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COURT OF APPEALS

STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

No. 24

ASSAD CEDENO,

Appellant.

20 Eagle Street
Albany, New York 12207
February 09, 2016

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA

Appearances:

DE NICE POWELL, ESQ.
APPELLATE ADVOCATES
Attorneys for Appellant
111 John Street, 9th Floor
New York, NY 10038

NANCY FITZPATRICK TALCOTT, ADA
QUEENS COUNTY DISTRICT ATTORNEY'S OFFICE
Attorneys for Respondent
12501 Queens Boulevard
Key Gardens, NY 11415

Sara Winkeljohn
Official Court Transcriber

1 CHIEF JUDGE DIFIORE: Okay, the next case
2 on the calendar is case number 24, People v. Assad
3 Cedeno.

4 MS. POWELL: Good morning, Your Honors; my
5 name is Denise Powell, and I'm here representing
6 Assad Cedeno in this appeal.

7 CHIEF JUDGE DIFIORE: Ms. Powell, would you
8 like some rebuttal time?

9 MS. POWELL: Yes, Your Honor; three
10 minutes, please.

11 CHIEF JUDGE DIFIORE: Excellent, you have
12 it.

13 MS. POWELL: Thank you. The question that
14 this case presents is simply this; can the People
15 avoid a Bruton violation by replacing a defendant's
16 name with a blank space in a nontestifying co-
17 defendant's statement that on its face inculcates the
18 defendant? This question, I submit, has - - - was
19 addressed and answered by the court - - - by the
20 Supreme Court in Gray v. Maryland and by this court
21 in People v. Wheeler.

22 In both of these cases, the courts held in
23 no uncertain terms that this redaction method falls
24 squarely within the Bruton rule; that is, they must
25 be precluded. The - - - the Gray court explained why

1 this is so. In Gray - - -

2 JUDGE ABDUS-SALAAM: Ms. Powell, is there
3 any way that this statement could have been redacted
4 so that it would be a proper statement to put before
5 the jury? In other words, not blanks, but maybe
6 somebody writing in something other than what the
7 person wrote in, male, or leaving the - - - you know,
8 the clothing description blank? Is there any way
9 that this statement could have been - - -

10 MS. POWELL: This statement could not have
11 been redacted with a blank for sure. Are you - - -
12 you're asking - - - if you're asking me if there was
13 an alternative method - - -

14 JUDGE ABDUS-SALAAM: Yes.

15 MS. POWELL: - - - perhaps, but that's not
16 this case. In this case, what the People did was
17 inserted blanks where Villanueva described the
18 clothing worn by my clothing - - - by my client, and
19 they - - - it remained blank and was submitted to the
20 jury for its review.

21 JUDGE FAHEY: So if it wasn't - - - so if
22 Detective Moser, I think, had just read it with the
23 blanks, and the - - - and the statement itself hadn't
24 been admitted into evidence and there had been a
25 proper limiting instruction that the court gave, then

1 would be - - - we be in the same situation?

2 MS. POWELL: Had the jury not asked to see
3 the - - - the statement?

4 JUDGE FAHEY: Right.

5 MS. POWELL: I think that's - - -

6 JUDGE FAHEY: In other words, if he - - -
7 if he just read it, which other courts have done, and
8 you don't submit the evidence in and of itself, and
9 any redaction that takes place isn't visible to the
10 jury and as - - - doesn't fall under any of the
11 Bruton, Richardson, and Gray problems.

12 MS. POWELL: I - - - that's - - - I think
13 that's - - - Your Honor is correct. I think that had
14 it been read in a way where the sentences made
15 grammatical sense - - -

16 JUDGE FAHEY: Um-hum.

17 MS. POWELL: - - - where the - - - it
18 wouldn't have alerted the jury that something had
19 been altered on the face of the document, then I
20 think perhaps it might have survived a Bruton
21 challenge.

22 JUDGE RIVERA: Isn't what matters what's -
23 - - what's altered, not just that something has been
24 altered? It's the point of what that alteration is
25 and the impact it may have on the jury's fact-finding

1 determination?

2 MS. POWELL: For sure. If - - - if it's
3 alter - - - I mean, I'm not sure that there would be
4 any basis to alter anything other than the
5 identification of a co-defendant or a defendant. But
6 yes, I think it - - - the alteration has to go to the
7 name or the identity of the - - - the accused.

8 JUDGE RIVERA: But would he have to have
9 redacted the reference to the gangs?

10 MS. POWELL: He should have, absolutely,
11 because that obviously narrows the field.

12 JUDGE RIVERA: Connects - - - connects the
13 defendant.

14 MS. POWELL: It narrows the field and
15 connects my client to the incident. So Gray - - - in
16 - - - in Gray, the Supreme Court made clear that when
17 the redaction is apparent on the face of the co-
18 defend - - - nontestifying co-defendant's statement,
19 those kinds of redactions fall into the Bruton scope.
20 And the - - - the reason is simply clear; because a
21 juror who sees a nontestifying co-defendant's
22 statement will see the blank on its face, it will
23 jump out, they'll focus on it, and ask the very
24 simple question, who are they trying to hide. And
25 they obvious answer, they'll look to the defense

1 table and they will just fill in the obvious blanks
2 with the - - - the defendant's name.

3 JUDGE RIVERA: Does it matter when - - -
4 when it's - - - it's a situation where you have
5 several potential suspects, even if - - - you're
6 talking about your - - - your client and one
7 defendant.

8 MS. POWELL: Um-hum.

9 JUDGE RIVERA: Does it make a difference
10 when there may be many to choose from? Let me put it
11 that way?

12 MS. POWELL: Well, that's, I think, what
13 the - - - the People are trying to suggest in their -
14 - -

15 JUDGE RIVERA: Well, yes. That's why I'm
16 asking.

17 MS. POWELL: - - - that whether or not - -
18 - that - - - that this case is removed from Bruton
19 and Gray because there were, let's say, more
20 participants than defendants on trial or name - - -
21 or number of redactions on the face of the document.
22 And I submit that that is not - - - that would not
23 remove it from the Bruton - - - scope of the Bruton
24 preclusionary rule for the simple - - - for this
25 simple reason. Again, the jury will look at the

1 document, they'll see the defendants at the defense
2 table, and they will fill it in with the obvious
3 answers: the defendant sitting next to the
4 nontestifying co-defendant.

5 This argument that the People raise on
6 appeal and raise below was actually raised in Gray.
7 The factual situation was virtually identical to the
8 factual situation here. There were more participants
9 in the Gray case than named - - - than actually be -
10 - - being tried, and also more than the number of
11 redactions that were on the face of the redacted
12 statement. In Gray, there were six participants;
13 there were two defendants that were on trial and two
14 redacted names, and that did not stop the Supreme
15 Court from holding that that type of redaction - - -
16 even though there was no one-to-one correspondence
17 between the number of participants and the number of
18 redactions, it still fell within the Bruton scope.
19 And in fact, the - - - and I should note that the
20 People actually raised that argument in Gray and the
21 Supreme Court rejected it. And - - -

22 JUDGE STEIN: How - - - how was Huacon's
23 statement about the defendant's nickname, how was
24 that facially incriminating?

25 MS. POWELL: Huacon?

1 JUDGE STEIN: Huacon.

2 MS. POWELL: Huacon, well, she was the - -
3 - she identified herself as my client's girlfriend,
4 and she said in an out-of-court statement that my
5 client's nickname was Bambino. And - - -

6 JUDGE STEIN: But how - - - so how does
7 that statement - - - on its face, how does that
8 incriminate without tying it into a whole bunch of
9 other testimony and evidence?

10 MS. POWELL: Well, Huacon's statement is
11 actually coming in under a different type of error.
12 We're not - - -

13 JUDGE STEIN: Oh, you're not claiming
14 that's a Bruton error?

15 MS. POWELL: It's a hearsay problem and a
16 confrontation problem, because in - - - in Huacon - -
17 -

18 JUDGE STEIN: Based on the - - - the police
19 officer's testimony or the detective's testimony or
20 based on her statement?

21 MS. POWELL: The - - -

22 JUDGE STEIN: I'm not - - -

23 MS. POWELL: The detective testified about
24 her out-of-court statement, but she was not a co-
25 defendant, so theoretic - - - technically it's really

1 not a Bruton problem. It's really a - - - a pure
2 hearsay confrontation problem.

3 And it is incredibly in - - -
4 incriminating, because in fact, there were witnesses
5 that claimed that they knew my client by his gang
6 King - - - his Latin King gang nickname, which was
7 Bambino, so that testimony not only tied him to the
8 Latin King gang but also corroborated the People's
9 witnesses.

10 JUDGE FAHEY: I thought they objected there
11 though, and the court had sustained the objection on
12 Bambino?

13 MS. POWELL: The - - - actually counsel
14 repeatedly objected to that testimony coming in.

15 JUDGE FAHEY: Um-hum.

16 MS. POWELL: The court overruled the
17 objection and then of course it came out, and then
18 subsequently counsel said, there's no way that that
19 error can be cured; I'm moving for a mistrial.

20 JUDGE FAHEY: I see.

21 MS. POWELL: And that's - - -

22 JUDGE FAHEY: Okay.

23 JUDGE FAHEY: Can I just take a - - - take
24 a step back a second to the issue I was asking you
25 about before which was the failure to get a limiting

1 instruction. Did you raise that issue and did you
2 argue that in your briefs?

3 MS. POWELL: I - - - I complained about
4 that, that obviously - - -

5 JUDGE FAHEY: I saw that, but I - - - I
6 don't remember it as a separate heading, and the
7 reason I asked is because I didn't see any objection
8 to it and I - - - and I thought that the People said
9 that that issue wasn't preserved. And logically, it
10 seems to me that that's - - - for you to be
11 successful, that's where you have to end up. That's
12 why I'm asking it.

13 MS. POWELL: Counsel asked for a
14 instruction at the charge conference, I believe, but
15 the instruction that was given was defective in my
16 view, but there was no subsequent objection to it.

17 JUDGE FAHEY: I see. So he asked for it
18 but didn't object to the charge that was given?

19 MS. POWELL: As given, yes.

20 JUDGE FAHEY: Yes.

21 MS. POWELL: Correct.

22 JUDGE FAHEY: Thank you.

23 MS. POWELL: But just to emphasize that
24 point, counsel moved in limine on Bruton grounds. It
25 was - - -

1 JUDGE FAHEY: That's correct, yeah.

2 MS. POWELL: - - - and the People's - - -
3 it was the People's obligation to correctly redact
4 the statement and this - - - and this court has held
5 in People v. Smalls that a motion to sever preserves
6 the issue.

7 JUDGE FAHEY: You understand what I'm
8 saying, though? There's a - - - there's a difference
9 between - - - between redacting the statement - - -
10 the statement - - - and the statement going into
11 evidence and then not offering any limiting
12 instructions.

13 MS. POWELL: And the actual charge,
14 correct.

15 JUDGE FAHEY: Yes.

16 MS. POWELL: I understand.

17 JUDGE FAHEY: All right.

18 CHIEF JUDGE DIFIORE: Counsel, could we
19 move to the identification procedure at the precinct
20 house for a moment?

21 MS. POWELL: Yes, I think that that area of
22 the law is settled, well established. A precinct
23 show-up is entirely suggestive and is
24 unconstitutional unless supported by exigent
25 circumstances.

1 JUDGE STEIN: Did you argue that, though?
2 I thought you - - - I thought the argument at - - -
3 at trial was that it was tainted by the
4 identification at the scene. I - - - I don't recall
5 that - - - that this argument that you're now raising
6 was - - - was raised at all at the trial level.

7 MS. POWELL: Counsel complained about the
8 joint - - - because not only was it a precinct show-
9 up, they actually showed or displayed my client with
10 - - - I believe it was four other suspects who were
11 arrested at the scene, and yes, counsel complained
12 that that joint identification was unduly suggestive,
13 and the court ruled - - - and the People also argued
14 that that was not - - - that was a completely proper
15 procedure, that it was confirmatory, even though
16 there was no evidence to support that. There's - - -
17 there was no evidence that in fact the identification
18 is - - - has sufficient level of familiarity with my
19 client so that that could be a confirmatory ID. And
20 the court, in the end, accepted that - - - that
21 rationale. But - - -

22 JUDGE ABDUS-SALAAM: Is there - - - is
23 there some other rationale for having the quote-
24 unquote confirmatory show-up at the precinct? There
25 were a number of people who identified several

1 individuals at the scene of this essential melee, and
2 then there were - - - I guess one of the reasons that
3 the police wanted to have this show-up at the
4 precinct or lineup was to cut people loose who really
5 weren't involved or, you know, confirm whether these
6 were the people who were actually identified at the
7 scene. Is that a - - - a legitimate purpose for the
8 show-up?

9 MS. POWELL: For a precinct show-up? It -
10 - -

11 JUDGE ABDUS-SALAAM: A - - - a confirma - -
12 - would that be considered a confirmation?

13 MS. POWELL: They were arrested already.
14 If - - - and this - - - as this court has held, any -
15 - - well, any time that you display a - - - a
16 suspect, a defendant, whether or not it's in person
17 or a photograph, that is subject to a - - - it must
18 pass constitutional muster, that it must - - - it
19 cannot violate the defendant's due process right. It
20 doesn't matter what the cop - - - what - - - what his
21 subjective intent was, if he needed to, you know,
22 confirm that he got the right people or whatever.
23 The point is that it's still nonetheless a pre-trial
24 identification procedure that must be done in a way
25 that does not violate the defendant's due process

1 rights.

2 CHIEF JUDGE DIFIORE: So would the facts of
3 a chaotic melee with multiple people under arrest and
4 multiple witnesses in the precinct house, would that
5 rise to the level of exigent circumstances?

6 MS. POWELL: Of exigent circumstances,
7 absolutely not. At that - - - the record clearly
8 shows that after my client and others were arr - - -
9 arrested at the scene at a show - - - at a show-up
10 that was also challenged, I might add, and the People
11 in their brief admit that those - - - that show-up at
12 the scene might very well have produced unreliable
13 identifications. So at that - - - logic tells us
14 that they should have - - - certainly should have
15 conducted unsuggestive (sic) proper lineups at the
16 precinct.

17 JUDGE RIVERA: So what would that have
18 looked like, considering these particular
19 circumstances?

20 MS. POWELL: We have - - - they have - - -

21 JUDGE RIVERA: What would not have violated
22 your client's constitutional rights?

23 MS. POWELL: Well, I - - - I don't want you
24 to show my client in a group - - -

25 JUDGE RIVERA: Okay.

1 MS. POWELL: - - - in a precinct with other
2 suspects, and also where the witnesses are - - - are
3 allowed to chat with one another, not only before the
4 show-up, but also after the show-up.

5 JUDGE RIVERA: And during?

6 MS. POWELL: And during. So they were
7 actually talking to one another after they already
8 identified - - -

9 JUDGE RIVERA: So someone would go in - - -

10 MS. POWELL: They would go in.

11 JUDGE RIVERA: - - - do an ID, come back,
12 come to the group and as far as you know - - -

13 MS. POWELL: Yeah, they're in there.

14 JUDGE RIVERA: - - - they were chatting
15 about what had just happened.

16 MS. POWELL: Right.

17 JUDGE RIVERA: The next person goes in - - -

18 -

19 MS. POWELL: Right.

20 JUDGE RIVERA: - - - and comes back, same
21 thing.

22 MS. POWELL: Right. That's exactly what
23 happened.

24 MS. POWELL: And there's a - - -

25 JUDGE FAHEY: It seems like - - - it seems

1 like what - - - it's - - - it's the minimization of
2 how long they want to keep the suspects lined up.
3 And that's - - - this court has addressed that in
4 Rodriguez, right.

5 MS. POWELL: The court has addressed that -
6 - - that question and has rejected that as a basis to
7 do a precinct show-up.

8 JUDGE FAHEY: It's not exactly the same
9 situation, though, as the Judge said. It - - - but -
10 - - but that - - - isolated by itself, you're right
11 about that.

12 MS. POWELL: That's right. It's not
13 enough.

14 CHIEF JUDGE DIFIORE: Thank you, Ms.
15 Powell.

16 MS. POWELL: And a four-hour - - - I'm
17 sorry.

18 MS. TALCOTT: Good afternoon. May it
19 please the court, my name is Nancy Talcott from the
20 Office of Richard A. Brown, the District Attorney of
21 Queens County on behalf of the respondent. The
22 redacted statement did not explicitly or implicitly
23 identify the defendant. It contained no names, no
24 nicknames, no identifying feature or clothing
25 descript - - - description linked to the defendant.

1 Even the only - - - even the unredacted statement
2 could only be linked, if at all, through a generic
3 clothing description. All - - -

4 JUDGE PIGOTT: What do you think of Ms.
5 Powell's argument, though, that when you leave
6 something out and the only person that could possibly
7 have been left out is the person sitting over at
8 defense table, the jury could reach that kind of
9 conclusion by themselves?

10 MS. TALCOTT: It was not at all clear who
11 was left out. That's the point. There actually was
12 no Bruton issue here. The defendant reading of Gray
13 places form over substance.

14 JUDGE PIGOTT: Wait a minute. You - - -
15 you said that, but she said the opposite, and I was
16 wondering if you could clarify that. In other words,
17 she's saying, here's one person sitting there being
18 tried and there's blanks in this thing, and a logical
19 jury is going to say, obviously the blanks apply to
20 this defendant. Does that make sense?

21 MS. TALCOTT: No, not under the
22 circumstances of this case where you had a hundred
23 people at the platform, at least fifteen suspects;
24 eight were brought to the precinct. No, it's not
25 clear at all - - -

1 JUDGE PIGOTT: No, you got to - - -

2 MS. TALCOTT: - - - to whom he referred.

3 JUDGE PIGOTT: I'm looking at it a little
4 more narrowly. I'm thinking you're in a courtroom
5 and you got a defendant on trial. Somebody says, you
6 know, I want to redact this thing so that the jury,
7 you know, doesn't reach the wrong conclusions, and
8 they do; and if it's read, as Judge Fahey suggested,
9 and they never see the blanks, then things seem to be
10 okay. But when they see the document and there's
11 blanks, Ms. Powell's point is that they're going to -
12 - - they're going - - - whether they're right or
13 wrong, they're going to assume that the blanks are
14 the defendant.

15 MS. TALCOTT: Well, they wouldn't, under
16 the circumstances of this case, because it was clear
17 from all of the evidence presented at trial that more
18 than these defendants sitting at the table were
19 involved and that - - -

20 JUDGE PIGOTT: But wouldn't - - - wouldn't
21 - - - I mean, if I was a juror I would say well, if -
22 - - if it was somebody else, they'd leave the name
23 in.

24 MS. TALCOTT: No, absolutely not. First of
25 all, it's clear from the statements as redacted it

1 didn't actually name anyone. It named some undefined
2 Latin King, so that wouldn't be clear to the jury at
3 all who it named.

4 JUDGE PIGOTT: You're kind of missing my
5 point, but go ahead, that's all right.

6 MS. TALCOTT: Sorry?

7 JUDGE PIGOTT: That's okay.

8 MS. TALCOTT: Oh.

9 JUDGE RIVERA: I think the point is why - -
10 - why are the People going to go through what is
11 clearly an expensive enterprise if they don't think
12 they got the right Latin King, and isn't that what's
13 obvious, then, from this statement that's redacted as
14 such?

15 MS. TALCOTT: No, not when it's clear that
16 there were so many other participants, potential
17 suspects, and also defendants not sitting at that
18 table who were also armed.

19 JUDGE RIVERA: What about the connection to
20 Bambino?

21 MS. TALCOTT: The - - - Detective
22 Wakowski's (ph.) - - -

23 JUDGE RIVERA: Huacon, yeah. Um-hum.

24 MS. TALCOTT: Well, the - - - again, that's
25 not a Bruton issue. It was inadmissible hearsay.

1 The court sustained the objection, defense counsel
2 declined a curative instruction and, as the Appellate
3 Division found, there was no significant probability
4 that the error contributed to the conviction. Hierro
5 said he knew the defendant as Bambino, Fegarow (ph.)
6 said he knew the defendant as Bambino, and quite
7 frankly, defense counsel referred to the defendant as
8 Bambino in his summation when he was talking about
9 them all getting together, let's pin it on Bambino.
10 So - - - and in light of the overwhelming evidence of
11 guilt where you had those three witnesses, two of
12 whom knew him and identified him as such, there's no
13 possibility that that - - - that error - - - which
14 was inadvertent.

15 CHIEF JUDGE DIFIORE: Counsel, backing up a
16 little bit, does the element of the crime of gang
17 assault that you have to be "aided by two or more
18 other persons actually present", does that make the
19 redactions in this case irrelevant?

20 MS. POWELL: I think Jass addressed that,
21 the Second Circuit case, where they said sometimes,
22 due to the nature of the statement itself, it can't
23 be redacted to omit reference to the third person,
24 which it - - - which the Second Circuit has stated is
25 - - - is a preference. You can't do that here

1 grammatically and also given the nature of the
2 charges. In Jass, you had conspiracy; here you have
3 gang assault where you do necessarily need a certain
4 amount of people. So Jass did acknowledge - - -

5 CHIEF JUDGE DIFIORE: Do a - - -

6 MS. TALCOTT: - - - that that was, in fact,
7 a factor to consider - - -

8 CHIEF JUDGE DIFIORE: Um-hum.

9 MS. TALCOTT: - - - when determining
10 whether the redaction has to refer to somebody. And
11 again, in Jass, it's not a numbers game. In Gray you
12 had more than people sitting at the table, and in
13 Jass you just had one - - - one defendant, one
14 redacted person's name.

15 JUDGE ABDUS-SALAAM: Counsel, even though
16 there were - - - I'm sorry.

17 JUDGE FAHEY: You go ahead.

18 JUDGE ABDUS-SALAAM: Even though there were
19 more people involved, there were only three people
20 sitting at the defense table, and I go back a little
21 bit to Judge Pigott's question; why would the People
22 go through the trouble of doing any redactions if
23 none of those things redacted referred to the
24 individuals sitting at trial, regardless of whether
25 there were other people involved in the melee?

1 MS. TALCOTT: Well, under the circumstance
2 of this case, it would have been linked to the
3 defendant and that - - - that would have clearly been
4 a problem, so you had to, in this case, because the
5 indication was that defendant wore red shorts, and
6 that Cassaris (ph.) had worn a blank tank - - - black
7 tank top. Now, had it described Huacon, you know, or
8 indicated her clothing or anything, it still would
9 have been redacted be - - - because you don't - - -
10 you don't want any indication of who it referred to.

11 The statement was admitted against
12 Villanueva. It was incriminating as to him. He put
13 himself at the scene. He put himself in the
14 particular car.

15 JUDGE STEIN: Did the court ever instruct
16 that it was limited to that?

17 MS. TALCOTT: No. Any claim regarding - -
18 -

19 JUDGE FAHEY: And - - - and so - - -

20 MS. TALCOTT: - - - the court's charge
21 which was - - -

22 JUDGE FAHEY: Go ahead.

23 MS. TALCOTT: - - - to Judge Fahey's point
24 is unpreserved and in fact waived. The court
25 specifically said after the charge was given, any

1 additions? The defendant, this defendant in
2 particular, said, oh, could you say something about
3 the redactions. The judge said, you want me just
4 tell them not to consider the redactions? Yeah,
5 pretty much. The court then made clear to the jury,
6 there have been some things redacted, pay no mind to
7 them, it's a legal issue, they have no bearing.

8 JUDGE FAHEY: Yeah, but - - - but let me
9 ask this. If we applied the Gray - - - the way I
10 understand Gray is - - - is that any visible
11 redaction is prohibited as a class; that - - - that's
12 kind of the way I read that. So if - - - I could be
13 wrong, wouldn't be the first time. But assuming
14 that's correct, if any visible redaction - - - to
15 Gray - - - this court hasn't applied Gray yet, I
16 don't believe, so if we applied it to this
17 circumstance, preservation wouldn't really matter
18 then, would it, on a limiting instruction?

19 MS. TALCOTT: Well, I - - - I think there
20 was a strategic reason not to request the classic
21 Bruton instruction, for lack of a better word.

22 JUDGE FAHEY: No, I - - - that's fine, you
23 can get to that - - -

24 MS. TALCOTT: Okay.

25 JUDGE FAHEY: - - - but if we applied the

1 Gray formula, would that - - - would that set aside
2 the question of no limiting instruction?

3 MS. TALCOTT: No, because I think that
4 reading of Gray is too narrow. Again, I think it's
5 form over substance.

6 JUDGE FAHEY: Um-hum.

7 MS. TALCOTT: Gray does not stand for the
8 proposition that oh, I have a statement with a blank,
9 Bruton problem, end of story. You have to - - - you
10 have to look at the - - - what the blank and the
11 statement and everything says, what that communicates
12 to the jury.

13 JUDGE FAHEY: Well, see, it seems in terms
14 of trying the case, it's relatively simple; you don't
15 - - - you don't submit it, you don't show - - - it's
16 visibly redacted, which means you don't hand it in to
17 them. So they - - - they get the statement that's
18 unredacted. Redacted means they shouldn't know about
19 it. They don't know about it. It's obviously
20 straightforward. You've got Watkufski (sic) or
21 whoever the other guy was, Moser, on the stand; they
22 read the statement.

23 MS. TALCOTT: Right.

24 JUDGE FAHEY: That's the end of the - - -
25 that's the end of the problem. It doesn't seem to be

1 - - - from a People's point of view, I don't see how
2 it creates a problem. And it's simple enough if - -
3 - if the - - - if the jurors want the statement - - -
4 they want the statement, it's simply read back to
5 them by the court reporter. These don't seem to be
6 insurmountable problems to me.

7 MS. TALCOTT: No, nor did the defense ask
8 for that, and again, there could be strategic reasons
9 - - -

10 JUDGE FAHEY: Well, the ques - - - the
11 question isn't that, though. The question is whether
12 or not if we applied Gray and the Gray formula, which
13 we haven't done before, then we're basically - - -
14 there would be no requirement to preserve it because
15 the visible redaction wasn't an error. In - - - in
16 other words, in my reading of Gray that I gave you,
17 it hadn't been an error at that time. We're saying -
18 - - we'd be saying it's error now.

19 MS. TALCOTT: Well, I think it's more than
20 just visible error. Again, Gray doesn't man - - -
21 otherwise Gray would mandate that you have to retype
22 everything.

23 JUDGE FAHEY: Um-hum.

24 MS. TALCOTT: And - - - which Judge Scalia
25 noted in the dissent - - -

1 JUDGE FAHEY: Um-hum.

2 MS. TALCOTT: - - - there is no such
3 mandate. In Richardson, they actually did, but all
4 the parties agreed. The defendants never said, let's
5 - - - let's retype it; and again, there could be
6 strategic reasons for that. Villanueva didn't write
7 his statement. Maybe they want to say like see, the
8 cop wrote this. There's corrections on these
9 statements - - -

10 JUDGE FAHEY: Um-hum.

11 MS. TALCOTT: - - - initialed. You know,
12 there could be defense reasons for not wanting it to
13 be retyped. They certainly could have asked. That -
14 - - that's another possibility. Or they could have
15 said, we don't want the physical document going in,
16 we don't want them. In fact, it's clear the
17 defendant didn't have a problem with it because
18 that's the specific charge he asked for in this
19 particular case.

20 JUDGE FAHEY: The way I understood it was
21 is - - - is the defense argument was that they
22 objected in conference but not after the charge was
23 given.

24 MS. TALCOTT: No, they didn't ask for the
25 classic Bruton - - -

1 JUDGE FAHEY: Charge, I see.

2 MS. TALCOTT: - - - like I said for lack of
3 a better word. And again, given this case, where it
4 did not in any way identify the defendant, it didn't
5 link him to the defendant, the defense may well have
6 had a strategic reason not to. All of a sudden you
7 have the judge saying, oh, you can't consider this
8 against him. They might be saying well, why would we
9 have. Whereas here, there was no indication this was
10 the defendant or anyone in particular other than
11 someone identified as a Latin King, and here, given
12 the large number of people that would have fit into
13 that class, it makes it even less likely.

14 JUDGE RIVERA: Well, where is the line in
15 the sand about what - - - what the - - - what the
16 statement as redacted indicates? In other words, is
17 it just you removed anything that shows a - - - that
18 might connect him because of physical description or
19 as you said red shorts or something like that? How
20 far can you go?

21 MS. TALCOTT: I - - - I think Jass set - -
22 -

23 JUDGE RIVERA: What inferences can be drawn
24 that perhaps cross the line?

25 MS. TALCOTT: I think Jass sets forth a

1 good standard. Exhibit a preference to remove all
2 reference to the people, and again, we discussed you
3 can't always do that grammatically or given the
4 nature of the charges. Then you posit two questions;
5 whether the redacted confession indicated to the jury
6 that the original statement contained actual names -
7 - - that's where you had Gray, the problem in Gray
8 was it substituted a name with an obvious indication
9 that it occurred to protect someone's identity - - -
10 and whether the redacted confession, even if the
11 first item introduced at trial, would immediately
12 inculcate the defendant in the charged crime. You
13 give this jury this redacted statement in a vacuum,
14 they'd have absolutely no idea who Villanueva is
15 talking about. There's absolutely no connection
16 whatsoever to the defendant, again, supporting a
17 theory that they may not have wanted the classic
18 Bruton charge.

19 JUDGE RIVERA: So you want us to adopt that
20 particular reading, Jass.

21 MS. TALCOTT: I think - - - I think it
22 balances the protections Bruton seeks for the
23 defendant against the interests in having joint
24 trials in cases like this that the State has. And I
25 think it strikes a fair balance. There are certainly

1 other options that the defense can choose to request
2 that the physical statement not go in at all, as
3 Judge Fahey indicated, or have the statement itself
4 retyped, as they - - - all the parties agreed to in
5 Richardson. There's no mandate right now that that
6 occur and, in fact, there may be reasons why they may
7 not want it to occur.

8 Finally, in this regard, error - - - if any
9 - - - in the admission of the statement was harmless.
10 There were two questions; the quantum in nature of
11 the evidence against the defendant if the error is
12 excised - - - here, you have three witnesses
13 identified him. Two of them knew him; they knew him
14 by name. One had been a former gang member. Another
15 one saw him at school a few times a week regularly.
16 Two - - -

17 JUDGE STEIN: Well, they - - - they - - - I
18 mean they had some credibility problems; you would
19 agree with that?

20 MS. TALCOTT: All before the jury.
21 Absolutely. The second question in the harmless
22 error in this situation is the causal effect the
23 error may have had on the jury. The jury's verdict
24 makes clear, this statement had no effect on them
25 whatsoever. If it affected the jury, the defendant

1 undoubtedly would have been convicted of manslaughter
2 at the least, if not murder. If the jury had given
3 it any credence whatsoever, Villanueva would have
4 been acquitted of everything when, in fact, he
5 wasn't.

6 JUDGE STEIN: On the other hand, they
7 specifically asked to see it, so it was obviously
8 something that - - - that they - - - they paid some
9 attention to.

10 MS. TALCOTT: Well, they asked to see all
11 the exhibits actually, I think, and - - - and the
12 statements as well and, you know, that's where we
13 can't delve into the deliberative process. We really
14 don't know if one person wanted to see it. We can
15 tell from the verdict that they didn't buy it. Why
16 they asked for it, we - - - we don't know, and that's
17 - - - that's just going to be pure speculation
18 whereas there's no speculation with what the verdict
19 was.

20 JUDGE ABDUS-SALAAM: Counsel, could you
21 comment - - -

22 JUDGE RIVERA: Can you address the lineup -
23 - - can you address the lineup issue?

24 JUDGE ABDUS-SALAAM: Yeah, that's what I
25 was going to do, the confirmation.

1 MS. TALCOTT: Just going to swap notes.

2 JUDGE RIVERA: Was there another way you
3 could have done this confirmation?

4 MS. TALCOTT: Well, it didn't have to be
5 done at all, so - - - as a practical matter, they had
6 the identifications. The only thing that would have
7 resulted was that somebody possibly implicated at the
8 scene would have been exonerated. They didn't have
9 to - - -

10 JUDGE RIVERA: But they did go forward so
11 now - - - now you're stuck with it so - - -

12 MS. TALCOTT: Right. So the question
13 before the court - - - this is a mixed question of
14 law and fact, so the question before this court now
15 is whether there's record support for the lower
16 court's hearing - - - the lower court's finding which
17 the Appellate Division left undisturbed that under
18 the circumstances, whether these show-ups were
19 reasonable and not unduly suggestive.

20 JUDGE GARCIA: I'm sorry - - -

21 JUDGE RIVERA: Well, how - - - how are they
22 not - - - how are they not unduly suggestive, sorry
23 for the double negative, if you have those witnesses
24 or potential witnesses who are identifying going back
25 and forth and having a conversation.

1 JUDGE GARCIA: Is that accurate, that
2 description of the process?

3 MS. TALCOTT: They were together, and
4 actually Detective Lopez (ph.) said yeah, we kept
5 them together under the circumstances because the
6 identifications were done.

7 JUDGE GARCIA: But were they allowed to
8 talk during the identification process, come in, come
9 out of the room?

10 MS. TALCOTT: Well, one came in - - - I - -
11 - I think they went back to the same room, but again,
12 if that was going to unduly impact them, then why is
13 Hernandez (ph.) the only one who puts a box cutter in
14 his hand? Everybody doesn't put a box cutter in the
15 defendant's hand. If - - -

16 JUDGE RIVERA: I'm sorry. I'm a little - -
17 - I'm a little unclear about your response to Judge
18 Garcia. Are you saying they - - -

19 MS. TALCOTT: Yes, they were - - - they - -
20 -

21 JUDGE RIVERA: - - - did go back and forth
22 between - - -

23 MS. TALCOTT: They didn't go back and
24 forth. One went - - -

25 JUDGE GARCIA: Right.

1 MS. TALCOTT: Then they came back, another
2 one went, then they came back. Yeah.

3 JUDGE GARCIA: Right.

4 MS. TALCOTT: So like, I - - - I don't
5 think they - - -

6 JUDGE GARCIA: Those were for
7 identifications. One may have added something about
8 a box cutter or not a box cutter, but what they were
9 saying is this is the person or not the person that I
10 saw, right?

11 MS. TALCOTT: Right. He - - - he was just
12 consolidating the information gathered at the scene.
13 And just as an aside - - -

14 JUDGE RIVERA: Were they in that room
15 together without any police? Were they by
16 themselves?

17 MS. TALCOTT: I think an officer was
18 outside.

19 JUDGE RIVERA: They were waiting - - -

20 MS. TALCOTT: And actually, I think at one
21 point, one of the officers said he was chatting with
22 the kids, and that's clear from when Huacon walks by
23 and they start identifying her and they take a couple
24 separately. And again, that's - - - where you hadn't
25 had that identification, they do remove them and

1 discuss with them separately, so they were cognizant
2 of the fact that, you know, okay, we - - - we have to
3 keep this separate because she hasn't been identified
4 yet. So - - - but - - -

5 CHIEF JUDGE DIFIORE: Counsel, why didn't
6 the People proceed with an independent source
7 hearing?

8 MS. TALCOTT: There was no need to because
9 you need an independent source hearing when you find
10 that the show-ups are suggestive. So the court found
11 that they weren't suggestive, so there was no need
12 for an independent source hearing. And under the
13 circumstances of the case - - - just - - - the People
14 don't concede that the initial IDs were questionable
15 - - - of questionable reliability or inherently
16 unreliable. Defendant doesn't even argue that now.
17 What Detective Lopez said - - - what our argument is,
18 given the potential for miscommunication under the
19 unique circumstances where you had a hundred people,
20 thirty to forty cops, multiple witnesses making
21 different identifications to different officers in an
22 area that had become a crime scene. A victim was
23 laying dead and they're collecting evidence which
24 included weapons.

25 JUDGE STEIN: Does that make it exigent?

1 MS. TALCOTT: Well, exigency isn't the only
2 factor. Riley says - - -

3 JUDGE STEIN: So but would you agree that
4 it doesn't make it an exigent circumstance?

5 MS. TALCOTT: Well, it - - - it has to be
6 couched in terms of exigency, although I would say
7 the real question before this court is
8 reasonableness. The exigency that existed at the
9 scene was the same exigency that existed at the
10 precinct, which is to let any - - - anyone who really
11 wasn't involved go. But the question - - -

12 JUDGE STEIN: So wouldn't that then be the
13 case in every time that there was a - - - a precinct
14 show-up?

15 MS. TALCOTT: No, it depends on the
16 circumstances. Again, here you have a continuous - -
17 - although it's three hours, there's no bright line
18 regarding the time - - - you have a continuous series
19 of events. You know Duuvon talks about the unbroken
20 chain of events. This chain is unbroken. It's just
21 a little longer.

22 JUDGE RIVERA: Why isn't that just
23 inconvenience as opposed to exigency?

24 MS. TALCOTT: Well, again, I - - - I don't
25 think the question before the court is exigency.

1 JUDGE RIVERA: But what's that risk?
2 What's that risk other than someone - - - I'm not
3 saying it's pleasant or we should violate anyone's
4 rights, don't get me wrong, but what - - - what's at
5 risk? What's the exigency?

6 MS. TALCOTT: Oh, here - - - no - - -

7 JUDGE RIVERA: What's the danger? What are
8 you concerned - - -

9 MS. TALCOTT: I don't - - - I'm not
10 claiming that the primary - - -

11 JUDGE RIVERA: Right.

12 MS. TALCOTT: - - - motive here was
13 exigency. The existence of exigent circumstances can
14 be a factor warranting the employment of a show-up
15 identification. Exigency is by no means the
16 requirement for a show-up to be admissible. And
17 again, the question before the court on this mixed
18 question of law and fact is whether under the
19 circumstances, there's record support for the hearing
20 court's finding.

21 CHIEF JUDGE DIFIORE: Thank you.

22 MS. POWELL: Just a couple of things, Your
23 Honors. First of all, there were four hours between
24 the time of the at-the-scene show-ups and the time of
25 the precinct show-ups. There was plenty of time to

1 conduct proper show-ups. And it's settled that for a
2 precinct show-up to be admissible, to be
3 constitutional, exigency must be shown and none was
4 shown - - - none was shown and none was claimed in
5 this case.

6 The other thing is the People continue - -
7 -

8 JUDGE ABDUS-SALAAM: Counsel, what about
9 the question of whether there's record support for
10 the - - - the lower court's decision? This is a
11 mixed question of law and fact.

12 MS. POWELL: There is no record support.
13 In fact, the People made no claim that this - - -
14 that they could not conduct proper lineups. This is
15 a claim that they're coming up with on appeal for the
16 first time so, in fact, that issue is not preserved
17 and it cannot be a basis upon which this court can
18 affirm.

19 And as to the - - - the hundreds of people
20 at the subway station, in fact, the People in their
21 opening statement narrowed who was involved. And the
22 - - - the prosecutor said that there were a number -
23 - - there were four or five people who ran out of the
24 second car and three of them, Cassaris, Villanueva,
25 and my client Assad Cedeno, were the ones who had the

1 knives. So when they looked at Villanueva's
2 statement where he claimed to identify those who were
3 armed with knives, who was he talking about? Ceden
4 and Cassaris, not the hundreds of people who were - -
5 -

6 JUDGE RIVERA: Well, just to clarify then,
7 is your - - - is your point that by the time they get
8 to - - - we're still talking about the lineup - - -
9 the time they get to the lineup, the police already -
10 - -

11 MS. POWELL: No.

12 JUDGE RIVERA: - - - that's what they're
13 doing. At least already they're not talking about
14 hundreds of people.

15 MS. POWELL: No, actually I was referring
16 to them - - -

17 JUDGE RIVERA: They're really only talking
18 about four; am I misunderstanding you?

19 MS. POWELL: No, I was actually trying to
20 address the People's argument that, you know, the - -
21 - that the jurors would have no clue as to whom
22 Villanueva's statement referred to.

23 JUDGE RIVERA: Oh, I'm sorry. Sorry,
24 you're on the Bruton. My apology.

25 MS. POWELL: Right. For all the reasons

1 that I argued in my brief, please - - -

2 CHIEF JUDGE DIFIORE: Thank you.

3 MS. POWELL: - - - I ask the court to
4 reverse.

5 (Court is adjourned)

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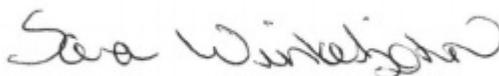
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C E R T I F I C A T I O N

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Assad Ceden0, No. 24 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



Signature: _____

Agency Name: eScribers

Address of Agency: 700 West 192nd Street
Suite # 607
New York, NY 10040

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