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COURT OF APPEALS  
STATE OF NEW YORK

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PEOPLE,

Respondent,

-against-

No. 18

NORMAN WHITEHEAD, JR.,

Appellant.

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20 Eagle Street  
Albany, New York  
February 7, 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  
ASSOCIATE JUDGE ROWAN D. WILSON

Appearances:

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Official Court Transcriber

1 CHIEF JUDGE DIFIORE: The next matter on this  
2 afternoon's calendar is appeal number 18, the People of the  
3 State of New York v. Norman Whitehead.

4 Counsel.

5 MR. HUG: Good afternoon, Your Honors. My name  
6 is Matthew Hug. I represent the appellant, Norman  
7 Whitehead. I would request two minutes for rebuttal.

8 CHIEF JUDGE DIFIORE: You may have two minutes,  
9 sir.

10 MR. HUG: Your Honors, I think that the case law  
11 is clear with respect to what I guess I'll term dry  
12 possession prosecutions. In other words, criminal  
13 possession of controlled substance charges in which there  
14 is no evidence to support either the weight the element of  
15 the identity of the substance.

16 JUDGE GARCIA: Well, it's not no evidence, right?  
17 It's there's no drugs. So the question, I think, really is  
18 what's the evidence that there were drugs, right? Because  
19 the rule is not, and this court has never held, that you  
20 need the drugs to convict on a possession charge.

21 MR. HUG: I would agree, Your Honor, with the way  
22 that you framed the question. The way that I look at it is  
23 when you're looking at cases involving intercepted  
24 telephonic communications, the court's repeatedly used the  
25 phrase other evidence. Other evidence, meaning the

1 evidence, the actual evidence because if I tell you - - -

2 JUDGE STEIN: What about testimony of people  
3 involved in the alleged drug sales? Is that other  
4 evidence?

5 MR. HUG: There are cases in which it can be  
6 considered other evidence, Judge. But you don't have that  
7 here. Certainly, you don't have that with Counts 225 and  
8 226.

9 JUDGE GARCIA: But you had cooperator testimony,  
10 no?

11 MR. HUG: With respect to 225 and 226? No. You  
12 do not.

13 JUDGE RIVERA: Well, so what's the only evidence  
14 they put forward on 225 and 226?

15 MR. HUG: 225 and - - -

16 JUDGE RIVERA: You see it - - - as you see it.

17 MR. HUG: As - - - as I see it, they tried to do  
18 this kind of roundabout dance in which they say the defend  
19 - - - and they - - - they allege, their - - - their  
20 evidence is pretty sparse with respect to even this. But  
21 they say that the defendant arranged on January 25th to go  
22 down to New York City to meet with Mr. Williams. While  
23 he's down there, he's alleged to have sold a quantity of  
24 cocaine to a Mr. Goodson in New York City. They presume  
25 that Mr. Whitehead returns to Schenectady with yet more

1 cocaine, though they - - - they present no - - - no  
2 evidence to support that. And then two days later, Mr.  
3 Goodson returns to Schenectady apparently and lo and behold  
4 he says while he was down in New York City I sampled a  
5 little of that on the 25th, therefore, the defendant must  
6 have had some more cocaine, the same batch that I sampled  
7 back down in - - -

8 JUDGE RIVERA: Well, you - - - it sounds like  
9 you're arguing what - - - that they actually needed direct  
10 evidence of this when, of course, they could have done this  
11 through circumstantial evidence. We could be looking at  
12 what are appropriate inferences. Why aren't there  
13 appropriate inferences that can be drawn? Why can't you  
14 connect these dots?

15 MR. HUG: Well, I think that it's ext - - - it's  
16 extremely thin, Judge, when you look at drug expert  
17 testimony, drug user testimony, you will find that in  
18 almost all of the cases it is from a sales charge in which  
19 the user, the end user, got it directly from the defendant  
20 and can say I'm familiar with the effects of cocaine. I  
21 got cocaine from the defendant on February 27th, which you  
22 don't have here. And I used it and it had the - - -

23 JUDGE GARCIA: That's the only evidence in those  
24 cases. It - - - it seems - - - I think what Judge Rivera  
25 is also suggesting here is you have to look at all of the

1 evidence surrounding the transaction. In those cases and  
2 the one where we had marijuana where it was a student and  
3 we said they didn't have enough experience to do that,  
4 that's the evidence. But here, you have a wiretap. You  
5 have surveillance. You have cooperator testimony, even in  
6 those two counts, not directly saying I bought the drugs  
7 and then I ingested them and I know the side effects of the  
8 drug. You had all of that type of testimony surrounding  
9 these transitions. So to parse it out and say you didn't  
10 have a user here may be true in those particular two  
11 counts, but we have to look at whether there was legally  
12 sufficient evidence in - - - in whole.

13 MR. HUG: I disagree, Judge. I don't think that  
14 they - - - you convict someone because you've got evidence  
15 that they did something over here to say that they must  
16 have done it also over here. If you look at the - - - at  
17 count 225 and 226, there is no evidence. The evidence is  
18 interpretations by a law enforcement officer as to what was  
19 being said on a communication on the 27th, allegedly, in  
20 the County of Schenectady. And the way that they try and  
21 tie it to other evidence is to say two days earlier  
22 somebody, who is a cooperating witness with us, said that  
23 he sampled a batch of cocaine, you know, some 100-and-some  
24 miles away, and therefore the defendant still must have  
25 cocaine. There is no proof that he still had anything, if

1 he - - - if he was even in New York City with Mr. Goodson.  
2 There is nothing to substantiate - - -

3 JUDGE RIVERA: Other than his own attempts to  
4 cook it to crack, right?

5 MR. HUG: Well, that's interpretation by an  
6 investigator that when he said the term rock - - -

7 JUDGE RIVERA: Again, then why isn't that - - -  
8 that the evidence the People have presented? The question,  
9 then, is whether or not that's appropriate evidence. So  
10 what - - - what is wrong with that evidence to let you get  
11 to those inferences?

12 MR. HUG: Because I don't think that it's  
13 evidence of anything more than just more of telephonic  
14 evidence. It's - - - it was more Martin. You can't keep  
15 piling more Martin evidence on top of Martin and Martin and  
16 say, well, we've got enough now.

17 JUDGE STEIN: But when - - - when that telephone  
18 - - - telephonic evidence includes statements or potential  
19 admissions by the defendant himself, isn't that some - - -

20 MR. HUG: Well - - -

21 JUDGE STEIN: Isn't that evidence?

22 MR. HUG: You don't have the types of admissions  
23 like you had in the marijuana case which was - - -

24 JUDGE STEIN: Well, but when he's talking about  
25 cooking it and - - - and that sort of thing.

1 MR. HUG: Well, the People point to - - - point  
2 to things like I - - - the term Rocky Balboa, but when you  
3 look at the transcripts, he's referring to this gentleman  
4 as Rocky Balboa. He's not saying, you know, did you get  
5 the Rocky Balboa, which Detective Guiry says that means  
6 crack. You know, I - - -

7 JUDGE RIVERA: But that sounds like your closing  
8 argument, right? It - - - it might be enough for the jury  
9 to draw those inferences. Again, I'm asking why can't you  
10 - - - why isn't this evidence the kind that can be used to  
11 get you to connect the - - - the dots on the possession?

12 MR. HUG: Well, I guess a good example, Your  
13 Honor, would be a case that the People cite which is People  
14 v. Guidice which is 83 N.Y.2d 630 (1994). It's an assault  
15 case. They cite to it for the proposition that telephonic  
16 admissions can form this other evidence. So you have an  
17 assault. Now you have a victim. The victim testified in  
18 Guidice. He said the defendant's co - - - cohorts beat me  
19 up. If you didn't have that, if the victim didn't exist,  
20 you couldn't find that victim, and you have a person on a  
21 telephone call saying I beat the crap out of that guy, I  
22 really tuned him up, that is not enough to convict the man  
23 for assault any more than if I explained to you right now,  
24 Your Honor, I have eight ounces of cocaine in my - - - in  
25 my bedroom. And you say, well, we're not even going to

1           bother going to your house, we're not going to do anything  
2           else - - -

3                   JUDGE STEIN:   But that's not all there is.  And -  
4           - - and that - - - I think that's the problem is is that  
5           we're - - - we're looking at this - - - this entire record  
6           and putting things together, not each individual thing by  
7           themselves.

8                   MR. HUG:   But your - - - you start to - - - it  
9           becomes this nebulous thing, I think, Judge, when you - - -  
10          if you go beyond - - -

11                   JUDGE STEIN:   But - - - but I mean people - - -  
12          we - - - people have been convicted of murder when there's  
13          no body, right?

14                   MR. HUG:   Yes.

15                   JUDGE STEIN:   Isn't that right?

16                   MR. HUG:   Yes.

17                   JUDGE STEIN:   Okay.  So - - - so and in those  
18          cases, isn't it a matter of looking at the totality of the  
19          evidence and the inferences to be drawn from that evidence  
20          in determining whether there is enough that a rational jury  
21          could find that this defendant murder this alleged victim.

22                   MR. HUG:   Without getting that - - -

23                   JUDGE STEIN:   How is this different?

24                   MR. HUG:   Because in this case, it requires rank  
25          speculation.  Okay.  The 225 charges him with having more

1 than four ounces of cocaine, and what do they provide  
2 besides an interpretation of a call to support that that  
3 actually existed and that that measure existed? They  
4 don't.

5 CHIEF JUDGE DIFIORE: Mr. Hug, on your argument  
6 regarding sufficiency as to weight, was that preserved  
7 below?

8 MR. HUG: As - - - as to the amount? Yes, Judge,  
9 I believe it is.

10 CHIEF JUDGE DIFIORE: Where in the trial record  
11 was that?

12 MR. HUG: I - - - I couldn't pinpoint an - - - an  
13 exact page number, but I presume - - - I - - - it is my  
14 presumption that it was included in the TOD that - - - at  
15 the conclusion of the People's evidence.

16 JUDGE ABDUS-SALAAM: Unless I'm misunderstanding  
17 the record, counsel, your client was convicted on seven  
18 counts, and you've only dealt with two.

19 MR. HUG: Right, Judge. I think those are the  
20 two - - - those are the two weakest charges as far as the  
21 possession go, as - - - from - - - in my opinion. I think  
22 that they all should fall, as I argue in my brief, but I  
23 think, obviously, if Your Honors don't go with me on 225  
24 and 226, I can't see you going with me on the remainder.

25 JUDGE ABDUS-SALAAM: Okay.

1 CHIEF JUDGE DIFIORE: Thank you, counsel.  
2 Counsel?

3 MR. HUG: Oh, I'm sorry. Thank you. I missed  
4 the - - - I missed the light.

5 CHIEF JUDGE DIFIORE: Missed the light.  
6 Counsel.

7 MS. FLEISCHMANN: Good - - - afternoon, Your  
8 Honors. My name is Lisa Fleischmann, and I represent the  
9 State in this action. May it please the court, I'd be  
10 happy to take the court through the evidence supporting  
11 Counts 225 and 226, and that evidence goes well beyond a  
12 couple of the phone calls.

13 CHIEF JUDGE DIFIORE: How do the People prove  
14 weight without the drugs?

15 MS. FLEISCHMANN: We proved it through telephonic  
16 admissions. We proved it through the eyewitness testimony  
17 of Carl Goodson. For other counts within this indictment,  
18 we proved it through the eyewitness testimony of Karashan  
19 Mansaray. They both said that they defendant gave him - -  
20 - gave them cocaine. Both are - - - are - - - Goodson is a  
21 user; he's a seller and a reseller. Mansaray is a seller  
22 and a reseller. They know what cocaine is, and they both  
23 testified that the defendant handed them the cocaine. So  
24 that's two ways - - -

25 JUDGE FAHEY: So - - - so - - -

1 CHIEF JUDGE DIFIORE: So it's your position that  
2 we don't need to go through the laboratory process with  
3 calibrated scales and determine the exact weight of the  
4 narcotics that was possessed or sold? Is that - - -

5 MS. FLEISCHMANN: Absolutely, Your Honor. This  
6 court has never held that that's been required, and that's  
7 circumstantial proof that we've offered of the existence of  
8 cocaine. In fact, this court, federal courts that I've  
9 cited to, courts across the country have all held that the  
10 - - -

11 JUDGE FAHEY: I don't know what to - - - I don't  
12 want you to get off track here on this.

13 MS. FLEISCHMANN: Right.

14 JUDGE FAHEY: On the four ounces, on the 225 and  
15 226, those are the four-ounce counts, right?

16 MS. FLEISCHMANN: Yes, Your Honor.

17 JUDGE FAHEY: All right. So I thought the - - -  
18 I thought the proof there was that there was 120 grams that  
19 we held out, cooked up into crack, and that's the proof of  
20 the four ounces?

21 MS. FLEISCHMANN: Correct.

22 JUDGE FAHEY: Okay. So the four ounces comes  
23 from the 120 grams. That's where the number comes from,  
24 right?

25 MS. FLEISCHMANN: That's correct, Your Honor.

1 JUDGE FAHEY: And, of course, but that relies on  
2 - - - purely on Goodson's testimony, right?

3 MS. FLEISCHMANN: That relies on Goodson's  
4 testimony and also on the testimony throughout the trial  
5 that shows that the defendant has familiarity with weight.

6 JUDGE FAHEY: Um-hum.

7 MS. FLEISCHMANN: He talks about weight with  
8 respect - - - I'm sorry, Your Honor. Go ahead.

9 JUDGE FAHEY: No. That's fine. I'm listening to  
10 you. I'm just mumbling to myself.

11 MS. FLEISCHMANN: Okay.

12 JUDGE FAHEY: Don't pay any attention to me, you  
13 know. Ignore that man, you know.

14 MS. FLEISCHMANN: For the very - - -

15 JUDGE FAHEY: All right.

16 MS. FLEISCHMANN: Go ahead.

17 JUDGE FAHEY: The second - - - the second counts  
18 I'm - - - I'm kind of curious about are 228 and 229. On  
19 228 and 229, the proof there is Mansaray, who wasn't a  
20 user, doesn't know if he's selling coke or not by his own  
21 admission and didn't test it himself, just by what he'd  
22 been told. You have the testimony of somebody named  
23 Johnson, right?

24 MS. FLEISCHMANN: Yes.

25 JUDGE FAHEY: Who said he was "pretty sure"

1           - - -

2                   MS. FLEISCHMANN:  Yes.

3                   JUDGE FAHEY:  - - - that it was.  So you're  
4 saying "pretty sure" is legally sufficient?

5                   MS. FLEISCHMANN:  I'm saying more than that.

6                   JUDGE FAHEY:  Okay.  Go ahead.

7                   MS. FLEISCHMANN:  "Pretty sure" were the words  
8 that Darren Johnson said, and he did testify, Darren  
9 Johnson, at trial that he is a user; he's a seller and a  
10 reseller.  What happened here was Karashan Mansaray on the  
11 day, the 27th, made phone calls and said to people stuff is  
12 pretty dried up out here.  I don't have anything.  So  
13 Johnson calls him and somebody named Roosevelt Cobb calls  
14 him.  And Mansaray can you hold on, can you hold on?  It's  
15 coming this evening.  And then along comes the defendant  
16 with the half kilo and Mansaray testifies that he  
17 distributed that cocaine to Roosevelt Cobb, another - - -

18                   JUDGE FAHEY:  So let me stop you.

19                   MS. FLEISCHMANN:  Um-hum.

20                   JUDGE FAHEY:  He never tested it.  He doesn't - -  
21 - he's assuming that it's coke, but he - - - he doesn't  
22 know it's coke, so he's not sufficient.  Mansaray is not  
23 sufficient to establish that it's coke.

24                   MS. FLEISCHMANN:  Right.  And we're not relying  
25 on his user testimony.

1 JUDGE FAHEY: All right. Okay.

2 MS. FLEISCHMANN: It's Johnson's testimony that  
3 we are.

4 JUDGE FAHEY: And you're - - - so you are saying  
5 that "pretty sure" - - - he used it later that evening and  
6 he's "pretty sure" it was the same stuff. He doesn't know.  
7 He was smoking it up?

8 MS. FLEISCHMANN: Yes. "Pretty sure." We're  
9 saying he - - - it's almost a certainty that he did have  
10 that cocaine from that half kilo. That was the cocaine  
11 that Mansaray had. From the nature of the - - -

12 JUDGE FAHEY: Is there any other proof that you  
13 can point to in the record besides "pretty sure"?

14 MS. FLEISCHMANN: The communications that  
15 Mansaray had with - - -

16 JUDGE FAHEY: Let me just stop you - - -

17 MS. FLEISCHMANN: Go ahead.

18 JUDGE FAHEY: - - - just so I'm clear.  
19 Telephone communications is - - -

20 MS. FLEISCHMANN: Yes. These are telephone-  
21 intercepted communications. And Johnson was looking for  
22 cocaine at 6:02 p.m. that night, and the defendant came in  
23 an hour later with the half kilo. And Mansaray was saying  
24 hold on. It's coming. And he told another person who  
25 called, as well, making an inquiry about cocaine, and

1 Mansaray said it's coming this evening. So it was clear -  
2 - - a clear, rational inference that a jury - - - jury can  
3 make from this evidence is that Mansaray had nothing and  
4 then it came in, and then it was distributed. And then  
5 we've got Johnson saying he's "pretty sure" that he sampled  
6 Mansaray's cocaine from that evening. He got cocaine from  
7 Mansaray that evening. And then he testified, as well,  
8 Johnson, that is, that every time he used Mansaray's  
9 cocaine it was cocaine. So considering all of that  
10 together, that is sufficient evidence, legally sufficient  
11 evidence, to demonstrate that the substance was, in fact,  
12 cocaine. Moving back - - -

13 JUDGE RIVERA: At what point would - - - would  
14 Goodson's statement be just too uncertain? You say "pretty  
15 sure" is - - - is good enough, but at what point is it now  
16 just too uncertain?

17 MS. FLEISCHMANN: Goodson was certain. Goodson  
18 said that he sampled the very cocaine that he got from the  
19 defendant in New York City, and he also - - - let me back  
20 up for a second. With regard to those two charges,  
21 somebody mentioned, I believe Your Honor, connecting the  
22 dots. Let me connect the dots for this court. With  
23 respect to those charges, Goodson testified that the  
24 defendant gave him cocaine on the 25th.

25 The next day, the two gentlemen are back up in

1 upstate New York, and they're talking over the phone. And  
2 they're giddy. They love the quality of this stuff. It's  
3 wonderful, pure, shiny stuff. Those are the words that are  
4 being used. Goodson testifies that he's talking about the  
5 quality of the cocaine. It's very clear from the context  
6 that the two gentlemen are talking about the very same  
7 parcel of cocaine and their respective pieces of it.  
8 Because one says that stuff's so shiny. The other says,  
9 yeah, I know. I'm looking at it. Goodson testified that  
10 they were talking about the cocaine that they both got on  
11 the 25th.

12 On the 27th, the defendant says to Karashan  
13 Mansaray I cooked up a buck twenty last night that I  
14 brought back, and a jury can rationally infer that he's  
15 talking about the cocaine that he brought back from New  
16 York City. He is also talking about that cocaine because  
17 he said he cooked it up. And he and Goodson on the 26th  
18 were talking about cooking up cocaine. Rocky Balboa,  
19 Goodson testified, was a reference to the fact that rock  
20 comes - - - crack comes in rock form. They also called  
21 each other Chef Boyardee and they made various jokes about  
22 cooking. Viewing all of this evidence together, that  
23 connects the dots so that any rational jury can conclude  
24 that the defendant possessed cocaine on the 27th and  
25 possessed it with the intent to sell because he offered it

1 to Mansaray.

2 I'd like to point out a couple of things that  
3 were discussed. The legal sufficiency of the evidence of  
4 the weight was not a part of the trial order of dismissal.  
5 I'd note that that's, I believe, at pages A-526 and 527, I  
6 believe is the trial order of dismissal. I would ask the  
7 court to take a look at pages A-518 and 519 and SA-350.  
8 That's the testimony of Carl Goodson in which he explains  
9 that he sampled the drugs that Mr. - - - that the defendant  
10 gave him and also that when they were talking about cooking  
11 up drugs, they were talking about the - - - the drugs that  
12 they got from New York City on the 25th. So viewing the  
13 evidence rationally, viewing - - -

14 JUDGE RIVERA: So if the - - - the witness who's  
15 a drug user just gets up and says I'm a drug user and says,  
16 oh, I know this was cocaine because I - - - I used it - - -

17 MS. FLEISCHMANN: Yes.

18 JUDGE RIVERA: - - - it - - - how much - - - how  
19 much experience as a drug user does that witness have to  
20 have?

21 MS. FLEISCHMANN: You have to lay a foundation.  
22 The - - - the witness does not have to be an expert.  
23 There's no law that requires the witness to be an expert.  
24 The Appellate Division cases that I relied on, the  
25 witnesses were not adjudicated experts. But there has to

1 be - - -

2 JUDGE RIVERA: Well, they don't have to be a  
3 scientific expert, but there has to be basis by which the  
4 person can communicate that, in their experience, this drug  
5 that they've ingested or that they've been in contact with  
6 they can testify to, under oath, their belief is that it's  
7 cocaine.

8 MS. FLEISCHMANN: Yes. What the prosecutor must  
9 do is lay a foundation with the witness, and that is  
10 exactly what the prosecutor did here.

11 JUDGE RIVERA: All right. So what - - - so  
12 that's what I'm saying. So what if the drug user says I  
13 smoked crack once?

14 MS. FLEISCHMANN: He testified, Goodson - - -

15 JUDGE RIVERA: No. I understand, but I'm asking  
16 you where to draw that line.

17 MS. FLEISCHMANN: Oh - - -

18 JUDGE RIVERA: Where do you draw the line?

19 MS. FLEISCHMANN: I would say you would - - -

20 JUDGE RIVERA: Once? Twice?

21 MS. FLEISCHMANN: I would say many times.

22 JUDGE RIVERA: Years?

23 MS. FLEISCHMANN: I would - - -

24 JUDGE RIVERA: An addict?

25 MS. FLEISCHMANN: Years, addict for user, I would

1 say, or frequent user, near addict, somebody who has used  
2 it in more than a recreational way, perhaps. Here - - -

3 CHIEF JUDGE DIFIORE: Thank you, Ms. Fleischmann.

4 MS. FLEISCHMANN: Yes.

5 CHIEF JUDGE DIFIORE: Thank you.

6 MS. FLEISCHMANN: Thank you, Your Honor.

7 CHIEF JUDGE DIFIORE: You're welcome.

8 Mr. Hug.

9 MR. HUG: Yes. Your Honors, briefly, with  
10 respect to the other possession counts, that being 228 and  
11 229. Counsel just acknowledged that Mansaray's alone was  
12 not enough to demonstrate that this was cocaine. I would  
13 like to direct Your Honors to the respondent's brief at  
14 page 66, which deals with Darren Johnson. And what you see  
15 is that there's a conversation that's allegedly had between  
16 Mansaray and Johnson in which Johnson is allegedly  
17 requesting a product or cocaine from Mansaray. Mansaray  
18 says I don't have it. Then the thread is left because  
19 there is zero proof. In fact, the proof is - - - belies  
20 their point that Johnson ever got cocaine that day or, you  
21 know, in the subsequent days from Mansaray. Mansaray,  
22 according to their brief, says that he sold it to people  
23 that were underneath like Cobb, William, Hyde (ph.), and  
24 others. He doesn't say, and there are no phone calls to  
25 substantiate, that Johnson ever got his hands on any

1 cocaine that came from Mansaray on February 27th or 28th or  
2 29th, for that matter.

3 JUDGE FAHEY: Let me ask you one point just to -  
4 - - it's on a slightly different topic, and I don't want to  
5 forget it. You - - - you argued that in the opening the  
6 use of the legal meaning of the word sale was discussed  
7 improperly by counsel.

8 MR. HUG: Yes.

9 JUDGE FAHEY: What - - - let's assume it was.  
10 Why isn't this simply an abuse of discretion standard?  
11 What - - - what remedy are you asking for?

12 MR. HUG: Judge, I think the - - - I'm asking for  
13 it to be remanded - - - reversed and remanded for a new  
14 trial.

15 JUDGE FAHEY: On that issue alone?

16 MR. HUG: If - - - if need be. Yes, Judge. I  
17 think that that - - - that so reduced the burden of proof  
18 on the - - - on the People, with respect to at least the  
19 sales counts, that, yes. That kind of bottom line of a - -  
20 - an offer is a sale is - - - is wrong, and the judge  
21 should not have permitted it and should have stepped in and  
22 given a curative instruction.

23 JUDGE FAHEY: But you're saying that the instruct  
24 - - -

25 CHIEF JUDGE DIFIORE: Mr. Hug, you also raised a

1 challenge to the eavesdropping order and the propriety of  
2 the eavesdropping order.

3 MR. HUG: Yes.

4 CHIEF JUDGE DIFIORE: Do you care to use some of  
5 your time to address that?

6 MR. HUG: Certainly, Judge. And the People  
7 pointed out that there are some preservation issues with  
8 that. I think that the defense pointed out, at the very  
9 least, that the main error that they pointed out was that  
10 the March warrant, which would have been the second warrant  
11 that included Mr. Whitehead, was based upon both  
12 intentional and at least reckless misstatements of facts by  
13 Investigator Sauter and when - - - when he stated  
14 unequivocally that he reviewed a video surveillance of an  
15 interaction between Mr. Whitehead and Mr. Williams at the  
16 Woodbury Commons and definitively saw a bag, a large bag,  
17 containing a white powdery substance. That's false. That  
18 was a bottle of windshield wiper fluid.

19 Where it goes into the intentional misstatement  
20 of fact was when he said that Detective Plante told me he  
21 saw it, too, when he was there, and Detective Plante  
22 testified that that simply wasn't true. So in - - - in  
23 addition to that, which I think is the more fundamental  
24 error, is - - - is that the court and - - - well, the  
25 prosecutor kept extending, expanding this warrant, this

1 eavesdropping warrant through amendment, ultimately through  
2 a terminated amendment making it somewhat like a zombie  
3 eavesdropping warrant that just was never going to end, and  
4 they were just adding more and more people instead of - - -

5 CHIEF JUDGE DIFIORE: You're suggesting that the  
6 order that ultimately authorized going up on the  
7 defendant's phone was an amendment, it wasn't an - - - a  
8 new order to go up on that defendant's phone?

9 MR. HUG: That's exactly what I'm saying, Judge.  
10 When you look at the applications and the orders that  
11 followed - - -

12 CHIEF JUDGE DIFIORE: I saw what it said. Yeah.

13 MR. HUG: - - - they're all amending that  
14 initial - - -

15 CHIEF JUDGE DIFIORE: I know what it said, but  
16 I'm going to the substance of what it accomplished.

17 MR. HUG: I - - - I'm saying yes. In - - - in  
18 substance and in form, which as this court has - - - has  
19 repeatedly said that this eavesdropping statute must be  
20 meticulously followed - - -

21 CHIEF JUDGE DIFIORE: Indeed.

22 MR. HUG: - - - and closely read. And if you  
23 look at Professor Prizer's (ph.) commentaries, he  
24 specifically - - - advised that this is an improper  
25 procedure. That if you - - - that the CPL permits

1 amendment like a plain view amendment. So if I'm - - - if  
2 I've got authorization to listen to guns and they're  
3 talking about cocaine, I can go and I can amend that  
4 warrant so I can listen to the cocaine. It doesn't say I  
5 can keep amending it and adding one, two, three, four, oh,  
6 person number four is talking to five, I want to talk to  
7 number five. The procedure is to go get a - - -

8 CHIEF JUDGE DIFIORE: That's assuming it's an  
9 amendment. Judge Garcia, did you have a question?

10 JUDGE GARCIA: No. I don't.

11 CHIEF JUDGE DIFIORE: Okay. Thank you, sir.

12 MR. HUG: Thank you, Judges.

13 (Court is adjourned)

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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. Norman Whitehead, Jr., No. 18 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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