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COURT OF APPEALS

STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

No. 150

OMAR SHABAZZ,

Appellant.

PEOPLE,

Respondent,

-against-

No. 151

DONALD PERRINGTON,

Appellant.

20 Eagle Street
Albany, New York 12207
September 04, 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

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1 CHIEF JUDGE LIPPMAN: Number 150 and 151.
2 Counselor?

3 MR. BERTAN: Good afternoon, Your Honors.
4 David Bertan, representing Mr. Perrington. My co-
5 counsel, Ms. Barbara Zolot, represents Mr. Shabazz,
6 and she will handle the rebuttal argument.

7 CHIEF JUDGE LIPPMAN: She's going to do the
8 rebuttal. So of your nine and six - - -

9 MR. BERTAN: I'm doing nine.

10 CHIEF JUDGE LIPPMAN: You're doing nine.
11 And then you're going to do six, and then you're
12 going to do part of your six to rebuttal, or what are
13 you doing?

14 MR. BERTAN: No, the six minutes will be
15 rebuttal.

16 CHIEF JUDGE LIPPMAN: The six minutes will
17 be rebuttal. Okay.

18 MR. BERTAN: Your Honors, it is hard to
19 imagine evidence that is more relevant in a weapons
20 case than a codefendant's admission that the gun was
21 hers. Had that statement been admitted, it would
22 have allowed the jury to properly assess whether the
23 presumption in this case had been rebutted and
24 whether appellants were in fact - - -

25 JUDGE PIGOTT: What's a - - - what's a

1 court supposed to do when, as I understand it, she
2 was severed because her lawyer said that she would
3 blame the other two?

4 MR. BERTAN: That's correct. It was
5 severed at the initial trial.

6 JUDGE PIGOTT: All right. So - - - so at
7 that point, the court says I'm going to sever her,
8 because her testimony is going to be that the gun
9 belonged to the - - - to your clients.

10 MR. BERTAN: Well, the basis for severance
11 was antagonistic defenses. I mean, the underlying
12 idea is that she would say it was their gun. But - -
13 -

14 JUDGE PIGOTT: Right. Now you want - - -
15 now you want to bring that same lawyer in - - - I
16 realize it's not the same - - - but, you know, to
17 say, oh, no; she's now willing to say that the gun is
18 hers, but we don't want her, for reasons I'm sure
19 you're going to get into - - - but it's against her
20 penal interest to have said that.

21 MR. BERTAN: Well, it's not the same
22 lawyer, Your Honor.

23 JUDGE PIGOTT: Right.

24 MR. BERTAN: What happened is, at the
25 trial, her attorney came - - - gave an opening

1 statement that he would blame the codefendants, and
2 the case was severed. My client's original attorney
3 had heard this statement. And what's happening is
4 that you need to look at the statement as of the time
5 it's made, not what subsequent events can be. In
6 this case, when the statement was made, you assess
7 its reliability at that point.

8 JUDGE READ: Well, what about
9 unavailability?

10 MR. BERTAN: I'm sorry, unavailability?

11 JUDGE READ: What about unavailability? I
12 mean, isn't that the key here, was - - -

13 MR. BERTAN: Well - - -

14 JUDGE READ: - - - how is it that she was
15 unavailable?

16 MR. BERTAN: Actually, reliability is the
17 most important factor. But in terms of
18 unavailability, that was certainly satisfied.

19 CHIEF JUDGE LIPPMAN: Did the Supreme Court
20 rule on unavailability?

21 MR. BERTAN: I'm sorry, Your Honor?

22 CHIEF JUDGE LIPPMAN: Did the Supreme Court
23 rule on unavailability?

24 MR. BERTAN: Well, the idea - - - yes, Your
25 Honor. The unavail - - - no, the Supreme Court in

1 this case? I'm sorry; trial court.

2 CHIEF JUDGE LIPPMAN: Yeah.

3 MR. BERTAN: Did not rule on
4 unavailability. If you look at the language of the
5 court's comments - - -

6 JUDGE SMITH: So you say - - - you say
7 there's a LaFontaine bar to our ever reaching - - -

8 MR. BERTAN: That is correct. At the
9 outset, this court would be barred from reaching that
10 issue. But when you - - -

11 CHIEF JUDGE LIPPMAN: But the Appellate
12 Division reached it, right?

13 MR. BERTAN: They should not have.

14 JUDGE READ: Well, why - - -

15 MR. BERTAN: Because - - -

16 JUDGE READ: - - - why isn't it possible to
17 read, or isn't it possible to read the trial court as
18 making alternative rulings? He was ex - - -
19 obviously he was at - - - you know, very skeptical
20 and didn't think he was unavailable, but then the
21 next day he said, "but in any event, I find the
22 statement unreliable." So why doesn't that show that
23 he ruled on both grounds?

24 MR. BERTAN: Well, if you parse out "in any
25 event", I think in common language, that sort of

1 excludes the prior consideration and turns to the
2 issue that's being decided in any event. But if you
3 look at the record from page A-380, the judge also
4 says that "It doesn't seem likely to me, given her
5 trial testimony," which shows you that the real issue
6 for this judge and the basis for his decision, was
7 the reliability of the statement.

8 JUDGE READ: Well, what are we supposed to
9 do - - - let's say we think it's ambiguous; what are
10 we supposed to do in that instance in relationship to
11 LaFontaine? If it's - - -

12 MR. BERTAN: My - - -

13 JUDGE READ: - - - susceptible to more than
14 one reading, in other words?

15 MR. BERTAN: My proposal would be to take
16 the common-sense interpretation of the phrase "in any
17 event", which in ordinary conversation would mean I'm
18 not really considering that, in any event. This is -
19 - -

20 CHIEF JUDGE LIPPMAN: But the judge is
21 saying what if - - - what if we find it ambiguous,
22 though?

23 JUDGE READ: Or - - -

24 MR. BERTAN: If you fi - - -

25 JUDGE READ: - - - either reading would

1 work.

2 MR. BERTAN: If that's the - - -

3 CHIEF JUDGE LIPPMAN: Or alternative, is
4 what she said.

5 JUDGE READ: Alternative, yeah.

6 MR. BERTAN: If you look at it as an
7 alternative, then I would suggest that in any event,
8 she was unavailable, as well as the statement was - -
9 - was reliable. If you look at what went on in terms
10 of trying to locate her, you had the NYPD, probably
11 the best detective agency in the world, unable to
12 find her. You had the District Attorney's
13 investigators go out to two locations - - -

14 JUDGE SMITH: Is there any record that the
15 defense lawyer tried to find her?

16 MR. BERTAN: No, there is not. But there
17 also is no requirement - - -

18 JUDGE SMITH: Isn't it - - - isn't it
19 possible - - - sometimes, one defense lawyer can do
20 better than the best agency in the world, because
21 he's got the - - - because he represents the
22 defendant, and she may want to help him.

23 MR. BERTAN: Well, I think in this case, if
24 you look at the underlying facts, it is unlikely that
25 Ms. Corneille would have been cooperative with the

1 defense attorneys, in any event, because - - - I keep
2 saying "in any event" - - - because she ended up
3 testifying essentially against them. So it seems
4 unlikely that she would be cooperative.

5 But the - - - the ultimate showing is not
6 that the defense attorney has to go find her. What
7 has to be shown is that she's unavailable. And when
8 you look at the record that was made where defense
9 counsel said bring in Officer Kailer (ph.), let's ask
10 him what he's done to find her, or sign the material
11 witness order, the defense did ask for that. If you
12 look at pages 373 and 374, those requests were made.
13 So what you have here is the defense showing she was
14 unavailable.

15 You are correct, the defense did not go out
16 and look. But the cases don't require that.

17 CHIEF JUDGE LIPPMAN: Counselor - - -

18 MR. BERTAN: The cases - - -

19 CHIEF JUDGE LIPPMAN: - - - what do - - -
20 what do the cases require on reliability? What's the
21 test?

22 MR. BERTAN: The real test for reliability
23 is if you look at the statement that under the time
24 it is made, it is a credible, believable statement.
25 Reliability deals with, in hearsay cases, the idea

1 that the circumstances surrounding the statement take
2 the place of either an oath or cross-examination.

3 JUDGE GRAFFEO: And why is - - - why is the
4 first comment to the attorney more credible than what
5 she testified to at trial?

6 MR. BERTAN: It's the same idea behind any
7 declaration against - - -

8 JUDGE GRAFFEO: Is it because of the
9 timing?

10 MR. BERTAN: Not the timing, but the
11 circumstances of it showing what she knew of the
12 facts, what she knew in terms of how this could
13 affect her, and an expression that she was
14 frustrated.

15 JUDGE PIGOTT: Can you tell me - - - I
16 didn't understand. There was a colloquy about the
17 District Attorney had warned defense counsel not to
18 talk to her?

19 MR. BERTAN: Yes. There was - - -

20 JUDGE PIGOTT: What's that all - - -

21 MR. BERTAN: - - - there was a material
22 witness order that the prosecutors had issued when
23 they were looking for her. And although the record
24 doesn't make it explicitly clear, there is the
25 uncontroverted statement that the defense was warned

1 away from her.

2 JUDGE PIGOTT: They don't have the right to
3 do that, though, do they? For people to tell you you
4 can't go find a witness?

5 MR. BERTAN: Well, prosecutors don't always
6 have the right to do a lot of what they do. But when
7 they make the threat, as a defense attorney, where
8 you're told you could be brought up on ethics charges
9 or prosecuted - - -

10 JUDGE PIGOTT: But that's not true, is it?

11 MR. BERTAN: If the witness is under a
12 material witness order, ethically, you would not be
13 able to talk to her if she has counsel. And that was
14 a question in the court as to whether Ms. Corneille
15 still had counsel.

16 JUDGE SMITH: And in the oral argument, the
17 judge said half a dozen times, I doubt her avail - -
18 - you - - - what that means, you can argue, which is
19 I have a serious question about whether she's
20 available. Wouldn't it have been the most natural
21 thing in the world for the - - - for the defense
22 lawyer to say I've done my best and I can't get her,
23 or I - - - I'm afraid to try because I'm afraid the
24 prosecutor's going to put me in jail or whatever the
25 reason was?

1 MR. BERTAN: They said the latter. And in
2 terms of the former, again, when you have an agency
3 such as the New York County District Attorney's
4 Office, I mean, they prosecute cases all over the
5 world; they find defendants and witnesses everywhere.
6 If they can't locate her, what are the odds that a
7 defense attorney could? It's a - - -

8 JUDGE SMITH: Maybe - - - maybe not so bad.

9 JUDGE PIGOTT: I mean, they're thinking you
10 could look behind the door in your office.

11 MR. BERTAN: Well, if it were that easy,
12 we'd have a different question here. But I think
13 when you look at it, defense attorneys show that she
14 was unavailable. And in terms of reliability, again,
15 when you look at the context of the statement and the
16 circumstances, this is a reliable statement.

17 JUDGE PIGOTT: Well, do you agree that if -
18 - - let's assume for a minute, the court said all
19 right, I'm going to let it in, that then the
20 transcript of the trial would come in in which she
21 had controverted that?

22 MR. BERTAN: Well, that - - - that would be
23 the corollary that the People could bring in is to
24 say that she made this statement - - - a subsequent
25 statement that is contradictory.

1 JUDGE READ: So - - -

2 MR. BERTAN: And then it becomes the jury's
3 responsibility to decide. If you look at - - - I
4 think that was in Fratello, where that's what was
5 done, because then the jury can decide, well, is this
6 in act - - - is this reliable or is this reliable?
7 But here they never got that chance. And when you
8 talk about a case where there is a presumption that
9 links this gun found in a woman's handbag next to a
10 woman in the backseat of the car, and that same woman
11 says that's my - - -

12 CHIEF JUDGE LIPPMAN: But what - - -

13 MR. BERTAN: - - - gun - - -

14 CHIEF JUDGE LIPPMAN: - - - does all that
15 tell us about her statement?

16 MR. BERTAN: That tells us that it's
17 reliable, because she knows the facts.

18 CHIEF JUDGE LIPPMAN: That it's reliable,
19 or that it's a reasonable probability that it's the
20 truth. What is the - - -

21 MR. BERTAN: I think that it's a - - -

22 CHIEF JUDGE LIPPMAN: - - - what do we go
23 on?

24 MR. BERTAN: - - - it's a rel - - - I think
25 both. It's a reasonable probability that it's true,

1 given the circumstances, and that she is reliable
2 because she is - - -

3 CHIEF JUDGE LIPPMAN: Given the context,
4 you're saying?

5 MR. BERTAN: She is aware of what she is
6 saying to this attorney and she's aware of the facts.

7 JUDGE READ: Even though there's evidence
8 going the other way. But you say that's a jury
9 question - - -

10 MR. BERTAN: Her statement - - -

11 JUDGE READ: - - - credibility?

12 MR. BERTAN: - - - you mean her statement -
13 - - her subsequent statement?

14 JUDGE READ: That, and I mean the other
15 things too. The purse only had the gun in it, right?
16 I mean - - -

17 MR. BERTAN: Right.

18 JUDGE READ: - - - I - - -

19 MR. BERTAN: It is a purse.

20 JUDGE READ: Well, it is a purse. When
21 most women carry purses around, they have more than a
22 gun in them, I hope. Usually not - - -

23 MR. BERTAN: I'm not sure how many women
24 carry purses with guns, but - - -

25 JUDGE RIVERA: But the purse is - - -

1 MR. BERTAN: - - - not too many men carry
2 purses.

3 JUDGE RIVERA: - - - but the purse is nex -
4 - - but the purse is next to the defendant. He o - -
5 - one of the defendants. He obviously had - - -

6 MR. BERTAN: It's between the two - - -

7 JUDGE RIVERA: - - - the had the
8 opportunity - - -

9 MR. BERTAN: - - - defendants.

10 JUDGE RIVERA: - - - to put - - -

11 MR. BERTAN: Yes.

12 JUDGE RIVERA: - - - plant the gun, put the
13 gun, however you want to think about it.

14 MR. BERTAN: And that's why you - - - you
15 let the statement in, you have it admitted, so that
16 the jury can decide - - -

17 CHIEF JUDGE LIPPMAN: So in the end - - -

18 MR. BERTAN: - - - who is correct.

19 CHIEF JUDGE LIPPMAN: - - - that's the
20 thrust of your argument: it should have come in; let
21 them figure it out.

22 MR. BERTAN: Let the jury figure it out.

23 CHIEF JUDGE LIPPMAN: Okay. Let's hear - -

24 -

25 MR. BERTAN: Thank you.

1 CHIEF JUDGE LIPPMAN: - - - from your
2 adversary.

3 MS. GLINER: May it please the court, my
4 name is Susan Gliner. I represent the People in this
5 case.

6 CHIEF JUDGE LIPPMAN: Counsel, why wouldn't
7 we let this in? Isn't there some indicia that this -
8 - - I don't know, there's a reasonable probability
9 that this - - - this could be a true statement?

10 MS. GLINER: Well, Your Honor, it doesn't
11 meet two of the essential requirements for - - -

12 CHIEF JUDGE LIPPMAN: Which two?

13 MS. GLINER: - - - admission of - - -

14 CHIEF JUDGE LIPPMAN: Tell us.

15 MS. GLINER: The first one is
16 unavailability. I think you need to meet all the
17 requirements - - -

18 CHIEF JUDGE LIPPMAN: He says that the DA
19 can't figure out where he is - - - where she is,
20 how's the defense going to know?

21 MS. GLINER: Well, I think the key to this
22 whole case is the - - - first of all, when they say
23 readable LaFontaine problem, when the judge made the
24 ruling on this, the ultimate ruling, he said
25 something, I think, that's the key to the case. He

1 said look, I'm not accusing you of anything
2 nefarious, but you don't want her testimony. The
3 fact of the matter is, the defense attorneys were
4 very candid. They didn't want the live testimony.
5 They had no interest in looking for her.

6 CHIEF JUDGE LIPPMAN: Why do you think the
7 - - - go to the issue we talked about with your
8 adversary. What did the judge below do? Did he
9 decide it on alternatively; did he decide it just on
10 reliability?

11 MS. GLINER: I think it's clear that the
12 judge decided it on availability. In fact, it's
13 interesting to note - - -

14 CHIEF JUDGE LIPPMAN: Decided on both?

15 MS. GLINER: I think he decided it on both.
16 I don't think this court has to reach both, because I
17 think the unavailability issue is just so against the
18 defendant in this case.

19 JUDGE PIGOTT: I missed it, then, because
20 as I understood it, there were - - - the DA was
21 looking for this person; the police - - - I mean,
22 weren't people looking for her?

23 MS. GLINER: The DA had a material witness
24 order. And I just have to correct something about
25 the record. It is not undisputed that the DA in this

1 case said to the defense attorney don't - - - don't
2 go near Corneille. What the DA did was, there was
3 another material witness order with respect to
4 Samantha Phillips. There's - - - our reading of the
5 record says that there was nothing that the DA ever
6 said to stay away from Corneille, even before this
7 whole issue arose.

8 But even assuming it's true, when the judge
9 said to the defendants, look, I'll sign a material
10 witness order, and you go out and find her, and they
11 did absolutely nothing. They made some motions,
12 some, you know, words. They did nothing. And one of
13 the lawyers very candidly said, you know, we don't
14 really want the live testimony, we want the hearsay
15 statement. But that's not the way the exception to
16 the hearsay rule works.

17 JUDGE PIGOTT: Where's that in the record?

18 MS. GLINER: If you look at - - - well, I
19 know - - -

20 JUDGE PIGOTT: I'll find it. I thought you
21 would have it available, but I'll find it.

22 MS. GLINER: The judge's decision referring
23 to that is on pages A-396 and 397 of the appendix.
24 And that's a reference to a statement made by one of
25 the attorneys when the judge was talking about

1 getting the witness in, saying you know, we really
2 don't want the witness' testimony, because she's just
3 going to say what she said at her own trial.

4 The idea is, and the trial judge recognized
5 this, is that the preference is for live testimony.
6 If you can't get the live testimony, then there are
7 circumstances under which it's fair to admit a
8 hearsay statement. But that's - - - this was not
9 that case, because the defense attorneys did not even
10 try to get the witness in, because they didn't think
11 - - -

12 CHIEF JUDGE LIPPMAN: If you just - - - put
13 aside the unavailability issue for the second. What
14 about the reliability issue - - -

15 MS. GLINER: Well, I think it's - - -

16 CHIEF JUDGE LIPPMAN: - - - in the context
17 - - - as your adversary says, in the context of
18 everything going on here: the purse, the handle,
19 next to her, it's her purse. What - - -

20 MS. GLINER: Well, I - - -

21 CHIEF JUDGE LIPPMAN: - - - what do you
22 make of all of that? And that she - - - she had no,
23 necessarily, a reason to lie when she was talking to
24 the other attorney. What - - - why would that not go
25 to the jury, putting aside we understand your

1 argument as to unavailability?

2 MS. GLINER: Okay. I think it's counsel
3 for the defense who is confusing credibility with
4 reliability. What you have here is a witness who, in
5 the past - - - or I shouldn't say witness; a
6 declarant, who had made two completely different
7 statements. One, she said it was her gun; one she
8 said, she - - - you know, it wasn't, presumably.

9 Once you have inconsistent statements,
10 neither of them were reliable. It doesn't almost
11 even matter which one is credible.

12 JUDGE SMITH: So you're - - - you're saying
13 that you can - - - putting aside availability - - -
14 suppose this woman were dead - - - you're saying you
15 could never get in her state - - - her statement
16 against interest, if she ever contradicted it?

17 MS. GLINER: What I'm saying is that
18 because in the past she had given two inconsistent
19 statements, the judge was well within his right as
20 the gatekeeper to say I have two inconsistent
21 statements. When someone makes two inconsistent
22 statements - - -

23 JUDGE SMITH: Well, one - - - one of which
24 - - -

25 MS. GLINER: - - - to you, how do you know

1 - - -

2 JUDGE SMITH: - - - one of which - - -

3 MS. GLINER: - - - which one is reliable?

4 JUDGE SMITH: - - - one of which was

5 obviously made for - - - it was obviously self-

6 serving. It was a statement at her own trial saying

7 she was innocent.

8 MS. GLINER: But the other - - - on the

9 other hand, as the judge noted, when she made the

10 first statement to the defense attorney, it was at a

11 very different stage of the trial. After all - - -

12 JUDGE SMITH: Why - - - I mean, either

13 statement might be true or it might be false. Why

14 shouldn't the jury figure it out?

15 MS. GLINER: Because that might have some

16 weight if we were talking about a live witness, if

17 you could put a live witness in front of the jury and

18 - - -

19 JUDGE SMITH: But we're - - - we're

20 assuming that they're - - - the live witness, it's

21 impossible to get the live witness. And the point of

22 the past recollection recorded - - - or it's not past

23 recollection, whatever it is - - - the statement

24 against penal interest rule is to substitute for an

25 unavailable witness a - - - the next best thing. Why

1 shouldn't we do that?

2 MS. GLINER: Because there were equal
3 reasons for her - - - for the first statement to be
4 true as the second statement to be true.

5 CHIEF JUDGE LIPPMAN: So to - - - so the
6 answer to Judge Smith's question before, whenever
7 there's a contradictory sis - - - statement, it can't
8 - - - it can't go in?

9 MS. GLINER: I can't - - -

10 CHIEF JUDGE LIPPMAN: I mean, always that's
11 the rule?

12 MS. GLINER: I wouldn't say always.

13 CHIEF JUDGE LIPPMAN: Where does it - - -

14 MS. GLINER: But in - - -

15 CHIEF JUDGE LIPPMAN: - - - where does it
16 say that?

17 MS. GLINER: It doesn't say it anywhere.
18 It's a matter of common sense that if you have two -
19 - -

20 CHIEF JUDGE LIPPMAN: It's a matter of
21 common sense that if there's two entirely different
22 contexts and, as the judge said, maybe one of them is
23 self-serving, it never goes in?

24 MS. GLINER: I'm not saying it never goes
25 in. But if you have a case like this one, where she

1 had motives to - - - to lie when she made a statement
2 to the defense attorney, at that point - - -

3 JUDGE GRAFFEO: But isn't that - - -

4 MS. GLINER: - - - it was very early in the
5 case. She had no record. They have very bad
6 records. Maybe she was trying to take the weight
7 from them, quote unquote.

8 JUDGE GRAFFEO: Isn't that the role of the
9 jury, though, to make that determination? You'd be
10 able to contest that first statement by using the
11 transcripts from the trial.

12 MS. GLINER: The problem is, is that the
13 judge is entitled, as a matter of discretion, to be
14 the gatekeeper. And - - -

15 JUDGE PIGOTT: Yeah, but you used it
16 yourself. You used it in her trial.

17 MS. GLINER: No, but - - - Your Honor, I
18 know the defense in their brief said that we were
19 being disingenuous, but I think they misunderstood
20 what the People were saying. This is not a case
21 where you have a robbery; at one trial we said - - -

22 JUDGE PIGOTT: No, no, no - - -

23 MS. GLINER: - - - well, this person - - -

24 JUDGE PIGOTT: - - - you cross-examined her
25 at her trial - - -

1 MS. GLINER: About her statement - - -

2 JUDGE PIGOTT: - - - about her statement.

3 So that - - -

4 MS. GLINER: - - - that it was not - - -

5 JUDGE PIGOTT: I'm almost - - -

6 MS. GLINER: - - - that - - -

7 JUDGE PIGOTT: - - - and I'm almost done.

8 I've got a subject and a predicate. At the time that
9 you were - - - that you were using it then, it was a
10 piece of evidence that you thought was useful in your
11 trial, the weight of it to be given, of course, to
12 the trier of fact.

13 Now, at a subsequent trial, same evidence
14 cannot be given to a trier of fact. Why?

15 MS. GLINER: Because in the first trial,
16 she was being impeached with the statement that the
17 gun was hers. This was a - - -

18 JUDGE PIGOTT: You wanted to prove that she
19 was telling the truth at the time that she gave the
20 statement - - -

21 MS. GLINER: But the - - -

22 JUDGE PIGOTT: - - - to her lawyer.

23 MS. GLINER: - - - there are two parts of
24 the statement. This was an act of constructive
25 possession. We were never saying it was only her

1 gun. The position - - -

2 JUDGE PIGOTT: No, no - - -

3 MS. GLINER: - - - of the People - - -

4 JUDGE PIGOTT: - - - you're missing my
5 point. You - - - you have the gun and you want to
6 use the gun in her trial. And she says that's not
7 the gun I had. So that trial's over. Now you want
8 to use the gun in this case.

9 MS. GLINER: But - - -

10 JUDGE PIGOTT: Or they want to use the gun
11 because they want to say it's - - - she said it
12 wasn't the gun. You said, well, you can't do that,
13 because the judge, in his discretion, can say that
14 gun can't be used.

15 It seems to me, it's a piece of evidence,
16 the weight be given to the trier of fact. I - - -

17 MS. GLINER: Your Honor, first of all, I
18 just want to point out again, that this whole
19 question wouldn't be reached at all, because she
20 wasn't available. But the point that I'm trying to
21 make about that we didn't - - - we're disingenuous,
22 or somehow using it differently, is that at the first
23 trial, the part of the statement in which she
24 admitted having the gun was the important thing. But
25 the People's position was never that the defendants

1 didn't possess the gun.

2 It - - - you could say, in a case where you
3 had only one perpetrator, that if we had tried one
4 case and said person X committed the crime, and then
5 later on, now we say person Z committed the crime,
6 that's inconsistent.

7 Our position was that all three of these
8 people possessed the gun constructively. So there
9 was nothing inconsistent about impeaching - - -

10 JUDGE RIVERA: So - - - so if she says I
11 really owned - - - owned the gun, you're saying that
12 doesn't exclude the possibility of a jury deciding
13 that the other two had some rights of possession to
14 the gun, while they're all in the car.

15 MS. GLINER: Exactly, Your Honor.

16 JUDGE RIVERA: Okay, I understand. But why
17 doesn't that go to the jury? Why doesn't that help
18 the jury, knowing that she has said I owned the gun,
19 determine whether or not, yes, under these
20 circumstances, they did or they didn't also have some
21 rights of possession in the gun?

22 MS. GLINER: Well, because, first of all,
23 you always have to deal with the unavailability
24 question, and that the defense attorneys here were
25 engaging in gamesmanship, which should not be

1 rewarded. They wanted the hearsay. They didn't want
2 the live testimony.

3 JUDGE PIGOTT: But you're accusing them of
4 that, but I don't think - - -

5 JUDGE RIVERA: But - - -

6 JUDGE PIGOTT: - - - it was established.

7 MS. GLINER: If you look at the - - -

8 JUDGE RIVERA: Yeah, but - - -

9 MS. GLINER: - - - record, Your Honor, they
10 - - - if you look at the record - - - I can't give
11 you the exact page - - - one of the defense
12 attorneys, when the - - - the trial judge said, you
13 know, I'll sign a material witness order, we'll get
14 her - - - and said we don't want her testimony, we
15 want her statement.

16 JUDGE PIGOTT: Well, I understand that.

17 MS. GLINER: That - - -

18 JUDGE RIVERA: I understand your argument
19 on that, but get back to my question.

20 MS. GLINER: Well, again - - -

21 JUDGE RIVERA: How - - - why is that - - -
22 does that not go to the jury, this argument you're
23 making about exclusive - - - this is not about
24 exclusive possession; she may have ownership, but
25 they may also have rights of possession. And they

1 want to say, fine, let the jury think about if
2 someone says I owned it, whether or not, under these
3 circumstances, they had rights of possession.

4 MS. GLINER: Because it's still - - - that
5 in and of itself doesn't make the statement reliable.
6 The fact - - - the judge was well within his
7 discretion, as the First Department found - - -

8 JUDGE READ: Well, is that what the
9 standard is - - -

10 JUDGE RIVERA: But the threshold - - -
11 sorry. The test on reliability is not - - - I mean,
12 do you think it's that significant? A reasonable
13 possibility the statement might be true? Why is that
14 - - -

15 MS. GLINER: Because when - - -

16 JUDGE RIVERA: - - - why does that first
17 statement not satisfy that standard?

18 MS. GLINER: Because when you have - - - if
19 someone tells you two contradictory stories, you have
20 - - - you can ea - - - you can reasonably say - - -
21 I'm not saying in every circumstance, but in this
22 circumstance, there was motives for her to give each
23 - - - for each statement to be truthful. So the
24 judge was well within his discretion - - -

25 JUDGE SMITH: What - - -

1 MS. GLINER: - - - to look at it and say -
2 - -

3 JUDGE SMITH: - - - what was - - -

4 MS. GLINER: - - - I don't know which one
5 of these statements is true.

6 JUDGE RIVERA: So - - -

7 JUDGE SMITH: What - - -

8 MS. GLINER: They're both unreliable; I'm
9 not going to let them in.

10 JUDGE SMITH: - - - what was - - - what was
11 the motive - - - what was the motive for her to lie
12 the first time?

13 MS. GLINER: Well, that was early on in the
14 case. She had no criminal record. The two
15 defendants that were tried later had very bad
16 records.

17 JUDGE SMITH: And I don't have a criminal
18 record, either. I don't go in and claim guns that
19 aren't mine.

20 MS. GLINER: But, Your Honor, it does
21 happen sometimes, that people who have relationships
22 with each other, especially if they don't realize the
23 consequences, and they don't think they're going to
24 get a - - -

25 JUDGE SMITH: There were no - - -

1 MS. GLINER: - - - lengthy jail term - - -

2 JUDGE SMITH: - - - there wasn't a lot of -

3 - -

4 MS. GLINER: - - - say it was mine - - -

5 JUDGE SMITH: - - - there wasn't - - -

6 excuse me. There wasn't a lot of proof about the

7 relationship, was there? It was - - - they proved

8 that they - - - they telephoned each other. That's

9 all.

10 MS. GLINER: Well, I'm just - - - I'm just

11 offering it as a possibility. You're say - - - I

12 thought you were saying there would be no rational

13 reason for her to even lie in the beginning, and I'm

14 submitting to you that there's enough evidence of a

15 relationship - - -

16 CHIEF JUDGE LIPPMAN: But there's less re -

17 - - I think - - - I think the point is, there's less

18 reason for her to lie in a more spontaneous statement

19 that she makes at the beginning, than there is when

20 she's on trial. Wouldn't you say comm - - - wouldn't

21 you say, in your words, that common sense would tell

22 you that?

23 MS. GLINER: But the problem is, is that

24 when you're talking about reliability, you may say as

25 a matter of common sense, most people don't - - -

1 don't lie when they - - -

2 CHIEF JUDGE LIPPMAN: No, no. I'm - - -

3 MS. GLINER: But you have - - -

4 CHIEF JUDGE LIPPMAN: - - - just saying - -

5 -

6 MS. GLINER: - - - two statements - - -

7 CHIEF JUDGE LIPPMAN: - - - could - - -

8 isn't there a reasonable probability that that
9 statement was true, given the context of that as
10 opposed to when I'm on trial. I don't want to be
11 convicted.

12 MS. GLINER: I don't - - - I don't think
13 the judge was required - - - again, we're talking
14 about reliability, not credibility - - - to make a
15 determination of which of these two statements was
16 more credible.

17 JUDGE PIGOTT: Did her acquittal - - -

18 MS. GLINER: Because they were
19 contradictory, and because there were rational
20 reasons for each statement - - -

21 JUDGE PIGOTT: Did her acquittal - - -

22 MS. GLINER: - - - the judge was well
23 within his discretion to say - - -

24 JUDGE READ: So is that the standard? Are
25 we looking at it as an abuse of discretion or not?

1 MS. GLINER: Yes. This was - - -

2 JUDGE READ: Is that what you're arguing?

3 MS. GLINER: - - - this was a discretionary
4 decision. The judge was the gatekeeper. It's well
5 established that the judge is the gatekeeper for the
6 admission of hearsay statements.

7 JUDGE PIGOTT: Did her acquittal come out
8 in the course of this trial?

9 MS. GLINER: I'm not sure, Your Honor. I
10 don't know.

11 JUDGE PIGOTT: Was she - - - was she a
12 product of - - - or an issue in the trial at all?

13 MS. GLINER: I don't believe so. I - - -
14 except for this off-the-record discussion about her -
15 - - I mean, of course, testimony from Samantha
16 Phillips about conversations and things like that. I
17 think that was about it.

18 JUDGE PIGOTT: Well, one of the - - - one
19 of the points of the summation that we didn't get to
20 was about the power issue, you know, who had the
21 power. And there was a lot of talk about they had
22 the power, you know, over her. And I didn't know if
23 it came out that - - - you know, that she had been
24 acquitted. Because wouldn't that have some
25 importance on whether or not this statement would

1 then come in?

2 MS. GLINER: If she - - - if the jury knew
3 she was acquitted?

4 JUDGE PIGOTT: Yeah.

5 MS. GLINER: I'm not sure I understand why.

6 JUDGE PIGOTT: Well, she was acquitted
7 because she said I didn't have the gun.

8 MS. GLINER: I don't believe that ever was
9 something that was argued by the other side that she
10 - - - I don't think - - -

11 JUDGE PIGOTT: That would be - - - that
12 would be - - -

13 MS. GLINER: - - - that was introduced by -
14 - -

15 JUDGE PIGOTT: - - - strong evidence that
16 if she didn't have the gun, then they must have,
17 because obviously the gun was there. And that would
18 make the statement that she made that the gun was
19 hers, even more important to them - - -

20 MS. GLINER: I don't believe - - - and
21 anyway, the defense attorneys in this case never made
22 any such argument about that. This wasn't something
23 that ever even came up before the trial judge. So I
24 think this is really a very simple question of first,
25 you don't even have to bother to look at the

1 reliability factor, because the defense attorneys, as
2 the trial judge noted and as the First Department
3 found, just did not want the live testimony.

4 And just to address the LaFontaine issue
5 again, it's important to note, the defendants did not
6 make this argument in the Appellate Division. When
7 they were in the Appellate Division they, at least
8 then, exhibited their belief that there had been a
9 determination on availability, and they argued that
10 it was wrong, but they didn't argue it wasn't made.
11 And the First Department then said yes, the judge was
12 in his discretion when he found that she was
13 unavailable.

14 Same thing with reliability. Again, the
15 judge was the gatekeeper, and he was well within his
16 discretion - - -

17 JUDGE RIVERA: I was going to ask you, on
18 some level, I almost don't understand why you didn't
19 want the statements. Didn't they support your - - -
20 your initial theory, or the theory that the court
21 eventually rejected? Didn't it bolster that theory
22 that she was under the control of these defendants?

23 MS. GLINER: Well, the thing - - - the
24 problem was, is that it might have demonstrated that,
25 but on the other hand, it also was a - - - there was

1 a part of the statement that wasn't against penal
2 interest that was basically saying oh, yes, these - -
3 - these two guys didn't have the gun. And that would
4 have been harmful to the People's case.

5 Now, that was the reason why the defense
6 attorneys didn't want her live testimony, because
7 they knew that if she testified, she would probably
8 say that it wasn't her gun. So basically what they
9 said to the judge is, yeah, give us a material
10 witness order, but we don't really want to look for
11 her, because we like her statement. Her statement's
12 better for us.

13 JUDGE SMITH: You - - -

14 JUDGE RIVERA: You always get that
15 statement in. Wouldn't you get that statement in?

16 MS. GLINER: I'm sorry?

17 JUDGE RIVERA: If they got their statement
18 in, wouldn't you have gotten that statement in?

19 MS. GLINER: Well, Your Honor, I don't
20 think that's the way the exception to the hearsay
21 rule works that, you know, let's bend the rule and
22 let this in, or let's bend the rule and let that in.
23 It wasn't admissible. I mean, the judge, I guess,
24 could have tossed out the rules of evidence and said
25 let everything in. But especially when you don't

1 have a witness available to cross-examine, that's not
2 a good way, I submit, to - - -

3 JUDGE RIVERA: Okay.

4 MS. GLINER: - - - run a courtroom.

5 JUDGE SMITH: No, no, no. You're out of
6 time, and I'm really asking for my colleagues'
7 indulgence here, but I meant to ask you to say a word
8 about the prosecutorial misconduct issues, especially
9 asking the question about "the girl in the car is
10 going to come through". Wasn't that kind of
11 outrageous?

12 MS. GLINER: I - - - you know, Your Honor,
13 I think that was a very vague reference - - - I think
14 as the trial judge found, the jury was not aware of
15 what was in the phone recordings, so that these vague
16 references - - -

17 JUDGE SMITH: Well, I don't think re - - -
18 is it really so vague? You're a prosecutor in this
19 case and you say to the witness, don't you remember
20 there being - - - don't you remember there being - -
21 - and the jury knows there are tapes, because you've
22 let it slip there are tapes - - - and you say to the
23 witness, don't you remember that they - - - that
24 somebody said the girl in the car is going to come
25 through. I don't see anything vague about that in

1 context.

2 MS. GLINER: Well, I - - -

3 JUDGE SMITH: It means she's going to come
4 in and lie for us.

5 MS. GLINER: First of all, the idea that
6 the prosecutor somehow did this with an eye towards
7 flouting the judge's ruling, I think, is clearly
8 belied by the record, because - - -

9 JUDGE SMITH: She was pretty persistent.

10 MS. GLINER: One - - - but one of the
11 reasons this happened was, was that as she was cross-
12 examining - - - I'm sorry, directly examining
13 Samantha Phillips, because Samantha Phillips was a
14 hostile witness, so it was almost like cross-
15 examination - - - she was very, very careful to
16 always keep all references out that might have
17 flouted the judge's ruling. And the witness kept - -
18 - was baiting her and saying, what conversation?
19 Where did this take place?

20 JUDGE SMITH: So this - - - this was just a
21 good-faith attempt to refresh her recollection - - -

22 MS. GLINER: Yes.

23 JUDGE SMITH: - - - didn't she - - - didn't
24 she say in the - - - didn't they say in the
25 conversation the girl in the car is going to come

1 through?

2 MS. GLINER: Well, since the witness kept
3 denying that any of these conversations happened, or
4 basically evinced total confusion, and the pro - - -
5 the only way the prosecutor basically had as a
6 reference point was to somehow allude, but you know,
7 even the witness herself, Samantha Phillips, said
8 something to the effect of, what girl in the car;
9 there are many girls in cars.

10 I think, again, you have to remember that
11 the jury was not aware of what was in the tapes - - -

12 CHIEF JUDGE LIPPMAN: Okay, counselor.
13 Okay, counselor, thanks.

14 MS. GLINER: Thank you.

15 CHIEF JUDGE LIPPMAN: Counselor, rebuttal.

16 MS. ZOLOT: Thank you. I'd like to cover a
17 few points here.

18 CHIEF JUDGE LIPPMAN: Go ahead.

19 MS. ZOLOT: First, on the LaFontaine issue
20 and the unavailability issue, one thing that I
21 believe strongly reinforces that the court did not
22 rule on unavailability, there were a couple of
23 applications that were left hanging on the issue of
24 Ms. Corneille's - - - their ability to get Ms.
25 Corneille. One was that the defense at A-374 did

1 actually ask the court to sign a material witness
2 order, and at another point, the defense - - - I
3 believe it's 373 - - - suggested that they have a
4 hearing at which the police officer who had gone to
5 look for Ms. Corneille come in and testify as to his
6 efforts.

7 So with these two applications hanging, it
8 seems that the court - - - that the court's ruling on
9 reliability really eliminated the need for the court
10 to address these outstanding applications. The
11 ruling on reliability pretermitted, if you will, the
12 court's - - -

13 JUDGE SMITH: And in his - - - in his
14 decision at page 396 of the record - - -

15 MS. ZOLOT: Yes.

16 JUDGE SMITH: - - - the judge says to - - -
17 "Allowing the statement in, while knowing the
18 declarant at a later time stated under oath the exact
19 opposite, just seems wrong on many levels." Doesn't
20 "on many levels" suggest that he had alternative
21 holdings, more than one reason for his - - - his
22 holding?

23 MS. ZOLOT: Well, I think he's saying that
24 I don't - - - you know, then it gets to exactly what
25 - - - the court doesn't expand on that, but the court

1 says "on many levels", and then it really talks about
2 letting it - - -

3 JUDGE SMITH: And then he says, "I think it
4 raises a question as to Mr. (sic) Corneille's
5 availability." And then says, "In any event, I don't
6 think it's reliable."

7 MS. ZOLOT: Right. So I think it's - - -

8 JUDGE SMITH: You would say that "raises a
9 question" is something other than I hereby rule she's
10 unavailable?

11 MS. ZOLOT: Correct. That the court was -
12 - -

13 JUDGE SMITH: It's ambiguous, isn't it?

14 MS. ZOLOT: I don't believe it's ambiguous.

15 CHIEF JUDGE LIPPMAN: What do you do if it
16 is ambiguous? What do we do?

17 MS. ZOLOT: I - - - if it's - - - if it's
18 ambiguous, given the language of the statute, 470.15,
19 which requires a ruling - - - which requires a ruling
20 by the lower court, then the ambiguity would cut in
21 the defendant's favor, because we don't have - - -
22 necessarily have a ruling here. I mean, this is a
23 statute. It has to be interpreted according to its
24 language. It requires a ruling. And if it's
25 ambiguous, why should it err on the side of it - - -

1 CHIEF JUDGE LIPPMAN: All right. Let me -
2 - -

3 MS. ZOLOT: - - - being a ruling?

4 CHIEF JUDGE LIPPMAN: - - - let me ask you,
5 going back to reliability. Your adversary says that
6 if there's two statements and they're - - - they're
7 inconsistent, you know, in general, you don't let it
8 in, because - - -

9 MS. ZOLOT: There's - - -

10 CHIEF JUDGE LIPPMAN: - - - you don't know
11 which is true.

12 MS. ZOLOT: - - - absolutely no support - -
13 -

14 CHIEF JUDGE LIPPMAN: Why not?

15 MS. ZOLOT: - - - in the law for that.

16 CHIEF JUDGE LIPPMAN: What's the test?

17 MS. ZOLOT: The test is whether the
18 statement, at the time it's made, is reliable. And
19 there's ample case law that - - -

20 CHIEF JUDGE LIPPMAN: How do you determine
21 that question?

22 MS. ZOLOT: The case law gives us excellent
23 guidance.

24 CHIEF JUDGE LIPPMAN: Tell - - - tell us.
25 What is it?

1 MS. ZOLOT: First, you look at the circum -
2 - - first you look at the nature of the statement, is
3 it in fact dis-serving. The dis-serving nature of the
4 statement itself gives it inherent trustworthiness.
5 This is from such cases as Maerling and Settles. The
6 more dis-serving the statement, the more trustworthy
7 it is. And here we have the most dis-serving of
8 statements, because it was an - - - it was an
9 admission of guilt.

10 Then you look at the circumstances
11 surrounding the making of the statement. And again,
12 there's guidance from the law on this. We look at
13 whether it was spontaneous. We look at whether it
14 was dis-serving; whether it was unequivocal; whether
15 or not it was custodial. For example, a custodial
16 statement, a presumption of unreliability actually
17 attaches to that. This was not a custodial
18 statement. This was also made to someone - - - an
19 officer of the court, a lawyer who - - - a lawyer for
20 the codefendants, who could be expected to act upon
21 such bombshell information.

22 Then, on top of all that - - - and Your
23 Honor alluded to this previously - - - you look, very
24 importantly, at whether there's independent evidence,
25 aside from the declaration, whether there's a

1 reasonable possibility - - - possibility, not
2 probability - - - a reasonable possibility that the
3 declaration might be true. And the case law
4 quantifies that as some evidence establishing - - -
5 tending to establish its truthfulness.

6 And here we have, and we talked - - - and
7 Your Honor talked about the factors before - - - we
8 have a gun found in a woman's purse next to the only
9 woman in the car. It's the only thing in the purse.
10 The purse is large enough to accommodate it. It
11 wasn't like it was stuffed into a clutch that it
12 couldn't fit inside. It's a big purse.

13 JUDGE SMITH: Do you - - - and do you also
14 rely on the fact that this was the defendant offering
15 the statement? Is the test different when it's the
16 defendant rather than the prosecution?

17 MS. ZOLOT: It's very different. The sta -
18 - - the standard is much more lenient when it's the
19 defense offering the statement. When it's the
20 prosecutor, the - - - the interest at stake has to be
21 of sufficient magnitude to all but rule out a motive
22 to fa - - - to falsify - - -

23 JUDGE SMITH: You - - - you limit that to
24 the prosecution cases?

25 MS. ZOLOT: That's the prosecution.

1 JUDGE SMITH: Okay. With - - - in the four
2 seconds you've got left, could you talk about
3 prosecutorial misconduct?

4 MS. ZOLOT: I'd like to. The prosecutor's
5 comments here were really a pervasive pattern. And I
6 do want to focus on the comment that Your Honor
7 pointed out. This was not a good-faith effort to
8 refresh recollection. And we know that because when
9 the prosecutor wanted to do it the right way, she was
10 able to.

11 When Officer Kailer needed his recollection
12 refreshed, the prosecutor properly gave him the
13 pedigree statement to read silently in the hope that
14 it would refresh his recollection. But when it was
15 Ms. Phillips, the prosecutor discloses the very thing
16 that's supposed to dis - - - refresh her
17 recollection, by disclosing the thing on the tape,
18 you know, the - - - what - - - didn't you hear that
19 they said the girl was going to come through.

20 JUDGE SMITH: Actually, you say according
21 to this - - - this is - - - that it wasn't even on
22 the tape, I guess is irrelevant, if it wasn't on the
23 tape at all.

24 MS. ZOLOT: That's right. And defense
25 counsel later said that isn't even accurate, so it's

1 a double-barreled instance of misconduct. And that's
2 just - - - it was from beginning to end in this
3 trial. There was the cross - - - the direct
4 examination of Samantha Phillips that was far more
5 like a cross; coupled with summation comments, the
6 worst of which, even after the court struck some of
7 the comments, the prosecutor continued talking about
8 how these defendants pulled this young girl, which
9 could only have led - - - which could well have led
10 the jury to either see that they were just extremely
11 bad people who should be convicted, or - - - or who
12 used women and coerced young girls, and therefore
13 should be convicted, or who coerced this young girl,
14 so even though there was evidence that it was her
15 gun, the jury should ignore that, because they
16 obviously coerced her to stash it for them. So - - -

17 CHIEF JUDGE LIPPMAN: Okay, counsel.
18 Thanks.

19 MS. ZOLOT: - - - it prejudiced the
20 defendants greatly.

21 CHIEF JUDGE LIPPMAN: Thank - - -

22 MS. ZOLOT: Thank you.

23 CHIEF JUDGE LIPPMAN: - - - thank you all.
24 Appreciate it.

25 (Court is adjourned)

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

I, Penina Wolicki, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Omar Shabazz, No. 150; People v. Donald Perrington, No. 151 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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