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COURT OF APPEALS
STATE OF NEW YORK

MARC MITCHELL,

Appellant,

-against-

No. 44

PEOPLE OF THE STATE OF NEW YORK,

Respondent.

20 Eagle Street
Albany, New York
April 20, 2022

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE ANTHONY CANNATARO
ASSOCIATE JUDGE SHIRLEY TROUTMAN

Appearances:

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1 CHIEF JUDGE DIFIORE: Okay. Good afternoon.
2 Next appeal on this afternoon's calendar is appeal number
3 44, The People of the State of New York v. Marc Mitchell.

4 Counsel?

5 MS. MA: Good afternoon. Two minutes for
6 rebuttal, please, Your Honor? Two minutes for rebuttal,
7 please, Your Honor?

8 CHIEF JUDGE DIFIORE: You may have two minutes.

9 MS. MA: Thank you. May it please the court.
10 Ying-Ying Ma on behalf of the appellant, Marc Mitchell.

11 Standing in place on a public sidewalk and
12 calling out help the homeless is not accosting, as any
13 English speaker understands that word.

14 JUDGE GARCIA: What if you block the sidewalk?

15 MS. MA: I don't think that - - - that meets the
16 common definition of accosting, which is to approach
17 someone, to go up to someone, meaning that you are
18 physically in their person space as - - -

19 JUDGE GARCIA: But what if you're in their
20 personal space that they want to be in and the only way to
21 get by is to approach you?

22 MS. MA: I mean, I think the word, the gravamen
23 of the word, is that it's hard to disengage when someone is
24 up - - - coming up to you and someone is in your personal
25 space. If you - - -



1 JUDGE GARCIA: But I'm walking down a Manhattan
2 sidewalk and you block my way. How is that not approaching
3 me?

4 MS. MA: I think it's a closer question, but I
5 don't - - - I don't believe it's - - -

6 JUDGE GARCIA: I mean, isn't that what happened
7 here?

8 MS. MA: In this case, Mr. Mitchell was on a
9 public sidewalk. He had two milk crates set up as a
10 makeshift table and he was just passively making a call out
11 for people to help the homeless. It doesn't say any - - -
12 I understand he was charged with disorderly conduct in that
13 seventy-five people walked around him, but those were
14 seventy-five people - - -

15 JUDGE GARCIA: But it says he blocked the
16 movement of approximately seventy-five people by the way he
17 set up his milk crates.

18 MS. MA: Yes.

19 JUDGE GARCIA: And that's - - - again, I
20 understand it might have been in support of another charge
21 as well, but it's in the affidavit supporting this.

22 MS. MA: And they were able to easily walk around
23 him. They were not stopped. They were not - - -

24 JUDGE GARCIA: But this is a - - - we are looking
25 at this is a complaint, right? It's a standard for a



1 complaint. So whether they could easily walk around him or
2 not that - - - you could maybe argue that at trial, but why
3 isn't that enough for the complaint?

4 MS. MA: Because there's simply no nonconclusory
5 evidentiary facts of accosting. Accosting has a common
6 definition, which is to go up to someone and to speak to
7 them insistently, and that's simply not - - -

8 JUDGE GARCIA: But that - - - that's actually not
9 the common definition. At least it wasn't at the time,
10 right?

11 MS. MA: I mean, I think at the most we have
12 ambiguity. At the time -- respondent does cite a few
13 selected dictionaries that say that accosting means to
14 speak to. Respondent also cites at least one dictionary
15 from the time, from 1961, that does define accosting as to
16 aggressively approach. So at most - - -

17 JUDGE GARCIA: Well, that dictionary from 1961
18 defines it to be "to approach, to speak to, to speak
19 without having first been spoken to"; that's the first
20 definition. The second definition is yours. "To confront,
21 usually in a challenging or defensive way".

22 MS. MA: Yes, and respondent is able to provide
23 no example from common usage either back then or today, in
24 which accost is used - - -

25 JUDGE GARCIA: But isn't def - - - a dictionary



1 definition somewhat the definition of common usage? And
2 every one from that time, at least as a first definition,
3 lists the more general approach, speak to first.

4 MS. MA: I believe the caselaw is clear that
5 dictionaries are merely a guidepost and that we do look to
6 the common understanding of the word because I think you
7 would come into - - - you would come across notice issues
8 if the plain meaning of a word were so vastly out of sync
9 with what a dictionary defined it to be.

10 JUDGE GARCIA: And - - - and so why are these
11 definitions out of sync?

12 MS. MA: Because there simply is no common usage
13 that's given in any of respondent's arguments in which the
14 word accost simply means to speak to first. You would
15 never say the teacher sitting behind a desk accosted her
16 students with a good morning class or the bus driver - - -

17 JUDGE CANNATARO: Counsel, outside of dictionary
18 definitions - - - and maybe this is a fault in my own
19 education or something, I don't know what the common
20 definition of accost is. I use the word, no question about
21 it, but I never really gave deep consideration to what it
22 was. And if I wanted to know, and lately I have wanted to
23 know, I would go look in a dictionary.

24 So what are the sources of common understanding,
25 as you put it, that exist outside of the dictionary?



1 MS. MA: Well, I believe we cited numerous common
2 usages from the New York Times, from literary - - - from
3 novels, from other literary sources, and I think it's very
4 telling that respondent could not find a single example
5 from any source outside of the select dictionary from the
6 1960s that does define accost as to speak to.

7 And I do want to point out that this is not even
8 the definition that the first - - - the appellate term
9 first department used in this case. Their definition is
10 completely nebulous, has no - - - it's not rooted in any
11 dictionary. Their definition is to take some affirmative
12 action to make contact with the victim. And you won't find
13 that in any dictionary because that's just not how anyone
14 uses that word.

15 JUDGE CANNATARO: And just to be clear, your
16 common - - - your assertion with respect to the common
17 definition is an approach accompanied by some aggressive
18 verbal exchange; is that right?

19 MS. MA: Yes, I think an approach followed by
20 speaking to someone specific in an insistent manner. I
21 think that is entirely consistent with how it's commonly
22 used and - - -

23 JUDGE CANNATARO: Well, insistent is a little
24 different than - - - I think I heard Judge Garcia use the
25 word defensive and/or aggressive. I think he might have



1 said that. You know, there's a - - - there's certainly a
2 difference between the tenor of those words. So which is
3 it? Is it just insistent? Is it, like, oh, please give me
4 money or is it hey, give me money or, you know, I'm going
5 to hurt you?

6 MS. MA: I mean, I think there are a number of
7 ways that you can accost someone. You can either do it
8 through a persistent interaction, like sort of not letting
9 someone disengage by continually asking them for something,
10 or you can do it in a more confrontational manner. But I
11 think what matters is in this case, Mr. Mitchell didn't do
12 any of those things. He was merely standing on the
13 sidewalk, making a call out to the general public, not to
14 any specific person. And in fact, seventy-five people were
15 seen just - - - just freely walking past him. Nobody felt
16 any type of pressure.

17 JUDGE TROUTMAN: But those seventy-five people
18 had to redirect their passageway based on his putting the
19 crates in the manner that he did.

20 MS. MA: I mean, that may be, but that's just a
21 fact of urban life. You know, often the Girl Scouts set up
22 tables and people have to walk around them if they don't
23 want to buy cookies, and that's just - - -

24 JUDGE TROUTMAN: So if there's a - - -

25 JUDGE GARCIA: But that would go - - - I'm sorry.



1 Go ahead, Judge.

2 JUDGE TROUTMAN: So there's a functional
3 equivalent of an approach; that he wasn't going to approach
4 them, but he made the traffic go in his direction.

5 MS. MA: But nobody even engaged with him, even -
6 - - even if you think that he made a functional equivalent
7 of an approach. Nobody engaged with him. He was not
8 persistent or insistent in any kind of engagement with
9 anybody.

10 JUDGE CANNATARO: Is - - - is that - - -

11 JUDGE TROUTMAN: So they would have to stop?

12 JUDGE CANNATARO: I'm sorry, is that part of
13 accost? Does there have to be an engagement? Does there
14 have to be a response from the person who is being
15 accosted?

16 MS. MA: No. There doesn't - - - well, I don't
17 think there has to specifically be a response, but it has
18 to be directed, targeted to someone. And to the extent
19 that Your Honors think that there is any ambiguity here, I
20 think the rule of lenity dictates that the interpretation
21 most favorable to Mr. Mitchell is - - - is the one - - -

22 JUDGE GARCIA: But you're arguing kind of an
23 ambiguity on the facts there, it seems like, not on the
24 law. I mean, if the law is clear what the definition is,
25 then we don't apply the rule of lenity.



1 But I'm having a hard time. So approach isn't
2 enough to you. So in those examples - - - and some of them
3 are in the examples of why the promulgated the statute,
4 where it's kind of a - - - it's fraud, right, it's not a
5 robbery where they go up, now, I lost my wallet or I - - -
6 that's not enough because it's not persistent or
7 aggressive? You know, I can change your ten-dollar bill
8 into a twenty; that's not necessarily aggressive. It might
9 be hopeful. It might be luring. But it's not aggressive
10 or persistent. And what if you just said that once?

11 MS. MA: I mean, I guess, respectfully, I
12 disagree. I think that is a persistent, targeted approach.
13 And in any event, that's clearly worlds away from what Mr.
14 Mitchell did here. Those were elaborate - - -

15 JUDGE GARCIA: But it doesn't fit your
16 definition, it seems like. Persistent to me means if you
17 try to walk away, you keep after them. Aggressive
18 obviously has its own meaning. But approach is different.

19 MS. MA: I mean, I think in those two examples,
20 there was definitely an approach. And I think by the
21 nature of what they were saying, kind of like oh, come look
22 at my handkerchief, I can do this, you know, magical thing
23 - - -

24 JUDGE GARCIA: That's aggressive or persistent?

25 MS. MA: I think it's insistent in a way that,



1 you know, draws someone in. But I think the main fact is
2 that you've entered someone's personal space, such that
3 they feel like it's somewhat difficult to now disengage
4 with you.

5 And in any event, I think we don't even need to -
6 - -

7 JUDGE RIVERA: So Counsel - - - I'm sorry; I'm on
8 the screen, Counsel. So it sounds like you've got a
9 version of a type of solicitation, right. That - - -
10 that's what it sounds like you were saying in response to
11 Judge Garcia. That there's a solicitation, right? Give -
12 - - in his case, it's here, give me money. But you're
13 saying it has to be more than just asking for the money?

14 MS. MA: Yes because I think accost - - -

15 JUDGE RIVERA: Am I understanding you? Okay.

16 MS. MA: Yes.

17 JUDGE RIVERA: So what - - - what would that be?
18 Try to help me understand the way you're responding to
19 Judge Garcia because I too am finding a little bit of
20 difficulty understanding your dividing line between
21 accosting and free speech.

22 MS. MA: Well, I think anything that would
23 satisfy the statute of attempted petit larceny by false
24 promise - - -

25 JUDGE RIVERA: Okay.



1 MS. MA: I mean, we already have that statute.
2 So there is a reason that the legislature created
3 fraudulent accosting and that reason is - - -

4 JUDGE RIVERA: But isn't that the mens rea - - -
5 isn't that the mens rea, as opposed to the actus reus,
6 right? Isn't that a little bit of that?

7 MS. MA: Right. But I think my point is - - -

8 JUDGE RIVERA: That you're conflating?

9 MS. MA: Yes. My point is that the first
10 department's definition of accosting sort of melds the two
11 statutes. There's no way that you can be guilty of
12 fraudulent accosting under this sum affirmative action
13 definition and not also be guilty of attempted petit
14 larceny by false promise. The only way that this is a
15 separate statute that has an independent actus reus is if
16 you give meaning to the term accost and - - - and that you
17 don't find it to be as completely nebulous. "Some
18 affirmative action". Anything could meet that definition,
19 "some affirmative action". You could take a piece of paper
20 and write on it help the homeless and hold it up and that
21 would meet the first - - - the - - -

22 JUDGE GARCIA: Not if you define it as approach
23 or call out to, right?

24 MS. MA: I'm sorry?

25 JUDGE GARCIA: Not if you define accost as



1 approach, right. Because if you're sitting on the side of
2 the road with a sign on your table and somebody comes over
3 and says hey, what's that about, that's kind of your - - -
4 but that's not what happened here.

5 MS. MA: Well, I'm sorry. Maybe I'm not
6 understanding, but - - - but appellate terms - - -

7 JUDGE GARCIA: Because here, he blocks the
8 sidewalk, people have to walk around him, and he's calling
9 out to people, saying help the homeless and, I mean, the
10 second element, which I know you dispute, with an intent to
11 defraud. So that's different to me than having a table on
12 the side of the road somewhere or under an awning and you
13 have a sign and people can come up and say hey, what - - -
14 what's this about? That's a very different scenario. I
15 mean, it might have been covered by the old statute, which
16 was - - - had different language in it, but it wouldn't be
17 covered by this.

18 MS. MA: I mean, I think that old statute is
19 exactly what would cover the - - - the facts here.
20 Stationing - - - Mr. Mitchell was simply stationed in
21 place. He was calling out for people to help the homeless.

22 JUDGE GARCIA: I think stationing would be my
23 example, how you set up a table off to the side. I have
24 some literature or maybe a sign and people come up and they
25 say hey, what's this about; that' stationing, right.

1 MS. MA: I don't believe that the complaint has
2 any more facts than that, besides that seventy-five people
3 - - -

4 JUDGE RIVERA: Well - - -

5 MS. MA: - - - walked around him, which I think
6 means that they --

7 JUDGE GARCIA: And he called out.

8 JUDGE RIVERA: But - - - but Cou - - -

9 MS. MA: I'm sorry?

10 JUDGE GARCIA: He called out to them, right?

11 MS. MA: Yes, he called out to them, but that's
12 still - - -

13 JUDGE GARCIA: And they had to walk around him.

14 MS. MA: That's not an approach, as people who
15 use the word accosting understand it to mean.

16 CHIEF JUDGE DIFIORE: Thank you, Counsel.

17 Counsel?

18 MR. TISNE: May it please the court. I'm Philip
19 Tisne for the respondent. The fraudulent accosting statute
20 does not require an element of aggression. The relevant
21 dictionaries - - -

22 JUDGE GARCIA: So Counsel, I'm on the screen.

23 Counsel, if I can. Good afternoon.

24 So if I stand in front of the courthouse on the
25 steps and someone is trying to enter and they have to walk



1 around me, did I accost them?

2 MR. TISNE: I don't think so, Your Honor. I
3 think that's - - -

4 JUDGE RIVERA: Why not?

5 MR. TISNE: Because you haven't taken some
6 affirmative action to draw them into your scheme, and
7 that's the appellate term's definition; that's the
8 definition we're talking about here.

9 JUDGE GARCIA: So if I had - - - if I was on a
10 cell phone and I'm talking, that's just talking in the air,
11 right. That's not drawing them in, is that your point also
12 to that? It's not just that I'm standing there without
13 saying anything?

14 MR. TISNE: Also not fraudulent accosting,
15 talking on the phone.

16 JUDGE RIVERA: Okay. So it has to be that I've
17 said something at the person who is coming at me?

18 MR. TISNE: You have to say something that is
19 designed or calculated to draw somebody into the scam that
20 you have set up. You can do that by - - - through a verbal
21 exchange or you can do that by going up to somebody. But
22 at no point does it need to be aggressive or persistent;
23 that is something that doesn't appear in - - -

24 JUDGE WILSON: How about - - - how about by a
25 sign?



1 MR. TISNE: A sign probably would not be enough.
2 And - - - and I think - - -

3 JUDGE WILSON: And so why not?

4 MR. TISNE: Well, because the - - - the - - - the
5 - - -

6 JUDGE WILSON: What if the sign is really
7 alluring? The sign is more eloquent than I am?

8 MR. TISNE: Sure, and that would be a situation
9 not unlike, for instance, displaying a bunch of fake hard
10 rock shirts and allowing people to be drawn in by the
11 shirts. What the statute contemplates is an affirmative
12 action by the defendant himself; that's what we're looking
13 at when we're talking about accost. You either have to
14 address somebody or you have to approach somebody to
15 address them; that what the - - -

16 JUDGE RIVERA: And - - - and do you have to
17 approach a particular individual? Let's say three people
18 are walking at me. Do I - - - do I have to say it to one
19 particular individual or make clear that I'm referring to
20 all three in my attempt to draw them in?

21 MR. TISNE: No. because a generalized call can
22 be calculated to produce an individual response just as
23 much as a targeted call can be.

24 JUDGE RIVERA: What if - - - what if he had said
25 the homeless are suffering; help them?



1 MR. TISNE: Well, I think the - - -

2 JUDGE RIVERA: Just in the air. Nothing else.

3 MR. TISNE: I think first of all, we're - - -
4 we're dealing with a complaint here, so all the fair
5 inferences go to the People, but I think - - -

6 JUDGE RIVERA: Yes.

7 MR. TISNE: - - - the fair instance on that is
8 that it is inviting a donation to the fake charity. If you
9 take out the last piece of your hypothetical, the homeless
10 are suffering, the homeless are, you know, it - - - I don't
11 - just - - - just the first part - - -

12 JUDGE RIVERA: Well, I - - - I'm sorry. Didn't
13 he only say help the homeless? I may have misread the
14 record.

15 MR. TISNE: No. The officer alleged that he
16 asked passing pedestrians to "help the homeless".

17 JUDGE RIVERA: Right. But did he - - - did he
18 say how? Did he verbally say how to do that?

19 MR. TISNE: No. Well, the allegation isn't in
20 the complaint, but the allegation in the complaint is that
21 he was asking passing pedestrians to help the homeless and
22 on his - - -

23 JUDGE RIVERA: Right. So - - - so but let - - -
24 we're just talking about the accosting. So if it's what he
25 has to say, since you said a sign is not good enough, I



1 don't know how anything on that table's good enough. If he
2 then has only said help the homeless, how is that - - - I
3 mean, I think that's different from if I stand on the
4 corner and I say please give ten dollars to the homeless.

5 MR. TISNE: Well, the allegation is not that he
6 just said help the homeless. The allegation is that he
7 asked passing pedestrians to help the homeless. And I
8 think the fair inference from that is that he's inviting
9 passing pedestrians to donate money to the - - - to the
10 fake charities, he has held him out - - - himself out as
11 representing, so that they can help the homeless. The - -
12 - the pieces of material on his table are relevant. Not
13 per - - - to the accosting element, but to the intent to
14 defraud.

15 JUDGE RIVERA: But could it - - - could it not be
16 - - - could it not - - - could it not be that the
17 instrument is saying by his articulation of that - - - that
18 sentence, help the homeless, that that is interpreted by
19 the officer as a request?

20 MR. TISNE: I don't understand your questions,
21 Your Honor. I'm sorry.

22 JUDGE RIVERA: Well, I thought that you said that
23 what the instrument does is say that he is formally asking
24 individuals on the street.

25 MR. TISNE: That's the only (indiscernible); that



1 he is asking passing pedestrians - - -

2 JUDGE RIVERA: Yes, but what I'm saying is - - -
3 I understood that that is a conclusion that comes from his
4 sentence, help the homeless; that he's asking people by
5 saying help the homeless.

6 MR. TISNE: Exactly, and - - - and in your
7 hypothetical, the first part, the factual statement the
8 homeless are in need of help, that doesn't invite a
9 response. But once the - - - the person, the speaker adds
10 and please help the homeless, that is something that
11 reasonably inferred at this stage of the litigation invites
12 a response. And it's the kind of thing that when you
13 broadcast to a generalized group of people, maybe you don't
14 get the first 100 people that you say it to, but the 101st
15 person comes over and donates money. And we know that's
16 the case, of course, because he told the officers that's
17 the case. He said, I - - -

18 JUDGE RIVERA: Yeah.

19 MR. TISNE: Yep.

20 JUDGE RIVERA: And if he - - - and if he said - -
21 - and if he said don't help the homeless, what act is he
22 requesting there?

23 MR. TISNE: Don't help the homeless? I mean, I
24 don't think he's inviting a response from them at all. I
25 mean, the whole point of his setup is to hold out that the



1 - - - the impression that he is an organization that is
2 collecting money to - - - for - - - to help - - -

3 JUDGE RIVERA: No, no. I get the other part of
4 it. The part I'm only interested - - - I think some very
5 interesting questions have been raised from the bench about
6 what this rule would be about the definition of accosting
7 because it strikes me that there's real concern - - - I'll
8 just say for me, real concern, where is the dividing line
9 between free speech and what can be criminalized. So just
10 with the actus reus.

11 MR. TISNE: Well, it's - - - it's not just speech
12 or advocacy. This is - - -

13 JUDGE RIVERA: Okay.

14 MR. TISNE: This is speech tailored to draw
15 somebody into a fraud scheme. There is no protected
16 category for fraud speech. This is something that by
17 virtue of the statute, he knew what he was doing was
18 criminal. He was - - - he intended to draw people into a
19 fraud scheme, as - - -

20 JUDGE GARCIA: Isn't that why they added the
21 intent to defraud element to begin with, to get around the
22 constitutional problem with the statute?

23 MR. TISNE: In '72, yes. That's - - - that - - -
24 there was an appellate term decision and they changed the
25 statute to add the intent element.



1 JUDGE RIVERA: Yeah, but that was my point; that
2 goes to intent. I'm just dealing with the action, the
3 conduct itself, right, the actus reus. The accosting part.

4 MR. TISNE: Exactly, but the - - - the - - -
5 there is no liability just for accosting. It's accosting
6 with intent. And that's why - - -

7 JUDGE RIVERA: Yes, that's the crime, but you've
8 got - - - you've got to do the - - - the action, right.
9 That - - - that's all I'm trying to get straight here.

10 MR. TISNE: Exactly, but liability doesn't attach
11 until you have both elements is what I - - - is I think the
12 - - -

13 JUDGE RIVERA: Well, criminal liability. If you
14 accost someone, it may very well leave you open to civil
15 liability.

16 MR. TISNE: It might, but that's not what we're
17 concerned with here today.

18 JUDGE RIVERA: Correct.

19 JUDGE WILSON: So I - - - I wonder - - -

20 MR. TISNE: What we're concerned with is the
21 criminal penalty.

22 JUDGE WILSON: I wonder why this doesn't make out
23 an attempt rather than a completed crime.

24 MR. TISNE: Because I don't think you could - - -
25 you're talking about an attempted larceny. I don't think



1 you could have attempted larceny without even identifying a
2 victim, and that's what this statute allows. It's what it
3 was designed to do.

4 The statute was proposed in '52 because the - - -
5 the People at the time specifically thought that attempted
6 larceny wasn't adequate to enfor - - - or to prosecute
7 these kinds of scams precisely because you needed a victim
8 for those crimes and you often didn't have them in these
9 situations because either people were too embarrassed
10 because they had been swindled or because they were
11 tourists and they had left the jurisdiction. And so they
12 came up with a statute that didn't require an actual
13 victim. All it required on the behalf of the defendant was
14 some act to sort of trigger this scam.

15 And what we have is accosts is somebody who goes
16 up to somebody else, either physically approaches them or
17 verbally approaches them with the intent to draw them into
18 this - - - to this scam. That - - - that's the definition
19 that was fairly well understood at pretty much every
20 material point when this statute was enacted or amended.
21 It's the - - - the meaning of the statute that most
22 naturally fits with the legislative history, the city's
23 memo in '52. I think the Bartlett Commission revision in
24 1965 clearly shows that there was no intent to - - - or any
25 kind of aggression needed.



1 And it's also the only one that sort of aligns
2 with the basic purpose of this statute. The purpose of
3 this statute is to get - - -

4 JUDGE RIVERA: So then, if I can just be clear
5 with - - - with what appears to be the way you see this
6 definition, since Judge Garcia had raised this hypothetical
7 before, I'm very interested in how you would - - - you
8 would answer it. If the setup he had - - - you know, his
9 setup had been to the side, where no one has to walk around
10 him, did he accost someone when he calls out help the
11 homeless?

12 MR. TISNE: Yes.

13 JUDGE RIVERA: Okay. Why is that, under - - -

14 MR. TISNE: The verbal act in that situation that
15 constitutes the accosting. It's the verbal act that is the
16 invitation to the scheme.

17 JUDGE CANNATARO: So your definition of accosting
18 doesn't include an approach of some kind?

19 MR. TISNE: It certainly can. It certainly can.
20 If he had gone out and was making some interaction with
21 people, that I think would be enough, but it's not limited
22 to that. And I think that's what they're trying to get is
23 a definition that limits this only to scams that are
24 initiated in some very narrow way, and that's clearly what
25 the legislature wasn't trying to do. The legis - - -



1 JUDGE CANNATARO: And what's the authority for
2 the definition of accost that doesn't include some sort of
3 approach?

4 MR. TISNE: I mean, the - - - we presented the -
5 - -

6 JUDGE CANNATARO: Because I think all the - - -
7 all the dictionary ones cut the same.

8 MR. TISNE: I - - - we have the dictionaries, so
9 those I think are pretty good. The dictionaries from 1949,
10 1951.

11 JUDGE CANNATARO: Yeah.

12 MR. TISNE: Even the dictionary, the third
13 Webster, it's from 1961 and then OED in 1979 and I think
14 1988. Those definitions all have as their primary
15 definition either you go up to and address or you speak to
16 first, without having first been spoken to. Those are the
17 physical approach and the verbal approach; that's what - -
18 -

19 JUDGE RIVERA: Well, Counsel, then what - - -
20 what do you make of the fact that there are these other
21 definitions? It certainly could have been that the
22 legislature, given what your opponent says is also the - -
23 - the way it's actually accosting is expressed otherwise,
24 other than in dictionaries, it's not as if the - - - her
25 version of the definition isn't found somewhere, right?



1 Your point is, well, it's not the first one. But it is
2 found in these dictionaries.

3 MR. TISNE: It's so that - - -

4 JUDGE RIVERA: How do we - - - how are we to
5 intuit that the legislature only intended - - - if we
6 assume you're right - - - only intended that first
7 definition?

8 MR. TISNE: Well - - -

9 JUDGE RIVERA: Given, perhaps, some of the other
10 concerns, right. Like - - - like, you know, the nun who is
11 on the corner, asking for money.

12 MR. TISNE: The nun who is on the corner asking
13 for money doesn't come within the scope of this statute
14 because she's not trying to involve anybody in a scam.
15 There aren't concerns about her organization.

16 JUDGE RIVERA: Well, again, that - - - I - - -
17 I'm asking about the - - -

18 MR. TISNE: If a police officer has reasonable
19 concern - - -

20 JUDGE GARCIA: - - - the actus reus, but I get
21 your point. I get your point.

22 MR. TISNE: If a police officer had reason to
23 suspect that somebody who is dressed as a nun was - - -

24 JUDGE RIVERA: Yeah.

25 MR. TISNE: - - - was soliciting donations for a



1 fake nunnery, then yes, that would be grounds for an
2 approach and perhaps a charge. But we're not talking about
3 pure advocacy. We're talking about fraudulent advocacy.
4 So I think these - - - these concerns about notice, these
5 concerns about fairness really are a red herring here.
6 This is a defendant who, if he had his way, would have
7 committed a completed larceny. He would have engaged in
8 conduct that is criminal in the penal law in about three or
9 four different ways. There is no question that - - -

10 JUDGE GARCIA: Counsel, Counsel, just a second.
11 You're out of time, so. But one of the ways - - - can't we
12 tell that the legislature didn't intend the second
13 definition is that the Bartlett Commission recommended
14 language in 1964 that would have tracked more closely that
15 definition?

16 MR. TISNE: It - - - it's precisely that, Judge
17 Garcia. And I want to add to that only a little bit; that
18 they - - - the Bartlett Commission proposed adding an
19 intent to harass. Legislature said no. But before that,
20 the statute included an intent - - - either had to be
21 accosting with an intent to disrupt the peace or accosting
22 that occasioned a disruption of the peace. The legislature
23 affirmatively took that out of the statute.

24 So we have both the element of harassment and the
25 element of disruption or disturbing the peace, which are no



1 longer in the statute. Of course the legislature didn't
2 want that and that makes sense because a confidence game is
3 a game that is built on instilling trust. It is not a game
4 that swindles people through threats or intimidation. And
5 if you imputed that to the statute, it would defeat the
6 whole purpose.

7 CHIEF JUDGE DIFIORE: Thank you, Counsel.

8 MR. TISNE: Thank you.

9 JUDGE CANNATARO: Counsel, your rebuttal?

10 MS. MA: Just as to that last point. The
11 Bartlett Commission - - - it's equally reasonable that they
12 did not include an intent to harass because the word accost
13 already, as part of its definition, has an element of
14 aggression or confrontation. And that is exactly as its
15 common usage includes.

16 JUDGE GARCIA: But the Bartlett Commission didn't
17 think that.

18 MS. MA: Well, they did - - - they also didn't
19 claim - - - I mean, there's no evidence in the legislative
20 history. It's equally reasonable to assume that they
21 believed that accosting already included this heightened -
22 - -

23 JUDGE GARCIA: But clearly, the Bartlett
24 Commission didn't believe that.

25 MS. MA: I'm sorry?



1 JUDGE GARCIA: The Bartlett Commission didn't
2 think it already included that because why would they have
3 proposed it?

4 MS. MA: I understand, the commission.

5 In any event, I do not think the legislative
6 history or even the dictionary support the respondent's
7 position. The majority of their own definitions include an
8 approach. And - - - and by that, this complaint fails
9 because Mr. Mitchell did not approach anyone. Dictionaries
10 are, by definition, somewhat backwards looking, so the fact
11 that it even included the - - - the definition that
12 includes an aggressive approach I think means that there
13 was, at the very least, ambiguity as to the definition of
14 the word accost back then.

15 And when there is ambiguity, the rule of lenity
16 dictates that the interpretation most favorable to the
17 defendant applies, and that is because of notice issues.
18 Because we want the average person walking down the street
19 to understand what is a criminal action and what isn't.
20 And if everyone walking down the street believes accost to
21 mean approaching someone with an element of aggression or
22 persistence and this court then uses a completely nebulous
23 definition not rooted in any dictionary - - -

24 JUDGE CANNATARO: So Counsel, I just want to
25 affirm really quickly. Then - - - under your definition,



1 this particular - - - 165.30 really can't be used to
2 prosecute swindles or confidence games because as your
3 adversary said, and it seems very true, those have to be
4 built on trust. And if there's an element of aggression in
5 there, there - - - there really isn't any possibility that
6 there's going to be trust. So are you saying that this
7 just can't apply to a confidence game?

8 MS. MA: I mean, I don't - - - I don't
9 necessarily agree that a swindle requires trust. I think
10 persistence - - - a persistent approach is what the
11 legislature wanted to ban. Because I think it is a little
12 bit more difficult to disengage yourself from somebody who
13 is trying to swindle you if they're in - - - someone - - -
14 the swindler is in your physical space, is, you know, being
15 contron - - -

16 JUDGE TROUTMAN: So you're saying it's an
17 either-or, persistence or aggression?

18 MS. MA: I think there are multiple ways that you
19 can accost someone. But the fact is that merely standing
20 on a sidewalk and making a generalized callout, an
21 invitation as you will, to donate, to help the homeless,
22 that is not accosting as anyone understands that word.

23 JUDGE GARCIA: Counsel, hasn't that really - - -
24 to get to the kind of switch the horses here, if we went
25 with one definition or another, for at least thirty years,



1 the courts have been defining it more broadly, not the way
2 you define it. Since at least Tanner. So the idea that
3 people are - - - have this expectation of what accost means
4 isn't borne out by any of the cases.

5 MS. MA: But Judge, Tanner is a criminal court
6 decision. They don't say any - - - it's dicta, actually,
7 from - - -

8 JUDGE GARCIA: But it's the only cases on - - -
9 on - - - in the record, the appellate term and the trial
10 courts have all been applying this broader definition. I
11 see none that applies yours. So the idea that we're going
12 against people's expectations seems to run up against the
13 decisions in this area.

14 MS. MA: Well, respectfully, I believe that they
15 have been applying the definition wrong. It's not a
16 definition found in any dictionary. They don't cite to a
17 dictionary. It's completely dicta. The court was just
18 merely pointing out that the defendant in Tanner had not
19 taken any affirmative action to make contact, they weren't
20 trying to create a completely new rule or a completely new
21 definition of accosting, and it has been misapplied since
22 then and we're asking this court to fix that error, based -
23 - - based on what the common usage of the word accost is,
24 which is a targeted, insistent approach.

25 CHIEF JUDGE DIFIORE: Thank you, Counsel.



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

I, Colin Richilano, certify that the foregoing transcript of proceedings in the Court of Appeals of People of the State of New York v. Marc Mitchell, No. 44, and was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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