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COURT OF APPEALS  
STATE OF NEW YORK

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PEOPLE,

Appellant,

-against-

No. 117

MARLO S. HELMS,

Respondent.

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20 Eagle Street  
Albany, New York  
October 12, 2017

Before:

CHIEF JUDGE JANET DIFIORE  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE LESLIE E. STEIN  
ASSOCIATE JUDGE EUGENE M. FAHEY  
ASSOCIATE JUDGE MICHAEL J. GARCIA  
ASSOCIATE JUDGE ROWAN D. WILSON  
ASSOCIATE JUDGE PAUL FEINMAN

Appearances:

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Sara Winkeljohn  
Official Court Transcriber



1 CHIEF JUDGE DIFIORE: Next on the calendar is  
2 number 117, the People of the State of New York v. Marlo  
3 Helms.

4 Good afternoon, counsel.

5 MS. MERVINE: Good afternoon. May it please the  
6 court, Chief Judge DiFiore, may I reserve two minutes for  
7 rebuttal, please?

8 CHIEF JUDGE DIFIORE: You may.

9 MS. MERVINE: Thank you. Leah Mervine on behalf  
10 of the People. We're here today because the Fourth  
11 Department's decision in this case created a split among  
12 the departments, and it disturbed well-settled case law  
13 that dated back to at least 1988. And in this state, it is  
14 very, very important to have some clarity for prosecutors,  
15 especially when we're looking to determine whether a  
16 foreign jurisdiction can count as a predicate.

17 JUDGE GARCIA: But isn't the majority rule  
18 cleaner? I mean you look at the elements and you line them  
19 up? And I read the dissent, which is a very thoughtful  
20 dissent, but it's a little difficult to follow, and do we  
21 really want judges engaging in that type of analysis and  
22 defense when you can apply the elements test? And I think  
23 if you look at the face of these statutes, there's clearly  
24 something missing, right?

25 MS. MERVINE: Judge Garcia, I - - - I would



1 respectfully disagree that it's cleaner. I think the real  
2 issue that we have here is that everything in the law has  
3 gray area. If everything were black-and-white, we would  
4 have no need for common law. We would have no need for  
5 judicial rulings. And I think the majority here recognizes  
6 that it almost creates - - - I hesitate to - - - to qualify  
7 how it comes across, but it does say that: "We agree with  
8 the dissent that the Georgia case law indicates that the  
9 criminal trespass is a lesser included but we cannot  
10 assume" - - - and I - - - I don't agree with that word,  
11 "from this that knowingly must be an element of the greater  
12 offense."

13 JUDGE STEIN: Well, didn't - - - haven't we  
14 already said in Jurgins and in Ramos and in Gonzalez that  
15 it's okay to take judicial notice of the lesser included  
16 statutes?

17 MS. MERVINE: Absolutely. And it's my  
18 understanding, Judge Stein, that you authored the decision  
19 in which you wrote: "Our reading of the statute is  
20 consistent with that of the D.C. courts." There that was  
21 the foreign jurisdiction.

22 JUDGE STEIN: So why is there confusion about  
23 that?

24 MS. MERVINE: I - - - I'm not certain, and I - -  
25 - and I hope I'm interpreting what you're saying correctly



1 in terms of that confusion. I think that here when you  
2 look at the totality of the crime in Georgia and you look  
3 at the totality of the crime in New York, they're the same  
4 exact thing.

5 JUDGE FAHEY: Well, I suppose it comes down to  
6 what we and - - - and the Appellate Division and the trial  
7 courts believe strict equivalency means.

8 MS. MERVINE: Absolutely.

9 JUDGE FAHEY: So - - - so if strict equivalency  
10 means just the words of the statute and nothing else then  
11 the majority is correct.

12 MS. MERVINE: Correct.

13 JUDGE FAHEY: If strict equivalency, however,  
14 means you have to look at the definitional statutes in  
15 conjunction with the statute in question plus case law, if  
16 necessary, then - - - then the dissent is correct.

17 MS. MERVINE: Correct, Judge Fahey. And I think  
18 that's so critical in this case. We cannot look at words  
19 because words do not carry the same meanings among  
20 jurisdictions. So, you know, I think that this - - -

21 JUDGE RIVERA: So what's the Georgia case law  
22 that shows their equivalent?

23 MS. MERVINE: The Georgia case law that shows  
24 their equivalent are the whole line of cases that we cited  
25 in regard to, one, the lesser included offense of criminal



1 trespass clearly includes the word knowingly. In addition  
2 to that they're the line of cases and somehow there seems  
3 to be a lot of issues with real estate in Georgia where  
4 people think they can go to a house that's for sale and  
5 have permission to just go through it and take things from  
6 it. But - - -

7 JUDGE FAHEY: I don't think we want to speculate  
8 on that.

9 JUDGE RIVERA: Let's not spec - - - let's not do  
10 that.

11 MS. MERVINE: I - - - I wouldn't. But I mean  
12 that is - - -

13 JUDGE FAHEY: Okay.

14 MS. MERVINE: - - - the line of case law and - -  
15 - and we very clearly cited that. If you - - - in this  
16 state, if you commit the crime of burglary here it's the  
17 exact same thing as Georgia. And for the court to have to  
18 go word to word, it doesn't make sense. And one of the  
19 things that we talked about was words don't carry the  
20 common meaning between states. What if they had a  
21 different definition - - -

22 JUDGE RIVERA: So - - -

23 MS. MERVINE: - - - of the word knowingly?

24 JUDGE RIVERA: So let me just - - - perhaps I'm  
25 misunderstanding the element. So in New York when you



1 enter, do you have to know that you have no rights to be on  
2 the property?

3 MS. MERVINE: Absolutely.

4 JUDGE RIVERA: Okay. And you're saying that's  
5 the same in Georgia?

6 MS. MERVINE: Absolutely.

7 JUDGE RIVERA: Where is that? Where is that in  
8 the statute?

9 MS. MERVINE: It's - - - it's from the common law  
10 I think. But the best way, Judge Rivera, to import that  
11 into it is from the fact that the lesser included - - - and  
12 they use the exact same test that New York uses - - - is  
13 that that criminal trespass, which is a lesser included - -  
14 - and I believe that the standard is strict equivalency - -  
15 - or I can't recall the term of art. But in that statute,  
16 it is listed. If it is a lesser included it has to be  
17 contained in the burglary statute.

18 JUDGE RIVERA: Yeah. But that just means it's a  
19 subset, right? You could have - - -

20 MS. MERVINE: No.

21 JUDGE RIVERA: - - - the larger sphere and not  
22 include that element, right?

23 MS. MERVINE: I would disagree. I think that - -  
24 -

25 JUDGE RIVERA: Based on what?



1 MS. MERVINE: Based on the way the Georgia law is  
2 worded, the lesser included must contain the higher. And I  
3 do apologize, there is a quote in my reply brief that I  
4 believe dir- - - addresses that directly on point. But  
5 one of the thing that - - - things that's very interesting  
6 about Georgia, too, is the fact that they don't even define  
7 knowingly. They say that knowingly - - - and this is from  
8 their case law. Knowingly is such a common term and it's -  
9 - - it's just one of those things that's assumed in all  
10 crimes in Georgia. They do not have strict liability  
11 crimes, and in New York we take the further step of  
12 enumerating that. But - - -

13 JUDGE WILSON: So why - - - why in Georgia is  
14 knowingly in the trespass statute but not in the burglary  
15 statute?

16 MS. MERVINE: I - - - you know, if you look at  
17 laws in New York, you could look at the Family Court Act.  
18 You could ask why we don't define the term juvenile.

19 JUDGE WILSON: But you - - - you haven't found  
20 any legislative history or anything like that that helps  
21 with that?

22 MS. MERVINE: I did not find that. It's just one  
23 of those things where it seems like there was a lack of  
24 standardization.

25 JUDGE FAHEY: Well, what about the definitional



1 standards in - - - in Georgia and the definitional  
2 statutes? Have you relied on them at all in your argument?

3 MS. MERVINE: In terms of the definition, they do  
4 not have the definition.

5 JUDGE FAHEY: Well, in other words, burglary is a  
6 crime.

7 MS. MERVINE: Correct.

8 JUDGE FAHEY: A crime is defined - - - the way I  
9 understand the dissent's argument under Georgia law is - -  
10 -

11 MS. MERVINE: Correct.

12 JUDGE FAHEY: - - - an act or omission with a - -  
13 - plus an intention or criminal negligence. Intention is a  
14 mental state. Georgia is a crime, burglary is a crime,  
15 intention is required.

16 MS. MERVINE: Correct. And - - -

17 JUDGE FAHEY: That's a definitional statute. The  
18 way I - - - this is the way I understand the dissent's  
19 argument that provides a specific higher standard than  
20 knowingly to address the question of whether or not there's  
21 equivalency between the statutes.

22 MS. MERVINE: Correct. And this is along the  
23 lines of the without knowingly is the equivalent - - -

24 JUDGE FAHEY: Right.

25 MS. MERVINE: - - - of knowingly, but - - - or



1 without authority, excuse me. But I think it's also  
2 important to look at Georgia Code Section 16-2-2 and also  
3 16-3-5, and those are the statutes that clarify that you  
4 never have strict liability in Georgia. But I do want - -  
5 - I see I have one minute left. I really wanted to address  
6 the point that this decision is really important, a state-  
7 wide issue - - - state-wide issue there is a lot of things  
8 that can come from this.

9 JUDGE RIVERA: Sorry. No what - - - what - - -  
10 let's go back to the strict liability. There is an intent  
11 requirement just to commit the felony not - - - not that  
12 you know what when you got on the property that you were  
13 there unlawfully.

14 MS. MERVINE: Without authority would be our  
15 version.

16 JUDGE RIVERA: Well, I know that's what you want  
17 to do but that's not what it says.

18 MS. MERVINE: But again, I would fall back on the  
19 lesser included, and I don't think we can go - - - I do see  
20 I'm out of time if I may have a moment - - -

21 CHIEF RIVERA: Yes.

22 MS. MERVINE: - - - Your Honor? I just would  
23 like to add, you know, in this state we have common law  
24 crimes. You can't look word-for-word to crimes. This  
25 court created a rule that confounded me as a prosecutor



1 when I was in City Court under People v. Longshore, where  
2 CPW4, Criminal Possession of a Weapon in the Fourth Degree  
3 has a common law element. If we compare side-by-side we  
4 get into absurd results, the word he to she. Okay, well,  
5 this person is male or identifies with a male identity so  
6 therefore we can't prosecute unless we have General  
7 Construction Law Section 22. I think that the rule that  
8 we're seeking for this court to implement is that it - - -  
9 a court can do an interpretive analysis of the foreign  
10 state statutes and case law in coming up with the correct  
11 result. And on that basis, we would ask this Court to  
12 reverse the Fourth Department. Thank you.

13 MR. JUERGENS: Thank you.  
14 Counsel.

15 MR. JUERGENS: Good afternoon. May it please the  
16 court, Dave Juergens, Monroe County Public Defenders Office  
17 for Marlo Helms. The Fourth Department applied well-  
18 settled law from this Court. It compared the statutes. It  
19 looked at the essential elements, what minimum requirements  
20 are in Georgia for burglary and in New York for burglary.  
21 They compared these and came to the conclusion that there's  
22 not strict equivalency, which is the People's burden to  
23 establish. The - - - they applied Ramos. Ramos is a case  
24 where it looked at the federal conspiracy statute and said,  
25 you know what, there's a missing element in New York. You



1 have to plead and prove an overt act. In Georgia, the law  
2 is different. You - - - these are talking about common law  
3 crimes. I mean we're talking two different statutory  
4 crimes in the - - - in the two different jurisdictions. In  
5 New York every burglary case the People have to plead and  
6 prove that the defendant was consciously aware that when he  
7 entered the building that he didn't - - - that it was  
8 unlawful, that he didn't have license or privilege. That's  
9 not the law in Georgia. In Georgia, the legislature  
10 decided that it was enough for a prima facie case of  
11 burglary for there to be a showing that there was no  
12 authority, there was entry, and that the intruder had an  
13 intent to commit a felony or a theft.

14 JUDGE RIVERA: Is that based just on the elements  
15 as you read them or on - - - and/or Georgia case law?

16 MR. JUERGENS: That's based the elements that are  
17 in the Georgia statute. And I would disagree with the  
18 People in their argument that the majority at the Appellate  
19 Division somehow said that you had to put blinders on, look  
20 just at the penal law statute and you're done. That's not  
21 what they - - - that's not what they decided. They decided  
22 that the People didn't meet their burden to show case law  
23 from Georgia or other statutes defining elements.

24 JUDGE STEIN: So you - - - so you - - - you agree  
25 that - - that the court can take into consideration, for



1 example, the lesser included statute of - - -

2 MR. JUERGENS: Well, what - - - what - - what New  
3 York courts should do is respect Georgia law as determined  
4 by Georgia courts.

5 JUDGE FAHEY: But that's not - - - that's not the  
6 way I understood what you said. I - - - I - - - the way I  
7 understood what you said is that they didn't meet their  
8 burden but that the court can look at definitional elements  
9 and can look at Georgia case law.

10 MR. JUERGENS: Yes. Yes.

11 JUDGE FAHEY: All right. So you agree with that  
12 point? Yeah.

13 MR. JUERGENS: I agree with that general  
14 analysis. I'm saying in this case applying - - -

15 JUDGE FAHEY: They - - - they didn't meet the  
16 burden here.

17 MR. JUERGENS: - - - applying that general  
18 analysis the People didn't meet their burden.

19 JUDGE RIVERA: You're saying the disagreement is  
20 if - - - if you do what they say, go look at the case law,  
21 go look at other statutes, look that there's this lesser  
22 included, your argument is yes, do all of that and you  
23 still end up in your place.

24 MR. JUERGENS: Exactly. Exactly.

25 JUDGE RIVERA: Then where the AD majority ended



1 up which is - - -

2 MR. JUERGENS: Because if you focus - - -

3 JUDGE RIVERA: - - - they're not the same  
4 elements. There's an element missing.

5 MR. JUERGENS: Exactly. And if you focus - - -

6 JUDGE FAHEY: So if that's the case did - - - did  
7 the - - - the majority in the Appellate Division, did they  
8 do that definitional case law analysis or was it purely  
9 element to element in the - - - in the statute themselves?  
10 Because it seemed to me to be that.

11 MR. JUERGENS: They did an analysis where they  
12 looked the statutes. They compared the essential elements.  
13 They saw that Georgia was missing an essential element - -  
14 -

15 JUDGE FAHEY: So - - -

16 MR. JUERGENS: - - - this knowingly requirement,  
17 and that the People did not point to a single Georgia case  
18 where Georgia courts said you know what, Georgia  
19 prosecutors in every burglary case, you - - - despite the  
20 fact that it doesn't say so in the statute, you have to  
21 prove - - - plead and prove that the defendant was  
22 consciously aware that when he entered not only - - - that  
23 he was entering without authority. And that's what the - -  
24 -

25 JUDGE RIVERA: So on this appeal, we have to do



1 that analysis too?

2 MR. JUERGENS: Pardon?

3 JUDGE RIVERA: On this appeal, we have to do that  
4 analysis too? We have to take into consideration the case  
5 law and other parts of the - - - the criminal statutes?

6 MR. JUERGENS: I - - - I think we need to do an  
7 apples-to-apples comparison of the essential elements of  
8 the statute, and to the extent that Georgia has definitions  
9 of their essential elements that can be explained by  
10 statutes outside the penal law statute in Georgia and/or  
11 case law, then we need to respect that. But that needs to  
12 be identified Georgia law, not - - - not the dissent here,  
13 which I respectfully would suggest, you know, looked at  
14 Georgia law and came up with its own interpretation. And  
15 that's not what New York courts are supposed to do. New  
16 York courts are supposed to identify what the Georgia law  
17 is and then do a comparison.

18 JUDGE FEINMAN: No Georgia case has arisen  
19 because everybody in Georgia knows that you need to know  
20 when you are committing a burglary what you're doing.

21 MR. JUERGENS: It's - - - it's - - -

22 JUDGE FEINMAN: That's too bad?

23 MR. JUERGENS: Well, no. No. It's - - it's - -  
24 it's what are the essential elements that are required in  
25 Georgia.



1 JUDGE FEINMAN: So my question - - -

2 MR. JUERGENS: There's no - - -

3 JUDGE FEINMAN: - - - is going to be a little  
4 different which is can you look at another state that has  
5 the same exact wording without the knowingly in it like  
6 Georgia and they have interpreted - - - the case hasn't  
7 arisen in Georgia but let's say it arose in Connecticut or  
8 some other jurisdiction.

9 MR. JUERGENS: I - - - I think it has to be a  
10 jurisdiction-to-jurisdiction comparison. I think you look  
11 at how Georgia has defined - - -

12 JUDGE FEINMAN: So if - - - if twenty-five states  
13 adopt the model penal code definition of burglary and, you  
14 know, the first one arises in a different jurisdiction, we  
15 can't look at that if it's not the same state?

16 MR. JUERGENS: I - - - I - - - I - - I think the  
17 - - - the analysis gets way, way beyond what this court  
18 said the - - - that the test is when you're doing a strict  
19 equivalency analysis looking at the - - - at the statutory  
20 elements because, you know, different states can define  
21 their - - - their essential elements in different manners -  
22 - -

23 JUDGE FAHEY: You know, the biggest thing that  
24 jumps out to me definitionally is that the Georgia  
25 definition of what a crime is.



1 MR. JUERGENS: And I'm glad - - - I'm glad you  
2 asked because - - -

3 JUDGE FAHEY: Go ahead and address it.

4 MR. JUERGENS: - - - to me it's - - - it's being  
5 misinterpreted by the dissent because Georgia defines its  
6 crime as requiring an actus reus and a mens rea and it  
7 talks about the mens rea being intention or criminal  
8 negligence. Doesn't say which of those elements would be  
9 applying to burglary. I mean that's a generic statute, and  
10 I've cited cases in my brief where that's interpreted as  
11 intention is a voluntary - - - is like a voluntary act. I  
12 mean I intentionally walk through the doorway, I enter the  
13 building because my brain tells my body to move and I - - -  
14 I walk through. That's a voluntary act. And criminal  
15 liability in most states requires voluntary acts. If I'm  
16 standing in the doorway and somebody pushes me into the  
17 building well, that's not a burglary because that - - -  
18 that - - -

19 JUDGE FAHEY: So that's how - - - I guess that's  
20 how we end up with the case law then. So the next step is  
21 is does case law tell us anything.

22 MR. JUERGENS: Well, true. And the case law from  
23 Georgia that I cited in my brief stands for the proposition  
24 that that's - - - when they say intentionally, they're  
25 referring to conduct or voluntary act, and I've cited the



1 New York statute defining what a voluntary act is.

2 JUDGE FAHEY: So - - - so let me ask you this.  
3 You've gone through this, you both have. You're both  
4 thoroughly vested in this. What is the mental - - - or the  
5 mens rea element that's required for burglary in Georgia?

6 MR. JUERGENS: To have the intent to commit a  
7 felony or a theft. If you enter and they show that you  
8 didn't have authority - - -

9 JUDGE FAHEY: So the mens rea element is - - - is  
10 you have the - - - had to make an intentional act; is that  
11 correct?

12 MR. JUERGENS: Well, I mean, you have to  
13 intentionally enter the building as in it being a voluntary  
14 act. You weren't pushed in. But the mens rea essential  
15 element in - - - for burglary to - - - for it to be a  
16 felony in Georgia is this intent to commit a felony or a  
17 theft. And you get to the - - - the lesser included if you  
18 have a lesser mens rea, and the lesser mens rea for  
19 criminal trespass is that you enter for an unlawful  
20 purpose. In all the cases that - - - the People don't cite  
21 any cases that talk about lesser includeds under this  
22 required evidence theory which is one of three different  
23 ways in Georgia apparently you can come to a lesser  
24 included. All the cases in the dissent and the People's  
25 brief involve where there's a question about whether the



1 defendant was saying, well, you know, I - - - if you had a  
2 legitimate purpose for entering then you don't get a  
3 criminal trespass charge because there's no reasonable view  
4 of the evidence that would support it. But if you were  
5 entering and maybe you were loitering or some - - -  
6 something unlawful but not rising to the level of an intent  
7 to commit a felony or theft, then you get the instruction.  
8 And then if you don't get the instruction you get a  
9 reversal and a new trial.

10 JUDGE FAHEY: And that's the source - - - and  
11 that's the source of your ambiguity argument?

12 MR. JUERGENS: Well, that's the source of - - -  
13 of - - - because the - - - this lesser included argument  
14 was raised sua sponte by the dissenting judge. It never  
15 was raised at the trial level or the Appellate Division  
16 level by the People. The dissenter respectfully read the  
17 law and came up with his own conclusion on how - - - on how  
18 the analysis should be conducted and - - - and came to  
19 conclusions that were disagreed with by the majority. The  
20 majority said we looked - - - and again, in this case I  
21 would cite to Perkins. This case in Perkins said that you  
22 don't look to defenses when you're doing a strict  
23 equivalency essential-element-to-essential-element test.  
24 In - - -

25 JUDGE STEIN: Well, but in Georgia, I mean, in -



1 - fair - - in all fairness, they - - - they sort of deal  
2 with their affirmative defense differently than we do,  
3 don't they? They - - - they keep the burden on the People  
4 if it's raised and - - -

5 MR. JUERGENS: Well, it's still - - - it's still  
6 - - - the distinction still is is that an essential element  
7 defines the crime. It's required in every case to be  
8 proven by the prosecution. In Georgia, you got to look at  
9 the facts of the case. You've got to look at the evidence  
10 to see whether or not there is support for your mistake of  
11 fact defense.

12 CHIEF JUDGE DIFIORE: Counsel, am I correct in  
13 recalling that your - - - Mr. Helms has already been  
14 sentenced?

15 MR. JUERGENS: Well, he did - - -

16 CHIEF JUDGE DIFIORE: It was sent back after the  
17 - - -

18 MR. JUERGENS: Yeah. Pending appeal he did a  
19 little over four years, and on the top crime it was a five-  
20 and-five promise so he did get resentenced and is now out.

21 CHIEF JUDGE DIFIORE: So if we were to reverse in  
22 this case are there any double jeopardy implications or  
23 concerns regarding additional punishment?

24 MR. JUERGENS: I - - - I haven't thought that - -  
25 - I haven't thought that through. I mean there - - - I



1 guess it would turn on whether he had a legitimate  
2 expectation of finality at this point since the People were  
3 granted an appeal, you know. I - - - I would have to look  
4 into it further.

5 CHIEF JUDGE DIFIORE: Thank you, counsel.

6 MR. JUERGENS: Thank you.

7 CHIEF JUDGE DIFIORE: Ms. Mervine.

8 MS. MERVINE: Thank you, Your Honor. If I may  
9 just address that last point. In regards to Mr. Helms, he  
10 was resentenced approximately two months before his CR. He  
11 has not served anywhere near the totality of the sentence  
12 of five years plus five years of post-release supervision.  
13 And when he was resentenced, he was given a one-year  
14 definite term. Therefore, it would be the People's  
15 position that the appropriate remedy in this case would be  
16 to reverse the Fourth Department, to vacate the resentence,  
17 and to reinstate the original sentence. That would not,  
18 from the People's position, invoke double jeopardy  
19 whatsoever. And I just wanted to also briefly address the  
20 - - -

21 CHIEF JUDGE DIFIORE: So one - - - one more point  
22 on that.

23 MS. MERVINE: Yes.

24 CHIEF JUDGE DIFIORE: Just - - - so he was  
25 resentenced?



1 MS. MERVINE: Correct.

2 CHIEF JUDGE DIFIORE: There was a new judgment  
3 entered. Does that render this moot, this appeal?

4 MS. MERVINE: No, Your Honor. There was - - - it  
5 was a modification, Your Honor. So the Fourth Department -  
6 - -

7 CHIEF JUDGE DIFIORE: Okay.

8 MS. MERVINE: - - - affirmed the conviction and  
9 vacated the sentence. Therefore, it's the People's  
10 position that it was the sentence only that was affected  
11 because they did affirm the conviction. It would be the  
12 People's position that the conviction in no way would be  
13 touched in this case. It would just be the sentencing that  
14 this court was focusing on.

15 CHIEF JUDGE DIFIORE: So it's not a new judgment?

16 MS. MERVINE: It is not a new judgment.

17 CHIEF JUDGE DIFIORE: That's - - -

18 JUDGE FAHEY: Yeah. I thought - - -

19 CHIEF JUDGE DIFIORE: - - - in your estimation.

20 JUDGE FAHEY: I thought it was because it was an  
21 enhancement that - - - rather - - - in other words, the  
22 sentence still stood but the enhancement didn't?

23 MS. MERVINE: That is correct, Your Honor. And  
24 if - - - if look at the certificate of conviction that we  
25 provided to this court - - -



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JUDGE FAHEY: Not a second violent felony offender. Right.

MS. MERVINE: It is - - - well, it's the certificate of conviction indicates that it's amended, that the judgment was not changed and that ordering was not changed. And just very briefly in regard to the point about the People had a burden to prove to county court that he was a recidivist, in this case, the court relied on People v. Toliver. It was well-established case law at that time. And we would ask that this court make that the case of New York. Thank you.

CHIEF JUDGE DIFIORE: Thank you.

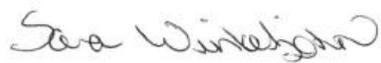
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C E R T I F I C A T I O N

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Marlo S. Helms, No. 117 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



Signature: \_\_\_\_\_

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