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COURT OF APPEALS
STATE OF NEW YORK

PEOPLE,

Appellant,

-against-

No. 17

DENNIS O'KANE,

Respondent.

20 Eagle Street
Albany, New York
January 10, 2018

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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Official Court Transcriber



1 CHIEF JUDGE DIFIORE: The next matter on this
2 afternoon's calendar is appeal number 17, the People of the
3 State of New York v. Dennis O'Kane.

4 MR. HORN: May it please the court, I'm Chris
5 Horn for the appellant, the People of the State of New
6 York. I'd like to reserve two minutes for rebuttal,
7 please.

8 CHIEF JUDGE DIFIORE: You may. Mr. Horn, is it
9 your position that on an ineffective assistance of counsel
10 claim that the court is foreclosed from looking at certain
11 portions of the record?

12 MR. HORN: Well, not precisely. I would say that
13 the - - - the rule in that instance is if the court
14 discovers an issue on its own that has not been raised by
15 opposing counsel - - - and in this case it was - - - it was
16 waived in the court below, it was not preserved, it was
17 consented to, and then it abandoned on the appeal, sure,
18 the court can look at the issue. But the first thing it
19 has to do just as a matter of due process and fundamental
20 fairness is give the parties notice of the issue - - -

21 JUDGE STEIN: But - - - but when - - -

22 MR. HORN: - - - and give them an opportunity to
23 be heard.

24 JUDGE STEIN: There are scores and hundreds and
25 thousands of - - - of appellate decisions probably



1 reviewing ineffective assistance of counsel claims. And -
2 - - and when that happens and the court - - - you agree
3 that the court is required to look at the totality of the
4 representation, right, so - - - so here are you saying that
5 County Court was - - - was not permitted to assess
6 defendant's allegation of ineffective assistance and say,
7 well, in and of themselves they don't get you over the hump
8 but - - - but when you add to it this problem that I - - -
9 that's right there in the record that I think is absolutely
10 abominal you get ineffective assistance of counsel. So
11 when a court does that sort of thing they have to go back,
12 send it back and say before I can consider this piece of
13 the record in determining overall representation I have to
14 give you an opportunity to be heard on that? Is - - - is
15 that what you're saying?

16 MR. HORN: That's exactly what I'm saying, Your
17 Honor.

18 JUDGE STEIN: But - - - but would you agree that
19 courts generally don't do that?

20 MR. HORN: I've not - - - I've never seen a
21 situation where you had a consented to, waived, abandoned
22 issue addressed by a court on its own without asking for
23 further briefing.

24 JUDGE STEIN: Well, assuming that the court
25 wasn't saying that it was error as a matter of law but was



1 a piece of the ineffective assistance of counsel, does that
2 not change the - - -

3 MR. HORN: It - - - it does not because it's the
4 defendant who bears the burden of showing that counsel
5 lacked any legitimate or strategic reason for the conduct
6 that occurred. So if you assume for the moment that, well,
7 that was a terrible idea to consent to the annotations on
8 that verdict sheet, they still have to show that there was
9 no legitimate reason to do so. And particularly under the
10 facts of this case, if we're not talking about general
11 matters, in the - - - under the facts of this case, there
12 was absolutely a legitimate reason why she consented to
13 those annotations.

14 JUDGE WILSON: Why isn't your due process concern
15 - - - concern solved by your ability to move to re-argue or
16 have the matter reheard?

17 MR. HORN: Well, first of all - - -

18 JUDGE RIVERA: You actually had an oral argument.

19 JUDGE WILSON: You did.

20 MR. HORN: Excuse me?

21 JUDGE RIVERA: You had an oral argument.

22 MR. HORN: We had an oral argument.

23 JUDGE RIVERA: You had an opportunity to make
24 clear to the court your position.

25 MR. HORN: Well, we had an oral argument on the



1 appeal at which point this issue was not addressed.
2 Defense counsel didn't raise it, the judge didn't ask about
3 it. There was a motion to re-argue in which I attempted to
4 raise the issue but I was immediately cut off and the
5 motion to re-argue was denied.

6 JUDGE RIVERA: But you submitted - - -

7 MR. HORN: So there was no briefing on it.

8 JUDGE RIVERA: Did you not submit - - - you
9 didn't submit any papers on the motion to re-argue?

10 MR. HORN: I did submit motion - - - I submitted
11 papers on the motion to re-argue but he denied the motion
12 to re-argue so there was never a full briefing of - - -

13 JUDGE RIVERA: But - - -

14 MR. HORN: - - - the issue.

15 JUDGE RIVERA: Well, but that's like having
16 raised the issue the first time and the judge rejected it.

17 MR. HORN: Well, no, because he didn't address
18 it. He still didn't address it.

19 JUDGE WILSON: We're not saying - - -

20 MR. HORN: He denied me the right to have - - -

21 JUDGE RIVERA: Well, how do you know he didn't -
22 - - how do you know the judge didn't review it and again
23 reject it?

24 MR. HORN: Because he - - - he - - -

25 JUDGE RIVERA: After all, denied the motion,



1 right?

2 MR. HORN: He denied the motion to re-argue. He
3 didn't grant re-argument in which case there would have
4 been a re-argument of the issues - - -

5 JUDGE WILSON: But don't courts typically - - -
6 when they - - - when they are presented with a motion to
7 re-argue, don't you think that they normally read the
8 papers and when they motion to re-argue it's because they
9 conclude that it's not - - - doesn't have any merit?

10 MR. HORN: Well - - -

11 JUDGE FEINMAN: I - - - I think what you're
12 suggesting is that to do that he would have had to grant
13 re-argument and adhere to the result as opposed to just
14 deny - - -

15 JUDGE FAHEY: Usually isn't the format usually
16 you grant a re-argument and then upon further review, it
17 will be either denied or not. And you'll - - -

18 MR. HORN: He denied it.

19 JUDGE FAHEY: You'll be allowed to make oral
20 argument and make a record of - - - of what you want, and
21 that's usually the great advantage of granting a re-
22 argument. At least you can make a record and preserve
23 these issues and bring them forward.

24 MR. HORN: Correct.

25 JUDGE RIVERA: But, counsel, I'm sorry. I'm not



1 understanding your position. I'm reading in your brief
2 County Court scheduled an oral argument on the People's
3 motion to re-argue. At oral argument, County Court
4 excoriated the People as misguided and called the verdict
5 sheet patently absurd. You tried to argue - - - so there
6 is an oral argument.

7 MR. HORN: I agree there's an oral argument - - -

8 JUDGE RIVERA: And - - - and if a judge is
9 telling you your position is patently absurd I think they
10 read your papers.

11 MR. HORN: I a hundred percent believe he read my
12 papers but my he did not grant re-argument on the issues.
13 He - - - he simply denied re-argument so it was never
14 briefed. And the biggest - - - the biggest problem in the
15 entire thing is - - -

16 JUDGE RIVERA: Well, if you submit on the papers
17 and you don't get an argument have you not been heard?

18 MR. HORN: I've been heard on whether or not
19 there should be re-argument. He denied re-argument.

20 JUDGE RIVERA: Well, and - - - and from the
21 judge's statement there's clearly rejection of your
22 position, more than once apparently according to your
23 brief.

24 MR. HORN: I - - - I - - - if Your Honor wants to
25 view it that way, sure. I disagree. He denied re-



1 argument. We weren't heard on the merits. It was never
2 briefed by the other side. And the biggest problem in the
3 entire thing is the burden has been shifted to us in this
4 instance. They have the burden of showing that there was
5 no legitimate reason to consent to that verdict sheet.
6 There are abundant reasons why you would do it because it
7 was perfectly consistent with her defense. Her defense was
8 the entire time all the way through was, yes, he committed
9 these acts, he did these things, he got on the stand and
10 admitted I did all these things. But he lacked the
11 culpable mental state to be convicted.

12 JUDGE RIVERA: I don't understand how that
13 shifted the burden. How did it shift the burden? You mean
14 because you got a burden on the re-argument motion?

15 MR. HORN: No, the burden to show that counsel
16 lacked any legitimate or strategic reason for his conduct.
17 If you can raise waived, abandoned, consented issues, if
18 the judge can do it by itself without having People brief
19 it and nobody every shows - - - he never even - - - the
20 judge never tried to show that there was no legitimate or
21 strategic reason for his conduct - - -

22 JUDGE STEIN: What - - -

23 MR. HORN: - - - at any point. He just said this
24 is the worst - - - this is ineffective assistance of
25 counsel at its worst. That's ipse dixit. That's not legal



1 reason.

2 JUDGE STEIN: What if County Court said in its -
3 - - in its decision instead of focusing on this issue that
4 was waived unpreserved, whatever, that taken by themselves
5 the - - - the claims of ineffective assistance that the
6 defendant has raised, you know, do not rise to the level of
7 deprivation of meaningful representation but in viewing the
8 record as a whole I - - - I find that there was ineffective
9 representation and doesn't refer to that issue? What - - -
10 what happens then?

11 MR. HORN: We lost, at that point, but that's not
12 what he did. And ultimately, we're getting sort of away
13 from the text of the decision. The decision is not about
14 ineffective assistance of counsel. He doesn't focus on
15 ineffective assistance of counsel.

16 JUDGE STEIN: Well, he certainly in his - - - in
17 the - - - in the argument on your re-argument motion that
18 that's what he was focusing on when he made his decision.

19 MR. HORN: Sure, but he's rewriting the decision
20 and he didn't grant re-argument so that's not a new
21 decision. But here when you read directly from the
22 decision and it says, "Here is it manifest that the cited
23 annotations on the verdict sheet were not authorized by CPL
24 310.20 and constitutes reversible error." He's saying that
25 the annotations on the verdict sheet constitute reversible



1 error, not that it's ineffective assistance of counsel. He
2 talks about how it's akin to a mode of proceedings error,
3 but it's not. This court has said it's not a mode of
4 proceedings error.

5 JUDGE STEIN: Well, he said it was akin to it.
6 As - - - as I read it what he was saying is that this is
7 such an egregious error on the part of defense counsel that
8 it's clearly ineffective assistance. That - - - that's how
9 I read what he was saying.

10 MR. HORN: Except that it is not error, People v.
11 Angelo, this court said when counsel consents to
12 annotations on a verdict sheet no error occurred in its
13 submission. There was consent. There's no error here
14 whatsoever.

15 JUDGE STEIN: No, no.

16 MR. HORN: He wouldn't have done. That's the
17 standard that's being applied is whether or not he would
18 have done that. That's not the standard.

19 JUDGE STEIN: Whether he would have consented?
20 Is that - - -

21 MR. HORN: Yeah. He - - - he's been a defense
22 attorney his entire career. He knows he wouldn't have done
23 that under those circumstances, but there is a perfectly
24 good strategic reason why it was consented to. And
25 ultimately it worked. There were two acquittals on two



1 counts where the defendant admitted to the underlying
2 conduct.

3 JUDGE STEIN: So is it possible the County Court
4 erred in finding that there was ineffective assistance of
5 counsel?

6 MR. HORN: I one hundred percent agree that he -
7 - - that he erred there. Then that's my - - - the second
8 part of my argument. He got it wrong in the procedure but
9 ultimately the result is also incorrect, and - - - and we'd
10 ask the court to - - -

11 CHIEF JUDGE DIFIORE: Why weren't those
12 annotations prejudicial?

13 MR. HORN: Why weren't they?

14 CHIEF JUDGE DIFIORE: Um-hmm.

15 MR. HORN: Because the defendant testified to all
16 of the conduct that's listed in those annotations. They
17 weren't contesting the conduct that is listed in those
18 parentheticals. He took the stand. He said yes, I did
19 that, but I didn't intend to harass or annoy her. Yes, I
20 did that, but I didn't intend to violate a court order. So
21 by her mind, there - - - there's absolutely no prejudice
22 and she specifically said - - -

23 JUDGE FAHEY: Yes, but you're not saying - - -
24 you're not saying without the - - - the waiver that those
25 annotations would have been proper, are you?



1 MR. HORN: No, no, no.

2 JUDGE FAHEY: Okay. All right.

3 MR. HORN: That would - - - no, no. With that
4 being said, absolutely.

5 JUDGE FAHEY: No, I just wanted to - - - no, I
6 got it. I got it.

7 MR. HORN: But particularly as far as her
8 strategy is concerned, in her summation at page 787 of the
9 trial transcript she says - - - she says to the jury:
10 "Each charge has to rise and fall on its own. Can't be
11 decided collectively. You have to look at the evidence
12 that relates to each specific charge. You're free to
13 render different verdicts on each specific charge." She
14 was focusing them on those events, so she wanted that in
15 front the jury. She wants them to know that this one's
16 about thirty-five emails, this one's about an incident in
17 court, this one's about yelling I love you out the window
18 as he's driving by. She wanted that in front of them so
19 that they would focus on the individual acts and not the
20 entire holistic case and find him guilty on everything, and
21 it worked. She got an acquittal on two counts. It was not
22 ineffective assistance of counsel.

23 CHIEF JUDGE DIFIORE: Thank you, counsel.

24 Counsel. Why wasn't it good strategy for her to
25 seek to have the verdict sheet annotated and point the jury



1 to the individual charges?

2 MR. EDWARDS: An excellent question, Your Honor.
3 If I may, my name is Paul Edwards. I represent Dennis
4 O'Kane in this action. County Court actually addressed
5 that issue in its decision. The County Court decision,
6 when it's describing the trial counsel's consent to the
7 verdict sheet says that: "The point made is that defense
8 counsel utterly failed to recognize, let alone grasp" - - -

9 JUDGE STEIN: Yeah, but where - - - where's there
10 any support in the record for that conclusion, and - - -
11 and at what point did County Court give anybody an
12 opportunity to address that issue?

13 MR. EDWARDS: With respect to the first part of
14 your question, I believe that this is Judge Lynch's finding
15 based on the record as - - - as a whole of trial counsel's
16 performance.

17 JUDGE STEIN: Well, but there has to be something
18 to point to in the record that would support that
19 conclusion, doesn't there?

20 MR. EDWARDS: I would say that there's - - -

21 JUDGE STEIN: You can't just make it up out of
22 thin air.

23 MR. EDWARDS: No, I agree. However, in the
24 context of the Court's decision, when Judge Lynch says, "It
25 is the Court's judgment that consent to the verdict sheet



1 evidences ineffective assistance of counsel at its worst."
2 The next thing he says is, "The point made is that defense
3 counsel failed to - - - to recognize let alone grasp the
4 annotation restrictions."

5 JUDGE STEIN: Right, I understand that. But - -
6 - but I - - - I'm not aware of anything in the record that
7 would - - - as a matter of fact, the record indicates that
8 there was a discussion between defense counsel and the
9 People and the Court and it was - - - and - - - and it was
10 - - - you know, the whole thing was discussed and - - - and
11 seems to me counsel made a conscious decision. Whether it
12 was a reasonable decision or not is another question, but I
13 - - - I just don't see what there is in this record that
14 would justify a legal conclusion that counsel didn't know
15 what she was doing.

16 MR. EDWARDS: Well, the record doesn't contain
17 whatever that earlier conversation was. As you point out,
18 Your Honor, there's a statement in the trial record where
19 it says this is - - - was the subject of a previous
20 discussion. We don't know what the previous discussion
21 was. The record simply doesn't reflect that, and he
22 basically says all set, counsel, and she says yes.

23 JUDGE STEIN: Right.

24 MR. EDWARDS: And that's what we've got.

25 JUDGE WILSON: So the - - - the only annotations



1 I think that you are complaining about are the
2 parentheticals that describe the evidence that relates to a
3 particular charge; is that right?

4 MR. EDWARDS: That's correct, Your Honor.

5 JUDGE WILSON: So the dates are okay and the
6 statement of the penal section code and description of what
7 that code section is, that's all okay. Those weren't
8 extraneous annotations?

9 MR. EDWARDS: That's correct, Your Honor. That -
10 - -

11 JUDGE WILSON: So could you take any one of them
12 you want and - - - well, before - - - before you do that,
13 are you - - - are you making any argument that the
14 information, the annotation in any of the parentheticals is
15 factually incorrect? That is there weren't thirty-six - -
16 - approximately thirty-six calls there were only two, and
17 it's misleading for that reason?

18 MR. EDWARDS: No, they - - - they all had a basis
19 in the People's evidence. The problem is that they're
20 being reflected in the verdict sheet itself not in - - -
21 you know, in the People's arguments, in the People's
22 accusatory instrument.

23 JUDGE WILSON: Okay. So - - - but - - - right.
24 So it's not that they're inaccurate. It's that they don't
25 belong there?

1 MR. EDWARDS: Correct. I - - - I think the way
2 that - - -

3 JUDGE WILSON: Okay. So why - - - then can you
4 explain why the - - - their existence on the sheet caused
5 any actual prejudice?

6 MR. EDWARDS: Well, whether they cause any actual
7 prejudice is a little tricky because of course jury
8 deliberations are not recorded. And one of the reasons
9 that in general there is no harmless error analysis of
10 verdict sheet notations is because we can't assess what
11 prejudice occurred - - -

12 JUDGE STEIN: And were any - - -

13 MR. EDWARDS: - - - in the jury deliberation.

14 JUDGE STEIN: Were any of those factual
15 allegations - - - or I shouldn't say were any of them.
16 Were those the same factual allegations that would have - -
17 - that were in - - - in the indictment or would have been
18 in an indictment?

19 MR. EDWARDS: They would have been in the
20 accusatory instruments - - -

21 JUDGE STEIN: Okay.

22 MR. EDWARDS: - - - but the big difference there,
23 Your Honor, if I may, would be - - - there have been cases
24 where, let's say, an accusatory instrument has been given
25 to a jury.



1 JUDGE STEIN: Exactly.

2 MR. EDWARDS: That's coming from the prosecution,
3 though. That's not coming from the Court. The verdict
4 sheet is coming from the Court.

5 JUDGE STEIN: But didn't the Court give a jury
6 instruction, a limiting instruction on what they were to do
7 with that?

8 MR. EDWARDS: Yes, it did. Yes.

9 JUDGE STEIN: Okay. So - - -

10 MR. EDWARDS: That's correct.

11 JUDGE STEIN: Does - - - does that not
12 compensate?

13 MR. EDWARDS: I think because there is no
14 harmless error analysis of the verdict sheet notation
15 errors I don't think that it does. I - - -

16 JUDGE STEIN: So where - - - well, we're - - -
17 we're not talking actually about the verdict sheet error.
18 We're talking about whether counsel was ineffective, right?

19 JUDGE GARCIA: You agree with that that that's
20 the basis for the count? It's somewhat confused, but that
21 the basis for the County Court holding is a finding of
22 ineffectiveness?

23 MR. EDWARDS: The - - - it's a finding of
24 ineffectiveness. Yes, absolutely. And I just think it's
25 important to clarify something because in the People's



1 brief they say that Albany County Court rejected every
2 single argument that the defense made and that's simply not
3 the case. The County Court decision did agree with a
4 couple of points that were raised. In fact, let's put it
5 this way. There were seven examples of ineffective
6 assistance of counsel that were raised on the appeal. Two
7 of those County Court agreed with the defense that - - -

8 JUDGE GARCIA: And those are what?

9 MR. EDWARDS: Those two were an error during
10 cross-examination that trial counsel failed to control
11 witnesses adequately. The Court - - - County Court said,
12 "It is manifest that defense counsel should have been more
13 proactive in moving to strike the inflammatory remarks
14 which were not responsive to the questions being asked."
15 The other one was an error which occurred during summation
16 when trial counsel failed to object to a remark made by the
17 prosecutor tell Mr. O'Kane this is enough. And Judge Lynch
18 - - -

19 JUDGE RIVERA: But were those - - -

20 MR. EDWARDS: I'm sorry.

21 JUDGE RIVERA: - - - either individually or
22 together have been enough for the County Court to say,
23 putting aside the annotations, these two or either one of
24 these is to establish ineffective assistance of counsel?

25 MR. EDWARDS: We know - - - we know the summation



1 one he found would not have been because what he said - - -
2 what Judge Lynch said was, "Clearly, such comment was
3 improper but does not necessitate a new trial." So that
4 error standing alone would not have necessitated a new
5 trial. However, it is a factor and there are - - - you
6 know, again Judge Lynch found two examples of ineffective
7 assistance of counsel where he agreed with the defense. He
8 also then found a third example because he was doing
9 exactly what People v. Baldi requires him to do which is to
10 look at the totality of counsel's performance. I think
11 it's important to - - -

12 JUDGE FAHEY: So - - - so that's the nub of it
13 isn't it, really? How far can the judge go in examining
14 the record, and do those issues have to be raised so
15 counsel can properly respond? So - - - so can an appellate
16 court search the record, find error, and - - - and based on
17 that error which no one's briefed and no one's argued make
18 the determination? It really isn't a question of - - - of
19 the error itself here. We're really talk - - - talking
20 about a different principle, aren't we?

21 MR. EDWARDS: We are in a way, and this is - - -
22 let's put it this way. This happens to defense counsel all
23 the time when we're arguing ineffective assistance of
24 counsel. We will argue, let's just take an example, that
25 trial counsel screwed up the summation, okay. And we'll



1 get a decision back from the appellate court saying I find
2 the totality of the representation was meaningful
3 representation because counsel made opening statements,
4 participated in questioning.

5 JUDGE RIVERA: Yes, but that's the standard and
6 your burden is to show otherwise.

7 MR. EDWARDS: Yes, but - - -

8 JUDGE RIVERA: You may do that by coming up with
9 an exclusive list or you may do that by showing these are
10 the egregious examples and by the way otherwise it shows
11 incompetence across the board.

12 MR. EDWARDS: We're never given any sort of - - -

13 JUDGE RIVERA: But there's no surprise on the
14 standard that it is the totality.

15 MR. EDWARDS: Exactly. That's exactly correct,
16 Your Honor. There is no surprise. Once ineffective
17 assistance - - - once ineffective assistance of counsel has
18 been raised it's no surprise to either party that all - - -

19 JUDGE FEINMAN: So - - - so what's the bottom
20 line - - -

21 MR. EDWARDS: - - - that all of counsel's conduct
22 would be looked at.

23 JUDGE FEINMAN: - - - here? If we - - - if we
24 think that there could be a strategic reason for allowing
25 the annotations, to defense counsel's consenting to the



1 annotations, what happens?

2 MR. EDWARDS: Well, I suppose that might depend
3 on whether that's a finding of fact or a finding of law by
4 Judge Lynch. I mean Judge Lynch said that he finds that
5 there - - - there would have been no comprehension of the
6 issue by the trial counsel. I'm not sure that's subject to
7 review as a - - - as a finding of fact. One thing I do
8 want to make - - -

9 JUDGE RIVERA: And just to be clear your position
10 is that - - - that the attorney could not consent and that
11 our law does not allow attorneys to consent to these
12 annotations. Is that your position?

13 MR. EDWARDS: Yes. No, it's that the - - - that
14 the consent of trial counsel was ineffective - - - an
15 example of ineffective assistance of counsel. Before my
16 time - - -

17 JUDGE RIVERA: So doesn't that require
18 understanding the motivation? Why isn't that something
19 that has to be resolved through a 440 motion?

20 MR. EDWARDS: Why isn't it something that has to
21 be resolved - - -

22 JUDGE RIVERA: Yes, yes.

23 MR. EDWARDS: - - - resolved through a 440
24 motion?

25 JUDGE RIVERA: Rather than speculate about the



1 motivation.

2 MR. EDWARDS: Judge Lynch doesn't directly
3 address that but based on the wording of his decision it
4 seems clear that his finding is that counsel simply didn't
5 understand the issue.

6 JUDGE RIVERA: Isn't it - - - isn't it that you
7 just can't believe a lawyer would do such a thing which is
8 a little bit different from the finding I think you're
9 trying to argue for here.

10 MR. EDWARDS: I'm - - - I'm not sure if that's
11 entirely accurate.

12 JUDGE STEIN: And even if that was a finding,
13 this court can review it for record support, can - - - can
14 we not?

15 MR. EDWARDS: Absolutely. Before my time runs
16 out, I do want to address just one issue and that is there
17 was some confusion about whether there was oral argument on
18 the motion to re-argue. Yes, in the appellant's appendix
19 that does appear - - - it's like four pages of transcript
20 from pages A-80 to 84 or 85.

21 JUDGE FAHEY: The way I understood that argument
22 was that you make a motion to re-argue. The motion to re-
23 argue was separately granted. If you - - - so there was an
24 argument on whether or not to grant the motion to re-argue,
25 which I assume was denied. If the argument had been



1 granted then you would have briefed it. You - - - however,
2 the Court would have set out a schedule for you and you
3 would have went forward maybe a week from now and then
4 argued it. That's the normal procedure as I understand
5 that.

6 MR. EDWARDS: It is, but during that colloquy,
7 there was some discussion of the underlying issue as well.

8 CHIEF JUDGE DIFIORE: Thank you, counsel.

9 MR. EDWARDS: Thank you.

10 CHIEF JUDGE DIFIORE: Mr. Horn.

11 MR. HORN: Very quickly, the - - - the biggest
12 problem with the totality of the case approach that he's
13 taking - - - and I agree that that is the standard that you
14 review the entire thing, you do it under the totality of
15 the case - - - it is not enough to simply allege
16 ineffective assistance of counsel and then shift the burden
17 to us to cull through the entire record, examine every
18 decision that counsel made along the line, whether it's
19 consent, whether it's waiver, whether it's calling one
20 witness or another witness, and coming up with legitimate
21 reasons why that was done. And that's what he's suggesting
22 can happen here. He abandoned the issue on appeal, but we
23 were supposed to somehow know that that was going to be an
24 issue and brief it.

25 And a lot of this can be avoided. I would ask



1 the court to adopt as reasoning Misicki v. Caradonna where
2 it said for a court, "To decide an appeal on a distinct
3 ground that we winkled out wholly on its own poses an
4 obvious problem of fair play." The courts "are not in the
5 business of blindsiding litigants, who expect them to
6 decide their appeals on rationales advanced by the parties,
7 not arguments their adversaries never made."

8 CHIEF JUDGE DIFIORE: Thank you.

9 MR. HORN: That's what happened here.

10 CHIEF JUDGE DIFIORE: Thank you, counsel.

11 MR. HORN: Thank you.

12 (Court is adjourned)

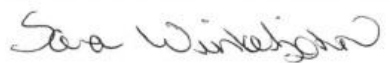
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C E R T I F I C A T I O N

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Dennis O'Kane, No. 17 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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