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COURT OF APPEALS

STATE OF NEW YORK

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PEOPLE,

Respondent,

-against-

No. 169

REYES RODRIGUEZ,

Appellant.

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20 Eagle Street  
Albany, New York 12207  
September 12, 2013

Before:

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

Appearances:

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David Rutt  
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: 169, People v. Rodriguez.  
2 Go ahead, counselor. You want any rebuttal  
3 time?

4 MR. LEVINE: Yes. May I have two minutes  
5 rebuttal, please?

6 CHIEF JUDGE LIPPMAN: How much?

7 MR. LEVINE: Two minutes.

8 CHIEF JUDGE LIPPMAN: Two minutes. You have it.  
9 Go ahead.

10 MR. LEVINE: Thank you.

11 May it please the Court, my name is Arnold  
12 Levine. I represent the appellant, Reyes Rodriguez, on  
13 this appeal.

14 The trial court committed reversible error in  
15 this case in at least three ways, two of which implicate  
16 the confrontation clause of the federal and state  
17 constitutions, one under Crawford, one under Bruton.

18 CHIEF JUDGE LIPPMAN: Talk about Crawford first.

19 MR. LEVINE: Your Honor, the trial judge in this  
20 case allowed Sgt. Clancy to testify, the information he  
21 learned from a cooperator. The People concede that. It  
22 was up to that point the only people who were saying that  
23 Reyes Rodriguez was Rumba who were the two cooperating  
24 witnesses who testified pursuant to cooperation agreement.

25 JUDGE SMITH: But if you - - - but if you lose

1 on your corroboration point, if we find that on - - - that  
2 in the record generally there's no - - - there's enough  
3 corroboration that the evidence was sufficient to support  
4 the conviction, then wasn't the hearsay about the nickname  
5 completely redundant? You already had the two cooperators  
6 giving him the - - - the two testifying cooperators  
7 testifying to the nickname.

8 MR. LEVINE: It was not, Your Honor, because if  
9 you find a constitutional violation, then the harmless  
10 error standard is one beyond a reasonable doubt, and the  
11 question is whether there's any reasonable possibility  
12 that the error contributed to the verdict.

13 JUDGE SMITH: I mean, can you really imagine a  
14 juror to - - - a reasonable possibility of a juror who  
15 says, well, I heard these two accomplices say his nickname  
16 was Rumba and I don't necessarily believe them but now  
17 that I've heard that an anonymous third cooperator I  
18 didn't see says the same thing, now I know his nickname is  
19 Rumba?

20 MR. LEVINE: Yes, Your Honor, because I think  
21 the more people who say it the more likely they are to  
22 believe that it's true, especially coming from Sgt.  
23 Clancy. Sgt. Clancy was not made to reveal who the  
24 cooperator was, what the cooperator's base of knowledge  
25 was.

1 JUDGE SMITH: But wouldn't that weaken the  
2 weight of the testimony with the jury?

3 MR. LEVINE: Would which?

4 JUDGE SMITH: I mean, the jury doesn't even know  
5 who he's quoting. Why would they be impressed with the  
6 testimony?

7 MR. LEVINE: Well, one, because it's becoming -  
8 - - it's coming through Sgt. Clancy who says that he knows  
9 it. In fact, Sgt. Clancy started testifying as if it was  
10 his own personal knowledge that the - - -

11 CHIEF JUDGE LIPPMAN: So he's trying to prove  
12 that he's Rumba?

13 MR. LEVINE: They're trying to prove - - -

14 CHIEF JUDGE LIPPMAN: That's what was there,  
15 that - - - for the truth of the fact that this guy is  
16 Rumba?

17 MR. LEVINE: Yes. He repeatedly referred to  
18 these phone records as belonging to Reyes Rodriguez.

19 JUDGE PIGOTT: Well, is it just a question of  
20 the order in which it comes in? I mean, if Hernandez and  
21 Eulalia, if I'm pronouncing that correctly, both said  
22 that's Rumba, there he is, I mean, where are we going?

23 MR. LEVINE: Well, they did testify to that.

24 JUDGE PIGOTT: I know. So I'm wondering why - -  
25 - so the officer then comes in and says, that's Rumba. I

1 mean - - -

2 MR. LEVINE: Well, the question is how does the  
3 officer know that. The officer can't just come in and  
4 repeat things even (indiscernible) cooperators said.

5 JUDGE SMITH: Well, is your answer to Judge  
6 Pigott that maybe they didn't believe the two cooperators?

7 MR. LEVINE: It's certainly possible that it's  
8 what the whole defense was, that the cooperators had every  
9 reason to lie. There was nothing really corroborating  
10 that - - -

11 JUDGE SMITH: It's, in common sense, a little -  
12 - - you can imagine them being total liars, but they make  
13 up the guy's nickname?

14 MR. LEVINE: They had cooperation agreements.  
15 They were given a sweetheart deal. They had a lot at  
16 stake, and they were arrested with Reyes Rodriguez, one of  
17 them was.

18 CHIEF JUDGE LIPPMAN: Was it confusing who's  
19 who, who these different nicknames were for everybody?

20 MR. LEVINE: Well, the two cooperators who  
21 testified didn't even apparently know my client's real  
22 name. They only testified to him as Rumba, the entire  
23 trial only referred to as Rumba, even when they testified  
24 again - - -

25 JUDGE GRAFFEO: How would it help your - - - how

1 would it help your client to have a third cooperating  
2 witness come in and say, I know him as Rumba?

3 MR. LEVINE: Well, depending on who that person  
4 is and what the impeachment of him would be, but the point  
5 is that they shouldn't even be allowed to get in through  
6 Sgt. Clancy what they're refusing to put on the witness  
7 stand. They can't put on the cooperators' testimony  
8 through Sgt. Clancy and leave him - - - and shield that  
9 cooperator from cross-examination, the whole basis of the  
10 confrontation clause. All right. They can't use this  
11 witness and his knowledge and use Sgt. Clancy as a  
12 surrogate for his knowledge.

13 JUDGE PIGOTT: That being said, I think you made  
14 an argument or the defense made an argument that the - - -  
15 that there was not sufficient corroboration of these two -  
16 - - the two that did testify? Is that your understanding?

17 MR. LEVINE: That's one of the arguments, yes.

18 JUDGE PIGOTT: Yeah. Now, I frankly forget  
19 everything the court said, but the red minivan was a big  
20 deal, right?

21 MR. LEVINE: Yes.

22 JUDGE PIGOTT: But he also said there were  
23 numerous other independent pieces of evidence?

24 MR. LEVINE: I don't know what other pieces of  
25 evidence there were besides - - - there was the phone

1 records she - - - the judge explicitly let the prosecutors  
2 argue that the corroboration may have come from the phone  
3 records, that she clearly was referring to the red  
4 minivan. The red minivan was on a video. The red minivan  
5 was witnessed by another person outside the bodega shortly  
6 before he was robbed, and Mr. Rodriguez was arrested in a  
7 red minivan a few months later.

8 JUDGE READ: That's not adequate in and of  
9 itself?

10 MR. LEVINE: Well, are we talking about just the  
11 corroboration requirement, the sufficiency of the  
12 evidence?

13 JUDGE READ: Yes.

14 MR. LEVINE: I don't think it is because nobody  
15 actually - - - except for the cooperators, nobody  
16 testified that those - - - all those red minivans were  
17 actually the same red minivan. The people - - - the  
18 prosecution never had their witnesses actually identify  
19 Mr. Rodriguez's red minivan.

20 JUDGE SMITH: So this is - - - if the only  
21 evidence in the case were that there was a red minivan at  
22 the scene of the crime and that Mr. Rodriguez drove a red  
23 minivan, that's all you have independence of the  
24 cooperators; you say that is - - - that's the same as  
25 nothing?

1 MR. LEVINE: I believe that's the same as  
2 nothing.

3 JUDGE SMITH: I mean, I might drive a red  
4 minivan, you might drive a red minivan.

5 MR. LEVINE: Exactly. There was nothing said to  
6 be distinctive about this red minivan in terms of  
7 stickers, damage.

8 JUDGE SMITH: But doesn't this case turn on  
9 whether you require cooperation in the independent Hudson  
10 sense? If you do, I can see you haven't got very much of  
11 it. On the other hand, under Rayone (ph.), you're allowed  
12 to do harmonizing corroboration. It seems to me there's a  
13 ton of that.

14 MR. LEVINE: Well, Your Honor, actually Rayone  
15 doesn't apply to this case because this Court has to  
16 review the sufficiency based on the charge given to the  
17 jury. And the charge given to the jury specifically was  
18 that they had to find independent corroborating evidence.

19 JUDGE SMITH: I know - - - you're talking about  
20 the rule that says that the sufficiency of the evidence is  
21 viewed in light of the law as charged.

22 MR. LEVINE: Correct.

23 JUDGE SMITH: Is there any case in which that  
24 rule has been used to overturn a jury verdict, that is you  
25 have sufficient evidence, but the law is charged being



1           mistakenly favorable to the defendant, the evidence was  
2           insufficient?

3                   MR. LEVINE:   Your Honor, to tell you the truth,  
4           I'd have to see whether there was.  I know this Court has  
5           relied on that rule several times and noted that if the  
6           prosecution fails to object to the charge as given,  
7           they're held to the higher standard that's given to that  
8           jury.

9                   JUDGE SMITH:  You say "the prosecution".  Have  
10          we actually relied on it against the prosecution?

11                   MR. LEVINE:  Yes, Your Honor.  There's - - - I  
12          cite several cases, I believe, in the brief.

13                   JUDGE SMITH:  Because the prosecution doesn't  
14          appeal.  The prosecution never attacks a jury verdict in a  
15          criminal case.

16                   MR. LEVINE:  Right.  But in terms of the  
17          defendant's argument on appeal about the sufficiency of  
18          the evidence, when the defendant argues that the People's  
19          proof didn't meet the higher burden - - -

20                   JUDGE SMITH:  So that's really my question.  Can  
21          the law as charge rule be relied on to overturn a jury  
22          verdict?

23                   MR. LEVINE:  Yes, because if the burden - - -

24                   JUDGE SMITH:  And you say you have cases.  I'm  
25          not going to ask you what the numbers are, but you say in

1 your brief there are cases that say that?

2 MR. LEVINE: Yes, that the prosecution is held  
3 to the higher burden. And of course, then if they haven't  
4 met that higher burden, then the evidence is insufficient  
5 under the higher burden, and the case would have to be  
6 reversed.

7 JUDGE PIGOTT: I don't want to distract you from  
8 you - - - you know, if that's your main argument, but you  
9 did bring up in your brief the Bruton issue with respect  
10 to what Amarante said that Eulalia said?

11 MR. LEVINE: Yes.

12 JUDGE PIGOTT: Would you like to be heard on  
13 that?

14 MR. LEVINE: Yes, Your Honors. Bruton has never  
15 been overruled by the Supreme Court, and it's actually not  
16 even been limited by the Supreme Court after Crawford.  
17 There is nothing said by the Supreme Court that limited  
18 Bruton to testimonial statements even post-Crawford.

19 Bruton represents a clear distinction among all  
20 confrontation clause cases by the United States Supreme  
21 Court. Under the Bruton line of cases, the statement  
22 that's being admitted into evidence is not being admitted  
23 against the defendant. So the declarant in those cases is  
24 never a witness against the defendant. So in your typical  
25 confrontation clause cases, including under Crawford, the

1 defendant would never have any confrontation clause  
2 rights; there would never been a violation. But Bruton  
3 laid out that this is an exception.

4 In fact, Justice Scalia, who authored Crawford  
5 and has authored many of these confrontation clause cases  
6 post-Crawford, wrote Cruz, and in Cruz, he noted that the  
7 Bruton line of cases is a clear distinction from regular  
8 Supreme Court analysis on confrontation clause because the  
9 evidence that's being admitted and is challenged is  
10 actually not being admitted against the defendant, and the  
11 declarant therefore is not a witness against the  
12 defendant. But they recognize - - -

13 JUDGE SMITH: Was this really a confrontation  
14 clause problem? Was the statement testimonial?

15 MR. LEVINE: Well, Your Honor, my point is that  
16 it doesn't have to be testimonial on the Bruton - - -

17 JUDGE SMITH: You say Bruton is not just a  
18 confrontation clause case; you say it's a hearsay case  
19 essentially?

20 MR. LEVINE: I say it's hearsay and it's a  
21 confrontation clause case that turns on different things.  
22 It hasn't been changed by Crawford because Crawford talks  
23 about whether statements are testimonial, of course.  
24 Under the Bruton cases, the statements are allowed in only  
25 against the declarant, and it would be an admission.

1 CHIEF JUDGE LIPPMAN: Does it matter that there  
2 are only the two defendants with this statement?

3 MR. LEVINE: Excuse me?

4 CHIEF JUDGE LIPPMAN: Does it matter that there  
5 are only the two defendants in terms of this statement?

6 MR. LEVINE: Yes, because if - - - when he says  
7 to Eulalia in the jail that you - - - they had nothing on  
8 us until you opened your mouth, the jury is likely to  
9 believe that that's referring to the defendant and the  
10 people he's being tried with. It's most readily the most  
11 logical explanation in anything else with respect to - - -

12 CHIEF JUDGE LIPPMAN: But the defendant's not  
13 there.

14 MR. LEVINE: Excuse me?

15 CHIEF JUDGE LIPPMAN: But the defendant's not  
16 there.

17 MR. LEVINE: Well, the defendant wasn't there,  
18 but the defendant was certainly on trial with them. He  
19 was put together in a team with these people by the  
20 prosecution, all their evidence, the cooperators, and he's  
21 constantly being referred to as part of this whole group.

22 JUDGE GRAFFEO: Why was the suggestion to say  
23 "me" instead of "us"? Would that have solved the problem?

24 MR. LEVINE: Yes, that was the suggestion, and  
25 the trial court thought that she didn't have the authority

1 to alter the statement. But that's exactly what the  
2 Supreme Court said she should do and has to do if she's  
3 not going to grant the severance, and of course, this was  
4 midway through trial, so it's understandable not to grant  
5 a severance. The other alternative is to redact the  
6 statement and change it from "us" to "me". This Court  
7 said so in People against Wheeler as well.

8 So I think that there's certainly - - - there's  
9 two circuit courts that have recognized this distinction  
10 between Crawford and Bruton. One is the Ninth Circuit in  
11 Harris against Frakes. It recognized that Crawford, in  
12 the Crawford line of cases, deal with statements that are  
13 admissible actually against the defendant. They're  
14 considered as direct evidence against the defendant.

15 CHIEF JUDGE LIPPMAN: What about the limiting  
16 instruction there?

17 MR. LEVINE: Bruton says a limiting instruction  
18 isn't enough, that the danger when people are tried  
19 jointly - - - at a joint trial, when they're tried  
20 jointly, the danger of the statement being used  
21 incorrectly by the prosecution is too much to bear and the  
22 confrontation clause doesn't allow it.

23 JUDGE PIGOTT: So the court was wrong when they  
24 said it was unpreserved?

25 MR. LEVINE: Yes.

1 JUDGE PIGOTT: Okay.

2 MR. LEVINE: Because the trial - - - the defense  
3 counsel asked for the exact remedies he was entitled to,  
4 certainly brought it to the court's attention what the  
5 issues were. In fact, this is a - - - I suggest it's  
6 something a third-year law student who's taken the  
7 procedure from the law would recognize.

8 JUDGE SMITH: Assuming that should never have  
9 come in and it was hearsay as to your client, why wasn't  
10 it harmless? I mean, either they believe this witness or  
11 they don't believe her. If they believe her, your  
12 client's so guilty he doesn't have to worry about it. And  
13 if they don't believe her, why should they believe her  
14 that this ambiguous statement was even made?

15 MR. LEVINE: Well, because this is something  
16 else from Amarante now; this is coming from somebody who's  
17 sitting next to my client and - - -

18 JUDGE SMITH: Well, yeah, but it's only the  
19 other - - - it was Eulalia Rodriguez who says that it came  
20 from Amarante.

21 MR. LEVINE: Right. Well, Eulalia Rodriguez - -  
22 - the jury is certainly free to believe some things she  
23 says and some things - - - and disbelieve other things she  
24 says. She's clearly involved in some of the crimes.  
25 Certainly, she's telling the truth about many of the

1 things, that who she's identifying as being involved and  
2 when and where they may not necessarily believe her, and  
3 they need corroboration tending to connect my client  
4 specifically to the crime.

5 JUDGE SMITH: The statement, as I remember, was  
6 they didn't have anything on us until you opened your  
7 mouth?

8 MR. LEVINE: Yes. I see I'm out of time.

9 JUDGE SMITH: Isn't "us" ambiguous?

10 MR. LEVINE: Your Honor, I don't think that "us"  
11 is ambiguous when he's being - - - when he's on trial with  
12 two other people, that the "us" is most likely to be - - -

13 JUDGE SMITH: But it was a gang of much more  
14 than two other people.

15 MR. LEVINE: Yes, but it doesn't seem to make  
16 sense about why he would be talking about other people who  
17 are not in the case, what the jury doesn't know about, is  
18 not being presented with, and the jury is most likely to  
19 look at the people they're looking at in the courtroom and  
20 saying that's who we're referring to. These three people  
21 are sitting together, they're a team, and the whole  
22 prosecution's testimony - - - evidence is - - -

23 CHIEF JUDGE LIPPMAN: Okay, counselor. Thanks.

24 MR. LEVINE: Thank you.

25 CHIEF JUDGE LIPPMAN: You'll have rebuttal.

1 Counselor.

2 MR. MARINELLI: Good afternoon. May it please  
3 the Court. My name is Christo - - -

4 CHIEF JUDGE LIPPMAN: Start with Crawford.

5 MR. MARINELLI: Well, since Crawford, the  
6 Supreme Court and this court have made it clear that the  
7 confrontation clause bars a statement only if it's  
8 admitted - - - testimonial and admitted for its truth, but  
9 - - -

10 CHIEF JUDGE LIPPMAN: Why isn't this admitted  
11 for the truth that this guy is Rumba?

12 MR. MARINELLI: The crucial fact for winning  
13 this claim is that the People presented those two witness  
14 - - - cooperators, Hernandez and Rodriguez, who testified  
15 to the defendant's nickname and the nickname of other - -  
16 -

17 CHIEF JUDGE LIPPMAN: Yeah, but why wasn't this  
18 particular statement, that did not come from the person  
19 giving it, was admitted to say this is Rumba, right?

20 MR. MARINELLI: Because the People already - - -

21 CHIEF JUDGE LIPPMAN: Why did it not go to the  
22 truth - - -

23 MR. MARINELLI: It did not go to the truth - - -

24 CHIEF JUDGE LIPPMAN: - - - because two other  
25 people said it, therefore it didn't matter? Is that what



1           you're saying?

2                       MR. MARINELLI: I'm saying that the People  
3 clearly weren't presenting it for its truth, and more  
4 importantly - - -

5                       CHIEF JUDGE LIPPMAN: Why do you say that? I'm  
6 saying why isn't it for the truth to say this guy is Rumba  
7 and it ties it all together?

8                       MR. MARINELLI: Sgt. Chancy was testifying about  
9 - - - clearly testifying and called to testify about a  
10 pattern of calls in these cell phone records. He  
11 testified to arresting the defendant, the recovery of the  
12 cell phones. A video was introduced of him scrolling  
13 through the cell phones. He testified as to subpoenaing  
14 the records.

15                      JUDGE SMITH: But they didn't recover the cell  
16 phone that all these calls were made to.

17                      MR. MARINELLI: No, Your Honor. But I'm saying  
18 when you look at the context where you're three weeks into  
19 trial, starting Clancy's testimony is focused on these  
20 phone records - - -

21                      JUDGE PIGOTT: Well, you say it's not Crawford,  
22 that there's no Crawford issue with respect to it?

23                      MR. MARINELLI: Yes, Your Honor, because it  
24 wasn't offered for its truth, and I don't think it would  
25 have been understood by the jury.

1 JUDGE GRAFFEO: What was it offered for then if  
2 not to claim that he was Rumba?

3 MR. MARINELLI: To explain the - - - why he is  
4 focus - - - why Sgt. Clancy had focused his analysis on  
5 certain phone numbers.

6 JUDGE SMITH: Well, but he - - - if the jury  
7 doesn't believe that those phone numbers are the  
8 defendant's phone numbers, it's totally irrelevant  
9 testimony.

10 MR. MARINELLI: That's right, Your Honor.

11 JUDGE SMITH: And certainly, if there were no  
12 other evidence in the case giving Rodriguez the name  
13 Rumba, then this would be - - - you would admit that this  
14 was a Crawford violation?

15 MR. MARINELLI: I don't believe so, Your Honor,  
16 given the context, that the jury would have only  
17 understood this as an explication of why he was looking at  
18 certain phone numbers.

19 JUDGE SMITH: You really think the jury doesn't  
20 - - - if they hear Sgt. Clancy say, so-and-so called Mr.  
21 Rodriguez, Mr. Rodriguez called so-and-so, they're not  
22 going to say - - - they're not going to infer that it was  
23 indeed Rodriguez?

24 MR. MARINELLI: Not when it's - - - when he's  
25 walked through, you know, why are you saying this, how did

1           you get this information, we got - - - how did you find  
2           these other phones? We found them through - - - via call  
3           ways.

4                    JUDGE SMITH: Well, and the cross is how do you  
5           know it's Rodriguez, and his answer is, because I know it  
6           was Rumba and something told me that Rumba is Rodriguez.  
7           I don't see how you can say that's not for the truth.

8                    MR. MARINELLI: When heard in context, it would  
9           not have been - - - it would have been understood as just  
10          that, an assumption on his part, not an assertion of fact  
11          meant to buttress facts that were already in evidence.

12                   I would say that given that testimony it is hard  
13          not to also question the fact even if it were a Crawford  
14          violation, I mean, this was - - -

15                   JUDGE SMITH: You said it's har - - - you say  
16          it's harmless.

17                   MR. MARINELLI: It's harmless, Your Honor.  
18          Given the testimony of Hernandez and Rodriguez, the jury  
19          would have had no reason to believe that Clancy's  
20          reference to a cooperator would have referred to anyone  
21          else.

22                   JUDGE PIGOTT: What about the Bruton issue?

23                   MR. MARINELLI: The - - - well, I think the  
24          federal court of appeals for the First Circuit has  
25          perfectly stated that the relationship of the Crawford

1 line of cases to Bruton, when they said in Figueroa  
2 Cardigena (ph.), if I may quote, "The Bruton-Richardson  
3 framework presupposes that the aggrieved co-defendant has  
4 a Sixth Amendment right to" - - -

5 JUDGE PIGOTT: To what? I'm sorry. You were  
6 reading so fast. That the what?

7 MR. MARINELLI: I'm sorry. "The Bruton-  
8 Richardson framework presupposes that the aggrieved  
9 co-defendant has a Sixth Amendment right to confront the  
10 declarant in the first place. If none of the  
11 co-defendants has a constitutional right to confront the  
12 declarant, none can complain that his right has been  
13 denied. It is thus necessary to view Bruton through the  
14 lens of Crawford and Davis. The threshold question in  
15 every case is whether the challenged statement is  
16 testimonial."

17 JUDGE SMITH: Suppose you're right that there  
18 was no Sixth Amendment violation here. It's still a  
19 violation of the hearsay rule, isn't it?

20 MR. MARINELLI: No, Your Honor, because, again,  
21 it was not introduced for its truth; it was introduced to  
22 illustrate Amarante - - -

23 JUDGE PIGOTT: It was not introduced for its  
24 truth?

25 JUDGE SMITH: Wait a minute. Wait a minute.

1           You don't think that the implicit meaning of that  
2           statement was you told the cops what we did?

3                       MR. MARINELLI:  It was - - - the matter asserted  
4           was they didn't have anything on us until you started  
5           cooperating.

6                       JUDGE SMITH:  And it doesn't - - - isn't he  
7           implicitly saying to her, you told the cops what we did?

8                       MR. MARINELLI:  The - - -

9                       JUDGE PIGOTT:  What was it offered for?

10                      MR. MARINELLI:  It was offered to show  
11           Amarante's consciousness of guilt, not to prove - - -

12                      JUDGE PIGOTT:  Then why didn't you stipulate to  
13           the "me"?  The defendant offered, if you're going to let  
14           it in, Judge, just say you didn't have anything on me  
15           instead of us because I've got a client that was not part  
16           of that conversation and is going to be harmed by it?

17                      MR. MARINELLI:  Because the trial court  
18           recognized it had nothing to do with defendant.

19                      JUDGE PIGOTT:  Well, then why did you use it  
20           three times in summation?

21                      MR. MARINELLI:  I believe we trusted it - - - I  
22           only recall twice, and one was to stress Amarante's state  
23           of mind, and that's most prominently discussed.

24                      I would just say about the "we" or the "us" or  
25           the "me", that I think there's a couple of cases that are

1           instructive, one, Gray v. Maryland on which defendant  
2           relies doesn't give him any aid because in that case you  
3           had a redacted statement that was "me", deleted, deleted,  
4           "committed an assault". And the Supreme Court even said  
5           that if that had just been me and a few other guys who had  
6           committed the assault, that would have been all right.

7                        In United States v. Jass, Judge Raggi of the  
8           Second Circuit, really elaborates very well on that, that  
9           when you have a statement that makes it clear in a  
10          redacted or unredacted form that the co-defendant has used  
11          actual names, that's what leads to the inference that he  
12          has named the co-defendant, and that's when you have a  
13          Bruton issue. If you have something more generally that's  
14          "me and a few other guys" or "we and us", that makes it  
15          sound as if the accomplice had - - -

16                      JUDGE PIGOTT: Then why did you offer it at all?  
17          If it's that ambiguous, why put it in? I mean, ambiguity  
18          implies that somehow somebody may misunderstand it, and if  
19          you were not offering it to finger the defendant here,  
20          then you wouldn't need it.

21                      MR. MARINELLI: We were offering it for the  
22          co-defendant.

23                      JUDGE PIGOTT: But you objected when the  
24          defendant said - - - if he wants to say they wouldn't have  
25          had anything on me if you hadn't talked, that's fine, but

1 not us because that means that we're in it and that's a  
2 Bruton violation, and you objected to that and the court  
3 sustained it.

4 MR. MARINELLI: Because it does not implicate  
5 defendant. It does not raise the inference that Amarante  
6 was accusing defendant of anything. If this is exactly  
7 the distinction made in Jass, it's - - - when you have a  
8 statement where the accomplice has implicated himself and  
9 others in the crime, the only inference for the jury there  
10 is the State thinks that the defendant is one of those  
11 accomplices. That's very, very different than saying - -  
12 -

13 JUDGE PIGOTT: And that was the purpose of the  
14 curative instruction?

15 MR. MARINELLI: The limiting instruct - - -

16 JUDGE PIGOTT: Right.

17 MR. MARINELLI: Yes, absolutely.

18 JUDGE SMITH: Can you talk about corroboration  
19 for a minute?

20 MR. MARINELLI: Sure. Of course, this Court has  
21 always held that accomplice corroboration evidence must  
22 simply "provide some basis for the jury to conclude the  
23 accomplice" - - -

24 JUDGE SMITH: Well, preliminarily, is he right  
25 that you have to meet the Hudson standard because that was

1 charged to the jury?

2 MR. MARINELLI: Yes, Your Honor, it appears that  
3 was the way it was charged, I think.

4 JUDGE SMITH: Yeah, I looked at his brief. He  
5 does seem to have cases that say that, doesn't he?

6 MR. MARINELLI: Mawagon (ph.) is one, yes.

7 So - - - but even with - - -

8 JUDGE SMITH: So as I understand Hudson, you  
9 have to pretend there are no accomplices testifying, and  
10 you have to see what you have to connect this defendant to  
11 this crime. What have you got except the fact that his  
12 car is the same color as one that appeared at the scene?

13 MR. MARINELLI: Yeah, it's a little stronger  
14 than that. When Junior Tejada (ph.) testifies about the  
15 Liberate Bodega robbery, he testifies that it's very rare  
16 to see any vehicle there in this generally pretty empty  
17 area. Yet on May 29th, 2005, immediately before the  
18 robbery, there's the red minivan.

19 JUDGE SMITH: But that - - - how does that  
20 connect Rodriguez to the crime any more than it connects  
21 every red minivan owner in New York?

22 MR. MARINELLI: You could say that the rarity,  
23 the fact that there's a red minivan - - -

24 JUDGE SMITH: I understand it's rare. It's rare  
25 for a red minivan to be at the scene of the crime. So



1 maybe that shows that whoever was driving that red minivan  
2 was one of the guilty parties. Maybe that's a stretch,  
3 but how do we infer that it was Mr. Rodriguez's red  
4 minivan?

5 MR. MARINELLI: I don't believe - - - it doesn't  
6 have to be - - - you're still allowed to take into  
7 consideration what testimony of the accomplices is  
8 actually being corroborated so - - -

9 JUDGE SMITH: Well, but, I mean, as I read  
10 Hudson - - - you have to forget about the testimony of the  
11 accomplices. Pretend that no accomplice ever testified.  
12 What have you got left of your case? And all you've got  
13 left is that he drove a red minivan and somebody saw a red  
14 minivan.

15 MR. MARINELLI: Even under Hudson, the purpose  
16 of the rule is to satisfy the jurors that the  
17 corroborators have testified truthfully. So, I mean, you  
18 wouldn't - - - the court's never held that it has to be  
19 even a prima facie case established by the independent  
20 evidence; it just has to be independent to connect the  
21 defendant to the crimes in some fashion. And when you - -  
22 - like Tejada's testimony, the June 22nd security video,  
23 defendant's arrest with other robbers on September 1st - -  
24 -

25 JUDGE PIGOTT: Is the security video the one - -

1 - the photograph?

2 MR. MARINELLI: It's an actual video. The video  
3 of a red minivan across the street from the Riverside  
4 Drive apartment house while Joseph Hernandez is casing it  
5 and then it drives by about seven or eight minutes before  
6 he actually burglarizes it.

7 JUDGE SMITH: Was there evidence that Rodriguez  
8 knew or was seen in the company of some of the other  
9 crooks? Testimony other than from accomplices?

10 MR. MARINELLI: Clancy's testimony about the  
11 circumstances of his arrest, yes.

12 JUDGE SMITH: Did Clancy testify that they were,  
13 what, in the same place at the same time?

14 MR. MARINELLI: Actually, Clancy testified to  
15 the arrest of - - -

16 JUDGE SMITH: He testified that a lot of people  
17 were arrested on the 1st of September.

18 MR. MARINELLI: Right. He also - - -

19 JUDGE SMITH: Did he say they were all hanging  
20 out together? Can you draw that inference?

21 MR. MARINELLI: He testified that - - - he also  
22 named Del Rosario who was the person from whom the second  
23 cell phone was recovered, and he had been a participant in  
24 other robberies as well. He didn't provide a  
25 comprehensive list of who was arrested that day.

1                   JUDGE PIGOTT: You know, I had a note, and I  
2 hope I understood it, that to avoid a missing witness  
3 charge, at the end of all the proof, the People claim for  
4 the first time that Sgt. Clancy's testimony was false and  
5 that the source of his knowledge was multiple cooperators.  
6 Is that true?

7                   MR. MARINELLI: Discussing the missing witness  
8 charge, yes, the idea was that his knowledge of the case  
9 wasn't pinned necessarily to one cooperator he would have  
10 been able to name specifically, that it would have - - -  
11 he had access to information that would have never been  
12 admissible at trial.

13                   I just want to quickly about - - -

14                   CHIEF JUDGE LIPPMAN: Sure. Go ahead.

15                   MR. MARINELLI: - - - about the Crawford issue,  
16 that while - - - about what was argued in summation. The  
17 People actually specifically disclaimed that these - - -  
18 that the phone records specifically identified defendant  
19 has a participant. They argued - - - simply argued more  
20 generally that, for instance, Hernandez's testimony  
21 committing robberies with Rodriguez was supported by his  
22 possession of a cell phone with phone number for Rumba and  
23 calls to that number. There was other evidence that was  
24 meant to prove that defendant was, in fact, Rumba.

25                   And when the court - - - I believe the colloquy

1 that my adversary is referring to about the court saying  
2 that the People could argue that, the fact is they - - -  
3 or that they could argue that the phone records were  
4 independent corroboration. They didn't; that's the main  
5 point. And it's actually addressing an argument - - - if  
6 it's a colloquy I believe he's referring to from  
7 co-defendant Amarante that concerning - - - the judge was  
8 actually very skeptical of that argument and actually - -  
9 - but you said you can argue it, it was almost more of a -  
10 - - I guess you can argue that, but I'm not saying that it  
11 wins the day for you.

12 Thank you. For these reasons, those in our  
13 brief, we ask that you affirm.

14 CHIEF JUDGE LIPPMAN: Thank you, counselor.

15 Counselor, rebuttal.

16 MR. LEVINE: Your Honors, the - - - Sgt.  
17 Clancy's testimony regarding identifying Reyes Rodriguez  
18 as the person associated with those phone records, clearly  
19 words for its truth, and there was no indication that he  
20 was making any assumptions. In fact, the prosecutor had  
21 asked him point blank numerous times who's the person  
22 associated with those phone records, and he said Reyes  
23 Rodriguez, and associated with other phone records, he  
24 named the other defendants.

25 JUDGE PIGOTT: And that was important because

1 the phone did not belong to your client, right?

2 MR. LEVINE: Right. The phone records for which  
3 - - - that were in evidence, there was no phone seized  
4 from my client or at the scene, from my client's van or  
5 anything that was associated with those phone records at  
6 all, and yet Sgt. Clancy testified repeatedly over and  
7 over again to calls being made by Reyes Rodriguez by name,  
8 not by Rumba, not by Hankook - - - Hancock (sic) Binoon.  
9 Hancock Binoon was the name in which the phone records  
10 were registered. Rumba was the name on which they were -  
11 - - the phone number was listed in the directories of the  
12 phones.

13 JUDGE SMITH: But that was okay, wasn't it, if  
14 there was proof from which the jury could have inferred  
15 that Rumba was Rodriguez?

16 MR. LEVINE: No, Your Honor, because it still -  
17 - - he is not allowed to repeat what other people have  
18 told him. And he wasn't in the courtroom when Hernandez  
19 and Rodriguez testified.

20 JUDGE SMITH: I get - - - in other words, he  
21 really should have said he called somebody named Rumba?

22 MR. LEVINE: Right. These are the phone records  
23 under the name Rumba.

24 JUDGE SMITH: Okay. But if the jury knows that  
25 Rumba is your client, then what difference does it make?

1 MR. LEVINE: Well, the question is how does the  
2 jury know? The jury up to that point is left to rely  
3 solely on the two cooperating witnesses who have formal  
4 agreements and are hoping to get themselves - - -

5 CHIEF JUDGE LIPPMAN: So your argument is it all  
6 comes together with Clancy?

7 MR. LEVINE: Yes. Clancy is the second to last  
8 witness and shores up the People's case and ties up  
9 different associates - - -

10 CHIEF JUDGE LIPPMAN: The client doesn't have  
11 the ability to - - -

12 MR. LEVINE: - - - and people together, and  
13 specifically refers to them by name, Reyes Rodriguez, as  
14 opposed to by nicknames.

15 CHIEF JUDGE LIPPMAN: Okay, counselor.

16 MR. LEVINE: Also, Your Honor, the - - -  
17 regarding the sufficiency of the evidence, Your Honor, in  
18 terms of the harmless error, sufficiency of the evidence  
19 analysis is not sufficient to overcome a harmless error  
20 analysis when there's constitutional harmless error. Mere  
21 sufficiency of the evidence wouldn't make the error  
22 harmless.

23 JUDGE PIGOTT: There was a - - - there was a - -  
24 -

25 JUDGE SMITH: It would have to be - - - it has

1 to be overwhelming evidence.

2 MR. LEVINE: Correct.

3 JUDGE PIGOTT: There was a - - - what I was  
4 asking your opponent about was the photograph of the red  
5 minivan, and he said it was a video. Are those two  
6 different things?

7 MR. LEVINE: There was a photograph taken of Mr.  
8 Rodriguez standing in front of his red minivan when he was  
9 arrested on September 1st. You can't make out really any  
10 details on the red minivan. It's really a close-up of Mr.  
11 Rodriguez, and you just see the minivan directly behind  
12 him, so you can sort of see the window and a little bit of  
13 front of the car. There's also a video from 153rd Street,  
14 a surveillance video, where you see a red minivan parked,  
15 stay there for about fourteen or so minutes, then pull  
16 out. It comes back later.

17 JUDGE PIGOTT: Well, there was a defense motion  
18 to preclude what I thought was a photograph because it had  
19 not been produced until after the victims had testified.

20 MR. LEVINE: Correct.

21 JUDGE PIGOTT: That's the photograph - - -

22 MR. LEVINE: That's the photograph - - -

23 JUDGE PIGOTT: - - - not the video.

24 MR. LEVINE: - - - of the September 1st  
25 takedown.

1 JUDGE PIGOTT: Okay. I got it.

2 MR. LEVINE: With respect to the video - - -

3 JUDGE SMITH: You're saying there's no way the  
4 jury could infer beyond a reasonable doubt that those two  
5 pictures showed the same minivan?

6 MR. LEVINE: From the photo itself, there's no  
7 way. It just doesn't show enough of the minivan to see  
8 anything.

9 JUDGE SMITH: You need the accomplice's  
10 testimony to get you there?

11 MR. LEVINE: Yes. And with respect to the  
12 video, if I may - - - I see my time is up.

13 CHIEF JUDGE LIPPMAN: Go ahead. Finish your  
14 thought, counselor.

15 MR. LEVINE: With respect to the video, when the  
16 van return - - - red minivan returns to 153rd Street,  
17 there's no sixteen-foot ladder on its roof, and yet Mr.  
18 Hernandez testified - - - he's the cooperator. He  
19 testified that when they returned the car parked and then  
20 he and others or so had to go back to the red minivan and  
21 get the ladder off of the roof of the minivan to go and  
22 prop up against the building, but you see the red minivan  
23 that comes through the video doesn't have a sixteen-foot  
24 ladder on the roof; it has no ladder on the roof.

25 CHIEF JUDGE LIPPMAN: Okay, counselor.



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MR. LEVINE: So it doesn't corroborate  
Hernandez.

CHIEF JUDGE LIPPMAN: Thanks, counselor.

MR. LEVINE: Thank you, Your Honor.

CHIEF JUDGE LIPPMAN: Thank you both.

(Court is adjourned)

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

I, David Rutt, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Reyes Rodriguez, No. 169 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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