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COURT OF APPEALS

STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

NO. 27

KENNETH SLADE,

Appellant.

20 Eagle Street
Albany, New York
March 25, 2021

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

Appearances:

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1 CHIEF JUDGE DIFIORE: Appeal number 27, The
2 People of the State of New York v. Kenneth Slade.

3 Counsel?

4 MR. PALMER: Good afternoon. My name is John
5 Palmer, appearing on behalf of Kenneth Slade. I'd like to
6 request two minutes for rebuttal.

7 CHIEF JUDGE DIFIORE: You may, Mr. Palmer.
8 Please.

9 MR. PALMER: The People built a file, a
10 certificate of translation, to cure a hearsay defect that
11 they knew about within ninety days of Mr. Slade's
12 arraignment.

13 JUDGE STEIN: Counsel?

14 MR. PALMER: In fact - - -

15 JUDGE STEIN: Counsel, this is Judge Stein. I
16 have a question for you. How - - - how do we reconcile
17 your position that the certificate needs to be submitted
18 with our - - - what I will call - - - our four-corners
19 jurisprudence about determining the legal sufficiency from
20 the four corners of the document itself? And most recently
21 I think we - - - we referred to that in - - - in our Hardy
22 case. So how - - - how do you reconcile your position with
23 that?

24 MR. PALMER: Right. So the defect here was
25 latent, latent in that it does not make an instrument



1 facially insufficient, but the defect is not without
2 consequence, as the complaint here did contain hearsay.
3 And the prosecution could not have stated ready on the
4 complaint that stated - - - that contained hearsay, as they
5 had to have had an information pre-arraignment free of
6 hearsay to take Mr. Slade to trial.

7 JUDGE STEIN: How is this hearsay? It - - -

8 MR. PALMER: It's hear - - -

9 JUDGE STEIN: Go ahead.

10 MR. PALMER: It is hearsay because the
11 complaint's factual allegations were hearsay in that they
12 were not the complainant's but they were a second-hand
13 write-up of the allegations.

14 And as this court found in Edward B. even when a
15 complainant signs an affidavit or a supporting deposition,
16 that - - - that hearsay defect is not cured until the
17 complainant knows what the instrument says and adopts the
18 allegations.

19 In the interim - - -

20 JUDGE STEIN: Well, couldn't there be - - -
21 couldn't there be a lot of reasons why there might be a
22 certificate of translation? Maybe it just would make it
23 faster. Maybe somebody can read and understand English,
24 but it - - - it - - - you know, it takes them a while and
25 they're trying to - - - you know, a lot of different



1 reasons.

2 So why would that necessarily indicate that the -
3 - - the - - - the person who signed and verified the - - -
4 the instrument didn't understand what - - - and - - - that
5 it wasn't their words?

6 MR. PALMER: Well, it shows that the prosecution
7 at the time that the cert - - - that the complaint was
8 signed, deemed translation a necessary part of the drafting
9 process.

10 JUDGE FAHEY: I'm a little confused. This is
11 Judge Fahey, here. I'm a little confused on how it could
12 be hearsay of the face of the deposition within the four
13 corners of the document.

14 MR. PALMER: It is not hearsay within the four
15 corners of the document. But we know from the
16 prosecution's own filing that the factual allegations were,
17 in fact, hearsay, because they - - -

18 JUDGE FAHEY: Wouldn't - - -

19 MR. PALMER: - - - were not the complainant's.

20 JUDGE FAHEY: - - - wouldn't we normally - - -
21 wouldn't you normally, in that situation - - - I recall
22 from my City Court days, you'd file a written notice and
23 request something within forty-five days, as I recall?

24 MR. PALMER: Yeah, that's what - - -

25 JUDGE FAHEY: If there - - - if there was some



1 insufficiency that you were seeking to correct, if it was
2 latent.

3 MR. PALMER: That's what a defense attorney - - -
4 defense would do, if they knew about this defect, within
5 forty-five days - - -

6 JUDGE FAHEY: Well - - -

7 MR. PALMER: - - - of arraignment.

8 JUDGE FAHEY: - - - I - - - I can see that.
9 Aren't there some other options you might have, though?
10 For instance, ask to file a motion in the interest of
11 justice? It seems to me you'd have some other options to
12 try and correct these - - - these latent defects.

13 MR. PALMER: Correct. And that's - - - for
14 example, if you filed a motion to dismiss for facial
15 insufficiency, I guess, depending on the trial court, they
16 would then ask the prosecution to file a certificate of
17 translation, as they have in other cases.

18 But here, this defect was revealed - - - it was
19 revealed, rather that the prosecution always knew that they
20 knew of the defect - - -

21 JUDGE FAHEY: Well - - -

22 MR. PALMER: - - - from the beginning of the
23 case, and revealed to the court and the defense when the
24 prosecution filed a certificate of translation, well after
25 those forty-five days had passed - - -



1 JUDGE WILSON: Counsel, the particular problem -
2 - -

3 MR. PALMER: - - - for defense to make such a
4 motion - - -

5 JUDGE WILSON: Counsel? The - - - the particular
6 problem I have with that on the facts of your case is that
7 if I understand it correctly, the complainant here, the
8 deponent, is Mr. Slade's wife. So he ought to know his
9 wife's fluency in English. He sees the - - - the
10 deposition. And isn't there something incumbent on him if
11 he thinks this is a latent defect, to say wait a minute, I
12 want a certificate of translation?

13 I mean, isn't - - - or to put it differently,
14 isn't it a fair inference that because he didn't do that,
15 his wife actually understands English well enough, and he
16 knows that?

17 MR. PALMER: No. As defense counsel did not know
18 of this defect or potential defect. And of course, even if
19 Mr. Slade spoke to his wife in English, it is not a given
20 that he had perfect knowledge of her language skills or
21 that he would know to tell his attorney and know that her -
22 - - her language ability was even relevant to pre-trial
23 litigation and to tell his attorney that within forty-five
24 days, to make such a motion, and even then, if that
25 information he had could sustain a motion to dismiss on any

1 ground.

2 And here counsel did not know that translation
3 was a necessary step in the drafting process until the
4 prosecution filed that certificate of translation
5 demonstrating that the complaint contained hearsay and that
6 all of their prior statements of readiness on that
7 accusatory instrument had been illusory.

8 JUDGE FAHEY: Counsel, one of the areas I
9 struggle with is there doesn't seem to be any statutory - -
10 - statute or case law that the court may - - - may examine
11 four latent defects that are not apparent on the face of
12 the accusatory instrument. I - - - I don't think - - - is
13 there anything you can point to that I should look at?

14 MR. PALMER: Well, Your Honor, to require a
15 certificate of translation gives effect to the CPL in that
16 - - -

17 JUDGE FAHEY: Well, what I'm asking - - - what
18 I'm asking you is - - - is one of the courts in one of the
19 cases - - - and I - - - relied on 2101(b) of the CPLR.

20 MR. PALMER: Right.

21 JUDGE FAHEY: Outside of that, is there anything
22 for you to - - - that you would point to, either statutory
23 or case law, that would say that a court may examine an
24 accusatory instrument for latent defects, in other words,
25 those that are not on the facial - - - on the instrument



1 itself?

2 MR. PALMER: Well, for example, intermediate
3 appellate courts such as the Appellate Term First
4 Department and the Appellate Division Second Department in
5 cases like Edwards, Brooks, and Maslowski, have looked
6 beyond the four corners of the instrument and found that
7 the prosecution's filing of this certificate of translation
8 with pre-trial indicia that the translator's assistance was
9 necessary, and has required a certificate of translation to
10 convert the complaint.

11 JUDGE FAHEY: I see. Maslowski is what you're
12 relying on?

13 MR. PALMER: Yes, as well as Edwards.

14 JUDGE FAHEY: Thank you.

15 MR. PALMER: And as the people failed to convert
16 the misdemeanor complaint into an information within ninety
17 days, Mr. Slade's arraignment here, this court should
18 reverse Mr. Slade's convictions and dismiss the charges.

19 CHIEF JUDGE DIFIIORE: Thank you, counsel.
20 Counsel?

21 MR. ANDERSEN: Thank you. Paul Andersen for the
22 People. May it please the court?

23 Your Honors, if we just look at the plain text of
24 the statute and CPL Article 100, there is no requirement
25 for - - - or as Judge Fahey was pointing out - - - any



1 vehicle or mechanism for a court to disrupt the prosecution
2 based on an allegation of a latent defect.

3 And as we submitted with our brief in Brooks,
4 that's a feature, not a bug. And when the new CPL - - -
5 and after the Bartlett Commission, which removed
6 misdemeanor preliminary hearings.

7 So here these - - - any issue with the
8 certificate of translation or that a - - - or that a
9 translator was used, is an issue best left for trial. So
10 the certificate here gives defense counsel notice that a
11 translator was present when this was drafted. A translator
12 was used. You can cross-examine the complainant about that
13 translation. You can even call the complainant - - - the
14 translator themselves, and maybe put that as part of your
15 defense.

16 But in no way does it affect the facial
17 sufficiency of the instrument. And as this court has long
18 held, we look at, as Your Honors pointed out, the four
19 corners of the instrument and we don't really need to look
20 beyond that or delay prosecutions, which this has now
21 tended to do as - - -

22 JUDGE WILSON: But so let me ask you this.
23 Sorry, over here.

24 MR. ANDERSEN: Yeah.

25 JUDGE WILSON: If it turns out at trial that,



1 let's say, the witness testifies I saw this document but I
2 had no idea what it said, because it was in English, and I
3 just signed it because I was told to sign it, there's not a
4 remedy for that; is that right?

5 MR. ANDERSEN: No, Your Honor. But I - - - it
6 would - - - but it would be the same thing if it was an
7 English-speaking complaining witness, like any witness that
8 would be an issue with. This isn't something that would be
9 specific to non-native English speakers.

10 Like any complaining witness could go on the
11 stand and say a prosecutor put this in my face, and I
12 signed it, and didn't let me read it.

13 So that still doesn't go one way or the other
14 here. And in fact, it - - - so that there really would be
15 no remedy to that other than, as this court noted in Edward
16 B., don't do it. Or if that would then go to the
17 credibility of the complaining witness in trial. But - - -

18 JUDGE FAHEY: Well, wouldn't you - - -

19 JUDGE RIVERA: Well, what - - - what - - - what
20 is the wife - - - in this case, what is the wife agreeing -
21 - - what is her agreement to the words on the paper when
22 she signs the complaint? What is - - - what is that
23 asserting?

24 MR. ANDERSEN: That - - - that she - - - this - -
25 - that the facts in those allegations attributed to - - -



1 in that complaint, attributed to her, are based on her own
2 personal knowledge.

3 JUDGE RIVERA: Okay. So how can that be a valid
4 document if she is unable to read the paper that she is
5 signing?

6 MR. ANDERSEN: Because it's still explained to
7 her. I think we'd have the same issue if there was an
8 illiterate witness or a blind complaining witness. Like we
9 wouldn't really need a certificate of reading out loud in
10 that case. So it's something similar.

11 And she's - - - it's still a presumption, looking
12 at the four corners of the instrument, that this was
13 explained to her.

14 JUDGE RIVERA: Yeah, but if you're reading out
15 loud, you're reading the actual words, and that's not what
16 happens here. There's no reading of the actual words.
17 There is someone who is taking the actual words and
18 converting them into another language. Correct?

19 MR. ANDERSEN: Yes, Your Honor. Or she used - -
20 - assisted, at least, in this case.

21 JUDGE RIVERA: Assisting?

22 MR. ANDERSEN: Assist - - - I believe. Because
23 the prosecutor affirmed that she had many conversations in
24 English. But I get what you're saying hypothetically, if
25 there's a translator present that a translate - - -



1 JUDGE RIVERA: Yes, but there's - - - there's
2 nothing in the record to - - - or you can correct me. Is
3 there something in the record to clarify that she could
4 read English or write English?

5 MR. ANDERSEN: No, Your Honor.

6 JUDGE RIVERA: Even if poorly?

7 MR. ANDERSEN: It's not in the record, Your
8 Honor. No.

9 JUDGE RIVERA: Okay. All right. So again, how -
10 - - how is the document valid when her statement is not
11 valid, what you're saying is what she is representing by
12 the signature cannot be valid?

13 MR. ANDERSEN: I - - - I - - - it's because the
14 statute says it's valid. And that's what we look at. And
15 going forward - - - and then - - - and if there's any
16 issue, whether there's a discrepancy, that's a trial issue,
17 because - - - so the issue here is - - - and it's very
18 plain in that secondary source - - - I'm sorry, Judge - - -

19 JUDGE RIVERA: No, no. Go - - - I'm listening.
20 Go ahead.

21 MR. ANDERSEN: Then that secondary source that -
22 - - when they reformed the CPL it was to speed up trials,
23 so that we can get to that fact-finding situation, get out
24 of that backlog, and - - - from the Bartlett Commission in
25 1968. And so these are all trial issues here.



1 And if a court has any issue with this, there's
2 still 100.30(2) which lets the court be like you know what;
3 I'm not too confident here - - -

4 JUDGE RIVERA: Um-hum.

5 MR. ANDERSEN: - - - either there's something
6 there, let's - - -

7 JUDGE RIVERA: Let - - - let me ask you the
8 following. Why - - - why isn't the procedure - - - the one
9 I'm going to suggest to you, which is you have a
10 complainant who - - - let's assume for the moment - - -
11 does not speak or write English - - - just for the moment.
12 Okay. And so you want to get their statement in English,
13 because the courts function in English.

14 All right. So you have them - - - because it's
15 their statement - - - either say it to someone who writes
16 it in Spanish, the language Spanish, that they can read and
17 that they speak, or they themselves write it out - - -
18 maybe it's typed afterwards, in the language that they
19 know. And that is their language, that is what they can
20 agree to. They can read it; they can confirm it. And then
21 a person takes that - - - maybe it's the same person who
22 spoke with them - - - takes it and does, indeed, in a
23 writing, translate it to English, and then writes on a
24 separate document that they have translated it and explains
25 their skill set.



1 Why wouldn't that be the process? Because then
2 you have a document in the language spoken and understood
3 by the individual, the complainant, and so they are,
4 indeed, asserting that is what represents their
5 articulation of the events. Right?

6 Either they said it to someone, or they wrote it
7 themselves. Why wouldn't that be the document? And then
8 all you have to do is connect the dots to get that to
9 English for the courts to be able to have their statement?
10 And that way defense counsel could take the materials and
11 have it confirmed? Why couldn't that be the process?

12 MR. ANDERSEN: Your Honor, that would be - - - I
13 would agree with you that that would be admissible - - - or
14 that would be a valid complaint, if we went through all of
15 those steps. But once again, the statute and other - - -
16 CPL 100 doesn't require all of that in there. So it would
17 - - - just complying with the statute itself, having this
18 witness swear under penalty of perjury the fact - - - the
19 underlying allegations based on their personal knowledge,
20 that's sufficient under the statute. So whether it's - - -

21 JUDGE FAHEY: So let me - - -

22 JUDGE RIVERA: What I'm saying to you is I don't
23 know how the document is valid when the person doesn't
24 understand the document. That's my - - - which is, to me,
25 different from your response to Judge Wilson, which is



1 anybody could just refuse to read it and sign it.

2 We all take a risk that that's what's gone on.
3 Someone hasn't paid attention - - - that's in contracts,
4 right - - - they don't pay attention, they sign something.

5 MR. ANDERSEN: Yes, Your Honor. But once again,
6 it's - - -

7 JUDGE RIVERA: This is different from I could not
8 if I wanted to understand what's in front of me.

9 MR. ANDERSEN: Your Honor, that would go beyond
10 the four corners of the complaint - - - of the complaint.
11 And once again, there have been complaining witnesses - - -

12 JUDGE RIVERA: But if the - - -

13 MR. ANDERSEN: - - - who spoke other languages -
14 - -

15 JUDGE RIVERA: - - - complaint is ab initio just
16 - - - something that is null and void, right, because she
17 is signing something that she cannot appreciate, I'm
18 finding it very difficult to get past that.

19 MR. ANDERSEN: Well, these were all
20 considerations that - - - there were witnesses who spoke -
21 - - who didn't speak English back in 1968 or prior to 1968.
22 These were all considerations that we presume the
23 legislature factored in.

24 And these policy arguments that Your Honor is
25 proposing, they are valid, but I don't think they're



1 appropriate here when we're looking at the CPL itself, and
2 -

3 JUDGE WILSON: Could - - - could I ask you - - -

4 MR. ANDERSEN: - - - what are the requirements.

5 JUDGE WILSON: - - - could I ask you a practical
6 question? So in this case, you had actually
7 contemporaneously produced a certificate of translation.
8 Is that commonly what your office does?

9 MR. ANDERSEN: What do you mean by - - - short -
10 - - like generate the document at the same time?

11 JUDGE WILSON: Well, I don't even know at the
12 same time. But here - - - here there was one that was
13 produced roughly contemporaneously with the accusatory
14 instrument. It just wasn't delivered to anybody, but it
15 had been created, right?

16 MR. ANDERSEN: Yes, Your Honor.

17 JUDGE WILSON: Is that usually what you do when
18 you have a foreign speak - - - language speaking witness?

19 MR. ANDERSEN: Yes, in the complaint room you'll
20 have the prosecutor assisted with a translator. And we
21 would memorialize that.

22 I think just because there's really - - - the
23 certificate of translation is a - - - is a rule that - - -
24 or is a document kind of crafted through crim-court - - -
25 or Criminal Courts from I think 1996, Kings County Criminal



1 Court, in People v. Dino Allen (ph.) was the first case to
2 introduce this concept and rejected the idea. The Legal
3 Aid Society of Brooklyn proposed it. And then a year-and-
4 a-half later, another criminal - - - criminal court from
5 Kings County decided actually, let's have these - - -
6 generate - - - file these documents.

7 So I think our office and many offices do that,
8 just - - - to just belt-and-suspenders it. Let defense
9 counsel know that there's a translator here.

10 JUDGE WILSON: Is it - - - is it burdensome?

11 MR. ANDERSEN: Excuse me?

12 JUDGE WILSON: Is it burdensome?

13 MR. ANDERSEN: To fill out the document, no. But
14 in terms of - - - if I guess more - - - this would be
15 appropriate for Brooks - - - but we don't know what the
16 court would want in the document other than what we have
17 here.

18 JUDGE WILSON: Right.

19 MR. ANDERSEN: It's here's the person that used
20 it, this is the language that it was translated from.

21 JUDGE WILSON: I mean, in some ways that's the
22 real practical problem here, right, is that you've got all
23 kinds of different intermediate courts saying you apply the
24 CPLR; no, you don't; you - - - you know, it - - - it's not
25 clear at all what you're supposed to put in that little



1 piece of paper.

2 MR. ANDERSEN: Which is why I think this is more
3 of a discovery issue or an issue for trial, just to let
4 everyone know that this - - - this person used a
5 translator. Here's the translator's name, if you need to -
6 - - if you want to voir dire on that or cross-examine the
7 complainant - - -

8 JUDGE RIVERA: Well, don't you at a minimum, need
9 an assertion from the person who claims they translated
10 that they actually do have the skill set to do that? I
11 mean, this is a skill. Not everyone can do this. You
12 agree with that?

13 MR. ANDERSEN: Yes, Your Honor.

14 JUDGE RIVERA: So you need an appropriate skill
15 set to be able to do this.

16 MR. ANDERSEN: Yes, but we don't know - - -
17 really know in the - - - there's no statutory guidance of
18 what's that - - - what's the floor necessary. And so - - -

19 JUDGE RIVERA: Yeah, and isn't that the problem?
20 Then we can't necessarily have confidence in the
21 translation or in an interpretation - - -

22 MR. ANDERSEN: But I think - - -

23 JUDGE RIVERA: - - - if you don't have someone
24 who can set forth that they have - - - are skilled in the
25 ability to do this task.



1 MR. ANDERSEN: But there's no requirement to - -
2 - like these are, once again, policy arguments, I think,
3 for the legislature to enact, that here's what's required.
4 For example, all - - - when we're in a grand jury, when
5 we're presenting cases in grand jury, we have to use a
6 trans - - - and there's a witness who doesn't speak
7 English, we use an interpreter who has like their
8 qualifications filed in the court.

9 I don't have the CPL provision, but like, yes,
10 but that's because we look at the statute, and the statute
11 tells us what we're required to do, and so - - -

12 JUDGE RIVERA: But what do you think is the
13 policy that drives that? I mean, you'd have to do it in
14 court too. So what do you think drives that? What - - -
15 what's the point of that?

16 MR. ANDERSEN: It's to ensure that when this
17 witness is here testifying to that - - - the ultimate
18 question of guilt or innocence, or I guess in the case of
19 the grand jury, probable cause - - -

20 JUDGE RIVERA: Right.

21 MR. ANDERSEN: - - - that that is an accurate
22 translation for the court to decide - - -

23 JUDGE RIVERA: Well, why should this be any less,
24 since is this is what puts the defendant on the path to
25 face the government - - -



1 MR. ANDERSEN: Because - - -

2 JUDGE RIVERA: - - - and a prosecution?

3 MR. ANDERSEN: Because the legislature intended
4 that. There is no misdemeanor due - - - there is no
5 misdemeanor preliminary hearings in New York any more,
6 which would have - - - presumably, if we had misdemeanor
7 preliminary hearings we'd go through the same qualified
8 translators filed on the court. But here, the legislature
9 made a distinct - - - like a purposeful choice to - - -
10 here's what's required to go forward, here's the source of
11 the allegation - - -

12 JUDGE RIVERA: So does that treat complainants
13 and defendants who don't speak English, can't read English,
14 can't write English, differently?

15 MR. ANDERSEN: Did you just say defendants, Your
16 Honor? I'm sorry.

17 JUDGE RIVERA: Well, defendants and complainants,
18 or whoever might otherwise be providing a supporting
19 statement, right, does it treat them differently under the
20 law - - -

21 MR. ANDERSEN: On - - -

22 JUDGE RIVERA: - - - in a way that's not really
23 justifiable, if - - - if the law has found other ways to
24 accommodate them to get a statement that's accurate from
25 them?



1 MR. ANDERSEN: I guess I'm not too sure of your
2 question. Does the legislative scheme as now treat them
3 differently? No - - - or as Your Honor - - -

4 JUDGE RIVERA: This process - - - you're saying
5 the law doesn't require it here, but it requires it there.
6 So I'm asking you about that different treatment.

7 MR. ANDERSEN: The different treatment versus
8 here and there is felony - - - is either through felony
9 cases through grand jury or the actual ultimate question of
10 guilt or innocence at trial.

11 But in terms of pre-trial, misdemeanors, this is
12 what the legislature has dec - - - has deemed necessary to
13 proceed, and in every - - -

14 CHIEF JUDGE DIFIORE: Thank you, Counsel.

15 MR. ANDERSEN: - - - stage, we've complied with
16 that.

17 CHIEF JUDGE DIFIORE: Thank you, Counsel.

18 MR. ANDERSEN: Thank you.

19 CHIEF JUDGE DIFIORE: Mr. Palmer?

20 MR. PALMER: I would just like to elaborate on
21 two issues that we touched upon in the respondent's
22 argument.

23 The respondent's saying that because the
24 instrument - - - they're essentially arguing for strict
25 compliance to the CPL. And if it looks facially sufficient



1 according to the CPL, that's kind of the end of the
2 question.

3 But here, if the prosecution acknowledged at
4 arraignment on this same instrument that it contained
5 hearsay, the defense would have no recourse as long as the
6 defect is not apparent on the face of the instrument.

7 There is no grand jury in misdemeanor
8 prosecutions, as the respondent pointed out. And there
9 would simply be no assurance that this is a direct,
10 complete, and amply investigated case.

11 And further, the prosecution has stated that they
12 do already use these documents.

13 JUDGE STEIN: Counsel, what - - -

14 MR. PALMER: But they say that it's an issue for
15 discovery.

16 JUDGE STEIN: - - - Counsel, can I ask you a
17 question? What's the purpose of the hearsay requirement or
18 the non - - - non-hearsay requirement? Isn't it to give
19 notice of the - - - of - - - sufficient to enable the
20 defendant to prepare a defense and to preclude double-
21 jeopardy? And isn't that met under the circumstances here?
22 Or aren't those purposes met under the circumstances here?

23 MR. PALMER: So the purpose of the instrument
24 generally and the reasonable cause requirement as well, the
25 need to provide that is, and for the alle - - - for the



1 alleged actions, but the non-hearsay allegation requirement
2 is so that we know that there is a sound supportable basis
3 for the prosecution in - - -

4 JUDGE STEIN: But if the legislature has decided
5 that - - - that if - - - if there's an issue there, it can
6 be addressed at trial, how does that prejudice the
7 defendant in any way?

8 MR. PALMER: Well, if the issue was facial
9 sufficiency, if counsel had moved for facial sufficiency,
10 it couldn't be found facially sufficient. But here the
11 issue is readiness, and that the People knowingly proceeded
12 on an instrument that they knew contained hearsay and could
13 not bring Mr. Slade to trial on, for over two-and-a-half
14 years, before they cured that defect.

15 JUDGE FAHEY: Can I ask, Judge, just - - - just
16 one other question?

17 CHIEF JUDGE DIFIORE: Yes, Judge Fahey.

18 JUDGE FAHEY: One of the things that strikes me
19 here is that the - - - the risk for latent defects that
20 could be in the accusatory instrument, would you say that
21 those - - - those risks of latent defects are different for
22 English speakers or non - - - and non-English speakers? Is
23 there a distinction to be drawn between the risks for those
24 two groups?

25 MR. PALMER: No, they - - -



1 JUDGE FAHEY: In other words, things that aren't
 2 on the accusatory instrument. You've got the translation.
 3 If the translation meets the statute, it's facially
 4 sufficient. So the question is: is there - - - as far as
 5 facial sufficiency, is there - - - is there any distinction
 6 that we can look at between non-English speaking defendants
 7 or accused and English-speaking accused, as far as facial
 8 sufficiency?

9 MR. PALMER: As far as the accused? No.

10 JUDGE FAHEY: I see.

11 MR. PALMER: There would be no difference.

12 JUDGE FAHEY: No distinction. The distinction
 13 really lies in what you can't see, right, the latent
 14 defect? Is - - -

15 MR. PALMER: Well, the - - - the distinction lies
 16 in what the complainant can see and understand and then
 17 adopt as their own - - -

18 JUDGE FAHEY: I understand that.

19 MR. PALMER: - - - allegation.

20 JUDGE FAHEY: But you're not saying - - -

21 MR. PALMER: To cure the defect - - -

22 JUDGE FAHEY: - - - that defect in and of itself
 23 is a latent defect. You can't see it on the face of the
 24 instrument. You know it because of the circumstances of
 25 the case. But it's not apparent on the face of the



1 instrument?

2 MR. PALMER: No, it is not apparent on the face
3 of the instrument.

4 JUDGE FAHEY: I - - - what I was trying to get at
5 is, is there some distinction that we would look at that
6 would be - - - that would go to something more fundamental,
7 like English-speaking defendants would be treated
8 differently as far as latent defects from non-English
9 speaking defendants. That's why I asked the question.

10 JUDGE RIVERA: Well, counsel, is - - - I think
11 part of that question is: is it the only kind of defect
12 that a non-English speaking defendant would be subject to?

13 MR. PALMER: I'm not sure I understand the
14 question. Sorry.

15 JUDGE RIVERA: Well, if - - - if the problem is
16 the - - - well, let's just take this example - - - the
17 complainant doesn't speak English, and it's not obvious
18 from the face of the accusatory instrument, supporting
19 documentation, the only person who's put in a position
20 that's - - - the person that's put in a different position
21 in that context is the person who's the non-English
22 speaking defendant, right? Or the non - - - I'm sorry - -
23 - the defendant who is - - - for whom the complaining
24 witness is non-English speaking?

25 MR. PALMER: Correct. And that requires a



1 certificate of translation, provides some further
2 assurances in those cases.

3 JUDGE GARCIA: Chief, can I ask a question.

4 MR. PALMER: As it allows - - -

5 CHIEF JUDGE DIFIORE: Yeah, Judge Garcia.

6 JUDGE GARCIA: I'm sorry. Up here. I have a - -
7 - I have a question. To follow up on that, from what Judge
8 Rivera's saying it really seems to me you're not
9 disadvantaging the defendant, who may or may not speak
10 English, what you may be disadvantaging is the complaining
11 witness who doesn't speak English, who now may have a
12 greater bar to being able to be a complainant, because
13 there may be this assumption, without some extra process
14 imposed, that it's hearsay.

15 So to me, it seems like the unequal treatment
16 potential here, would not be between a defendant who speaks
17 or doesn't speak English, because everything will be
18 translated for that defendant, but it would be between an
19 ability of a complaining witness to file a complaint or
20 swear out an affidavit. Wouldn't that be the problem here?

21 MR. PALMER: Well, no. And that does not make
22 cases where complainants are not English speaking more
23 difficult to prosecute - - -

24 JUDGE GARCIA: Well, I'm going to presume - - -

25 MR. PALMER: - - - it provides a benefit - - -



1 JUDGE GARCIA: - - - that it's hearsay - - - I'm
2 going to presume - - -

3 MR. PALMER: - - - to those people - - -

4 JUDGE GARCIA: - - - that it's a hearsay
5 scenario.

6 MR. PALMER: - - - in that they're able to know
7 that the allegations - - - able to know what allegations
8 are being attributed to them. They're able to ensure and
9 confirm the accuracy of the allegations that are attributed
10 to them.

11 And as was outlined earlier, this is not a very
12 difficult process. It was one that the prosecuting offices
13 are already at least trying to do, when they can.

14 And as to respond to the respondent's argument
15 that it's a discovery issue, they are not filing these
16 documents right before trial as part of discovery; they're
17 filing them frequently, it seems like, from the cases that
18 we know of - - - they're filing them when they're trying to
19 convert the accusatory instrument.

20 CHIEF JUDGE DIFIORE: Thank you, Counsel.

21 MR. PALMER: Thank you.

22 (Court is adjourned)

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

I, Penina Wolicki, certify that the foregoing transcript of proceedings in the Court of Appeals of The People of the State of New York v. Kenneth Slade, No. 27 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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