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COURT OF APPEALS

STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,

Appellant, Papers Sealed

-against-

No. 187

KEVIN W. ,

Respondent.

20 Eagle Street
Albany, New York 12207
October 10, 2013

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE VICTORIA A. GRAFFEO
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE ROBERT S. SMITH
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM

Appearances:

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Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: We're going to take
2 the first case, number 187, People v. Kevin W.

3 Counselor? Would you like any rebuttal
4 time, counselor?

5 MS. FENN: Yes, Your Honor, four minutes,
6 please.

7 CHIEF JUDGE LIPPMAN: Four minutes, okay.
8 You have it. Go ahead.

9 MS. FENN: Assistant District Attorney
10 Danielle Fenn for appellant Richard A. Brown. May it
11 please the court.

12 CHIEF JUDGE LIPPMAN: Counselor, let me ask
13 you a question. Could one look at the circumstances
14 here and say that the - - - the People are being
15 given a second bite of the apple, sort of, with all
16 the parameters established, before they even get to
17 the second hearing or the reopened hearing?

18 MS. FENN: Your Honor, in this case, it was
19 proper for the trial court to reopen the hearing.
20 First, Havelka doesn't apply pre-trial. Those are
21 post-trial decisions where cases were remanded while
22 an appeal was held in abeyance, and it was remanded
23 for a reopened suppression hearing. But moreover,
24 even if Havelka does apply, in this situation the
25 reopening was proper, because the People cannot have

1 realized or anticipated - - -

2 CHIEF JUDGE LIPPMAN: Doesn't it put the
3 People at a real advantage, the second time, in
4 knowing, you know, how to approach the issues that
5 were involved?

6 MS. FENN: No, Your Honor, because the
7 Crandall exception, where there's a misapprehension
8 of law, applies in that situation where there's a
9 misapprehension of law that the People cannot have
10 anticipated before they rested at the initial
11 hearing. And in this case, the People cannot have
12 anticipated that the hearing court would need the
13 testimony of Sergeant Indiviglio (ph.).

14 JUDGE SMITH: Well, suppose there were not
15 a misapprehension of law, suppose this is identical
16 with Havelka except that it was the reconsideration
17 rather than an appeal, would you still say that the
18 rule should be different for reconsideration?

19 MS. FENN: Your Honor, in this case the
20 People moved to reargue, and the idea that a court
21 can reconsider its ruling is proper. The Court could
22 have many reasons, even if there's not a
23 misapprehension of law, why it might want to review
24 its ruling. For example, there might have been
25 witnesses that weren't available at the first

1 hearing, or it could be a case where - - -

2 JUDGE SMITH: Well, that's true - - -

3 MS. FENN: - - - the court decides - - -

4 JUDGE SMITH: Of course that's - - - well,
5 it's always true, in a Havelka situation, that maybe
6 the People could do better the second time. But
7 that's the - - - I guess Havelka says that's the
8 problem; we don't want them to be able to do better
9 the second time.

10 MS. FENN: Well, in Havelka there were
11 certain considerations that this court felt were
12 important. The - - - the fear that the defendant
13 would have the specter of renewed proceedings or that
14 there would be the tailoring of testimony from a
15 court that had already had a conviction that it wants
16 to uphold.

17 CHIEF JUDGE LIPPMAN: Isn't it your
18 obligation, counsel, to know whose testimony is
19 important here?

20 MS. FENN: Yes, Your Honor - - -

21 CHIEF JUDGE LIPPMAN: I mean, why - - -

22 MS. FENN: - - - and in this case - - -

23 CHIEF JUDGE LIPPMAN: - - - why don't - - -
24 figure out and do it and then - - - and then why
25 shouldn't you be stuck with the consequences? Why do

1 we say, okay, oh, you didn't do it right the first
2 time, let's let the - - - try again; let's get it
3 right until we get the result that we want. I'm just
4 saying it seems unfair to allow the People that kind
5 of flexibility. Just to - - - putting aside Havelka,
6 putting aside any case, doesn't it seem to you kind
7 of, gee, that someone might perceive that as not
8 being a level playing field?

9 MS. FENN: Your Honor, no. In this case,
10 there were three witnesses that testified at the
11 initial hearing, and when the People rested, they
12 reasonably believed that that was sufficient. It
13 wasn't until they received the JHO's decision that
14 they realized that the JHO - - -

15 CHIEF JUDGE LIPPMAN: But that's my point.

16 MS. FENN: - - - needed that.

17 JUDGE GRAFFEO: Couldn't they - - -

18 CHIEF JUDGE LIPPMAN: That's my point.

19 Okay, go ahead.

20 JUDGE GRAFFEO: Couldn't it be anticipated
21 that they were going to need both officers?

22 MS. FENN: In this situation, the People
23 could have reasonably believed that the fellow
24 officer rule applied and that the testimony of the
25 sending officer - - -

1 JUDGE GRAFFEO: And that - - -

2 MS. FENN: - - - wasn't necessary.

3 JUDGE GRAFFEO: And that was a risk to
4 take, wasn't it? If you've decided to rely on the
5 fellow officer rule, then maybe you have to live with
6 that determination, as opposed to bringing both
7 officers in.

8 MS. FENN: Well, in this case - - - and the
9 concern - - - in Crandall this court talked about a
10 balancing, that it needs to be fair for the defendant
11 but it also needs to be a chance where the People
12 have one opportunity to present all of their evidence
13 if there is a mistake of law. And in this case,
14 after resting, the People reasonably believed that
15 there was enough testimony, based on Officer Gunger's
16 (ph.) own observations at the train station, the
17 casing behavior that they matched the description - -
18 -

19 JUDGE ABDUS-SALAAM: Well, how is that a
20 mistake in law, counsel, that you reasonably believed
21 that what you presented was sufficient?

22 MS. FENN: Your Honor, it's a
23 misapprehension of law because the JHO thought that
24 they needed direct testimony of this gun signal when
25 the testimony at the initial hearing was enough. The

1 People established the basis for knowledge. It was
2 Officer - - -

3 JUDGE ABDUS-SALAAM: Well, I could see your
4 point if it were the other way around, if the offi -
5 - - if the second officer, who came in the second
6 hearing, testified first, because he was the one with
7 the most knowledge of the events on the subway. But
8 you presented the arresting officer, who didn't have,
9 apparently, full knowledge of all events on the
10 subway.

11 MS. FENN: The testimony of the arresting
12 officer provided the observations on the platform
13 before they got on the train and also the
14 observations what happened after they stopped the
15 defendant. The officer was on the same side of the
16 seat as the defendant, so he wasn't able to have a
17 direct view of the defendants while they were on the
18 train. But it was Sergeant Indiviglio who had an
19 unobstructed view of this hand gesture that Richard
20 made. And he conveyed to - - -

21 JUDGE ABDUS-SALAAM: But you knew that
22 before the hearing.

23 MS. FENN: It was - - - the People were
24 able to present the testimony of Officer Gunger, and
25 use this fellow officer rule, because they're working

1 together for one purpose, and that's to investigate
2 this robbery that happened two stations before; it
3 was on the same train line.

4 JUDGE SMITH: It sounds - - -

5 MS. FENN: So they also - - -

6 JUDGE SMITH: It sounds like you're arguing
7 that the JHO got it wrong the first time.

8 MS. FENN: Yes, Your Honor, he should - - -

9 JUDGE SMITH: But - - - and if that's the
10 case, then we don't have to worry about whether it
11 was right to reopen, I suppose, or at least that we
12 would limit the - - - it's not a very dramatic rule
13 to say well, if you got it right - - - if you got it
14 wrong the first time, you can re - - - you can reopen
15 and get it right. But suppose - - - suppose the
16 decision the first time was right, would they be - -
17 - would you say they'd still be permitted to reopen?

18 MS. FENN: I'm sorry, Your Honor, if the
19 suppression was - - -

20 JUDGE SMITH: If the JHO correctly
21 suppressed the evidence after the first hearing, does
22 the - - - does the trial court still have the
23 discretion to say, you know what, I think I'm going
24 to allow more - - - or reopen the hearing and hear
25 some more evidence?

1 MS. FENN: The trial court retains the
2 ability to control the proceedings. They can order
3 additional evidence. They can call - - -

4 CHIEF JUDGE LIPPMAN: Yeah, but I think the
5 judge's question, though, was very focused on if what
6 they had in - - - what the JHO had in front of him,
7 if he issued the right determination on the law or,
8 you know, that this was right, it should have been
9 suppressed, and then the DA comes in and says, you
10 know, if I can introduce some more evidence, I think
11 I could change his mind. Is that the way this should
12 work?

13 MS. FENN: Well, the trial - - -

14 CHIEF JUDGE LIPPMAN: Do you follow - - - I
15 think that's what Judge Smith was saying. Is that
16 your view, that okay, let's see if we can get a
17 different result if we give more evidence?

18 MS. FENN: Your Honor, in this case the
19 trial court should have the discretion. The People
20 moved to reargue and then, at some point, wanted to
21 call an additional witness. And the trial court
22 should have the discretion to make those rulings - -
23 -

24 CHIEF JUDGE LIPPMAN: Even in the - - -

25 MS. FENN: - - - whether they want - - -

1 CHIEF JUDGE LIPPMAN: - - - circumstance
2 where the JHO got it right? Based on what the JHO
3 had in front of him, got it right, does the trial
4 court have the discretion to open it up and say, oh,
5 let's get some more witnesses, maybe we'll get a
6 different result?

7 MS. FENN: In this case - - -

8 CHIEF JUDGE LIPPMAN: Do you follow my
9 question?

10 MS. FENN: Yes, Your Honor.

11 CHIEF JUDGE LIPPMAN: What's the answer?

12 MS. FENN: In this case, there was
13 something that the JHO wanted that the People could
14 not have anticipated, so the trial court reasonably
15 allowed the People to provide the evidence that the
16 JHO obviously wanted, this direct testimony of the
17 gun signal.

18 JUDGE RIVERA: So your argument, unless I'm
19 misunderstanding you, is not that the JHO was
20 applying the incorrect legal standard.

21 MS. FENN: He misapprehended the law that
22 we needed this sending officer. The testimony at the
23 initial hearing was sufficient, based on Officer
24 Gunger's own observations, and then his reliance on
25 the information provided by his partner, who had

1 direct knowledge of this gun signal. He could
2 reasonably - - -

3 JUDGE SMITH: Is sufficiency the test that
4 is - - - well, suppose both sides could have produced
5 suffi - - - could have presented sufficient evidence.
6 You could have - - - you can certainly have a case
7 where the evidence is sufficient to support either
8 result on a mixed question. Does that - - - is that
9 enough, if the People's case was legally sufficient,
10 but so was the case in favor of suppression and the
11 JHO and the suppression court actually sitting - - -
12 exercising their power to decide mixed questions,
13 decided in the defendant's favor? Is that - - - as a
14 general rule, is it okay to reopen the hearing?

15 MS. FENN: It should be within the trial
16 court's discretion. There could be a number of
17 reasons why a trial court should want to reopen a
18 hearing. And it could be a case where the trial
19 court has a concern about whether they got it right
20 or maybe it's - - -

21 CHIEF JUDGE LIPPMAN: But would it have
22 been different if the JHO said I don't have
23 everything I need, and then the judge opened it up,
24 obviously within its discretion, right?

25 MS. FENN: Yes, Your Honor.

1 CHIEF JUDGE LIPPMAN: But the JHO didn't
2 say that; the JHO issued a ruling based on what he
3 had in front of him.

4 MS. FENN: Yes, Your Honor, but it wasn't
5 until that ruling that the People realized that the
6 JHO felt he needed this additional testimony, direct
7 testimony - - -

8 CHIEF JUDGE LIPPMAN: Oh, no, the People
9 felt that he needed more, right?

10 MS. FENN: In the decision he talks about
11 two things. One was he called the description
12 general. And then he said there was testimony - - -
13 there should have been testimony or they needed
14 testimony that whether Sergeant Indiviglio's
15 observation - - - it was reasonable to think that - -
16 -

17 CHIEF JUDGE LIPPMAN: Yeah, but because
18 there wasn't, he decided the way he decided.

19 MS. FENN: Yes, Your Honor, but it wasn't
20 until that ruling that the People realized that - - -

21 CHIEF JUDGE LIPPMAN: Oh, I should have
22 presented other evidence.

23 MS. FENN: Or - - -

24 CHIEF JUDGE LIPPMAN: What I'm saying is,
25 it seems to me odd that the JHO, in effect, draws the

1 map by saying why he decides. And the People could
2 go back and then say, okay, now I see what you want,
3 I'm going to go and say whatever and now we can get a
4 different result, and the People did. My question,
5 again, is, is that fair?

6 MS. FENN: Yes, Your Honor, because the
7 trial court could have the discretion, and there's no
8 reason why a trial court could say I don't think
9 there's enough, I'm not going to give you another
10 chance.

11 CHIEF JUDGE LIPPMAN: So your answer really
12 is if the trial court thinks it's fair to open it up,
13 they have the discretion to do so.

14 MS. FENN: No, Your - - - - not whether
15 the trial court thinks it's fair, but the trial court
16 has discretion for a number of rulings or being able
17 to control the proceedings. And in this case, the
18 trial court should have the discretion about whether
19 to reopen.

20 CHIEF JUDGE LIPPMAN: So let me put it
21 another way; the trial court has almost unlimited
22 discretion to reopen - - - I'm not saying that - - -
23 one way wrong or right, but your argument is the
24 trial court basically has unlimited discretion to
25 reopen it?

1 MS. FENN: The trial court should be vested
2 with the discretion whether to reopen or not. The
3 trial court can always say no, I'm not going to let
4 you do that. But in this case, the People moved to
5 reargue and the trial court properly allowed them - -
6 -

7 CHIEF JUDGE LIPPMAN: Okay.

8 MS. FENN: - - - to call this additional
9 witness.

10 CHIEF JUDGE LIPPMAN: Counselor, you'll
11 have your rebuttal. Let's see what your adversary
12 has to say.

13 MR. LEVINE: Good afternoon, Your Honors.
14 Joshua Levine for - - -

15 CHIEF JUDGE LIPPMAN: Counselor, why
16 shouldn't the judge have the discretion?

17 MR. LEVINE: Because the - - -

18 CHIEF JUDGE LIPPMAN: Why not? What's
19 wrong - - -

20 MS. FENN: The - - -

21 CHIEF JUDGE LIPPMAN: What's wrong with it?

22 MR. LEVINE: The judge does - - -

23 CHIEF JUDGE LIPPMAN: People now see, oh, I
24 see what evidence was needed there. Why is that not
25 appropriate and within the judge's discretion?

1 MR. LEVINE: To answer that question, I'd
2 like to focus on something my adversary said.

3 CHIEF JUDGE LIPPMAN: Go ahead.

4 MR. LEVINE: Stated that the JHO said I
5 needed testimony. The JHO never said I needed
6 testimony.

7 JUDGE SMITH: Well, but the judge
8 implicitly said it by ordering the reopening.

9 MR. LEVINE: No.

10 JUDGE SMITH: He said I want more.

11 MR. LEVINE: Actually, no, the judge did
12 not say that. The judge said - - -

13 JUDGE SMITH: Well, but by ordering a new
14 hearing - - - I mean, the only reason to order it is
15 you think there should be - - - is you think you'd
16 like to have some more testimony.

17 MR. LEVINE: Actually, no, Your Honor,
18 because the judge was quite clear. He stated, "To
19 cut to the chase" - - - this is a quote - - - "To cut
20 to the chase, he" - - - referring to the prosecutor -
21 - - "wanted to present another witness". That was
22 the only reason given. The judge never makes - - -

23 JUDGE SMITH: You think the judge was under
24 the impression that he didn't have the power to
25 overrule the prosecutor's wish?

1 MR. LEVINE: I'm not sure I understand the
2 question.

3 JUDGE SMITH: You think the judge was just
4 following the prosecutor's orders?

5 MR. LEVINE: No, not following the
6 prosecutor's orders, but - - -

7 JUDGE SMITH: I mean, he obviously made a
8 judgment that it was a good idea to give the
9 prosecutor that opportunity.

10 MR. LEVINE: No, the court made a judgment
11 that because the People wanted to present another
12 witness that it would allow them. That's not - - -

13 CHIEF JUDGE LIPPMAN: What would have been
14 okay for the prosecutor to say that - - - that would
15 have made the judge reopening it okay? What if he
16 said I want to give another witness - - - because
17 why? What would have been - - - made it - - - made
18 it within the judge's discretion to reopen it?

19 MR. LEVINE: Just about nothing I can think
20 of, Your Honor. This was - - - the People did not
21 ask to do this until more than five-and-a-half months
22 after the judge had adopted - - - without
23 reservation, had adopted the JHO's findings of facts
24 and conclusions of law and ordered the property
25 recovered suppressed.

1 JUDGE ABDUS-SALAAM: So counsel, is it the
2 timing of the motion to reargue that you're
3 complaining about? If it had been done, say, fifteen
4 or twenty days after the decision was rendered - - -

5 MR. LEVINE: Actually, Your Honor, if it
6 had been done one minute after the decision had been
7 handed down, it would have been improper, because the
8 People had been handed a roadmap of what was wrong
9 and what was missing from their presentation. It
10 would have been entirely wrong. Whether it's five-
11 and-a-half months or five minutes would have made no
12 difference in this case.

13 JUDGE SMITH: So reopening is always wrong?

14 MR. LEVINE: No, reopening is not always
15 wrong. Both of our briefs are filled with examples
16 of where reopening is proper. Crandall is one of
17 those. The People are relying on Crandall, but
18 Crandall supports my position entirely.

19 JUDGE SMITH: Isn't there a value to giving
20 a judge discretion to say look, I - - - it may be the
21 People's fault, it may be - - - it may be the
22 witness' fault, it may be nobody's fault, but I think
23 an injustice has been done here, and I think it's
24 worth the trouble and the risks and everything else
25 to have another hearing and get the right result.

1 MR. LEVINE: To rule that way would render
2 a meaningless hash of the venerable Havelka-Bryant
3 rule. Havelka is thirty-five years old. Bryant is
4 thirty-eight years old. It works in this court.

5 JUDGE SMITH: But isn't there something to
6 be said for the People's point that it's one thing to
7 order a new suppression hearing after the guy's been
8 convicted when there's a tremendous natural impulse
9 to uphold the previous conviction, and it's another
10 thing when you have a judge essentially reversing his
11 own decision, where the natural impulse, as everyone
12 knows, is to stick to your decision. But here's a
13 judge who says, yeah, I'm not satisfied, I don't - -
14 - I'm not satisfied with the record, I'm not
15 satisfied with what I decided. Why shouldn't he be
16 allow - - - and the case hasn't been tried yet. It's
17 not as though you're - - - you're going on forever.

18 MR. LEVINE: The problem is the same risk
19 of tailoring, whether unconscious or conscious, that
20 this court ruled about in Havelka, is present in this
21 situation.

22 JUDGE SMITH: Has there ever been a trial
23 without the risk of tailoring of the police witness'
24 testimony - - - trial or hearing?

25 MR. LEVINE: That's - - - that's - - -

1 forgive me, but I think that that's an odd question.

2 But here we have to not lose focus - - -

3 JUDGE SMITH: On the - - -

4 MR. LEVINE: - - - of the fact that there

5 was - - -

6 JUDGE SMITH: It is an odd question, but

7 the point of it is that the risk of tailoring is a

8 risk that is run every day.

9 MR. LEVINE: It's in their - - -

10 JUDGE SMITH: And there are other things to

11 worry about, beside the risk of tailoring, including

12 - - - including the simple risk of injustice of

13 getting the wrong result. Isn't that entitled to

14 some weight?

15 MR. LEVINE: But here the tailoring was - -

16 - happened after the court had issued a decision

17 stating exactly what was lacking in the People's

18 case.

19 CHIEF JUDGE LIPPMAN: Well, how - - - does

20 it matter that we're dealing with a JHO and the judge

21 here?

22 MR. LEVINE: None whatsoever. There's no

23 difference whatsoever. The - - -

24 CHIEF JUDGE LIPPMAN: The JHO stands in the

25 shoes of the judge?

1 MR. LEVINE: Well, if the judge, as the
2 judge did here, adopts, without reservation, the
3 findings of fact and conclusions of law, as the
4 People pointed out in their reply brief, Scalza, I
5 believe was the name of the case where that was a
6 challenge to the very existence of the JHO. But the
7 court pointed out that a judge has the same plenary
8 powers when there's a JHO as when there's not a JHO.
9 So if the judge was not clear, if the judge didn't
10 understand, if the judge needed clarification, as was
11 not the case here, the judge can ask for that. But
12 that didn't happen here. The People just were
13 permitted to reopen because they wanted to. That's
14 not a reason.

15 JUDGE SMITH: Well, what if - - - what if
16 the People came to the judge and said, Judge, I think
17 you need some clarification, and the judge said,
18 yeah, I agree with you. Can he do that?

19 MR. LEVINE: Then the judge has made a
20 decision that it needs clarification.

21 JUDGE SMITH: I see. So that - - - the
22 case I just put would be a different case?

23 MR. LEVINE: Very different case. There
24 was no lack of clarity in this case. As to - - -
25 let's say - - -

1 JUDGE SMITH: There was no lack of clarity?
2 I mean, wasn't the whole point of calling the second
3 officer to see what the first officer really did - -
4 - really was relying on?

5 MR. LEVINE: That's not a lack of clarity,
6 Your Honor, that's a lack of proof by the People.
7 Those are two very different things.

8 JUDGE SMITH: Well, are they really?
9 Doesn't - - - isn't the purpose of a proof, to make a
10 proof, to make clear what happened?

11 MR. LEVINE: The purpose of proof is for
12 the People to set forth the basis for the stop, for
13 the police stopping the defendant. They had every
14 full and fair opportunity to do so. If they failed
15 to do so, they have to live with that. And they do
16 have remedies, of course. If they think, as the
17 People assert in this case, that the decision was
18 wrong, they can certify and appeal to the Appellate
19 Division. Or, as they initially pursued but
20 abandoned, they can move for reargument. They
21 cannot, though, as they stated in their reply brief,
22 just say, well, we're not limited to those because
23 the court granted us reopening. That's throwing the
24 ball to the court.

25 JUDGE SMITH: Suppose there's a suppression

1 hearing at which the defense lawyer makes a mistake
2 and decides not to call a witness who he later
3 realizes he should have called, and he goes to the
4 trial judge and says, Judge, I'm sorry, I made a
5 mistake, I want you to exercise your discretion in
6 the interest of justice to give this guy, you know -
7 - - this guy should not - - - should not have this
8 evidence - - - this evidence shouldn't be suppressed;
9 reopen it, let me call him. Does the judge not have
10 discretion to say yes?

11 MR. LEVINE: Oh, that's a tough question,
12 Your Honor.

13 JUDGE SMITH: I like that one.

14 JUDGE LEVINE: Does the judge not have
15 discretion to say yes? The judge, I think - - - I
16 think there is a difference. Havelka is about the
17 full and fair opportunity for the People. And I
18 think there is not the same danger of tailoring, in
19 that situation that Your Honor - - - this
20 hypothetical that Your Honor has stated, that there
21 is - - - that was realized in this case and that was
22 anticipated in Havelka. So I think those are two
23 different situations.

24 I would like to point out that the People
25 keep referring to an error of law in this case. But

1 the People, of course, what is that error of law?
2 They would say it's the failure of the first hearing
3 court to - - - to apply the fellow officer rule.
4 Well, I answer that - - - that in the brief. I
5 pointed out how the first hearing court referred to
6 the officer's observations and what Gunger had
7 gleaned from Indiviglio's communications to him. And
8 so the answer to that - - - this sets forth a classic
9 mixed question of law and fact. Did the court
10 properly apply the fellow officer rule and credit
11 Gunger's knowledge that was communicated to him by
12 Indiviglio? And so that is a question that's beyond
13 this court's power to review. This court cannot,
14 based on that record, decide that the first hearing
15 court was wrong.

16 And even though I have a little bit more
17 time, I think - - -

18 CHIEF JUDGE LIPPMAN: Up to you. Do you
19 have anything else?

20 MR. LEVINE: - - - if there are no
21 questions, I will - - -

22 CHIEF JUDGE LIPPMAN: Thank you, counselor.

23 MR. LEVINE: - - - otherwise rest on the
24 brief.

25 CHIEF JUDGE LIPPMAN: Appreciate it,

1 counsel.

2 MR. LEVINE: Thank you, Your Honor.

3 CHIEF JUDGE LIPPMAN: Counsel, rebuttal?

4 MS. FENN: Yes, Your Honor.

5 CHIEF JUDGE LIPPMAN: Counselor, what about
6 the five-and-a-half months? That's an awful long
7 time to be fooling around with this thing.

8 MS. FENN: Your Honor - - -

9 CHIEF JUDGE LIPPMAN: Why did it take you
10 five-and-a-half months?

11 MS. FENN: What happened was that after the
12 People received the decision, they said they wanted
13 an adjournment to consider what to do. Then by the
14 next adjournment the People said that they were going
15 to file a motion to reargue. They filed about three
16 weeks later. It was adjourned several times. Within
17 this time period that the court kept adjourning it
18 for a decision, it seems that sometime off the record
19 there was - - - the People wanted to call this
20 additional witness, and that was the - - - the
21 proceeding that defendant - - -

22 CHIEF JUDGE LIPPMAN: So the delay is not
23 due to you, in your mind?

24 MS. FENN: No, Your Honor. The People
25 filed the motion to reargue when they said they were

1 going to file it. It was adjourned by the court
2 several times. And it's not the concern in Havelka
3 where defendants are going to be haunted by the
4 specter of renewed proceedings, because defendant
5 knew right away that the People would challenge it.

6 Also, this court has jurisdiction to review
7 these claims. First, the propriety of the reopened
8 hearing is a question of law for this court's review.
9 Also, the claim about reasonable suspicion about the
10 initial hearing is reviewable because it's about the
11 minimum amount of evidence necessary to establish
12 reasonable suspicion. The parties are generally in
13 agreement about the basic facts: He was stopped, he
14 refused to present identification or answer
15 questions, and a gun was recovered from his backpack.
16 So the issue before this court is whether that was
17 enough to establish reasonable suspicion.

18 Also, regarding the JHO's decision, when
19 the People say that the JHO indicated or said that he
20 needed more, that's an inference from the decision.
21 The JHO never makes any comments on the record. But
22 it's an inference from the decision that that's what
23 he needed. He said the description was general and
24 there was no direct testimony about this gun signal.

25 Moreover, in Crandall, this court talks

1 about a balancing, that there's a balance between the
2 defendant's right against having unjust second
3 chances, and also the People's right to present
4 evidence and have a full opportunity to be heard.
5 And in this case - - -

6 CHIEF JUDGE LIPPMAN: Didn't they have a
7 full opportunity to be heard in the first session
8 with the JHO?

9 MS. FENN: Well, it's the People's position
10 that it falls under that exception for Crandall that
11 if there's a misapprehension of law. But this also
12 provides an opportunity for truth seeking.

13 JUDGE PIGOTT: Aren't there two - - - a
14 move to reargue is to say, Judge, you misunderstood
15 an issue of law and we want to clear that up for you;
16 let's reargue the law. You didn't do that. You
17 said, you know, obviously you didn't find sufficient
18 evidence so we want to bring in more evidence.

19 MS. FENN: Your Honor - - - I'm sorry.

20 JUDGE PIGOTT: And that wasn't - - - that
21 doesn't work, does it?

22 MS. FENN: Well, Your Honor, the People
23 initially moved to reargue. They could have either
24 appealed to the Appellate Division. They chose the
25 motion to reargue. While the - - - after the motion

1 was filed but while it was pending, at some point it
2 seemed that the People wanted to call this additional
3 witness. And it's the People's - - -

4 JUDGE PIGOTT: But - - -

5 MS. FENN: - - - position - - - I'm sorry.

6 JUDGE PIGOTT: No, I just - - - it just
7 seems to me that - - - I guess I'm just repeating
8 what everybody else says; get your act together and
9 have your hearing and win or lose, go. But don't get
10 your act together, lose, and then say, well, wait a
11 minute, I think I'm going to bring in some more
12 evidence here, and I've got a couple of witnesses out
13 in the hall that I could have called the first time
14 but now I'm going to call them the second time. That
15 just doesn't make sense. If the guy was sick and you
16 postponed the presentation of your entire case until
17 that officer was ready to testify, that would make
18 sense. But to rest, say here's our evidence, and
19 have the judge make a ruling that you don't like and
20 then say, well, then why don't we just put in more,
21 it just doesn't seem like the way our system works.

22 JUDGE RIVERA: And how many times do you
23 get to do that, by the way?

24 MS. FENN: Well, Your Honor, in this case
25 it's self-limiting because there was only one other

1 officer that was present.

2 JUDGE RIVERA: Well, in this case.

3 MS. FENN: But in this - - - in general, if
4 the trial courts have discretion, they can say I'll
5 give you one chance, or no, I'm not going to - - -
6 I'm not going to let you call five other officers,
7 all the partners. But the trial courts should have
8 that discretion to be able to retain control over the
9 proceedings and decide whether additional witnesses
10 can - - -

11 CHIEF JUDGE LIPPMAN: Counselor, an appeal
12 was not really a viable option here, right, based on
13 the record that you had the first time? I mean, it
14 makes sense, from your perspective, to go - - - to
15 try and get back to the JHO.

16 MS. FENN: Your Honor, in this case, the
17 People decided not to pursue it. I think that - - -

18 CHIEF JUDGE LIPPMAN: No, no, but I'm
19 saying to you that makes perfect sense, if the People
20 understand that based on the record the judge got it
21 right.

22 MS. FENN: Your Honor, it was the - - - the
23 People's choice to pursue reargument and then - - -

24 CHIEF JUDGE LIPPMAN: I under - - -

25 MS. FENN: - - - that's why it was

1 adjourned.

2 CHIEF JUDGE LIPPMAN: Okay. Thanks,
3 counsel.

4 MS. FENN: Thank you.

5 CHIEF JUDGE LIPPMAN: Thank you both.
6 Appreciate it.

7 MR. LEVINE: Thank you.

8 (Court is adjourned)

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

I, Sharona Shapiro, certify that the foregoing transcript of proceedings in the Court of Appeals of Matter of The People of the State of New York v. Kevin W., No. 187 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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