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COURT OF APPEALS

STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

No. 107

TYRELL COOK,

Appellant.

20 Eagle Street
Albany, New York
November 21, 2019

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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1 CHIEF JUDGE DIFIORE: The next appeal on this
2 afternoon's calendar is appeal number 107, The People of
3 the State of New York v. Tyrell Cook.

4 Good afternoon, counsel.

5 MS. MITTER: Good afternoon, Your Honors. May it
6 please the court. My name is Alexandra Mitter, and I
7 represent appellant, Tyrell Cook.

8 Before I begin, I'd like to reserve two minutes
9 for rebuttal, please.

10 CHIEF JUDGE DIFIORE: Yes, you may.

11 Ms. Mitter, is it your position that a hearing
12 court can never reopen a suppression hearing after the
13 prosecution has rested?

14 MS. MITTER: That is not my position at all, Your
15 Honor. My position is that the People get one full and
16 fair opportunity to make their best case against
17 suppression. The Court, nevertheless, retains ample
18 discretion to decide that something has denied the People
19 this full and fair opportunity, and --

20 JUDGE GARCIA: So is that essentially the Havelka
21 rule you're asking us to apply?

22 MS. MITTER: Absolutely, and Kevin W. It's - - -
23 there's a long string of precedent here that says the
24 People get one full and fair opportunity.

25 JUDGE RIVERA: And Kevin W. already said that?



1 MS. MITTER: It absolutely did.

2 JUDGE RIVERA: It already said that.

3 MS. MITTER: And it said that Havelka applies in
4 the pre-trial setting. It didn't say it applies in this
5 very specific pre-trial posture that we happen to find
6 ourselves in.

7 JUDGE GARCIA: Kevin W. talks about a balance,
8 right, and you're balancing certain policy issues, and
9 you're balancing finality and the fact that a party should
10 be prepared for the hearing. And we're striking that
11 balance. And Havelka talks about, you know, factual
12 circumstances and applying a rule in a logical way. And so
13 in Havelka we did that after appellate review, and the case
14 was sent back, and we said no, we applied the Havelka rule
15 which had developed over time in other cases.

16 MS. MITTER: Sure.

17 JUDGE GARCIA: And then we got to Kevin W. and we
18 rolled that back to post-suppression decision. And that
19 case is clearly about a decision to reopen a hearing after
20 the court had ruled. So now we're faced with a different
21 factual circumstance, and we're again looking to balance
22 those interests.

23 And if you're looking at finality and
24 preparedness, and you're looking at the other policy
25 reasons and the problems that were identified in Havelka



1 and the other cases about tailoring and about the haunting
2 specter of nonfinality, why is it that we should strike
3 that same balance when there's been no formal ruling by the
4 suppression court?

5 MS. MITTER: Because I think during oral
6 argument, and particularly - - - particularly during this
7 oral argument here, all of the same things that caused this
8 court in Kevin W. to say we are concerned about finality,
9 we are concerned about tailoring, we're concerned about all
10 of those things that you just mentioned, all of those
11 things happened in the oral argument here. The Court
12 identified, quote, unquote, "the issue", and then explained
13 to the prosecutor that if a counterfactual that had not
14 been presented had in fact - - -

15 JUDGE GARCIA: Assume that may even be true here,
16 and I'm sure your colleague on the other side will
17 disagree, but assume that's true here, aren't we making a
18 rule for all time? So your rule is not you look at that
19 and see how much did the trial judge signal; your rule is
20 never, ever, ever, only if they didn't have a fair
21 opportunity.

22 MS. MITTER: Well, I think you have to start from
23 the premise. The first principle here is that everybody,
24 the People, in this particular situation, get one full and
25 fair opportunity to meet whatever it is their burden is;



1 in this particular situation, opposing suppression. You
2 get one full and fair opportunity. And there's ample
3 reason for that to be the starting position. The point is
4 you have to show that something denied you that full and
5 fair opportunity. Otherwise, what is the point of the rule
6 in the first place?

7 JUDGE GARCIA: That's assuming we adopt your
8 rule, and the question for us is do we adopt that rule,
9 right? I mean, do we apply full and fair opportunity,
10 which is a very limiting principle, to restrict any
11 discretion, other than for those limited reasons, by the
12 trial judge an hour after the suppression hearing closes?

13 MS. MITTER: I think that here the point is that
14 in Kevin W. this court articulated a rather broad principle
15 that Havelka applies with equal force in the pre-trial
16 setting. That's the language of this court's decision.

17 JUDGE STEIN: And they talk about implicit or
18 explicit direction from the court about basically what was
19 missing, right?

20 MS. MITTER: They did indeed, and that's
21 precisely what happened here.

22 JUDGE STEIN: So I think the question is is: is
23 there a reason to apply a different rule in a suppression
24 hearing where the - - - where the - - - there hasn't been a
25 formal ruling than there is in the other contexts in which



1 we've applied that rule.

2 MS. MITTER: I think there's absolutely no reason
3 to draw the distinction that the People are proposing to
4 draw here. All of the concerns that were at issue because
5 a formal decision had been rendered in Havel - - - in Kevin
6 W., are happening here because the prosecution was getting
7 precisely the type of both implicit and explicit direction
8 from the court about the problem with this case. And he
9 understood what was happening.

10 JUDGE STEIN: Well, is that a limitation on
11 discretion? I mean, how does discretion fit into that --
12 to that rule?

13 MS. MITTER: So discretion fits in a number of
14 ways. I mean, the court could realize that it hadn't
15 actually done that implicit or explicit direction. I mean,
16 I think there's - - - there's a number of ways in which the
17 court could say, you're rested, we've started argument, but
18 for the first time the defense attorney is raising an issue
19 that had never been raised before, and so you should be
20 allowed to address that legal issue by reopening the
21 suppression hearing.

22 JUDGE RIVERA: So let me ask, so if counsel - - -
23 excuse me, if the court - - -

24 MS. MITTER: Yes.

25 JUDGE RIVERA: - - - listening to oral argument,



1 doesn't say a word, not a word, but the prosecutor hears
2 something that defense counsel has said and at that point
3 requests to reopen to present additional evidence.

4 MS. MITTER: I mean, I think that - - - that
5 presents a closer question, public policy, and I think that
6 - - -

7 JUDGE RIVERA: But what's the answer to the
8 closer question?

9 MS. MITTER: Well, I think it depends on
10 precisely how it came out because we're not trying to have
11 defense counsel act as sort of a second seat to the
12 prosecutor here to identify all of the issues that the
13 prosecutor, because it was his burden, was supposed to have
14 realized in the first instance. Now, I'm not trying to say
15 - - -

16 JUDGE WILSON: The thing that worries me, I
17 think, though, which relates to your last answer, is that
18 you're asking us to substitute a pretty brightline rule,
19 right, when is there a formal ruling, with something that's
20 pretty mushy, that will require Appellate courts to decide
21 has there been implicit signaling, how we interpret these
22 words, what did the prosecutor make of that or, you know,
23 take Judge Rivera's example, which is even a little bit to
24 one side of that: what if the court said nothing? Or what
25 if the court is nodding and we can't see that on the



1 record? It's - - - you know, that's a hard problem.

2 MS. MITTER: No, I understand the difficulties
3 that this creates, but as all of Your Honors have expressed
4 concerns so far, we want to give the trial court
5 discretion, in that instance, to decide what makes the most
6 sense.

7 JUDGE FEINMAN: So what would the rule be?

8 MS. MITTER: I think the - - -

9 JUDGE FEINMAN: If you were successful - - -

10 MS. MITTER: Sure.

11 JUDGE FEINMAN: - - - what would you ask?

12 MS. MITTER: I mean, I think in the first
13 instance, I would argue that the rule should be that, once
14 the parties have rested, the full and fair opportunity has
15 ended. I think, as a fallback position, once the courts
16 have - - - once the court and the parties have started
17 engaging in oral argument, and precisely that type of
18 explicit or implicit indication of the deficiencies in the
19 case have come to the fore, that that is the moment at
20 which the full and fair opportunity - - -

21 JUDGE FAHEY: So you would say - - - your first
22 position, though, is the court wouldn't have discretion to
23 reopen.

24 MS. MITTER: No, not at all, Your Honor, because
25 I think - - -



1 JUDGE FAHEY: Okay.

2 MS. MITTER: - - - there's a number of things
3 that prevent - - - that - - - that the court could find, or
4 not find, prevented the People from having that full and
5 fair opportunity. For example, as I mentioned earlier, all
6 of a sudden they start arguing about something that hadn't
7 really been at issue in the omnibus motion and as a result
8 wasn't an issue in the suppression hearing. So at that
9 point the prosecutor of course should be allowed, in the
10 court's discretion, to put on evidence to address that.

11 JUDGE RIVERA: So when they can't, from your
12 rule, is if the judge determines that the prosecutor's
13 evidence is deficient, that the prosecutor had every chance
14 to present whatever evidence the prosecutor wished to
15 present - - -

16 MS. MITTER: I think - - -

17 JUDGE RIVERA: - - - that's where you say they
18 don't get that opportunity, regardless of what the judge
19 may say, whether the judge nods, regardless of - - -

20 MS. MITTER: I want to make sure I understand
21 Your Honor's question correctly. So - - -

22 JUDGE RIVERA: Well, I'm trying to find out where
23 you - - - where you draw the line since you're saying you
24 don't have a brightline rule - - -

25 MS. MITTER: I draw - - -



1 JUDGE RIVERA: - - - although I think you do.

2 MS. MITTER: I draw the line at the point that
3 all of the concerns in Havelka and Kevin W. are implicated,
4 which here, and in many cases, happens during oral argument
5 when the deficiencies are being identified in the case and
6 - - -

7 JUDGE RIVERA: So that's what I'm saying. So
8 when you say, no, no, the judge does have discretion, and -
9 - and you return to this focus on whether or not the
10 prosecutor had a full and fair opportunity, right - - -

11 MS. MITTER: Absolutely.

12 JUDGE RIVERA: - - - to present whatever evidence
13 the prosecutor wanted to present on - - - on - - -

14 MS. MITTER: Absolutely.

15 JUDGE RIVERA: - - - the respective issue, which
16 I take then to be the flip side: if the judge decides what
17 - - - and you can correct me if I'm misunderstanding you -
18 - - if the judge determines that what has happened is not
19 that the prosecutor couldn't come forward with evidence,
20 that they just didn't have the opportunity to do so, but
21 they've come forward with whatever evidence they were
22 intending to come forward with and it falls short.

23 MS. MITTER: I agree. At that point, under Kevin
24 W., the court no longer has discretion to reopen. That's -
25 - -



1 JUDGE GARCIA: Has any - - -

2 MS. MITTER: That's the line.

3 JUDGE GARCIA: Has any Appellate Division court
4 applied your rule?

5 MS. MITTER: I think there's plenty of Appellate
6 Division courts that say that a court properly exercised
7 its discretion to deny reopening - - -

8 JUDGE GARCIA: Right - - -

9 MS. MITTER: - - - because - - -

10 JUDGE GARCIA: - - -but they're assuming
11 discretion.

12 MS. MITTER: And - - - and I continue to assume
13 that discretion.

14 JUDGE GARCIA: And there are courts that have
15 said they properly exercised their discretion to reopen in
16 cases that did not fit within the Havelka except -- rule.

17 MS. MITTER: In the First Department, absolutely,
18 and I think the First Department is doing that based on a
19 misunderstanding of this - - -

20 JUDGE GARCIA: No other department besides First?

21 MS. MITTER: Not in the way that the First
22 Department is doing it. I think there's other department's
23 decisions that are being cited by both sides here, but to
24 the extent that they're giving a reason for why that
25 discretion was properly being exercised to reopen, if it's



1 within exactly what I'm talking about here, you know,
2 Hernandez, where there was a new issue raised in oral
3 argument, Whitmore, where there was a new basis, based on
4 the defendant's testimony because - - -

5 JUDGE GARCIA: I think certainly - - -

6 MS. MITTER: - - - the prosecutor had no reason
7 to - - -

8 JUDGE GARCIA: - - - if you have the Havelka
9 factors, you can reopen. I mean, the question is if you
10 don't, can you?

11 MS. MITTER: And I don't know, Your Honor, but we
12 are - - - we are within Havelka, and we are within Kevin W.
13 and all of the concerns raised therein. Thank you.

14 CHIEF JUDGE DIFIORE: Thank you, counsel.
15 Counsel?

16 MS. KNIGHT: May it please the court. Shera
17 Knight for the People of Bronx County.

18 This court, in Kevin W., stated that the truth-
19 seeking function of a suppression hearing is critical.

20 JUDGE STEIN: But that's true about trials too,
21 right? And we certainly have applied similar rules in - -
22 - in the trial context. Why - - - why is -- why is
23 suppression different?

24 MS. KNIGHT: Because it's getting to the truth of
25 whether or not there was unlawful conduct by the police.



1 JUDGE STEIN: Yes, and so - - - so what is - - -
2 what is the significance of that as opposed to getting to
3 the truth of whether an accused person did or didn't commit
4 a crime?

5 MS. KNIGHT: Because we're evaluating whether or
6 not a defendant's rights have been violated. So - - -

7 JUDGE STEIN: So do you think that there are any
8 - - - any limitations on the court's exercise of discretion
9 under these circumstances, or whenever the People figure
10 out that they want to introduce more evidence, they ask for
11 it and - - - and in a sense, then it's never an abuse of
12 discretion to agree to reopen.

13 MS. KNIGHT: No, I'm not saying that at all.

14 JUDGE STEIN: So what are the limitations you
15 think are on the court's exercise of its discretion?

16 MS. KNIGHT: I would say Kevin W. and Havelka,
17 that is when the court has rendered a decision. And before
18 that it is in the court's discretion.

19 JUDGE STEIN: Unlimited discretion?

20 MS. KNIGHT: Not - - - no, you need to look - - -

21 JUDGE STEIN: But that's my question.

22 MS. KNIGHT: - - - at certain things.

23 JUDGE STEIN: That's my question is: we know
24 Kevin W. and Havelka and the - - - and the context in which
25 that rule was - - - was made. Now we have a slightly

1 different context. And my question is: in this context,
2 what, if any, limitations are there when - - - when there
3 hasn't been a - - - a formal decision on the merits?

4 MS. KNIGHT: Well, you need to consider the
5 concerns that were brought forth in Havelka, such as the
6 tailoring of testimony.

7 JUDGE RIVERA: So what would be an example of
8 where a judge should not - - - could not, rather, exercise
9 their discretion to permit reopening without it being an
10 abuse of discretion? What would be an example, from the
11 People's perspective? This is an attempt to see how you
12 might be able to respond to what I think Judge Stein is
13 getting to.

14 MS. KNIGHT: If there were shown to be bad faith
15 on the part of - - -

16 JUDGE RIVERA: Bad faith by who?

17 MS. KNIGHT: By the People which, in this case,
18 there absolutely was not. There was good faith.

19 JUDGE RIVERA: What would that look like? What
20 do you mean by bad faith?

21 MS. KNIGHT: Um - - -

22 JUDGE RIVERA: Let me ask you this one. Let's
23 say the court, they've rested, and now they're in oral
24 argument, and the court peppers the prosecutor with a lot
25 of questions, perhaps does the same to defense counsel.



1 Then - - - then perhaps presents some rhetorical questions
2 like: doesn't it look like your evidence could - - - your
3 argument would be more persuasive, it would be stronger if
4 you had called Officer So-and-So, or if someone had
5 testified to this, or if you presented the following
6 document? Wouldn't that, perhaps, make your case look a
7 little bit stronger? Maybe that would take it over the
8 line. And the prosecutor says, you're right, Your Honor,
9 I'd like to - - - I'm moving to reopen so that I can submit
10 all of that information?

11 MS. KNIGHT: Right, but - - -

12 JUDGE RIVERA: Does that get close to tailoring?

13 MS. KNIGHT: No, I mean, the judge is - - -

14 JUDGE RIVERA: Even if the judge said what I
15 think is wrong with your case; go put it on?

16 MS. KNIGHT: Well, it's an ongoing colloquy
17 between the judge and the parties to flesh out issues. And
18 that's what happened here is, during the discourse, issues
19 - - -

20 JUDGE RIVERA: Well, to flesh out issues based on
21 the record as it stands, as opposed to your evidence falls
22 short; go beef it up.

23 JUDGE WILSON: What if, during argument, the
24 judge says, okay, here's what I think I'm going to do, but
25 I want to sleep on it for a couple days. Is it then too



1 late to reopen?

2 MS. KNIGHT: No, he hasn't rendered a decision at
3 that point.

4 JUDGE WILSON: Even though he's sort of read a
5 tentative decision into the record and said, but I'm not
6 sure about this.

7 MS. KNIGHT: I think that's a closer call.

8 JUDGE WILSON: Okay. Well, that's what I'm - - -

9 MS. KNIGHT: But here there definitely - - -

10 JUDGE WILSON: - - - trying to do.

11 MS. KNIGHT: Yeah, there definitely was not a
12 decision rendered in this case.

13 JUDGE RIVERA: It would seem there's a lot of
14 room - - -

15 MS. KNIGHT: And - - -

16 JUDGE RIVERA: - - - in your approach for the
17 judge ever to be viewed as having abused their discretion
18 by permitting the reopening of the suppression hearing for
19 the prosecutor to submit additional evidence to address
20 gaps or deficiencies in their presentation.

21 MS. KNIGHT: Well, if there's good faith on the
22 part of the prosecutor, and if issues come forth, there are
23 preservation rules. There's no reason why the People
24 should not be afforded the opportunity - - -

25 JUDGE RIVERA: So what do you mean by good faith



1 - - -

2 MS. KNIGHT: - - - to cure a deficiency.

3 JUDGE RIVERA: - - - the prosecutor thought it
4 was a good case, and now they've realized, hm, perhaps I'm
5 missing something?

6 MS. KNIGHT: He may have misjudged the strength
7 of his evidence. And that shouldn't prevent him -- this
8 isn't a gotcha principle of law as was, you know,
9 disapproved of by this court in Whipple. That's not the
10 point; it's to get to the truth. So in order to get to the
11 truth, if the People need to bring forth more evidence, or
12 if the court - - -

13 JUDGE WILSON: But if the only - - -

14 JUDGE FEINMAN: So let me try to - - -

15 JUDGE WILSON: - - - principle were - - -

16 JUDGE FEINMAN: I'm sorry.

17 JUDGE WILSON: I was just going to say if the
18 only principle were getting to the truth, we wouldn't have
19 Havelka.

20 MS. KNIGHT: Right, but the concerns in Havelka
21 are considered by the court - - -

22 JUDGE FEINMAN: Let's bring it back to - - -

23 MS. KNIGHT: - - - in their evaluation of whether
24 or not to reopen the hearing. If they feel there's going
25 to be a great risk of tailored testimony, that would be an



1 example where they may not reopen a hearing. Or if - - -

2 JUDGE FEINMAN: Well - - -

3 MS. KNIGHT: - - - there's a case where, you
4 know, if the witness that the People would want to put on
5 the stand has evidence that is completely irrelevant to the
6 issue that they're dealing with, that would be another
7 example where a judge would deny reopening a hearing.

8 And there was a case like that where the People
9 wanted to bring in 911 evidence, and the court denied the
10 reopening of the hearing because the 911's were not
11 relevant. So if it's something that's not relevant to the
12 issue at hand, or if there's a high risk of tailored
13 testimony, then that would be a point where the judge, in
14 his discretion, would deny the People an opportunity to
15 reopen.

16 JUDGE STEIN: So a lot of this does talk about
17 the risk of tailored testimony. So - - - so I guess, if we
18 narrow it down to just that, so what circumstances are
19 there that show that there's a high risk of - - - of
20 tailored testimony? Wouldn't a court indicating that it
21 didn't think that the evidence was sufficient or that
22 perhaps some other evidence would add, as Judge Rivera
23 alluded to, wouldn't that create a high risk of tailoring
24 even if there hadn't been a formal decision?

25 MS. KNIGHT: Well, there are protections in place



1 to prevent or detect tailored testimony. And one is the
2 judge, who's - - -

3 JUDGE STEIN: But so if that's true then, then
4 you're not talking about the risk of tailoring; then you're
5 talking about looking back to see if in fact there was
6 tailoring. Those - - - those are two different things,
7 aren't they?

8 MS. KNIGHT: Yes.

9 JUDGE STEIN: Okay. And the second thing you can
10 only determine after you've already given permission to
11 reopen the hearing.

12 MS. KNIGHT: True.

13 JUDGE STEIN: Okay. So - - - so which is it?

14 MS. KNIGHT: But I think there might be certain
15 circumstances where a judge might feel there is more risk,
16 if it's something where it comes down to one thing that
17 needs to be said or - - - it depends on the circumstances.

18 But the cases in the First Department, as my
19 adversary claims the First Department is apart from the
20 other departments in their understanding, they all talk
21 about and they all consider tailoring. And actually, one
22 of the cases that was handed to the court in this case,
23 Cestalano, actually cited to a Second Department case,
24 Suphal. So there's absolutely no misunderstanding of how
25 Kevin W. and Havelka apply in the pre-trial setting and how



1 they also interact with Whipple because it's not
2 incompatible.

3 JUDGE FEINMAN: So then let's actually apply it
4 to the facts of this case, as opposed to a hypothetical.
5 What actually, in your view, transpired? Did the judge
6 actually signal, somehow, his understanding? You know, how
7 do you think the rule plays out when applied here?

8 MS. KNIGHT: I think there was an ongoing
9 spirited colloquy that was going on between the court and
10 defense counsel where issues were being fleshed out. And
11 this was - - - and the People were in the midst of a full
12 and fair opportunity throughout these - - - these two
13 hearings. And as the issue - - -

14 JUDGE FEINMAN: Did he ever suggest that the
15 whole issue of the sweating was the decisive issue in his
16 mind?

17 MS. KNIGHT: Did the judge?

18 JUDGE FEINMAN: Whether it's - - - yeah, did the
19 judge, as opposed to either of the parties?

20 MS. KNIGHT: It was a concern. It - - - it was
21 an issue that the judge definitely wanted more information
22 on. He had requested the transcripts.

23 I just want to point out that this judge, as far
24 as implicit and explicit - - - explicit direction, he
25 didn't believe that he had the discretion to reopen the



1 hearing. So that absolutely did not occur in this case.
2 He was not telling the People: here, here's what you need;
3 ask me to reopen, because he didn't believe he could
4 reopen.

5 JUDGE FEINMAN: Right, and then he comes back the
6 next day, after the People bring certain cases - - -

7 MS. KNIGHT: Do research.

8 JUDGE FEINMAN: -- and he reconsiders that
9 ruling.

10 MS. KNIGHT: And we - - - right.

11 JUDGE FEINMAN: All right.

12 JUDGE RIVERA: What you're describing, as the
13 judge believing the interpretation of Havelka and Kevin W.,
14 as I cannot reopen this, I don't have discretion is that he
15 felt at great liberty to explain what his concerns were,
16 which does create the risk of tailoring.

17 MS. KNIGHT: Yes, but the judge also is well-
18 equipped to determine whether there has been tailoring, and
19 the judge here also assured defense counsel that she'd have
20 ample opportunity to cross-examine the witness. So there
21 are protections in place to prevent tailored testimony.

22 JUDGE RIVERA: Well, cross-examination won't
23 prevent the testimony. I think your argument is that we
24 would hope that cross-examination might show some weakness
25 that suggests that it's tailored testimony, but it will not



1 prevent it.

2 MS. KNIGHT: Well, the decision would not be
3 upheld if it was shown that there was tailored testimony.

4 JUDGE RIVERA: One would hope.

5 CHIEF JUDGE DIFIORE: Thank you, counsel.

6 MS. KNIGHT: Thank you.

7 CHIEF JUDGE DIFIORE: Counsel?

8 MS. MITTER: Thank you, Your Honors. I'd like to
9 just briefly respond to where my adversary ended and then
10 get to the 330.30 issue, if I may, because I think that
11 where respondent just left off sort of gave the game up.

12 She said we were in the midst of our full and
13 fair opportunity while oral argument was happening. And
14 that's just simply not the case under Kevin W. And so I
15 think, to be clear, what the court said, because we want
16 the court to be able to explain exactly what it thinks the
17 problems are so that it can get - - - there could be a
18 give-and-take in oral argument. If people are worried
19 about what they say in oral argument leading to reopening
20 sort of ad hoc, then we're going to be chilling exactly
21 that argument. And what the court - - -

22 JUDGE RIVERA: Doesn't your rule lead to the
23 court being careful not to ask questions?

24 MS. MITTER: No, I think the rule - - - the rule
25 suggests that - - - the rule is designed to encourage the



1 People to have done the research, understood their case,
2 and come with what they believe is their best case. And
3 sometimes that won't be enough, and that's okay; that's how
4 it works.

5 So I'd like to - - - to get to the 330.30 issue,
6 just briefly, if I may, because what we have here is two
7 jurors, one of whom was a holdout in favor of acquittal,
8 telling everyone that an MTA employee who was on the jury
9 told them that there would have been video at the subway
10 stop in question.

11 JUDGE STEIN: Wasn't that common knowledge, and
12 didn't defense counsel in fact raise that in his
13 examination of witnesses?

14 MS. MITTER: It's not common knowledge, Your
15 Honor, and I think - - - I think there's a couple problems
16 with that.

17 JUDGE WILSON: No, counsel, my eight-year-old
18 points out the video cameras on the subway platforms.

19 MS. MITTER: But what the court said here was
20 that post-9/11, everybody knows that there's surveillance,
21 and while we might know that we're in a surveillance kind
22 of state, at large, what we don't know is that every subway
23 station, including the one at issue, has cameras, that
24 those cameras record, and that those recordings, and the
25 MetroCard swipes, by the way - - - there's two pieces here



1 - - - that those would be available to defense counsel.
2 Effectively, what happened - - -

3 JUDGE RIVERA: But once counsel is trying to
4 point out the weakness of the People's case, that the
5 investigators could have gotten the surveillance video, or
6 at least didn't try to get it, didn't try and find out
7 anything about the MetroCards, that it would be the natural
8 thought of a juror, perhaps incorrectly, depending on the
9 instructions from the judge, to wonder, gee, why didn't - -
10 - why didn't the defendant bring that forward if it's
11 exculpatory?

12 MS. MITTER: So if the jurors had that question
13 and they - - - they wanted - - - they sent out a note
14 saying, Your Honor, can we consider that the defendant
15 didn't do that, the answer would be no, you can't consider
16 that. And there would be a reinstruction that the burden
17 remains with the People on this point.

18 JUDGE RIVERA: Yes, but I thought your point was
19 that the problem is that there's one juror who's sort of
20 stoking the fires about this issue based on some - - - some
21 expertise or information that that juror brought into the
22 room.

23 MS. MITTER: Absolutely. I mean, effectively,
24 what we have here is that the MTA juror sort of built the
25 record and made the case for an adverse inference that was



1 then held against Mr. Cook for documents not in his
2 possession.

3 But because this happened in the jury room,
4 instead of in the courtroom, defense counsel had no ability
5 to, for example, point out the practical difficulties of
6 obtaining that evidence. And so I think, for all of those
7 reasons and the reasons in our brief, this court should
8 reverse the conviction.

9 JUDGE RIVERA: Did counsel ask for some kind of
10 instruction to the jury?

11 MS. MITTER: At what point, Your Honor?

12 JUDGE RIVERA: Regarding this issue.

13 MS. MITTER: Regarding this issue? There - - -
14 there - - - they didn't know about this issue until - - -
15 until after the fact of - - -

16 JUDGE RIVERA: No, no, not about the juror, about
17 the: I'm making this argument, please, maybe you want some
18 other kind of instruction related to what is the burden
19 that the defendant - - - excuse me, that the People carry,
20 that the defendant bears no burden.

21 MS. MITTER: There was discussion of the fact
22 that the burden doesn't shift because the People had
23 engaged in some burden - - -

24 JUDGE RIVERA: The usual - - - the usual
25 instruction on that. I'm asking was there any request,



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perhaps, for something to - - -

MS. MITTER: Defense counsel did in fact - - -

JUDGE RIVERA: - - - expand, given this questioning.

MS. MITTER: Defense counsel did in fact ask for more and was - - - was denied that.

JUDGE RIVERA: Thank you.

MS. MITTER: Thank you.

CHIEF JUDGE DIFIORE: Thank you, counsel.

(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 The People of the State of New York v. Tyrell Cook, No. 107, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Sharona Shapiro

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