

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

COURT OF APPEALS
STATE OF NEW YORK

PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

NO. 75

RONG HE,

Appellant.

20 Eagle Street
Albany, New York
September 11, 2019

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE PAUL FEINMAN

Appearances:

PAUL SKIP LAISURE, ESQ.
APPELLATE ADVOCATES
Attorney for Appellant
111 John Street, 9th Floor
New York, NY 10038

SETH M. LIEBERMAN, ADA
BROOKLYN DISTRICT ATTORNEY'S OFFICE
Attorney for Respondent
350 Jay Street
Brooklyn, NY 11201

Karen Schiffmiller
Official Court Transcriber



1 CHIEF JUDGE DIFIORE: The first matter on this
2 afternoon's calendar is appeal number 75, the People of the
3 State of New York v. Rong He.

4 Counsel?

5 MR. LAISURE: Good afternoon, Your Honors, Paul
6 Skip Laisure with Appellate Advocates for Mr. He. I would
7 like to start with the Brady violation, but can I reserve
8 two minutes for rebuttal?

9 CHIEF JUDGE DIFIORE: You may, sir.

10 MR. LAISURE: Thank you.

11 The People failed to provide contact information
12 for witnesses who were at the scene of the crime and who in
13 - - - inculcated third parties. And this was a violation
14 of Brady, because they had an obligation to disclose the
15 means for investigating.

16 JUDGE FEINMAN: So is it your position that if
17 you disclose the identity of the witnesses, but you fail to
18 disclose the phone numbers and addresses, that is always a
19 Brady violation?

20 MR. LAISURE: Generally speaking, yes. There
21 would be exceptions, but that would be the general rule.

22 JUDGE FEINMAN: All right.

23 MR. LAISURE: But - - - but - - -

24 JUDGE FEINMAN: And in terms of this particular
25 case, did we ever actually get a definitive ruling from the



1 Supreme Court as to whether this was discoverable?

2 MR. LAISURE: Several times. The - - - the main
3 thing was that Justice - - -

4 JUDGE FEINMAN: You know, there seems to be a lot
5 of back and forth in the record of basically - - - how to
6 put this politely - - - passing the buck from one judge to
7 another, because they're in front of lots of different
8 trial court judges.

9 MR. LAISURE: Well, what was happening, Your
10 Honor, is that - - - is that defense counsel was - - -
11 found himself before different judges and tried to get a
12 better ruling each time. So he - - - in front of Judge
13 Shillingford, he asked for this information, and the People
14 said no, we don't want to give it to them. We only want to
15 give the witnesses the phone number of the defendant - - -
16 defense counsel, and Judge Shillingford said that's
17 appropriate. That was a ruling.

18 JUDGE FEINMAN: Okay, so that's your position.
19 That's the ruling we're dealing with.

20 MR. LAISURE: Well, that's the ruling we're
21 dealing with, especially in light of Judge - - -

22 JUDGE FEINMAN: All right, so when we measure
23 whether or not this is material in terms of whether it was
24 a Brady violation, the third prong, do we look at it based
25 on the information that Judge Shillingford had in front of



1 her when she made that ruling, or do we use a retrospective
2 lens, looking about what happened at the trial, to figure
3 out whether there was a reasonable possibility that there
4 would have been a different result?

5 MR. LAISURE: Well, with respect to whether there
6 was error, you have to look at the trial, it's true, but
7 whether it's material, I believe, has to do with what has
8 been proffered. And we have a third-party possibility here
9 of someone else who committed the crime; that's extremely
10 material.

11 JUDGE GARCIA: Let me ask that question - - -

12 MR. LAISURE: Yeah.

13 JUDGE GARCIA: - - - just a little bit
14 differently. It's a somewhat unusual situation for a Brady
15 case here, where you have the People going to - - - well,
16 the judge gets involved, right? The judge makes a ruling
17 on Brady. Usually, what you would have is the People fail
18 to disclose something; the question is, is it mater - - -
19 is it Brady, is it exculpatory? And then we go through the
20 steps, right?

21 So the fact that there was a judge's ruling here,
22 does that affect the Brady analysis in any way?

23 MR. LAISURE: I don't believe it does, Your
24 Honor. Be - - - because what - - - what - - - what the
25 ruling did was to permit the People's position to - - - to



1 remain. So that - - - that's the Brady problem that was -
2 - - that was - - -

3 JUDGE GARCIA: So in essence, it would be
4 withholding, but blessed by distri - - -

5 MR. LAISURE: Right.

6 JUDGE GARCIA: - - - by the trial judge.

7 MR. LAISURE: That's right. So - - - so the
8 Brady violation has been approved. That's - - - that's
9 what it is. It - - -

10 JUDGE GARCIA: And that's not reviewed on an
11 abuse of discretion; it's viewed through the standard, as
12 Judge Feinman was saying, standard Brady lens, right?

13 MR. LAISURE: That's right. That's what I
14 believe.

15 The People offered the - - - to contact the
16 witnesses and give the phone numbers of - - - of the
17 defense counsel. I - - - I believe what that did was to
18 turn over the defense investigation to the witnesses. The
19 witnesses would then have to decide they want to contact
20 defense counsel - - - why would the witness want to do that
21 - - - and then actually do it in a timely fashion. That is
22 not an adequate substitute for a defense investigation.
23 And - - - and - - -

24 CHIEF JUDGE DIFIORE: Were any proffered
25 suggestions by defense counsel as to - - - if the



1 prosecutor had some concern, and that was the reason why
2 they suggested that they go through the court, did - - -

3 MR. LAISURE: Well - - -

4 CHIEF JUDGE DIFIORE: - - - defense counsel take
5 a position on that?

6 MR. LAISURE: Yes. First of all, he has offered
7 something other courts have - - - have - - - have ruled on,
8 which is a pro - - - protective order preventing him from
9 disclosing the information to his client. His client
10 doesn't know the information. Nobody's in danger. And if
11 we can't trust an officer of the court to abide by a
12 protective order, we have bigger problems than Brady. That
13 was a perfectly reasonable alternative that would meet the
14 Popole's problems with safety - - - which, by the way,
15 there were none. There had been no indication of any
16 threats made to anyone at this time - - -

17 JUDGE FEINMAN: Well, you see, but that's one of
18 the reasons why I asked you the question that I did,
19 because I think maybe at the time the judge gave her
20 blessing to this method, that hadn't been established, but
21 perhaps later on, there was.

22 MR. LAISURE: I disagree. I don't think it ever
23 was. The - - - the threats that were alleged came later,
24 and they were against prosecution witnesses, not defense
25 witnesses. These are defense witnesses who - - -



1 JUDGE FEINMAN: So - - - so - - - I want to
2 focus, if we can, on what the record establishes on the
3 materiality, because, you know, any materiality analysis
4 has to be closely tied to the record, and - - - and if I
5 understand your argument, you're saying that there was
6 perhaps another perpetrator; there were two perpetrators,
7 and - - - and that's what these two witnesses would have
8 provided.

9 But isn't there also evidence in the record that
10 suggests that this was really ultimately tried as a not
11 whodunit, but a what-happened case, right? Those are the
12 two typical scenarios in a criminal defense. And it was a
13 self-defense or justification defense that was put forward.
14 And so how does that square with your saying that it's
15 material, because it would have gone to identification?

16 MR. LAISURE: Because the Brady violation
17 foreclosed that defense. It prevented the defense from
18 making the third-party-culpability argument, and so he's
19 left with a worse alternative.

20 JUDGE FEINMAN: But didn't he try to bring some
21 of this out anyway through the examination of the police
22 witnesses, through their statements and the DD5s - - -

23 MR. LAISURE: He did - - -

24 JUDGE FEINMAN: - - - et cetera?

25 MR. LAISURE: He did his best, Your Honor, and -



1 - - and the court ruled - - - told the jury you can't use
2 this as evidence, only as impeachment. This was not - - -

3 JUDGE STEIN: Wasn't there also a problem that -
4 - - that we don't know what would - - - what interviewing
5 those witnesses might have revealed about other potential
6 witnesses?

7 MR. LAISURE: That's exactly right, one of - - -
8 one of the things I was going to get to. Not only do we
9 know - - - do we - - - we don't know whether the
10 recantation by one of the witnesses would have been
11 flipped, because the jury heard that. We don't know what
12 other witnesses that may - - - may have been turned up.
13 This is classic Brady information that was never - - - he
14 couldn't get at it, because the club was closed, and - - -

15 JUDGE FEINMAN: So it's not so much that it's
16 exculpatory, but that it would lead to information that
17 might provide - - -

18 MR. LAISURE: That's the standard. This court's
19 - - -

20 JUDGE FEINMAN: - - - defense?

21 MR. LAISURE: In - - - in Andre W., it's - - -
22 it's the right to the defendant to discover potential and
23 material witnesses.

24 JUDGE FAHEY: Was there ever a hearing held here
25 like there was in Andre W.?



1 MR. LAISURE: No.

2 JUDGE FAHEY: No? All right. You went through
3 four judges, right, Shillingford, Judge Mangano, Judge
4 Miller, and - - - and Judge Donnelly?

5 MR. LAISURE: It think that's right. Three of
6 them ruled on it. Justice Miller said she's - - - she's
7 ruled and Justice Donnelly said it was unambiguous, you
8 lost. You know, so - - - so there was no question about
9 the ruling.

10 JUDGE FAHEY: So - - - and the ruling was - - -
11 were the court notes that Judge Shillingford had made; is
12 that correct?

13 MR. LAISURE: Yes, that's right.

14 JUDGE FAHEY: Ah, I see. All right. On - - - on
15 the prejudice prong - - - it's the only prong that's
16 relevant, really, here. Subsequent - - - you didn't get
17 the contact information, but subsequent to that, we - - -
18 there's a trial; there's a confession and there's video
19 evidence of - - - of the defendant allegedly committing the
20 crime. Doesn't that eliminate any prejudice?

21 MR. LAISURE: No, Your Honor. The - - - the - -
22 -

23 JUDGE FAHEY: Why not?

24 MR. LAISURE: First of all, there's false
25 confessions. Secondly the con - - - the confession did not



1 match the medical evidence. The - - - the object that was
2 claimed he used - - -

3 JUDGE FAHEY: But the confession was before the
4 jury?

5 MR. LAISURE: Yes, it was.

6 JUDGE FAHEY: The statement that he made to
7 police officers, right?

8 MR. LAISURE: Right, yeah, right.

9 JUDGE FAHEY: And isn't there a - - - you know
10 the record better than me. He - - - I thought he
11 identified himself on the videotape also.

12 MR. LAISURE: He did as - - - as leaving the
13 place after the - - - after this melee.

14 JUDGE FAHEY: I see.

15 MR. LAISURE: You know, so I don't think you can
16 go by the - - - the confession, because it's not accurate.
17 The - - - the witness identified the person after telling
18 the police, originally, I didn't see the face, no - - - and
19 they closed the - - - they closed the case - - -

20 JUDGE FAHEY: And - - -

21 MR. LAISURE: - - - because he - - -

22 JUDGE FAHEY: - - - and what do you think - - -
23 it's not do - - - how are we to view this in light of the
24 recent changes in the law?

25 MR. LAISURE: Well - - -



1 JUDGE FAHEY: Go ahead.

2 MR. LAISURE: The changes in the law have been
3 meant to strengthen Brady, not eviscerate it. And you know
4 - - -

5 JUDGE FAHEY: They aren't directly irrelevant to
6 this case, but it's a policy matter and it's - - -

7 MR. LAISURE: That's right; that's right. And
8 you know, the state bar association report that I talked
9 about in the - - - in the - - - in the brief and - - - and
10 the court's own press release indicates we take Brady
11 seriously. How - - - how can this conduct be reconciled
12 with that policy? I don't know.

13 JUDGE RIVERA: Counsel, it's a little hard to - -
14 -

15 CHIEF JUDGE DIFIORE: Counsel, do you want to
16 take a moment on the Payton issue, please?

17 MR. LAISURE: Sure, Your Honor. The - - - the
18 main thing that I'd like to say about that is that the
19 police should not be permitted to conduct a - - - an
20 unconstitutional procedure in order to justify an
21 unconstitutional situation that they had created. That's
22 what happened here. They - - - there was a Payton
23 violation, and then in order to get probable cause, since
24 they don't have it because it was a Payton violation, they
25 - - - they do a suggestive show-up.



1 This isn't the reverse. You can use a suggestive
2 show - - -

3 JUDGE FAHEY: But there was no - - - there wasn't
4 a Payton violation, right? I - - - I don't know if I agree
5 with you that our case law says if you're in the hallway,
6 that's a Payton violation.

7 MR. LAISURE: Your Honor - - -

8 JUDGE FAHEY: And I - - - it's hard for me to
9 understand the expectation of privacy in that location.

10 MR. LAISURE: Okay, the - - - part of the problem
11 is the People didn't bring the right witnesses to that
12 hearing. We don't know, actually, where he was arrested.
13 We only know where he was seen when the other cops arrived.

14 JUDGE WILSON: Well, let me - - - let me ask you
15 this. If we reversed on Brady - - -

16 MR. LAISURE: Yeah.

17 JUDGE WILSON: - - - just assume that for a
18 second - - - doesn't the Payton issue get relitigated ab
19 initio because of our decision in Garvin?

20 MR. LAISURE: I suppose that's accurate, yes.

21 JUDGE WILSON: Would there be - - -

22 JUDGE FEINMAN: Really? Why - - - why - - - we
23 would be remanding for a trial, if there's a Bra - - -
24 Brady violation. We would be remanding for - - - you don't
25 usually get a second bite on either side.

1 MR. LAISURE: You know what? I take it back. I
2 think Your Honor's correct.

3 JUDGE FEINMAN: I'm - - -

4 MR. LAISURE: I take that back. I - - - I think
5 the hearing would stand, in which case, I think you should
6 address the - - -

7 JUDGE WILSON: So even - - - even if someone
8 viewed Garvin as a change in the law that rendered the
9 prior suppression decision incorrect, you'd be stuck with
10 it?

11 MR. LAISURE: I'm sorry; say that again?

12 JUDGE WILSON: Even if Garvin represents a change
13 in the law - - -

14 MR. LAISURE: Yes.

15 JUDGE WILSON: - - - as regards Payton, and the -
16 - - let - - - let's also just assume for the purpose of
17 argument that everybody would agree that the - - - and you
18 don't have to agree to this, but that everybody would agree
19 that the suppression decision here is wrong under Payton,
20 after Gar - - - after Garvin?

21 MR. LAISURE: Yeah, I'm - - - respectfully, I
22 don't think it matters - - -

23 JUDGE WILSON: Okay.

24 MR. LAISURE: - - - because you don't have
25 jurisdiction over - - - over this, because - - -



1 JUDGE WILSON: Okay.

2 MR. LAISURE: - - - of LaFontaine.

3 JUDGE WILSON: Well, that's the question.

4 JUDGE GARCIA: Would it go to the flagrancy of
5 the police misconduct under the Payton evaluation?

6 MR. LAISURE: I think the Payton evaluation is a
7 separate analysis from attenuation. Yes, the - - - the
8 flagrancy of it becomes part of the attenuation analysis,
9 but it - - - but there - - - it is what it is, once the
10 Payton analysis has - - - has taken place. So there's not
11 - - - it's not - - - they're not interrelated in that way.

12 JUDGE FEINMAN: So - - - so - - -

13 CHIEF JUDGE DIFIORE: And Counsel, is there a
14 witness who called 911 and alerted the police to its
15 location? What - - - how does that factor in here?

16 MR. LAISURE: Well, that - - - that part of why
17 this isn't an intervening factor, all of that information
18 that they got from the show-up was already known to the
19 police at the time they did the arrests. So - - - so there
20 wasn't anything new that it - - - that intervened between
21 the arrest and the statement. That's what Justice Hall
22 dissented on.

23 JUDGE FEINMAN: But - - - but we've never held
24 that the - - - the intervening circumstances as, you know,
25 a necessary prerequisite. I mean, there's a lot of factors



1 that go into a factual finding of attenuation.

2 MR. LAISURE: Well, there - - - yes, that's true,
3 but the other factors go our way. It wasn't - - - it
4 wasn't too long a time - - -

5 JUDGE FEINMAN: Four hours.

6 MR. LAISURE: But that's - - - this - - - this
7 court and other courts have held that that's not enough to
8 attenuate. And in fact, that together with Miranda is not
9 enough to attenuate.

10 JUDGE STEIN: But all of these - - -

11 MR. LAISURE: So we're focused on the other ones.

12 JUDGE STEIN: But all of these issues are - - -
13 are mixed questions, are they not?

14 MR. LAISURE: Yes.

15 JUDGE STEIN: All of these individual - - -

16 MR. LAISURE: Except for the fact - - -

17 JUDGE STEIN: - - - factors?

18 MR. LAISURE: - - - that the Appellate Division
19 used the wrong legal standard when it was talking about the
20 interrogation occurring at a different location with
21 different interviewers. It has nothing to do with - - -

22 JUDGE STEIN: But why - - - why - - -

23 MR. LAISURE: - - - attenuation analysis.

24 JUDGE STEIN: - - - why wouldn't that go to the -
25 - - to the time frame and to the flagrancy? Why - - - I



1 mean, maybe we - - - maybe we've never actually said that
2 in this context, but why - - - why wouldn't that be
3 relevant?

4 MR. LAISURE: Your Honor, no one has said that in
5 this context, and I don't see how it would be relevant,
6 because what - - - what we're talking about is what has
7 happened between the - - - the timing of - - - of the
8 arrest, and the timing of the statement. And they're being
9 a different loca - - - it's almost always going to be a
10 different location. It's going to be a different - - -

11 JUDGE STEIN: But it's - - - it's - - - it's a
12 break. It's a break. It's - - - it's - - - it's - - -

13 MR. LAISURE: But we're - - -

14 JUDGE STEIN: - - - you know, it's not one
15 continuous thing, and I - - - and I think that's part of
16 the analysis, and - - - and so I - - - I mean, I - - -

17 MR. LAISURE: No, that's a part - - -

18 JUDGE STEIN: Have we ever said that - - - that
19 the factors that we've articulated were exclusive factors?

20 MR. LAISURE: No, you haven't, but - - - but
21 there isn't anything about those two factors that informs
22 attenuation. The way it does inform, whether there's a
23 break in psychological questioning in the question-first
24 context. That's very relevant to that. It's not relevant
25 to this, because the break you're talking about is the

1 time, not who's doing the investigating.

2 JUDGE STEIN: But let - - - let's assume that we
3 agree with you on that, so even without that, how - - - can
4 - - - how can we not say that there's record support for
5 the determination that there is - - -

6 MR. LAISURE: Well - - -

7 JUDGE STEIN: - - - attenuation?

8 MR. LAISURE: - - - the point is, under Borges,
9 that - - - there - - - if there's an incorrect analysis
10 that's - - - that's taken place, then there's a question of
11 law, without preservation. So that's - - - that's - - -

12 CHIEF JUDGE DIFIORE: Thank you, Counsel.

13 MR. LAISURE: Thank you.

14 CHIEF JUDGE DIFIORE: Counsel?

15 MR. LIEBERMAN: Good afternoon, my name is Seth
16 Lieberman. The People fulfilled their Brady obligation in
17 this case, by providing the defense attorney with the
18 document showing the witnesses' names and the information
19 that they provided to the police, by offering a reasonable
20 alternative to what the defense had suggested, which was
21 namely to contact the witnesses themselves - - -

22 JUDGE RIVERA: But, Counsel, I - - - I - - -
23 you'll correct me if I'm wrong, the ADA at the time - - -
24 the prosecutor at the time - - - said that was the policy,
25 and so it wasn't unique to this case. Is that still the



1 policy of this district attorney's office?

2 MR. LIEBERMAN: It is our policy to try to not
3 give that information; that is correct.

4 JUDGE RIVERA: That's - - - so that's the first
5 response.

6 MR. LIEBERMAN: We have - - -

7 JUDGE RIVERA: You don't give that information.

8 MR. LIEBERMAN: We have a legitimate concern
9 about witness tampering. And - - - but in this particular
10 - - -

11 JUDGE RIVERA: So I'm saying, that's the policy
12 regardless of the actual facts related to any particular
13 case.

14 MR. LIEBERMAN: In general, yes. I can't say
15 that hap - - - in every case that would be the policy, but
16 in general.

17 JUDGE GARCIA: But they were making a Brady claim
18 here, right? I mean, they weren't saying these - - - draw
19 your witness list, and the answer to that is our policy is
20 we don't give out our witness addresses. They were saying
21 there's material in here that's Brady, and the office has
22 an obligation to make meaningful Brady disclosures.

23 MR. LIEBERMAN: And they did.

24 JUDGE GARCIA: But their answer to that was,
25 well, we'll let them know you want to talk to them, and you



1 - - - you know, we're simply saying, we'll get back to you.
2 I - - - the way I think about this case, and I know you
3 argue - - - argue exculpatory nature of the materials, but
4 what if this was a case where you had a report from John
5 Smith, and - - - and John Smith says, you know, I - - - I
6 was there, I saw somebody else do this, gives a full
7 description. And it is so completely exculpatory, and the
8 answer of your office is the same one you gave here. Would
9 you think that was sufficient?

10 MR. LIEBERMAN: Yes - - -

11 JUDGE GARCIA: Well, we'll let them know if you
12 want to talk to them.

13 MR. LIEBERMAN: Yes - - - yes, Your Honor. And
14 let me - - - let me just spell this out. We provided an
15 alternative, which may very well have - - -

16 JUDGE GARCIA: But it has to be meaningful.

17 MR. LIEBERMAN: And it was meaningful.

18 JUDGE GARCIA: And you gave the ability - - - you
19 gave we'll be the messenger, essentially. But the - - -
20 there's no direct contact - - - and I'm not saying - - - I
21 think Judge Feinman was getting to this earlier - - -
22 should there be a rule that you have to give an address or
23 you have to give - - - but shouldn't there be, particularly
24 in this day and age, some meaningful way to make direct
25 contact. That could be a blind email, that could - - - and



1 I'm suggesting things.

2 MR. LIEBERMAN: Your - - - Your Honor, that - - -
3 that's - - - there are many ways to have provided the
4 defense with an opportunity to gain access to the
5 witnesses, and by gaining access, meaning actually making
6 contact with the witnesses. We provided an alternative.
7 The defense never explained why that was inadequate. And -
8 - - excuse me - - -

9 JUDGE STEIN: Well, the defense did make an
10 alternative proposal that - - - that - - - that you
11 rejected, which - - - or - - - which was that the court
12 could make a protective order. So - - -

13 MR. LIEBERMAN: Right.

14 JUDGE STEIN: - - - what was - - - what was - - -
15 what was wrong with that?

16 MR. LIEBERMAN: Well, that - - - that wasn't - -
17 - that wasn't an alternative proposal with respect to how
18 to provide the - - - how to actually get contact between
19 the defense and the witnesses. That was just a protective
20 order.

21 JUDGE STEIN: Well, that - - -

22 MR. LIEBERMAN: Protective order just goes to
23 protecting the witnesses. But we were con - - - what we
24 were offering was an alternative means of the defense
25 obtaining access to the witnesses.



1 JUDGE STEIN: You know, but that - - - but that's
2 my point. The defense wanted to make the contact directly
3 to those potential Brady witnesses, and said, if - - - if
4 you give me the information to do that, I won't give that
5 information to my client. Then all of your concerns about
6 witness tampering and all that presumably would be resolved
7 - - -

8 MR. LIEBERMAN: Act - - - actually no - - -

9 JUDGE STEIN: - - - so what was the problem with
10 that?

11 MR. LAISURE: - - - because often, the defense
12 attorneys rely on investigators that, in the past, a number
13 of them have acted unscrupulously. So those are the kinds
14 - - -

15 JUDGE STEIN: But that's - - -

16 JUDGE RIVERA: Well, you could have made that
17 part of the protective order, right, the - - - the - - -
18 that - - - the counsel could not share that information
19 with anyone, correct?

20 MR. LIEBERMAN: I - - - I suppose, yes.

21 JUDGE RIVERA: And that - - - and if you - - -

22 MR. LIEBERMAN: But - - -

23 JUDGE RIVERA: - - - if you had made that
24 showing.

25 MR. LIEBERMAN: Yes, but can I - - - we provided



1 an alternative that stood some chance that the defense
2 attorney would actually be able to contact the witnesses.
3 He never took us up on that. And if he had, he might well
4 have got - - - gotten access.

5 JUDGE RIVERA: Well, because what Brady requires
6 is that they have the kind of information that they can go
7 and proceed with their investigation and to make the
8 contact. It's not give me the information and then you go
9 and contact the witness, and let us know if perhaps the
10 witness wants to talk to us.

11 MR. LIEBERMAN: Well, it - - - that - - - if that
12 works, then it works.

13 JUDGE WILSON: Well, how would you feel - - -

14 MR. LIEBERMAN: And if it doesn't work - - - if
15 it did - - - it - - - actually, can I just finish?

16 JUDGE WILSON: Sure.

17 MR. LIEBERMAN: Yeah, I'm sorry. If it didn't
18 work, if in fact, we had come back and said, we - - - we -
19 - - so I spoke to the witnesses, the witnesses don't want
20 to talk to you, then the defense could have said, okay,
21 then - - - then we have to do it my way, because your way
22 didn't work.

23 JUDGE STEIN: So - - -

24 MR. LIEBERMAN: Didn't he - - -

25 JUDGE STEIN: - - - so what's the judge to - - -



1 then - - - then what's the judge to do then? Then you go
 2 back to the judge, and you say, judge, we have a witness
 3 who doesn't want to talk to him at all; he's a - - -
 4 they're afraid of the defendant, that if - - - if, you know
 5 - - - if there's any contact here, we don't know; maybe
 6 this witness will disappear and we - - - and won't even be
 7 available for trial. And then - - - so - - - so you build
 8 up your case - - -

9 MR. LIEBERMAN: No, no - - -

10 JUDGE STEIN: - - -for not giving the
 11 information - - -

12 MR. LIEBERMAN: But there are other alternatives.
 13 We could have brought the witness to the po - - - to the
 14 district attorney's office. We could've subpoenaed the
 15 witness and brought them to the courthouse. There are - -
 16 -

17 JUDGE WILSON: But how - - - how meaningful do
 18 you think it would be to have a rule the other way around,
 19 that you had to do your investigative work through defense
 20 counsel? Would that be adequate?

21 MR. LIEBERMAN: Well, it's - - - it's not as if
 22 there's a rule - - - it - - - the - - - it's not as if it
 23 has to be done one - - - in one particular way, as long as
 24 it's a meaningful way of providing the defense with an
 25 opportunity to gain access. We did that. The defense



1 didn't choose to go that route, and if they had - - -

2 JUDGE RIVERA: And then you didn't say, okay, so
3 we'll bring the witness to the courthouse, exactly what
4 you've suggested now, so you can have that - - -

5 MR. LIEBERMAN: Well, wasn't that - - -

6 JUDGE RIVERA: - - - interaction.

7 MR. LIEBERMAN: Wasn't that - - -

8 JUDGE RIVERA: Did I miss that?

9 MR. LIEBERMAN: I'm sorry. Wasn't the defense
10 supposed to say, I - - - I don't think that's - - - your
11 wit - - - your method is going to work because, and I'd
12 like to suggest this method. But the defense never
13 actually preserved why - - -

14 JUDGE RIVERA: I don't know. Bra - - - Brady
15 says you've got to turn it over. He says you haven't
16 turned it over. You say we don't want to turn it over.
17 It's our policy; we never do. Okay, well, maybe we can do
18 this for you. He says that doesn't work; I want the
19 information pursuant to Brady.

20 MR. LIEBERMAN: But he - - -

21 JUDGE RIVERA: You certainly could have come back
22 and said no, Brady doesn't require that; we're never going
23 to do that. Or oh, how about this one? Once he's made
24 clear - - -

25 MR. LIEBERMAN: But why - - -



1 JUDGE RIVERA: - - - they're trying to have
2 direct contact with the witnesses.

3 MR. LIEBERMAN: I - - - I go back to the - - -
4 the fact that if he had used our route, he might very well
5 have had contact with the witnesses.

6 JUDGE GARCIA: Or he might have alienated the
7 witnesses if, by some chance, the prosecutors go to these
8 witnesses, and they say, I don't want to talk to the
9 defense. Now the prosecutor's going to go back and say,
10 now you have to tell them yourself. And that can already
11 be kind of now, oh, now I have to do this and I have to - -
12 - whereas, if they had contact themselves the first time,
13 they could make their pitch as to why they should talk to
14 the defense lawyer, without having the first approach,
15 which now may be kind of locked in, done by the
16 prosecutors. Why isn't that a good reason just to say, no,
17 that doesn't work?

18 MR. LIEBERMAN: Well, the - - - the defense
19 didn't provide that as a reason in first place, so that
20 isn't preserved. And second, the defense attorney might
21 have faced a situation where the witnesses were fearful of
22 the defense and if the People had come forward first in
23 saying, the defense attorney wants to talk to you, that
24 might have actually put the penumbra of the Pe - - -
25 People's office around this request - - -



1 JUDGE FEINMAN: Let's - - -

2 JUDGE STEIN: But Counsel, this sounds rather
3 speculative to me, and - - - and what - - - what I am
4 having trouble understanding is why this doesn't run afoul
5 of Andre W. that says that you have to have a founded fear
6 for witness safety, not just a general policy that you're
7 afraid of witness tampering. And every - - - every answer
8 that I've heard you give here has all boiled back down to,
9 hey, that's our policy; you get to try that first, and if
10 that doesn't work, then we'll see what happens next.

11 MR. LIEBERMAN: Well, we're - - - we're generally
12 concerned because of past experience.

13 JUDGE STEIN: But the - - -

14 MR. LIEBERMAN: This happened to be - - -

15 JUDGE STEIN: But my point is, is that that's not
16 what we said is permissible. So you're - - - you're - - -
17 you're - - - you know, you seem to be trying to explain why
18 that's a good policy, but - - - but we've said that doesn't
19 work.

20 MR. LIEBERMAN: I - - - I'm not sure if this
21 court has ever set a rule that it has to be done a
22 particular way. And so - - - so long as the Pe - - -
23 People provide a meaningful opportunity to - - -

24 JUDGE RIVERA: But Brady - - - Brady is about
25 disclosure, not about the prosecutor being a gatekeeper,



1 right. Brady is pretty straightforward.

2 MR. LIEBERMAN: Okay, well, maybe I should move
3 on to the materiality issue.

4 JUDGE FEINMAN: I think that's a good idea.

5 MR. LIEBERMAN: Okay, so in this particular case,
6 there is absolutely overwhelming evidence of the
7 defendant's guilt. The defendant made it a statement
8 inculcating himself. He lived ten blocks away from the - -
9 - the scene of the crime. And he was identified - - -

10 JUDGE RIVERA: Without the statement, is there
11 overwhelming evidence of guilt?

12 MR. LIEBERMAN: Well, we still have the - - - the
13 ID, where this particular witness, Tong, had an
14 extraordinarily long opportunity to act - - - actually
15 observe the defendant in the first place, and then made an
16 iden - - - a line-up identification of the defendant and
17 then an in-court identification. So the - - - there would
18 be, but the statement certainly makes it overwhelming.

19 And by contrast, the only materiality analysis
20 that - - -

21 JUDGE STEIN: What if these witnesses might - - -
22 had come - - - were willing to come forward with
23 exculpatory evidence, and the defense then changed its
24 tactic, and instead questioned the - - - the - - - the
25 confession itself. Isn't that possible? I mean, here you



1 have somebody who's speaking through an interpreter, and
2 you know, maybe would raise that it was an invalid
3 confession. But - - - but didn't have a - - - but chose a
4 different tactic here, because it didn't have - - - he
5 didn't have that exculpatory evidence.

6 MR. LIEBERMAN: Well, actually he - - - he did
7 make use of those reports. The - - - the mat - - - the
8 content of those reports actually was before the jury, and
9 he did make use of them as if - - -

10 JUDGE RIVERA: But - - -

11 MR. LIEBERMAN: - - - it were exculpatory.

12 JUDGE RIVERA: Yeah, but for what purpose? What
13 was the jury instructed?

14 MR. LIEBERMAN: Well, for two - - - for two
15 purposes.

16 JUDGE RIVERA: What was the jury instruction?

17 MR. LIEBERMAN: Well, he was permitted to suggest
18 in summation that the accounts in those reports
19 contradicted the witness' accounts. But putting that aside
20 - - -

21 JUDGE RIVERA: That's not evidence in summation.
22 What was the instruction to the jury?

23 MR. LIEBERMAN: Well, the jury was instructed
24 that it was to be considered as what was told to the
25 police. But let me just continue with the materiality



1 point, which is basically, there was additional information
 2 about these witnesses, which was they ultimately said they
 3 did not observe the assault, and the - - - the most ex - -
 4 - the most exculpatory material was from this person Zhao,
 5 who said that he saw two people attack a victim with beer
 6 bottles. And that is totally, totally at odds with - - -

7 JUDGE FEINMAN: The video - - -

8 MR. LIEBERMAN: - - - the actual injuries that -
 9 - -

10 JUDGE FEINMAN: The video and the medical
 11 evidence.

12 MR. LIEBERMAN: And - - - and the medical
 13 evidence. Absolutely. Totally at odds, because you can't
 14 - - - the medical expert explained that it was very
 15 unlikely that you get a shard of glass that would have been
 16 long enough to inflict such deep wounds. And what he
 17 neglected to mention - - - and this is common sense - - -
 18 the bottle is curved. If - - - and the wounds were
 19 straight, and if you slash somebody with a curved edge,
 20 that's not going to be a straight cut. That's going to be
 21 a mess. And that was not the nature of the wound.

22 JUDGE GARCIA: It seems to me when we had recent
 23 cases on this that the materiality analysis is always a
 24 very difficult thing to do in hindsight. It's just the
 25 nature of that - - - that test. One, I think, this is the



1 lighter standard, the lower standard, because it was
2 specifically requested, but - - - that's helpful, but it
3 isn't so much, you know, okay, we had the evidence at
4 trial, and now we weigh that against these reports.

5 That's a hard thing, because assuming this is
6 exculpatory, and they - - - it was withheld, they never got
7 a chance to develop the record as to what those witnesses
8 would actually say, and how they would say it. So it's a
9 difficult analysis to do, and I thought the Supreme Court
10 was leaning more towards, you know, does this shake
11 confidence in the verdict - - -

12 MR. LIEBERMAN: Well, absolutely not.

13 JUDGE GARCIA: - - - which goes to, of course,
14 your point about the - - - the strength of - - - of your
15 evidence. But the harder question, I think, particularly
16 here then is how would this has - - - have fundamentally
17 altered the defense theory of their case, perhaps from a -
18 - - you know, a self-defense to a misidentification to a -
19 - - and that, to me, is what the argument would be here in
20 terms of the confidence one would have in this verdict.

21 MR. LIEBERMAN: The - - - this does not at all
22 minim - - - enhance a lack of confidence in - - - in the
23 verdict, because you actually have additional information
24 about the witnesses. And in - - - and in fact, the second
25 witness, who's the 911 call, it's not even clear that that



1 was exculpatory, because he merely talks about having said,
2 in the 911 call, that a friend of his was a victim of
3 assault, and then two guys said they were co - - - going to
4 - - - going to come back with guns, but it wasn't clear who
5 those two pe - - - those two people were, and if they were
6 even - - - even involved in the assault.

7 But with respect to Zhao, the - - - the total
8 picture is totally at odds with what happened, and so you
9 can actually envision how this would all play out, because
10 if anything, if he had put the witnesses on the stand, and
11 they had testified to what they had said in their reports,
12 they would have been devastatingly impeached with the - - -
13 the information that they la - - - later gave to the
14 police, as well as by the nature of the wounds, which - - -

15 JUDGE STEIN: But - - - but isn't the whole
16 purpose of wanting to talk to the witness themselves that
17 what came through the police reports may not be the whole
18 story or may not be accurately reported, and - - - and so
19 on and so forth. So - - - so it's seems like, you know,
20 your premise sort of fails, because that's the whole ba - - -
21 - reason for the contact in the first place, and we don't
22 know what speaking with Zhao or - - - or the 911 caller
23 would have led to, either. So - - - so trying to - - -
24 judging materiality only based on what you say would have
25 happened doesn't seem to be the right - - -



1 MR. LIEBERMAN: You know, you - - - you - - -

2 JUDGE STEIN: - - - the right way to approach it.

3 MR. LIEBERMAN: I - - - I - - - that's not - - -

4 I don't think that's the correct way to look at this,

5 because you have to base probabilities, and it is,

6 ultimately, a determination of probabilities, on the

7 information that's known at the time. And the information

8 that's known at the time, ultimately, is not exculpatory.

9 And you could actually make that argument about any police

10 report, because they talk to a witness - - - that witness

11 might actually say, he didn't see anything.

12 But you can say, well, if - - - if he - - -

13 defense attorney had gone to talk to that witness, maybe

14 the de - - - that witness would have actually inculpated

15 the person. You - - - you can only make the analysis on

16 the information that's available - - -

17 JUDGE STEIN: Well, and the information that was

18 available was that two people said two people were

19 involved, so - - -

20 MR. LIEBERMAN: Well, only one person said that

21 two people were involved. The second person, it wasn't

22 clear who those other two people were. The first person

23 said he saw them attack with beer bottles. That isn't

24 correct. And it's also the defense burden. It's not our

25 burden to establish materiality.



1 So the defense has to spell out how it actually
2 is going to impact. He can't start speculating and say,
3 well, if we talked to them, they would have changed their
4 story. They would have provided a better story. That's
5 not how it works. The defense has to spell out a
6 reasonable alternative way it would have - - - if it would
7 have panned out. He's in the realm of speculation if he's
8 think - - - saying it's going to get any better than what
9 was in the reports. And what was in the reports wasn't
10 good at all in the - - - in the totality.

11 CHIEF JUDGE DIFIORE: Thank you, Counsel.

12 MR. LIEBERMAN: Thank you.

13 CHIEF JUDGE DIFIORE: Counsel?

14 MR. LAISURE: Thank you - - -

15 JUDGE RIVERA: So why - - - why isn't it pure
16 speculation as he suggests?

17 MR. LAISURE: Your Honor, the whole case would
18 have been different had they been able to speak with these
19 witnesses.

20 JUDGE FAHEY: Yeah, but he argued that you
21 abandoned your pursuit of any remedy. What did you do
22 after Judge Shillingford's ruling?

23 MR. LAISURE: He - - - he - - - nothing. Because
24 he made the offer of the alternative, the People - - -

25 JUDGE FAHEY: Did you offer any other alter - - -



1 MR. LAISURE: - - - and the court would not
2 accept that.

3 JUDGE FAHEY: Did you offer any other
4 alternatives?

5 MR. LAISURE: No.

6 JUDGE FAHEY: Did you come back - - - did you ask
7 for a hearing?

8 MR. LAISURE: It's not his burden to do any of
9 those things.

10 JUDGE FAHEY: That wasn't my question. Did you
11 ask - - -

12 MR. LAISURE: No.

13 JUDGE FAHEY: Okay. And you didn't offer any
14 alternative?

15 MR. LAISURE: That's right. Ex - - - except for
16 one - - -

17 JUDGE FEINMAN: Do - - -

18 MR. LAISURE: - - - that was rejected.

19 JUDGE FEINMAN: Do we know if it was - - -

20 MR. LAISURE: A reasonable one that was rejected.

21 JUDGE FEINMAN: Finish your answer; I - - -

22 JUDGE FAHEY: Yeah, I'm sorry. What was the
23 alternative you - - - you said a reasonable one that was -
24 - -

25 MR. LAISURE: I won't disclose this information



1 to my client. You worried about your witnesses? I won't
2 tell them.

3 JUDGE FAHEY: I see.

4 JUDGE RIVERA: The protective order.

5 MR. LAISURE: A protective order.

6 JUDGE FEINMAN: All right.

7 MR. LAISURE: And I'll tell you why that - - - he
8 didn't take them up on their - - - on their offer, and one
9 - - - Judge Garcia pointed to one thing, which is ta - - -
10 you know, tainting the witnesses, but you don't want a law
11 enforcement to go talking to your potential witnesses and
12 finding incriminating evidence. Defense counsel, I'm sure,
13 had that in his head. You don't want the DA doing your
14 investigation. So that was - - - that would be another
15 reason not to accept that offer.

16 JUDGE FEINMAN: So is there any evidence in this
17 record - - - I don't recall seeing any - - - that the
18 defense actually did go out and make an effort to try to
19 find these people with the names?

20 MR. LAISURE: It was impossible, Your Honor.
21 They - - - they had Asian names, sort of were the
22 functional equivalent of Smith and Jones, and the club's
23 closed.

24 JUDGE FEINMAN: But - - - and the first range of
25 names in this country, but - - - so the fact that it's an



1 Asian name, in and of itself, is irrelevant.

2 MR. LAISURE: No, no, he - - - he proffered that
3 they were very common Asian names, and there was nowhere to
4 look for them, because the club had closed. There was
5 absolutely no possibility of doing an investigation, other
6 than getting that contact information.

7 JUDGE WILSON: These - - - these were also
8 transliterated names, so you know - - -

9 MR. LAISURE: That's right.

10 JUDGE WILSON: Jang, and Jan, and Jeng - - -

11 MR. LAISURE: They were phonetically rendered.

12 JUDGE WILSON: - - - and you don't know exactly
13 how it is.

14 MR. LAISURE: That's right.

15 JUDGE WILSON: Right?

16 MR. LAISURE: How - - -

17 JUDGE RIVERA: So they could be wrong, anyway?

18 MR. LAISURE: I'm sorry?

19 JUDGE RIVERA: Since they're phonetic, you mean
20 they could be wrong anyway?

21 MR. LAISURE: That's- - - that's correct. But
22 the - - - the contact infor - - - information presumably
23 would be right.

24 JUDGE FAHEY: Yeah, but to say that their names
25 were too hard for us to be able to find them, seems to be -



1 - - it's not a legal theory or - - - or a pronouncement and
2 I don't think this court should be making it, and - - - and
3 it's - - - it seems like a cultural limitation you're - - -
4 you're allowing of - - - of the world we live in to make a
5 determination for that. That'd be the fairest way to put
6 it, I think.

7 MR. LAISURE: I don't think so, Your Honor. If
8 they were - - - if they were - - - if their names were
9 Smith and Jones, where would you look for them in Brooklyn?
10 There's just no way - - - you can't - - - there - - -
11 without some - - -

12 JUDGE RIVERA: Well, the People didn't argue
13 otherwise, correct?

14 MR. LAISURE: I'm sorry?

15 JUDGE RIVERA: The People didn't argue otherwise?

16 MR. LAISURE: No, that's right. They didn't
17 argue that. They didn't argue that there was a
18 particularized harm to any witness that was possible from
19 this. If - - - if - - - if I may, I would like to just
20 state what I think the rule ought to be.

21 CHIEF JUDGE DIFIORE: You may, sir.

22 MR. LAISURE: The People must - - - I'm going to
23 read this to get it right - - - at least upon request,
24 disclose contact information for potentially material
25 exculpatory witnesses, at least when the defense has no



1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

other means of investigation, unless the People can show at a hearing that doing so would put witnesses at a particular - - - particularized risk of harm, in which case, the least restrictive remedy, some - - - something like an order of protection, ought to be ordered.

CHIEF JUDGE DIFIORE: Thank you, Counsel.

JUDGE FEINMAN: So - - - so - - - and who has the burden to request that hearing you're suggesting?

MR. LAISURE: The People. They're the ones who want to avoid the obligation.

JUDGE FEINMAN: Okay. I just want to be clear.

CHIEF JUDGE DIFIORE: Thank you, Counsel.

(Court is adjourned)



1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

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

I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of People of the State of New York v. Rong He, No. 75 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



Signature: _____

Agency Name: eScribers

Address of Agency: 352 Seventh Avenue
Suite 604
New York, NY 10001

Date: September 16, 2019

