENBERG: And that's not really any
17 different from what happened here.

18 JUDGE PIGOTT: Thank you, sir.

19 MR. GREENBERG: Thank you very much.

20 JUDGE PIGOTT: Thank you both very much.

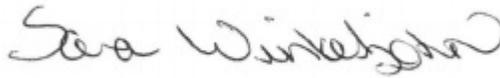
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C E R T I F I C A T I O N

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



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