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COURT OF APPEALS

STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

NO. 44

MEYERS (JOSEPH A.),

Appellant.

20 Eagle Street
Albany, New York
April 15, 2026

Before:

CHIEF JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE MADELINE SINGAS
ASSOCIATE JUDGE ANTHONY CANNATARO
ASSOCIATE JUDGE CAITLIN J. HALLIGAN
ASSOCIATE JUSTICE L. MICHAEL MACKEY

Appearances:

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Official Court Transcriber



1 CHIEF JUDGE WILSON: The last case on today's
2 calendar is People v. Meyers, and we're delighted to be
3 joined and grateful for the participation of our colleague
4 from the Third - - - Appellate Division, Third Department,
5 Honorable Michael Mackey.

6 Counsel.

7 MR. ABBATOY: Thank you, Judge. David Abbatooy
8 for Mr. Meyers.

9 Judge Wilson, if I could reserve three minutes
10 for rebuttal?

11 CHIEF JUDGE WILSON: Yes.

12 MR. ABBATOY: I appreciate it. Thank you.

13 Under the unique circumstances of this case, it's
14 our position on this appeal with respect to reconstruction
15 that Mr. Meyers demonstrated that it was impossible, or
16 essentially futile, to try to create an appellate record in
17 this case that wouldn't provide the necessary accuracy and
18 detail that is required for him to pursue his rights on
19 appeal.

20 JUDGE SINGAS: But they did do that. They had a
21 reconstruction hearing that was pretty extensive and
22 comprehensive, so they did more than try. They actually
23 had a hearing and were able to reconstruct the trial. Do
24 you disagree with that?

25 MR. ABBATOY: Well, I - - - I do in - - - in two

1 respects. First, and I - - - I think there's kind of this
2 final paragraph of the Yavru-Sakuk case that I think kind
3 of maps out for the court how it should go about its
4 analysis in terms of whether or how to do a reconstruction
5 hearing. And one of the threshold considerations that I
6 think the Yavru-Sakuk court instructs is to determine
7 initially whether it would be futile to do the exercise of
8 a reconstruction hearing; and then perhaps after that, look
9 to whether the fruits of the reconstruction hearing
10 actually gave the person an appellate record that is
11 meaningful for the purposes of appeal.

12 JUDGE SINGAS: How - - -

13 JUDGE RIVERA: So what makes the record deficient
14 that's developed through the reconstruction hearing?

15 MR. ABBATOY: Okay. So in - - - in the
16 reconstruction hearing itself, I mean, initially, we have
17 the trial judge himself telling us that he's only relaying
18 to us the gist. And this is possibly, I think, maybe the
19 very best construction of the facts for the prosecution,
20 these notes from the judge. He's telling us he got only
21 the gist of this thirteen-day trial that includes
22 scientific testimony from multiple experts, nuanced,
23 detailed testing.

24 JUDGE CANNATARO: Can I pause you there for one
25 second - - -

1 MR. ABBATOY: Sure.

2 JUDGE CANNATARO: - - - because this has been a
3 lingering concern about what's - - - what's - - - what's
4 preserved in the transcript and what wasn't, from the
5 trial. It seems to me that a lot of what was missing was
6 nontestimonial portions of the trial, like, jury selection,
7 summations, charge conference. It - - - it's not - - - not
8 so much testimonial portions of it. Is that a correct
9 interpretation? And if it is, does that make a difference
10 with respect to how damaging the absence of those parts
11 are?

12 MR. ABBATOY: Okay. So I think there's a couple
13 of ways to respond to that. First, our top line argument
14 throughout these proceedings, right from the outset, has
15 been that since the - - - the thing that the stenographer
16 attempted to - - - to produce for us was uncertified, there
17 is no record whatsoever.

18 JUDGE CANNATARO: So everything's missing in a
19 way?

20 MR. ABBATOY: Everything is missing because - - -
21 I mean, the CPLR tells us what prima facie evidence is for
22 the purposes of appellate review, and it has to be a
23 certified transcript. So right at the outset, none of that
24 information in what the stenographer produced can be relied
25 upon.

1 CHIEF JUDGE WILSON: Well, we have - - - we have
2 trials that proceed with no stenographers at all regularly,
3 right? Just an audio record. And if you want to take an
4 appeal here in some of those cases, it's off of the notes.
5 You know, the - - - I forgot what the thing is actually
6 called, but it's a statement of objections.

7 MR. ABBATOY: Affidavit of errors.

8 CHIEF JUDGE WILSON: Yes. Yeah.

9 MR. ABBATOY: Right.

10 CHIEF JUDGE WILSON: So if you don't have a
11 transcript, and we still proceed, and it's not a due-
12 process violation.

13 MR. ABBATOY: Well, I mean, I think there are a
14 couple of responses. First, that would only be permissible
15 in a misdemeanor case. But secondarily - - - and this is a
16 homicide case where this person is facing potential
17 lifelong imprisonment. I would suggest that there is, at a
18 minimum, a sliding scale that this court should consider
19 with respect to how much inaccuracy it's willing to
20 tolerate in a murder case versus a petty larceny case, or
21 less - - - or some lesser case.

22 JUDGE SINGAS: But the Appellate Division did
23 find that this partial transcript, parts of it, were
24 accurate. So then how do - - - how were we to look at
25 that? What's our review power then? Because I - - - I

1 think you're asking for just strike that partial transcript
2 entirely, right? But now we're faced with the situation
3 where there was a reconstruction hearing, and the Appellate
4 Division did credit parts of that hearing, so what's our
5 authority? What - - - what - - -

6 MR. ABBATOY: Yeah. I think this presents to you
7 a - - - a purely legal question, and I'm not sure if Your
8 Honor is suggesting that this might present some kind of
9 factual question that's already been determined by the
10 Appellate Division. In this case, we have made a legal
11 argument that we've made throughout this case that there is
12 no authority for any court to accept or compel a person to
13 proceed to appeal on an uncertified transcript, and that is
14 what we've always had from the outset here.

15 Going back to the question from Judge Cannataro
16 just a second ago, which I think this kind of leads into.
17 Not only are we faced with a completely uncertified
18 transcript, that we could have had no notice that we were
19 compelled to rely on in these circumstances, but actually,
20 I do disagree with the characterization that the things
21 that seem to be missing, predominantly missing, are only
22 perhaps legal proceedings, et cetera.

23 First, we have - - - just looking at, kind of,
24 those initial notes that the stenographer produced. We
25 have pages and pages, hundreds of pages, I think, at least

1 a hundred pages of dozens and dozens of questions and
2 answers in this code with omitted notations,
3 untranscribable notations. And it's - - - when things are
4 character - - - and that is just testimony. That is just
5 sworn testimony. And to my knowledge - - -

6 JUDGE RIVERA: So - - - so let's say we agree
7 with you on that. Is that reason alone for a - - -
8 reversal and a new trial? What - - - what's the record
9 from the reconstruction hearing? Would that be enough?

10 MR. ABBATOY: I - - - I think - - - I think that
11 gets us a really far way down the road towards establishing
12 prejudice - - -

13 JUDGE RIVERA: Um-hum.

14 MR. ABBATOY: - - - in this case, which, as I
15 understand it, is our only duty to establish two things in
16 the - - - in the lower court.

17 One, the existence of genuine appealable issues
18 and - - - which we have done, and I think it's implicit in
19 this case because every defendant coming out of a jury
20 trial has a weight of the evidence case to present. And
21 since we know, looking at the page, that there are, one,
22 numerous or completely uncertified transcripts and
23 numerous, numerous questions and answers of sworn testimony
24 that are not, you know - - - definitely not transcribed,
25 definitely not available for my review, that we know we

1 have, at a minimum, overcome that genuine appealable issues
2 bar, because we know the Appellate Division has to review
3 the weight of the evidence, and we know that there are
4 substantial portions of sworn testimony that are not
5 transcribed.

6 JUDGE GARCIA: So just a slightly different
7 issue. I'm having some trouble understanding what happened
8 in the reconstruction hearing with the original exhibits.
9 Could you go into that a little bit for me?

10 MR. ABBATOY: Yeah. So prior to the
11 reconstruction hearing itself, you know, the only thing we
12 had in our possession was these partial notes.

13 JUDGE GARCIA: Um-hum.

14 MR. ABBATOY: We - - - and when I say "we", I
15 mean, me and my co-counsel at that time, were at that time
16 struggling to even understand what - - - what the factual
17 scenario - - - scenario was in the underlying trial. We
18 thought it helpful to have the admitted trial exhibits,
19 especially because of the scientific nature of the case,
20 and we knew that scientific evidence had been admitted, so
21 we made requests of the prosecutor to produce those items.
22 The prosecutor would not do that.

23 JUDGE GARCIA: So give me an example of what some
24 of those would be.

25 MR. ABBATOY: Okay. So it - - - there are at

1 least a hundred - - -

2 JUDGE GARCIA: Um-hum.

3 MR. ABBATOY: - - - exhibits.

4 JUDGE GARCIA: Presented.

5 MR. ABBATOY: A handful of them are scientific
6 reports - - -

7 JUDGE GARCIA: Um-hum.

8 MR. ABBATOY: - - - one of whom came from the New
9 York State Police investigator, who I think was a central
10 figure - - -

11 JUDGE GARCIA: Um-hum.

12 MR. ABBATOY: - - - to the prosecutor's case.
13 Another came from the medical examiner. The medical
14 examiner's report was actually entered into evidence.

15 JUDGE GARCIA: And you had no copies of those at
16 the reconstruction hearing?

17 MR. ABBATOY: That's right, Judge.

18 JUDGE GARCIA: None from the appeal - - -

19 MR. ABBATOY: That's right.

20 JUDGE GARCIA: - - - original appeal, nothing?

21 MR. ABBATOY: Those things would not have been
22 provided to us.

23 JUDGE RIVERA: You - - - you never saw them?

24 MR. ABBATOY: No, no.

25 JUDGE RIVERA: You had no access to them?



1 MR. ABBATOY: No, we did not.

2 CHIEF JUDGE WILSON: So the People say you were
3 provided some of them, maybe not until the hearing started;
4 is that wrong?

5 MR. ABBATOY: The prosecution never provided us
6 any of the admitted exhibits from this case.

7 CHIEF JUDGE WILSON: A little different question.

8 MR. ABBATOY: Okay.

9 CHIEF JUDGE WILSON: Did you ever see them,
10 regardless of who provided them?

11 MR. ABBATOY: No, I did not.

12 CHIEF JUDGE WILSON: You - - -

13 MR. ABBATOY: I - - - I - - -

14 CHIEF JUDGE WILSON: Well, okay. You - - - no -
15 - - nobody working for the defendant here ever saw any of
16 these exhibits in connection with the reconstruction
17 hearing?

18 MR. ABBATOY: No, we did not.

19 JUDGE HALLIGAN: Did you have the opportunity to
20 see them, which is, I think, what the People suggest?

21 MR. ABBATOY: I - - - I do not believe we had a
22 meaningful opportunity.

23 JUDGE HALLIGAN: What does that mean?

24 MR. ABBATOY: I'm getting - - - so - - -

25 JUDGE HALLIGAN: What opportunity did you have?

1 MR. ABBATOY: So two days down the line in the
2 reconstruction hearing itself, the prosecution, in response
3 to our renewed objection, says essentially something like,
4 well, if they want to look at what I have here today,
5 they're welcome to do so. Having already had a couple of
6 important witnesses on the stand, including the trial
7 judge, I think, maybe at that point at least one of the
8 defense attorneys had testified. The prosecutor had maybe
9 begun his testimony. Just being offered the opportunity to
10 see what the prosecutor has in court doesn't give us the
11 opportunity to absorb the contents of these a - - a hundred
12 exhibits. It doesn't give us - - - certainly, it doesn't
13 give us the same opportunity that the prosecutor had to
14 study these exhibits.

15 JUDGE HALLIGAN: Why couldn't you get them from
16 trial counsel? Did I miss that?

17 MR. ABBATOY: Because the admitted exhibits
18 themselves are one-of-a-kind items that are - -

19 JUDGE GARCIA: But how is a medical examiner's
20 report a one-of-a-kind item?

21 MR. ABBATOY: The - - - the thing that the court
22 actually received into evidence is the thing - - -

23 JUDGE HALLIGAN: But you couldn't get a copy?

24 JUDGE CANNATARO: But it could be copied, can't
25 it?

1 JUDGE GARCIA: Yeah.

2 JUDGE HALLIGAN: It wasn't submitted
3 electronically. You didn't have a copy. You couldn't get
4 it from the medical examiner?

5 MR. ABBATOY: As Appellate - - - well, as
6 appellate counsel, we don't have the opportunity to
7 subpoena information like trial counsel would. We don't
8 have the - - -

9 JUDGE GARCIA: But all the exhibits that trial
10 counsel presumably had copies of, like, I would assume the
11 medical examiner's report had to be turned over. Why
12 didn't you have those?

13 MR. ABBATOY: I'm sorry, Judge. I - - - I - - -

14 JUDGE GARCIA: Why didn't you have trial
15 counsel's copies of all these reports, which my
16 understanding would be they had to be turned over.

17 MR. ABBATOY: The trial attorney in this case was
18 the now former prosecutor, so - - - or was the now - - -
19 now prosecutor, or he works for the prosecutor's office
20 now, I should say.

21 JUDGE GARCIA: And he refused to hand over his
22 file?

23 MR. ABBATOY: At the time - - - I mean, this is
24 all off the record, Judge. I mean, I can share this
25 information with you for, you know, for the court's

1 edification. It's not - - - it's not on the record. At
2 the time that the representation turned over at the time he
3 was done, he gave me some of the documents that he had.
4 And I can represent to this court, as I did to the lower
5 court, that the things that I received were a fraction of
6 the things that I saw the prosecutor bring to court every
7 day.

8 JUDGE CANNATARO: So it's possible that trial
9 counsel did receive all these exhibits, as would be common
10 in the regular course of a trial. They would be turned
11 over by the prosecution ahead of trial. He just may have
12 had a reason not to want to turn them over to you?

13 MR. ABBATOY: I'm not sure why the - - - the
14 lawyer chose to turn over some limited view of what was
15 actually turned over, but for the purposes of my
16 representation on appeal, I think it's at least reasonable
17 for me to be able to request of the prosecution to produce
18 for me the very same things that the jurors considered, so
19 I can see it in the same format that the jurors considered
20 it. And for me to have those things available to me - - -

21 CHIEF JUDGE WILSON: By the same format, you mean
22 the originals instead of copies; is that what you mean?

23 MR. ABBATOY: Copies of the trial exhibits?

24 CHIEF JUDGE WILSON: Yeah.

25 MR. ABBATOY: I - - - I don't think I - - - I'm

1 sorry, Judge. My - - - my - - - my time is up.

2 CHIEF JUDGE WILSON: No, that's okay.

3 MR. ABBATOY: I don't think I literally have to
4 have the original of the thing that was in court. But I at
5 least have to have the prosecutor provide me with a copy of
6 the thing that was - - - that was with the exhibit tab on
7 it that was handled in court, presented to the jury, and
8 the jury considered, because that is the thing that is
9 actually - - - that was actually considered by the - - - by
10 the jury.

11 JUDGE SINGAS: But I - - - but I think the
12 prosecutor said here, I'm looking at 2138, "Defense counsel
13 is more than welcome to look at whatever I have here." And
14 you said they were bringing stuff into court every day.
15 There are no secrets. I really don't want to go and
16 photocopy all of the files. They have all that stuff.

17 JUDGE RIVERA: And wouldn't they only have to
18 give you copies of whatever trial counsel apparently didn't
19 give you?

20 MR. ABBATOY: No, Judge. I - - -

21 JUDGE RIVERA: They're not giving you duplicates,
22 right?

23 MR. ABBATOY: - - - I - - - I mean, Judge, I
24 think as appellate counsel, just like I'm entitled to a
25 full transcript of the - - -

1 JUDGE RIVERA: Um-hum.

2 MR. ABBATOY: - - - proceedings, I see no
3 difference of why these very same documents, and I think
4 this is what the Nixon case stands for, why these very same
5 documents admitted into evidence, taken literally, I think
6 the case explains this, received by the trial court itself.

7 JUDGE HALLIGAN: So are you saying, though, that
8 the obligation specifically is to make a copy of everything
9 and give it to you, or that the obligation - - - and - - -
10 and it's not satisfied by allowing you to come and review
11 and identify whatever you're missing?

12 MR. ABBATOY: That - - - I mean, I think
13 generally, no, because it doesn't give me the same
14 opportunity that the prosecutor has to - - -

15 JUDGE HALLIGAN: So is that the problem here?
16 You're - - - you're saying that they had to copy everything
17 and give it to you on the front end and that allowing you
18 to review it was not sufficient?

19 MR. ABBATOY: I don't really think they really
20 offered me the opportunity to review, Judge.

21 JUDGE HALLIGAN: Well, Judge Singas read you the
22 - - - the excerpt, I think. You - - - do you - - - you
23 didn't take that as a good-faith offer?

24 MR. ABBATOY: I - - - I can attest that not that
25 it wasn't made in good faith, but viewing it in court,

1 whatever the prosecutor brought into the courtroom - - -

2 JUDGE RIVERA: So - - - so your argument is you
3 needed it in advance? That's your argument.

4 MR. ABBATOY: We did request it in advance.

5 JUDGE RIVERA: Um-hum.

6 MR. ABBATOY: I think it was reasonable to ask
7 for that.

8 JUDGE RIVERA: I understand that.

9 MR. ABBATOY: We gave everyone plenty of notice,
10 so if there were any administrative difficulties - - -

11 JUDGE RIVERA: And in advance, the prosecutor
12 said no?

13 MR. ABBATOY: That's right.

14 JUDGE RIVERA: Or the judge didn't order it.

15 MR. ABBATOY: And I - - - I - - -

16 JUDGE RIVERA: I understand that, but the
17 prosecutor said no?

18 MR. ABBATOY: Yes.

19 JUDGE CANNATARO: That statement that was read
20 ends with, "But they have everything already anyway."

21 MR. ABBATOY: Right.

22 JUDGE CANNATARO: And what - - - that's a
23 misrepresentation?

24 MR. ABBATOY: I - - - I think perhaps the lower
25 court judge or even the prosecutor was under the

1 impression, perhaps, that appellate counsel receives these
2 things as a matter of course.

3 JUDGE CANNATARO: Yeah.

4 MR. ABBATOY: We don't.

5 JUDGE CANNATARO: They do. Oh, I mean, defense
6 counsel does. I don't know if appellate counsel does.

7 MR. ABBATOY: We don't. We do not receive those
8 things unless we request it. And since the caretaker of
9 those exhibits is, at least in my experience - - -

10 JUDGE RIVERA: I'm sorry. So when - - - when - -
11 - when the prosecutor says they've got them already, did
12 you say, no, I don't?

13 MR. ABBATOY: I - - - I said that repeatedly
14 throughout this conversation, Judge.

15 JUDGE RIVERA: Um-hum.

16 MR. ABBATOY: I said it before that, and I said
17 it probably three more times after that in the Appellate
18 Division. And they never debated that I didn't actually
19 have these documents. And I think even their argument
20 today in this court is just that that offer that Judge
21 Singas read was my opportunity to actually receive those
22 things. And as I've said, I don't believe that was
23 meaningful, but I - - - I think the record - - - and - - -
24 and I don't believe there's even been any debate on this
25 record that I did not actually receive those one-of-a-kind

1 exhibits that were actually offered in court, signed by - -
2 - you know, authorized by the judge and - - -

3 JUDGE RIVERA: In advance of the reconstruction
4 hearing?

5 MR. ABBATOY: Never, never. Not even - - -

6 JUDGE RIVERA: Well, you've got the offer at the
7 reconstruction hearing, so - - -

8 MR. ABBATOY: But then we - - - then we requested
9 them for use on appeal again. Or after the - - - the
10 Appellate Division asked to see the exhibits, I made a
11 request of the Appellate Division to ask them to have the
12 prosecutor turn those things over to me. I - - - think
13 maybe in response - - - continuing response to Judge
14 Halligan's question. If those things had been made
15 available to me, and there was - - - by the prosecutor's
16 offer, and there was truly no debate about whether I had
17 them or whether they were part of the case, it would have
18 been easy at that point, if they were being turned over to
19 the Appellate Division, to just turn them over to me at
20 that time.

21 Not only did they not debate at that time that I
22 actually had them, or I could have seen them at some other
23 point, they just opposed it in a letter. They made no
24 sworn statements, and the Appellate Division went on to
25 consider everything with - - - and I represented it again

1 to the Appellate Division in my motion, and I believe maybe
2 in my reply brief, that we'd gone through the whole - - -
3 whole process without seeing these trial exhibits, which,
4 of course, were at least an ingredient in the jury's
5 verdict.

6 JUDGE MACKEY: I'd just like to ask a question
7 about another part of the record, and this has to do with
8 the defendant's expert and the motion to preclude. And the
9 trial judge says that he ruled on that objection outside
10 the presence of the jury, but I don't see anything in the,
11 let's say, the original record or in the reconstruction
12 that shows us what that ruling is. Did I miss something,
13 or is that not in there?

14 MR. ABBATOY: I think the ruling that the judge
15 is talking about with respect to that transaction - - -

16 JUDGE MACKEY: Right.

17 MR. ABBATOY: - - - is - - - relates to whether
18 or not their expert should be precluded on the basis of
19 time and that's - - -

20 JUDGE MACKEY: Right, but he said he made a
21 ruling.

22 MR. ABBATOY: Yes.

23 JUDGE MACKEY: And I don't see anywhere in the
24 record or in the reconstruction that says what the ruling
25 was or whether an exception was taken to the ruling. Did I

1 miss something, or is that - - - was that not
2 reconstructed?

3 MR. ABBATOY: I don't think - - - well, I think
4 if I'm - - - if I'm getting this right, I - - - I think
5 what happens is there are two arguments made by the
6 prosecutor. He makes one argument with respect to
7 timeliness, and then he makes this other argument with
8 respect to criminality, essentially, I'll say. And
9 everyone goes home for the night and they come back the
10 next day, and I want to say it's in the judge's notes and
11 not these kind of stenographer's notes later where he makes
12 a - - - where he - - - he discusses what the argument was
13 and what ended up happening. Ultimately, since I think the
14 attorneys withdrew the defense expert that the judge either
15 ruled that it - - - implicitly that it wasn't precluded or
16 concluded perhaps that he didn't have to make - - -

17 JUDGE MACKEY: Well, they said they were not
18 going to call him, but - - - that appears to have occurred
19 after the judge said he made a ruling outside the presence
20 of the jury, and I just - - - I don't see the ruling.

21 MR. ABBATOY: Yeah, I - - - I don't - - - I don't
22 see the judge say - - - I - - - I think it's clear on the
23 record. I don't think the prosecutor has ever debated that
24 the reason why the - - - the expert wasn't called wasn't
25 because of a preclusion-type ruling by the judge. But - -

1 - and - - - and the - - - the reconstruction record I think
2 is crystal clear on this. The reason why, and this is from
3 the defense attorneys - - - the reason why that expert
4 wasn't called was because they were afraid they were going
5 to be prosecuted for that - - - that.

6 Thank you for the extra time, Judge. I
7 appreciate it.

8 CHIEF JUDGE WILSON: Thank you.

9 MR. ROWCLIFFE: Good afternoon. May it please
10 the court. My name is Victor Rowcliffe. I'm a special
11 prosecutor and appearing on behalf of the respondent in
12 this case. I'll start out with obviously we were
13 discussing the - - - the - - - exhibits on the appeal here.

14 I would submit to the court that the trial
15 exhibits were not part of the reconstruction hearing. The
16 reconstruction hearing pertained to various issues
17 regarding voir dire, jury selection, opening and closing
18 statements, as well as some of the missing testimony that
19 was inconsistent. And I would submit to you, there was not
20 an issue before the court at the reconstruction hearing
21 whether or not there was a missing exhibit, whether the
22 admissibility of any of those exhibits - - -

23 CHIEF JUDGE WILSON: Well, you - - - but - - -
24 but you were able to use the exhibits and figuring out what
25 things you might want to ask the people who are testifying

1 at the reconstruction hearing, correct?

2 MR. ROWCLIFFE: It was - - - that's - - - that's
3 possible, but I did not do that.

4 CHIEF JUDGE WILSON: You didn't refer to them at
5 all?

6 MR. ROWCLIFFE: No.

7 CHIEF JUDGE WILSON: I - - - I didn't mean in
8 open court. I mean, you didn't look at them to try and
9 figure out what to ask people.

10 MR. ROWCLIFFE: No, Your Honor. I looked at the
11 - - - what witnesses' testimony was - - - that we were - -
12 - were missing, and I asked the attorneys, both the - - -
13 and - - - and the - - - and the judge and his notes
14 regarding what their testimony was and what was missing in
15 order to reconstruct that record, to adequately preserve
16 the defendant's right to appeal on that matter.

17 JUDGE CANNATARO: And you didn't use the exhibits
18 to inform your questioning about what the areas that might
19 have been covered were during that testimony?

20 MR. ROWCLIFFE: No, it was not necessary.

21 JUDGE CANNATARO: You're just - - - you said,
22 tell us what was said?

23 MR. ROWCLIFFE: It was not necessary, Your Honor.
24 The exhibits weren't - - - there wasn't any issue. There
25 were - - - they were - - - the exhibits were admitted

1 without objection. There wasn't an issue that was relevant
2 to the reconstruction proceeding.

3 JUDGE CANNATARO: Okay.

4 MR. ROWCLIFFE: It's the People's position
5 further, Your Honor, in the course of our appeal that the -
6 - - the reconstruction hearing adequately conducted was
7 conducted and that the defendant had all the ability to
8 raise any issues on appeal. And in fact, in this case,
9 it's the People's position, that the defendant hasn't
10 really raised any issues on appeal. It's a matter of
11 speculation.

12 JUDGE RIVERA: What about his point regarding the
13 weight of the evidence?

14 MR. ROWCLIFFE: I'm sorry, Your Honor?

15 JUDGE RIVERA: What about his argument regarding
16 the weight of the evidence review - - -

17 MR. ROWCLIFFE: Certainly, Your Honor, we could -
18 - -

19 JUDGE RIVERA: - - - as unique to the Appellate
20 Division?

21 MR. ROWCLIFFE: Absolutely. We can - - - it's
22 the People's position regarding the weight of the evidence
23 that there is sufficient evidence with the original record,
24 as well as the - - - the reconstruction hearing to show,
25 one, that the defendant here in this case committed these



1 crimes and every element that was - - - the People had to
2 prove.

3 JUDGE RIVERA: But weight of the evidence is not
4 a sufficiency, right? Those are two separate - - -

5 MR. ROWCLIFFE: Yes.

6 JUDGE RIVERA: - - - exercises, I'll call them.

7 MR. ROWCLIFFE: Correct, correct. I'm sorry.
8 The - - - the evidence showed that the defendant on - - -
9 on three occasions on the evening that this occurred,
10 traveled to the victim's house. In each process, there's
11 video, telephone recordings of the defendant returning to
12 the house with his co-defendant unloading the car with
13 property.

14 On the last video, it shows that the - - - the
15 co-defendant was carrying a torch into the house. You have
16 the testimony of the People's experts in this case that
17 testified that they found the - - - the fire had started in
18 the - - - in the basement of this house outside the wood
19 stove. The defendant, when he was - - -

20 JUDGE CANNATARO: All of this is the trial
21 evidence, right?

22 MR. ROWCLIFFE: Correct.

23 JUDGE CANNATARO: Did it make it into the
24 reconstruction, or was it not even an appropriate subject
25 of the reconstruction?

1 MR. ROWCLIFFE: Well, the - - - the judge's notes
2 covered a lot of that testimony that was missing. That
3 included some of that information as well.

4 JUDGE SINGAS: What about the certification of
5 the record that counsel brought up?

6 MR. ROWCLIFFE: I - - - I would submit to the
7 court that there are portions of the record that were
8 certified and - - - and signed by the court reporter. Yes,
9 there was missing - - -

10 JUDGE CANNATARO: Were they appropriately
11 certified by the court reporter?

12 MR. ROWCLIFFE: I - - - I'm sorry?

13 JUDGE CANNATARO: Were they certified in the
14 manner prescribed by law?

15 MR. ROWCLIFFE: I believe that they're - - -
16 they're signed by the court reporter to the best of her
17 ability the - - - the - - - the various dates of the trial.

18 JUDGE SINGAS: So are you saying that the - - -
19 that what was available was certified?

20 MR. ROWCLIFFE: Yes.

21 JUDGE SINGAS: Okay.

22 JUDGE HALLIGAN: Is that recitation the standard
23 recitation, "to the best of my ability"? I thought not.

24 MR. ROWCLIFFE: I don't believe it is, but I
25 mean, there is - - -

1 JUDGE HALLIGAN: Why - - - why isn't that
2 problematic?

3 JUDGE CANNATARO: I mean, there's reason to
4 believe here that this reporter was not one of high
5 ability.

6 MR. ROWCLIFFE: I can't speak to why there are
7 the - - - the missing - - - what happened in the course of
8 why - - -

9 JUDGE HALLIGAN: I guess the question is, is, you
10 know, looking at that certification and seeing what are
11 evident serious gaps and some of the transcriptions, I'm
12 not even sure what to call them, are - - - are pretty
13 concerning, so why shouldn't that cast doubt on the rest of
14 what we have before us?

15 MR. ROWCLIFFE: Well, I think it does, Your
16 Honor, and I think that's why we're here. I mean - - -

17 JUDGE HALLIGAN: I mean, with respect - - - yes.
18 But I mean, why shouldn't that make us ask whether or not a
19 reconstruction hearing was appropriate in the first
20 instance at all? If there had been no record at all, would
21 a reconstruction hearing have been appropriate in your
22 view?

23 MR. ROWCLIFFE: Yes, Your Honor. I think your -
24 - - your precedent on regarding reconstruction hearings,
25 it's - - - it's not favorable to automatically reverse a

1 case and have a new trial just because there's something
2 missing in the transcript.

3 JUDGE HALLIGAN: No, I'm asking if - - -

4 JUDGE CANNATARO: If there's no record.

5 JUDGE HALLIGAN: - - - there if there was no
6 record at all. Zero.

7 MR. ROWCLIFFE: Well, I think that would have
8 been - - - that's Rivera's decision. However, I think
9 we're - - - this case is much different than Rivera.

10 JUDGE HALLIGAN: Yeah, but what I'm trying to
11 understand is - - - is differentiating it, I think, rests
12 on the proposition that what we do have in front of us has
13 some integrity, right? And so what I'm asking is, why
14 shouldn't, you know, the errors, the - - - the - - - let's
15 call it unorthodox certification, cast doubt on the rest of
16 what is - - - is, you know, has survived prior to the
17 reconstruction hearing?

18 MR. ROWCLIFFE: I think when you look at what
19 survived, Your Honor, I think there is consistencies, and
20 you have the presumption of regularity that - - - and when
21 you look at that stuff, when you look at the evidence and
22 those - - - what was provided with the irregularities,
23 there is some consistency, and it makes sense. It flows
24 until you hit those areas that are missing. And then I
25 think, Your Honor, when you add everything together, the -

1 - - the missing transcripts, the reconstruction hearing,
2 and what we did have, and when you put those together, I
3 think that provides an adequate basis for the defendant to
4 have a fair appeal. Certainly - - -

5 JUDGE RIVERA: It's not just that it's missing,
6 it's that the - - - it's transcribed as blah, blah, blah,
7 and in certain portions, it strikes me - - -

8 MR. ROWCLIFFE: It is.

9 JUDGE RIVERA: - - - that that is very troubling.

10 MR. ROWCLIFFE: It - - - yes, Your Honor. That -
11 - - that is problematic, and I think that's why we had - -
12 - we - - - we had a reconstruction hearing, and we were
13 able to do so. We had the - - - the trial judge. We had
14 the - - - the attorneys testify to fix those gaps and to
15 fix those irregularities.

16 JUDGE CANNATARO: So this portion of your
17 argument seems to imply, and you can push back if you think
18 I'm wrong. There is a level, you know, it's not just no
19 transcript at all would - - - would make a reconstruction
20 hearing futile. There's a level below which you can fall
21 where reconstruction just isn't going to be helpful. Is
22 that what you're saying?

23 MR. ROWCLIFFE: I - - - I - - - I would submit to
24 the court, and I think my reading of the prior decisions
25 are - - - I think it's a factual determination that the

1 defendant has to allege that a reconstruction hearing is
2 impossible. All right, and I think there in Rivera and
3 Harrison, the reconstruction hearings were impossible - - -

4 JUDGE CANNATARO: Is it simply that it's
5 impossible? So it - - - so to - - - to revisit your
6 answer, to Judge Halligan's question, if there's no record
7 whatsoever, but there's a claim that the reconstruction
8 hearing is possible, we could reconstruct everything that
9 happened at the trial?

10 MR. ROWCLIFFE: I believe you - - - I believe
11 that - - -

12 JUDGE CANNATARO: Still get one?

13 MR. ROWCLIFFE: I believe you - - - yes, I
14 believe you have the opportunity to at least - - - if the
15 parties are available, I believe you can. Yes.

16 JUDGE RIVERA: Because the goal is to provide a
17 record sufficient to identify appealable issues and proceed
18 with appellate review?

19 MR. ROWCLIFFE: Yes, and to ensure that the
20 defendant has a - - - a fair and appropriate review on
21 appeal of all the appropriate issues.

22 CHIEF JUDGE WILSON: So what if defense counsel
23 had not been available at all for some reason, so all you
24 had is the People's recollection and the trial judge's? Do
25 you have any fairness concerns there?

1 MR. ROWCLIFFE: I mean, it's certainly not ideal.
2 I mean, but I - - - but I still think you can - - - I - - -
3 you had the - - - the - - - with the trial judge, there's
4 other ways. There's many different ways that a record can
5 be reconstructed. If one of the parties isn't available,
6 that certainly is a factor for the court to determine.
7 Yes.

8 And in regard to counsel - - - or your - - - Your
9 Honor's question regarding the - - - the judge's decision,
10 I - - - I - - - I don't believe the record indicates that
11 the judge did issue a decision on the prosecutor's motion
12 to preclude the expert testimony of the defendant.

13 JUDGE MACKEY: Well, he says he made a ruling, so
14 do we have any - - - do we know what the ruling was?

15 MR. ROWCLIFFE: I think in the - - - no, Your
16 Honor. I don't believe there was a ruling. There was - -
17 -

18 JUDGE MACKEY: So you think he misspoke when he
19 said there was a ruling, or that was an error in the
20 transcript? Because I don't see a ruling anywhere, and I
21 think it's important if we do get to that substantive issue
22 of preclusion of the arson expert to know what the ruling
23 was regarding that and whether there was an objection filed
24 to it.

25 MR. ROWCLIFFE: That issue regarding the - - -

1 the - - - the People's motion to preclude the defendant's
2 expert witness was discussed on multiple occasions, and
3 it's in portions of the original transcript that was not
4 portions - - - it was not part of the reconstruction
5 hearing, and I don't believe that they tabled the issue.
6 They - - - the prosecutor made his arguments on the record.
7 They adjourned for the night. And then the next morning,
8 the defendant withdrew his request to call that expert as a
9 witness. I don't believe there is a record of the judge
10 ever - - - the trial judge ever making a decision one way
11 or the other regarding that.

12 JUDGE MACKEY: I agree. I mean, we don't know
13 what the decision was other than he says he made a ruling.

14 MR. ROWCLIFFE: Right. I - - - I understand.
15 Yeah. I think the process was, and it was contemplated,
16 that the expert would be subject to a voir dire prior to
17 testifying, and I think then the judge would have made a
18 ruling after that process, but then that never happened, so
19 I don't believe the trial judge ever issued a ruling on the
20 prosecutor's preclusion argument.

21 JUDGE MACKEY: Essentially, if you - - - if you
22 look at the substance of that issue, if it was preserved,
23 and if we could get to it. It's the - - - the District
24 Attorney essentially said that the defendant's arson
25 expert, in order to look at - - - because he looked at the

1 stove, he violated the General Business Law and would be
2 charged with a crime if he testified?

3 MR. ROWCLIFFE: The - - - prosecutor made two
4 arguments, Your Honor. One, first, was that there was a
5 late disclosure of his report. The second argument was
6 that the - - - the - - - the expert was acting as a private
7 investigator and was not licensed by New York State to do
8 so, which would be a violation of the General Business Law.

9 JUDGE MACKEY: So now the expert, he didn't go
10 out and look for and find, like, track down evidence or
11 witnesses or anything that you'd expect a private
12 investigator to do. I mean, he was just an expert who, in
13 order to have a foundation for his opinion, had to look at
14 the evidence, right? I mean, doesn't it seem a little far-
15 fetched?

16 MR. ROWCLIFFE: I think he was not licensed. If
17 he was called as an expert witness, he was going to give an
18 opinion as to the origin of the fire, which would be in
19 violation. He was not a licensed private investigator,
20 Your Honor, and I - - -

21 JUDGE CANNATARO: What - - - what - - - I - - - I
22 don't understand the - - - the connection between being a
23 licensed private investigator and offering an opinion as to
24 the origin of a fire. Could you just explain that to me?

25 MR. ROWCLIFFE: Under the - - - I - - - I think

1 it's the General Business Law, Section 70, that requires if
2 you are going to - - - the statute says if you are going to
3 give an opinion as to an origin of the fire, you have to be
4 a licensed private investigator.

5 JUDGE CANNATARO: The statute actually - - -

6 JUDGE MACKEY: It - - - it says if you're going
7 to investigate, not if you're going to give an opinion.

8 MR. ROWCLIFFE: Investigate.

9 JUDGE MACKEY: And if you're correct about that,
10 then wouldn't any, like, accident or reconstruction expert
11 be committing a crime if they - - - they go look at the
12 vehicles that were involved, or an engineer in a product
13 liability case if they look at the equipment involved. By
14 extension here you're saying they're all committing crimes?

15 MR. ROWCLIFFE: I don't believe I'm saying that.
16 I - - - I - - - I think that the - - - the statute
17 specifically discusses the fire investigation.

18 JUDGE MACKEY: Fires and accidents. All right.

19 JUDGE CANNATARO: So the problem was that this
20 person went there, went to the location and looked at it.
21 Because I - - - I think you might be saying if they had
22 simply looked at the police investigation, looked at the
23 photographs. That - - - and I think you'd concede that
24 police are allowed to investigate scenes.

25 MR. ROWCLIFFE: I would hope so.

1 JUDGE CANNATARO: Yeah. So if they just looked
2 at what the law enforcement had done then and then offered
3 an opinion, you would not have had the same objection, or
4 would you still object?

5 MR. ROWCLIFFE: I believe that the prosecutor was
6 still going to object.

7 JUDGE MACKEY: Because that's what he did. He
8 just looked at what the State police had at the State
9 police barracks, right, by consent?

10 MR. ROWCLIFFE: Yes.

11 JUDGE MACKEY: I mean, there was an appointment
12 made.

13 MR. ROWCLIFFE: Yes.

14 JUDGE MACKEY: He went down, looked at it with
15 the consent of the People and the police, and that's
16 alleged to be a crime.

17 MR. ROWCLIFFE: Right.

18 JUDGE MACKEY: And defense counsel, if they put
19 him on the stand, they were threatened that they could be
20 charged as accessories?

21 MR. ROWCLIFFE: That - - - I think that was the
22 argument the prosecutor made. I - - - I wouldn't call it a
23 threat, Your Honor. I think that when you read the record,
24 the prosecutor put these things out onto the record, and
25 part of his motion was, hey, this expert is not a licensed

1 individual. That - - - that was never ruled on by the
2 trial court, and the defendant withdrew his request for
3 that witness to testify.

4 JUDGE MACKEY: Didn't that create a conflict of
5 interest between defense counsel and the defendant?

6 MR. ROWCLIFFE: I would submit to the court, no,
7 that does not create a conflict of interest. It may be a
8 conflict between the defendant and - - - I'm sorry, the - -
9 - the attorneys and the expert witness, but not the
10 defendant. The defendant certainly - - - that was not an
11 issue involving - - - I want to make sure I get the right
12 language on that.

13 JUDGE MACKEY: Well, in the - - - in the
14 reconstruction, I think, both defense counsel testified
15 very clearly that the reason they didn't call him was they
16 were afraid of being arrested, that the DA brought BCI
17 investigators into the courtroom, ready to arrest the
18 witness, and they were concerned then. So why doesn't that
19 create a conflict between counsel, who is now worried about
20 being arrested if they put this witness, who presumably is
21 going to give testimony beneficial to the defendant, on the
22 stand?

23 MR. ROWCLIFFE: The - - - an - - - an attorney
24 should never be allowed to violate their ethical duties and
25 call witnesses that potentially could be violating the law.

1 That's not a conflict between the defendant and the
2 attorney. It's an issue that is more before the witness
3 and the defendant.

4 CHIEF JUDGE WILSON: Thank you.

5 MR. ROWCLIFFE: Thank you, Your Honor.

6 MR. ABBATOY: I'd like to say a few words about
7 the preservation, the expert issue, because I think in - -
8 - in the course of your discussion with Mr. Rowcliffe, it
9 maybe came into focus a little bit more than what you're
10 asking initially.

11 So for the purposes of the - - - let's call it
12 the criminality issue that we're presenting here, there
13 are, I think, three ways that we're asking this court to
14 review this as a question of law.

15 I'm not sure if your question, Judge Mackey, is
16 implying that perhaps this isn't preserved. There's a
17 couple of methods we ask this court to review this as a
18 question of law.

19 First, counsel's ineffectiveness. If - - - if
20 counsel is not objecting at that point or the court sees
21 some failure with respect to counsel's litigation of this
22 issue, you can review this as a matter of ineffectiveness.

23 Second, I think the court should perhaps examine
24 some - - - some of its former cases with respect to whether
25 an objection was truly available to counsel at that time.

1 I don't think the court could have necessarily ordered the
2 prosecutor not to prosecute or file charges against the
3 defense expert or the defense attorneys at that time. I
4 think separation-of-powers issue, sort of, precludes that,
5 so it's not like a motion could have been made on that
6 subject.

7 But the final question of law that, I think,
8 presented to this court, is the one under Wandell, that - -
9 - or when this court that - - - the - - - is the one that
10 this court explained when it decided Wandell, which I cited
11 in my reply brief, where the court discusses, essentially,
12 the requirement of, not just defense counsel, but also the
13 judge to sort out this issue.

14 And the fact of the matter is, I think on this
15 record, the prosecution can't have it both ways. It either
16 was perfectly justifiable in accusing these folks of a
17 crime or it wasn't, and there was no good-faith reason to
18 do it. But if there was a good-faith basis to accuse these
19 folks of a crime, which is what I heard the prosecutor just
20 argue, then there's absolutely a conflict that had to be
21 revealed to the defendant at that point. The record is
22 clear that that is - - - that did not happen at that point.

23 CHIEF JUDGE WILSON: Well, counsel could have - -
24 - could have opposed the motion to preclude and prevailed
25 on that.

1 MR. ABBATOY: The motion - - - there were - - -
2 with respect to timeliness. Yes.

3 CHIEF JUDGE WILSON: No, not with respect to
4 timeliness, with respect to the preclusion on the grounds
5 of criminality. That is, the court could have said this is
6 a misinterpretation of the statute, and I'm not precluding
7 the witness on that basis. That would have removed any
8 conflict.

9 MR. ABBATOY: I don't - - - I - - - I don't
10 believe that the court could have, for example, made a
11 ruling that would have essentially given the witness and
12 the defense attorneys immunity, which I think is what the
13 court might be suggesting.

14 To the contrary, I think, and I - - - I - - - I
15 don't have it at my fingertips, but I - - - I know there's
16 case law that says that the court does not have the
17 authority to grant immunity under those circumstances to
18 testifying witnesses. Nonetheless - - -

19 JUDGE CANNATARO: So wait a minute. If - - - if
20 the defense allowed the expert to go on the stand, outside
21 the presence of the jury, for a voir dire about whether or
22 not he was qualified - - - he or she was qualified to
23 testify, and the judge made a ruling on whether or not to
24 preclude the witness. That - - - is it your argument that
25 that could also be a prosecutable crime on the part of the

1 defense attorney?

2 MR. ABBATOY: That's not our position. It's sort
3 of assuming arguendo - - -

4 JUDGE CANNATARO: No, no, no. But you said - - -

5 MR. ABBATOY: Right.

6 JUDGE CANNATARO: - - - he couldn't do that
7 because he had fear of being prosecuted.

8 MR. ABBATOY: He had fear of being prosecuted
9 because of the threat from the prosecutor. And I - - - I
10 don't - - - I didn't see this as a question being raised
11 with respect to the qualifications of the expert, but only
12 with respect to whether they were licensed in the State of
13 New York.

14 JUDGE CANNATARO: But doesn't that go to - - -
15 that's just essentially a question of qualification. Is
16 the witness competent to testify or not?

17 MR. ABBATOY: No, because in - - - in - - - I
18 think it - - - it is absolutely clear that a - - - a fire
19 expert can testify as an expert witness and be qualified as
20 an expert. But perhaps, for example, under the scenario
21 that Judge Mackey gave, not have conducted an investigation
22 as defined by the General Business Law, so it's not a
23 question of their, like, educational qualifications to
24 testify.

25 I think the court does have jurisdiction over

1 that question, but the threat is nonetheless there. It's -
2 - - it's there from a public official that has the
3 authority to follow through on it, regardless of the
4 court's ruling with respect to whether that person could
5 testify.

6 And - - - and the - - - the record before this
7 court doesn't require any speculation from - - - from this
8 court with respect to why the person didn't ultimately
9 testify. The defense attorneys clear that up. They clear
10 that right up and say the reason why we didn't call the
11 person is because there was this threat of us being
12 prosecuted, so that is what directly raised, at a minimum,
13 the threshold question of whether a Wandell and Gomberg-
14 type inquiry should have been done at that point.

15 CHIEF JUDGE WILSON: Thank you.

16 MR. ABBATOY: Thank you, thank you.

17 (Court is adjourned)

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

I, Dani Lewter, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Meyers (Joseph A.), No. 44, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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