

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,

Respondent,

-against-

NO. 60

ZAVEARR BACON,

Appellant.

20 Eagle Street
Albany, New York
May 15, 2025

Before:

CHIEF JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE MADELINE SINGAS
ASSOCIATE JUDGE ANTHONY CANNATARO
ASSOCIATE JUDGE SHIRLEY TROUTMAN
ASSOCIATE JUDGE CAITLIN J. HALLIGAN

Appearances:

SAMIR DEGER-SEN, ESQ.
LATHAM & WATKINS, LLP
Attorney for Appellant
Time-Life Building, 1271 6th Avenue
New York, NY 10020

JULIA GORSKI, ESQ.
NEW YORK COUNTY DISTRICT ATTORNEY'S OFFICE
Attorney for Respondent
100 Centre Street
New York, NY 10013

Brandon Deshawn
Official Court Transcriber

1 CHIEF JUDGE WILSON: Now we finally get to the
2 last case on the calendar, which is People v. Bacon.

3 (Pause)

4 MR. DEGER-SEN: May it please the court. Samir
5 Deger-Sen, for Appellant. I'd like to reserve four minutes
6 of time for rebuttal.

7 CHIEF JUDGE WILSON: Yes.

8 MR. DEGER-SEN: This case involves a conviction
9 that was secured almost exclusively based on identifying
10 information read to the jury by police officers from notes
11 that they made during witness interviews. It is undisputed
12 that those witness interviews occurred several minutes
13 after the officers came to the scene, after the assailant
14 had left, and after the witnesses were moved to a separate
15 location and began receiving medical attention.

16 JUDGE CANNATARO: Would you like to continue the
17 preservation discussion we were having in the last
18 argument?

19 MR. DEGER-SEN: Very happy to, Your Honor.

20 JUDGE CANNATARO: How is this preserved here?

21 MR. DEGER-SEN: This is preserved because an
22 objection was made that made clear, as the statute
23 requires, the party has to make its position - - -

24 JUDGE CANNATARO: The only relevant objection I
25 could discern was the objection made at the close of the

1 People's case to dismiss, which discussed at length the
2 sufficiency of the evidence in the case. I don't remember
3 anything about a Confrontation Clause violation.

4 MR. DEGER-SEN: Oh, I - - - so it - - - it was
5 framed as a motion to dismiss the indictment, and I think
6 that makes complete sense in this context because it's
7 undisputed the government has never disputed that if you
8 take away - - - if you exclude this evidence that was
9 tainted by the confrontation violation, there's no case
10 left.

11 JUDGE GARCIA: Is that argument made if you take
12 away this evidence tainted by the confrontation - - -

13 MR. DEGER-SEN: Yes. I think - - - I think the -
14 - -

15 JUDGE GARCIA: - - - in terms of a Confrontation
16 Clause violation?

17 MR. DEGER-SEN: Yeah. I think if you look at the
18 colloquy, I think it's very clear what counsel was trying
19 to say. And remember, he only found out there's a
20 Confrontation Clause violation a minute ago. I mean,
21 throughout this entire trial, the government has said, you
22 know, from the opening - - -

23 JUDGE TROUTMAN: Does it not go instead to legal
24 sufficiency?

25 MR. DEGER-SEN: I think it's both things. It's -

1 - - this evidence is impermissible, and as a result of
2 that, there's no more evidence, and so the evidence is
3 insufficient. If you look at what he says, so he starts
4 out by saying this at 567. He says, since we didn't have
5 the complainants here, the jury is left with the wrong
6 impression as to the condition of Mrs. Violando. And he
7 talks about what he would have said to impeach her. So he
8 says, you know, she, you know, had taken Klonopin, she was
9 woozy, all of this stuff. This is the kind of stuff I was
10 going to say to impeach - - -

11 JUDGE GARCIA: And does he say anywhere,
12 therefore, you cannot consider any of that testimony
13 because it's a constitutional violation?

14 MR. DEGER-SEN: Yeah. He says, there was no
15 ability to cross-examine. That's at 567. Then he said,
16 it's difficult to make out a case because they haven't
17 subjected themselves to cross-examination. That's at 570.
18 And - - -

19 JUDGE GARCIA: It seems to all go to development
20 of the record supporting a conviction - - -

21 MR. DEGER-SEN: Well - - -

22 JUDGE GARCIA: - - - a potential conviction.

23 MR. DEGER-SEN: - - - cross-examination is
24 obviously the heart of the confrontation, right. In
25 Garcia, you know, the statement, we don't have the witness

1 here, was held to be sufficient to preserve a Confrontation
2 Clause violation. So saying cross-examination three times,
3 obviously, makes that clear. And I do think, you know, the
4 - - - this is only intelligible as an argument that this
5 evidence is impermissible is tainted by a Confrontation
6 Clause violation because he's not saying, look, this
7 evidence is too weak. You know, if you pick this evidence,
8 the jury - - - the - - - a reasonable juror couldn't
9 believe it. He's saying this evidence is - - -

10 JUDGE SINGAS: I know, but we don't even have to
11 go there because I think they were pretty clear. The court
12 - - - I may have - - - I don't know what page it is. The
13 court said, the question before the court is based upon the
14 evidence that they did put in whether it was lousy or not
15 lousy. Is it sufficient to go forward? And at the close
16 of counsel's argument, counsel said, so if Your Honor is
17 asking me why the People have not made out a prima facie
18 case, that's my argument. And there's nothing about the
19 Confrontation Clause there.

20 MR. DEGER-SEN: Well, he's already explained that
21 this evidence that they have relied on is impermissible
22 because he didn't have the ability to cross-examine. And
23 what he - - - and he specifically says this - - -

24 JUDGE HALLIGAN: So that phrase, I take it, there
25 was no ability to cross-examine, is the crux of what should

1 have alerted the judge that there was a Confrontation
2 Clause claim here?

3 MR. DEGER-SEN: Absolutely, Your Honor. And - -
4 -

5 JUDGE HALLIGAN: But it's in the context, isn't
6 it, of arguing about sufficiency?

7 MR. DEGER-SEN: I - - - I think it makes - - -

8 JUDGE HALLIGAN: It's not clear what would alert
9 the judge that they need to engage that question distinct
10 from the sufficiency.

11 MR. DEGER-SEN: Well, I mean - - -

12 JUDGE HALLIGAN: Not that one couldn't make the
13 argument. I'm not suggesting that. But what would alert
14 the judge that there's a separate ground here that should
15 be explored?

16 MR. DEGER-SEN: I don't think they're necessarily
17 separate. I think they're properly intertwined here. He
18 was saying both things. He was saying this evidence, the
19 reason why that's insufficient. He was never saying the
20 reason - - -

21 JUDGE HALLIGAN: Well - - -

22 MR. DEGER-SEN: - - - why it's insufficient is
23 because there just isn't enough evidence here. He's saying
24 - - -

25 JUDGE HALLIGAN: I mean, it seems to me that the

1 question whether evidence is sufficient is distinct from
2 whether a discrete piece of evidence is admissible or
3 inadmissible because of a possible Confrontation Clause
4 concern.

5 MR. DEGER-SEN: I don't think it's distinct in
6 this context because no one was ever suggesting that when
7 you look at the evidence, all this evidence, a jury just
8 couldn't believe what these officers are saying, it's too
9 weak. He was - - -

10 JUDGE SINGAS: How about when the officers
11 testified? Would that have been an appropriate time to
12 lodge a Confrontation Clause objection? And that didn't
13 happen here, correct?

14 MR. DEGER-SEN: No. That wouldn't have been the
15 appropriate time because appropriate time because the - - -
16 there was no Confrontation Clause - - -

17 CHIEF JUDGE WILSON: Well, but there clearly - -
18 -

19 MR. DEGER-SEN: - - - on that.

20 CHIEF JUDGE WILSON: - - - could have been
21 hearsay objections made to all that testimony, right? When
22 the officer - - -

23 MR. DEGER-SEN: There could have been hearsay
24 objections made, but the - - - the Supreme Court - - -

25 CHIEF JUDGE WILSON: Why - - - and so what do we

1 make of the fact that the counsel chose not to make a
2 hearsay objection to the testimony?

3 MR. DEGER-SEN: It says - - - the Supreme Court
4 said in Crawford, hearsay and Confrontation Clause are not
5 coincidence if there's lots of things that might not be
6 hearsay but might still fall within the Confrontation
7 Clause. And I think it's - - - it would be reasonable to
8 think this is one of those things because these could very
9 plausibly be excited utterances when it's - - - when
10 excited utterance hearsay exception goes to the state of
11 the condition of the complainants. But that's not what the
12 Confrontation Clause objection goes to. That goes to the
13 nature of the interrogation, the circumstances surrounding
14 the interrogation. So this, I think, is actually one of
15 those situations where it's a very clear Confrontation
16 Clause violation, and very plausibly, this falls within the
17 excited utterance hearsay objection. So counsel could have
18 been thinking that. And he'd been assured on the first day
19 of trial, the government said, this is at 391, the
20 complainants will explain that all to you. So that was in,
21 you know, the government's opening. In counsel's - - - in
22 our counsel's opening, he says the exact same thing. He
23 says, they're going to talk to you. I'm going to, you
24 know, describe what they say, or that they're going to be
25 here in front of you. Then even on the penultimate day of

1 trial, this is at record 451, the government says, the only
2 two remaining witnesses will be the victims, who I
3 anticipate calling tomorrow. And then later on the day she
4 says, tomorrow, I anticipate calling both complaining
5 witnesses and never corrects that. So he only finds out -
6 - - the only time he finds out that they're not going to be
7 there and that there is a Confrontation Clause violation -
8 - - until the witness is - - - is not made available, there
9 is no Confrontation Clause violation. He fully expects
10 that to be a Confrontation Clause violation.

11 JUDGE CANNATARO: So Counsel, I'm - - - I'm - - -

12 MR. DEGER-SEN: I did - - -

13 JUDGE CANNATARO: - - - I'm looking at the
14 motion, you know. It's around page 567 to 569 of the
15 record. And that - - - again, that doesn't seem to be what
16 he's saying. It - - - it's not that - - - I don't see
17 anything about - - - I realize that a confrontation problem
18 occurred when the victims weren't called. It's about
19 cross-examining the - - - one of the victims about
20 Klonopin. And just to, like, really make sure that the
21 court understood what it was dealing with, the court
22 reiterates, and I think you might have heard this in
23 another question, the question before the court is based
24 upon the evidence that they did put in, whether it was
25 lousy or not lousy or whatever, it was - - - it is

1 sufficient to go forward. And the attorney says, that's
2 right. Yes. In the light most favorable to the People.
3 Right. And the answer is - - - by the attorney, no, it's
4 not sufficient to go forward. I don't understand where the
5 confrontation is in that.

6 MR. DEGER-SEN: I - - - it is in the - - - so the
7 first part where he talks about cross-examination, I think
8 the issue here is the government has never disputed that if
9 you take away that - - - the impermissible evidence, it is
10 insufficient. There's nothing wrong with making a
11 sufficiency argument in - - - in this and - - - and saying
12 - - -

13 JUDGE CANNATARO: That may be true, but we
14 require preservation of - - -

15 MR. DEGER-SEN: Absolutely, Your Honor. And the
16 only way of understanding this colloquy - - - and again, he
17 had two minutes to think about it. Is this - - - would it
18 have been much better if he had said, I'm - - - the - - -
19 what I mean by this is, this evidence is a violation of the
20 Confrontation Clause, so it should be admitted and - - -

21 JUDGE TROUTMAN: So you said he only had two
22 minutes to think about it. Are you saying the court didn't
23 give sufficient time for - - -

24 MR. DEGER-SEN: No. I'm just saying, the reason
25 why it's - - - and like, it's properly preserved, but the



1 reason it's not completely elegant is, he didn't have a lot
2 of time to think about it and - - -

3 JUDGE TROUTMAN: And because in trial - - -
4 during trial, the - - - they basically jump to their feet
5 and they just - - -

6 MR. DEGER-SEN: Yeah.

7 JUDGE TROUTMAN: It's not an unusual thing for it
8 to be inartful; is that what you - - -

9 MR. DEGER-SEN: Exactly. And that's why this
10 court always looks to the substance of what's said and
11 what's conveyed. And I think - - - that's why I said, if
12 you - - - if you start with what he's saying, it is that
13 this evidence - - - I should have been able to impeach this
14 person. So that can't be understood as a - - - as
15 sufficiency challenge in the sense of, this evidence is not
16 - - -

17 JUDGE CANNATARO: Well, he said, I should have
18 been able to cross-examine this person - - -

19 MR. DEGER-SEN: Exactly.

20 JUDGE CANNATARO: - - - and cross-examine them
21 about taking Klonopin.

22 MR. DEGER-SEN: Exactly.

23 JUDGE CANNATARO: And - - -

24 JUDGE RIVERA: You know, that's irrelevant if
25 your whole point is what they put on is insufficient. Why

1 does it matter what else I would have asked? The whole
2 point is insufficient - - -

3 MR. DEGER-SEN: Exactly. He's - - -

4 JUDGE RIVERA: - - - on its face.

5 MR. DEGER-SEN: What he's saying doesn't - - -
6 wouldn't have made sense if what he was saying was, this is
7 just inadequate evidence. What he's saying - - - the only
8 way of making sense of it is, what he's saying is, I wasn't
9 allowed to persuade - - - to present something. So not
10 that this is unpersuasive evidence. The problem is the
11 evidence is too persuasive - - -

12 JUDGE CANNATARO: And you know that's fair - - -

13 MR. DEGER-SEN: - - - because the jury is getting
14 an incomplete picture - - -

15 JUDGE RIVERA: Well, he could be saying both.

16 MR. DEGER-SEN: He could be saying both, and he
17 was saying both, and it's appropriate.

18 JUDGE RIVERA: It's insufficient, and I didn't
19 get to cross-examine.

20 MR. DEGER-SEN: Correct. It's appropriate to say
21 both. And the last part of this, which I think makes this
22 really clear, is the last sentence of what he says. He
23 says, there's no other witnesses that would be able to
24 testify as to those circumstances admittedly other than
25 Alexa Violando. So what he's trying to say - - -

1 JUDGE RIVERA: Let me ask you. Let's assume for
2 one moment that the court determines that the trial judge
3 only appreciated counsel statements as a question of
4 sufficiency, didn't appreciate that it was a Confrontation
5 Clause argument at all. What does that mean then? Do we -
6 - - should the rule be that counsel has to clarify that for
7 the judge? I think Judge Halligan was asking a question
8 along those lines. Or is it just, did you preserve it?
9 You raised it? If the judge didn't understand, it doesn't
10 matter. You've preserved your argument.

11 MR. DEGER-SEN: It's just that he preserved and
12 he raised it. And there's no indication in Garcia that the
13 - - -

14 JUDGE RIVERA: But isn't the point of
15 preservation to ensure the judge has an - - -

16 MR. DEGER-SEN: Right. It's - - -

17 JUDGE RIVERA: - - - opportunity to address the
18 issue?

19 MR. DEGER-SEN: Right. It's an objective
20 inquiry. But if you've said enough to preserve something
21 and the judge just isn't understanding it, then I don't
22 think that kind of subjective - - -

23 JUDGE HALLIGAN: Well, I would think that to
24 preserve something, your statement has to be sufficient
25 that a judge would reasonably understand it to make the

1 point.

2 MR. DEGER-SEN: Absolutely. And in Garcia, it
3 was, we don't have the witness here, and that was enough.

4 JUDGE CANNATARO: And if the court does a sum up
5 - - - if it says, just so I'm sure, the issue before me is
6 the following, and then says sufficiency, that's still
7 preserved even though the court clearly - - - it's not that
8 the court misapprehended the argument and counsel had no
9 reason to know it. The court's saying, here I am
10 misapprehending the argument that you are very clearly
11 making. But that's still - - -

12 MR. DEGER-SEN: I mean, I guess I don't know if
13 he's misapprehending it in this context because what is
14 being said is, it - - - it is a motion for sufficiency.
15 It's a motion dismissing the - - - for insufficiency. And
16 what's being said is, the evidence - - - this evidence - -
17 - you can't consider this evidence, Judge, because I
18 couldn't cross-examine them. The jury is going to get the
19 wrong impression. He said the wrong impression multiple
20 times. And then he says at the end, and there's no other
21 evidence that would be able to support this verdict.
22 That's what he's saying. And the judge says, so you're
23 saying it's sufficiency objection? Yeah, it's a
24 sufficiency objection. I don't think - - - now, again, it
25 would be more elegant he said, and don't forget, nested

1 within my sufficiency objection is the idea that this
2 evidence is impermissible. That would be more elegant.
3 But of course, that's what he's saying. I mean, you've got
4 a situation here where, you know, you literally have this
5 police testimony of the only two witnesses, the
6 government's entire case. You know, they've been promising
7 these witnesses the whole time, police testimony read from
8 a complaint report into the record in front of the jury,
9 and then suddenly, at the eleventh hour, the two witnesses
10 don't appear. Of course, the judge understood there's a
11 Confrontation Clause concern here. And of course, you
12 know, saying cross-examine three times should be enough for
13 any reasonable judge to look at that and say, well, I got
14 to kind of think about the Confrontation Clause here. And
15 I think anyone who went to law school would understand that
16 there's some Confrontation Clause issue here. And I think
17 the judge should understand it. I think what happened here
18 is he just thinks - - -

19 JUDGE GARCIA: But even within - - -

20 MR. DEGER-SEN: - - - oh, that's not a valid - -
21 - that's not enough for sufficiency, so I'm going to let -
22 - - go ahead.

23 JUDGE GARCIA: Even within two minutes - - - even
24 within two minutes, you would have the ability to
25 understand there was a Confrontation Clause violation,

1 right?

2 MR. DEGER-SEN: I think so, right? I mean, so -
3 - - well, that's - - - and so I you know, that's why it's a
4 - - - it's - - - you have to look at the whole context of
5 the trial.

6 JUDGE CANNATARO: So the attorney did appreciate
7 it. He just chose not to use those specific terms?

8 MR. DEGER-SEN: He - - - I mean, he used the term
9 cross-examination - - - I mean, the - - -

10 JUDGE CANNATARO: But he went to law school, and
11 he very quickly appreciated the confrontation violation.
12 He just didn't - - - it was so obvious he just didn't feel
13 it needed - - -

14 MR. DEGER-SEN: I - - - I mean - - -

15 JUDGE CANNATARO: - - - to be mentioned.

16 MR. DEGER-SEN: I think that might be right, Your
17 Honor. I mean, I do think it might be that he - - -

18 JUDGE RIVERA: Well, they didn't say that in
19 Garcia either.

20 MR. DEGER-SEN: It didn't say in Garcia either.
21 You know, in Garcia it says - - - I mean, that's how people
22 sometimes talk in the heat of the moment. You know, you
23 say, I couldn't cross-examine him. Here's what I would
24 have said. He's trying to convey the substance of what
25 he's saying. And if you look at the substance of what he's

1 saying, it is not - - - a jury is not - - - can't be
2 persuaded by this. No rational juror could look at these
3 officers' testimony and, you know, find in favor of the
4 government. What he's saying is, I have lost the big
5 opportunity here because, you know, the crucible of cross-
6 examination, as Crawford describes it, is all about being
7 able to present impeachment evidence. And he describes the
8 impeachment evidence. He says three times, I couldn't
9 cross-examine this person. He says two times, it's going
10 to give an incomplete picture to the jury. And then he
11 ends by saying, there are no other witnesses, so there's
12 nothing else, basically. And so again, it's not the most
13 elegant, but in the kind of substance of a form inquiry
14 that this court looks at, I do think it is certainly a lot
15 more than in Garcia. I mean, in Garcia, the government's
16 argument was, well, you can't tell the difference between
17 that and a hearsay objection. And this court said, it's
18 still enough to preserve a Confrontation Clause objection.
19 So this seems a lot - - - at least to my mind, the
20 substance of this conveys a lot more information about what
21 kind of thing he was asking for than the objection in
22 Garcia. And I do think that timing - - - I mean, the
23 government sort of jumps between the sort of form and the
24 timing objections. I think the form objection, again, it
25 just - - - was he able to understand it? I think

1 absolutely. It was clear that he was. And then we cite
2 the State v. Quebrado case on timing, which is that the - -
3 - the violation is not complete until that moment. So I
4 think all the timing issues fall out of this case as well.
5 It's just, was this intelligible? Was the judge on notice?
6 And I think the judge, I think, was pretty clearly on
7 notice based on the full colloquy and the substance and the
8 full context.

9 CHIEF JUDGE WILSON: Thank you.

10 MR. DEGER-SEN: Thank you. So on to the - - -

11 CHIEF JUDGE WILSON: Well, your time is up, but
12 if you would like a minute to go on to that and then deal
13 with the rest on your rebuttal, that's fine.

14 MR. DEGER-SEN: Great. Thank you, Your Honor.
15 Well, so I mean, I think the merits of this are
16 straightforward, as I was describing. I mean, the
17 emergency exception is limited to situations that are a cry
18 for help or the provision of information enabling officers
19 to immediately end a threatening situation, where of no
20 case from the U.S. Supreme Court that has found the
21 emergency exception satisfied when the questioning is not
22 immediate. You know, all the cases where the emergency
23 exception occurs, in Bryant, in Bradley, in Andino, it is
24 immediate. We're aware of no case where the exception has
25 been satisfied when an officer is taking notes of the

1 witness testimony. And this case has both. And so I think
2 it falls within the heartland of testimonial statements
3 barred by the Confrontation Clause. And the First
4 Department's - - - the First Department's rule, if this
5 court allows that rule to go into effect, and it is the
6 rule that the First Department regularly now routinely
7 imposes in this kind of emergency exception case, is
8 basically that if the perpetrator is still at large and the
9 victim is visibly shaken, that's an emergency. That - - -
10 you know, that satisfies the emergency exception. That is
11 a test that has no manageable limits. It works a radical
12 expansion of the exception - - -

13 JUDGE RIVERA: Why is it an emergency if they see
14 the alleged perpetrator running in the tunnels to
15 potentially another station?

16 MR. DEGER-SEN: I think it might - - - you could
17 characterize that as emergency. But as the Supreme Court
18 said in Bryant, the existence vel non of an ongoing
19 emergency is not the touchstone of the testimonial inquiry.
20 Instead, the ultimate inquiry is whether the primary
21 purpose of the interrogation, so it's the interrogation,
22 was to enable police assistants to meet the ongoing
23 emergency.

24 So of course, in all situations where there's
25 been a violent crime and the perpetrator is on the loose,

1 you could characterize that as an emergency or a dangerous
2 situation. But you then look at the circumstances of the
3 interrogation, and here, there was - - - there was a
4 conversation that we fully admit, you know, could have been
5 nontestimonial, which is when - - - as soon as the officers
6 come down, they say a bunch of stuff, he hit me in the
7 face, we've conceded down the line that's nontestimonial.
8 But when you take the person upstairs, you wait several
9 minutes, you wait for medical attention to arrive, you take
10 out your notepad and you start writing it down, there is no
11 case that they cite that looks remotely like that. That is
12 quintessentially testimonial, as the Supreme Court said in
13 Davis. We do not think it's conceivable, the protections
14 of the Confrontation Clause can readily be evaded by having
15 a note-taking policeman recite the unsworn testimony of the
16 declarant. That's exactly what happened here. There are
17 no - - -

18 JUDGE CANNATARO: Am I correct that it was at
19 that subsequent outside upstairs questioning that the
20 police learned that there were actually two people involved
21 in the commission of this crime?

22 MR. DEGER-SEN: I think they may have mentioned
23 there were two downstairs. I'm not a hundred percent sure.
24 I can check for rebuttal.

25 JUDGE CANNATARO: No. I'm just - - - because I'm

1 just wondering, that would be something that, you know,
2 seems fairly nontestimonial and more - - - like, they're
3 still investigating an ongoing emergency, which was - - -
4 and my next question. And you could answer one or both or
5 neither. Can't there - - - can't sometimes it be both?
6 Can it be both investigatory and maybe - - -

7 MR. DEGER-SEN: Right. It almost always is both.
8 You know, that's the sort of nature of these things. It is
9 dual purpose. And so then you have to look at what the
10 primary purpose is. And you basically ask the question,
11 what would a reasonable observer - - - what would they
12 think the primary purpose of this is? And I think in a
13 situation where - - - you know, if you ask the question
14 immediately, like, in Bryant, you have a potential active
15 shooter situation, you know, what's happening? Where is
16 he? You know, that is a sort of thing that a reasonable
17 observer would look at and say - - - and just, you know,
18 like it was on the subway platform, where did he go? They
19 went and looked and all of that, those kinds of questions.
20 You know, those would fit comfortably with the emergency
21 exception. But I don't think a reasonable person thinks,
22 well, when you take the - - - you know, you take an
23 individual above ground, you wait several minutes, you take
24 out your notepad, you start writing, even if - - - you
25 know, in the officer's mind, it's like, well, this will

1 help us resolve the crime, maybe we'll catch him, but you
2 know, - - -

3 JUDGE CANNATARO: Or maybe help us find the - - -

4 MR. DEGER-SEN: - - - maybe - - - maybe - - -

5 JUDGE CANNATARO: - - - the person.

6 MR. DEGER-SEN: - - - you know, that - - - that
7 could be a purpose, but it's not the primary purpose at
8 that point because at the - - - at that point when you're
9 noting things down, you've waited all of this time, the
10 primary purpose is to create a record for the
11 investigation. And this case is, I think, unusual, because
12 the actual testimony here really reflects that what they
13 were doing was exactly that, was making the complaint
14 report. The government suggests in their brief that, we
15 don't know if they were really making the complaint report.
16 That's not true. If you look at the testimony at page 407,
17 this is the question, what do you do when the suspect is no
18 longer on the scene? Answer, we try to get a detailed
19 description of the suspect, and we put the information down
20 on a complaint report. Then the next page at 408, it then
21 gets entered into a computer, and then ten pages later at
22 418, they're asked the question, after the complainants are
23 meeting with the EMT, what did you do? Answer, we asked
24 the questions in regard to what happened, and we took a
25 report. We asked detailed descriptions of the suspects.



1 JUDGE RIVERA: Yeah. But that's logical, is it
2 not? I mean, you're not going to get that kind of
3 information and never archive it.

4 MR. DEGER-SEN: Well - - -

5 JUDGE RIVERA: It's all they're saying, we got
6 the information and we eventually put it in a report.

7 MR. DEGER-SEN: It is saying, what's your routine
8 practice? Your - - - that was at 408, your routine
9 practice is, after the - - - after, you know, the assailant
10 has gone, you sit down and you start taking detailed
11 information to make a report, and then we enter into a
12 computer. That's what he says. And then later on, he
13 says, you know, so what did you do in this case? And he
14 said, we, quote, "took a report and we asked detailed
15 questions." So this record is very clear that what was
16 happening here was, they were asking questions at that
17 point for the purpose - - - they were following their
18 routine practice that they described on the stand. And
19 then the reason why there were - - - there's so many - - -
20 you know, the - - - you know, there's a long colloquy about
21 the complaint report at 423 and 24. Why? Because the
22 prosecutor is laying the foundation for the use of the
23 complaint report as the notes to refresh the recollection.
24 So various times then, you know, they take the complaint
25 report out and the memo book that was made on that day, and

1 that's the basis of the testimony. So it is
2 quintessentially the kind of testimonial statement that we
3 saw in Crawford. And by - - - you know, they don't dispute
4 that the statements were later used for the complaint
5 report. They don't identify any other interview that was
6 used for the complaint report, and no one has even
7 testified to any other purpose of these statements other
8 than creating the complaint report. So it is about as
9 clear as day that this was a situation where they were
10 taking the statements down for investigative purposes, for
11 purposes of the complaint report.

12 CHIEF JUDGE WILSON: Thank you.

13 MS. GORSKI: Good afternoon, Your Honors, and may
14 it please the court. Julia Gorski, for the People.
15 Defendant never objected on Confrontation Clause grounds.
16 While he complained about not being able to cross-examine
17 the victims, his complaint was made within a routine trial
18 order for a dismissal where the question - - -

19 JUDGE SINGAS: So why isn't that enough?

20 MS. GORSKI: Because the question under that
21 specific motion is whether or not the People's evidence, as
22 is, is legally sufficient, not whether the People's
23 evidence is still admissible despite the victims not
24 appearing in court.

25 JUDGE HALLIGAN: So why isn't the reference to

1 cross-examination sufficient?

2 MS. GORSKI: Because it did not alert the trial
3 court to the detective's testimony that they are now taking
4 issue with on appeal.

5 JUDGE RIVERA: So what's the point of even
6 mentioning cross-examination, if not to raise for the court
7 that there's a confrontation problem?

8 MS. GORSKI: Well, the - - - they were not
9 arguing that without being able to cross-examine the
10 victims that their testimony was now inadmissible. They
11 were saying, we wanted to bring out more testimony to show
12 that their testimony was actually unreliable, that is,
13 legal sufficiency.

14 JUDGE RIVERA: Do they have to go through some
15 explanation as to why they're asserting three times,
16 apparently, that they were not able to cross-examine? Do
17 they have to explain that to the court?

18 MS. GORSKI: Yes. They had to make a
19 confrontation - - -

20 JUDGE RIVERA: Why is that?

21 MS. GORSKI: - - - violation. Because it needs
22 to - - -

23 JUDGE RIVERA: Why is that?

24 MS. GORSKI: The trial court needed an
25 opportunity to address this issue.

1 CHIEF JUDGE WILSON: So what is the difference
2 between saying I can't cross-examine the witness and saying
3 the witness isn't here?

4 MS. GORSKI: Well, in the context of a legal
5 sufficiency argument, that's not even the proper remedy.
6 The proper remedy is not even dismissal of the entire
7 indictment.

8 JUDGE CANNATARO: No. But that does get you
9 preservation of confrontation because that's what was said
10 in Garcia?

11 MS. GORSKI: No. And the biggest distinction in
12 Garcia is that the defendant moved to strike the
13 detective's testimony because they were not able to cross-
14 examine.

15 JUDGE TROUTMAN: In this particular instance,
16 when neither of the claimed victims are present, isn't it
17 obvious that confrontation is an issue in context of the
18 arguments that the defendant was making?

19 MS. GORSKI: Well, no, and there's two things
20 there. First, the - - -

21 JUDGE TROUTMAN: Why?

22 MS. GORSKI: - - - defendant never objected
23 contemporaneously on hearsay or any other basis. So there
24 was no - - - he took no issue with the statements coming in
25 as excited utterances. And second, to solidify that he

1 took no issue - - -

2 CHIEF JUDGE WILSON: But we don't know - - - how
3 do we know that's the reason. That is, isn't it possible
4 that he took no issue because he believed he would be able
5 to cross-examine these witnesses?

6 MS. GORSKI: Well, yes. And when he learned that
7 he would not be able to do so, he did not make a motion to
8 strike the detective's testimony, and he did not move for a
9 mistrial. And I think what really solidifies that this is
10 not what he was talking about was that, in response to his
11 legal sufficiency argument - - -

12 JUDGE RIVERA: So because he asked for what you
13 consider an inadequate remedy, he didn't preserve the
14 constitutional claim?

15 MS. GORSKI: I think it supports that he was not
16 making a constitutional claim. And additionally, in
17 response to his legal - - -

18 JUDGE RIVERA: Well, on the sufficiency, I just
19 don't see the point of saying, I didn't get to cross-
20 examine. What does that have to do with the sufficiency?

21 MS. GORSKI: It went to the credibility and the
22 reliability - - -

23 JUDGE RIVERA: And confrontation is about the
24 credibility and being able to test that - - - all that
25 SCOTUS tells us.

1 MS. GORSKI: Well - - -

2 JUDGE RIVERA: That's the jurisprudence, being
3 able to test through cross-examination the credibility and
4 the witness' testimony.

5 MS. GORSKI: Correct. But he took no issue with
6 the testimony that was already in evidence. He never drew
7 the court's attention to the detective's test - - -

8 CHIEF JUDGE WILSON: Well, he must have - - - the
9 - - - isn't - - - but the objection, I haven't had the
10 chance to cross-examine, isn't that challenging the
11 testimony that came in?

12 MS. GORSKI: Not necessarily, especially not in
13 the context of a legal sufficiency motion, maybe in a
14 motion to strike testimony or a motion for a mistrial, but
15 not in this context.

16 CHIEF JUDGE WILSON: Why do you say that?

17 MS. GORSKI: Because the issue in legal
18 sufficiency is whether or not the People's evidence
19 established every element of the charged crime.

20 CHIEF JUDGE WILSON: Right. And if you say - - -

21 MS. GORSKI: You view that in the light most
22 favorable to the People.

23 CHIEF JUDGE WILSON: Right. And if - - -

24 MS. GORSKI: So you're taking - - -

25 CHIEF JUDGE WILSON: Right. And if you say, in

1 the context of legal sufficiency, I haven't had the chance
2 to cross-examine these people, right?

3 MS. GORSKI: Correct.

4 CHIEF JUDGE WILSON: Aren't you necessarily
5 saying, and therefore, you can't consider that testimony?

6 MS. GORSKI: I don't think so. I think you're
7 just saying, I would have liked to bring out more testimony
8 in addition to what has already been brought out. And I
9 think it's very important that he - - -

10 JUDGE RIVERA: Could you be saying both?

11 MS. GORSKI: I don't think - - - I think that's a
12 stretch. I think that is a stretch in this context. And
13 the prosecutor, in response, said, even though the victims
14 did not testify, their evidence - - - their testimony is in
15 evidence as fact. She repeatedly said that in response to
16 the motion to dismiss - - -

17 CHIEF JUDGE WILSON: But why would your - - - if
18 you say, I would just have liked to bring out more
19 testimony, why would that go to legal insufficiency?

20 MS. GORSKI: It didn't. And that's why the court
21 had to redirect him.

22 CHIEF JUDGE WILSON: But so then it has to be - -
23 - but then it has to be understood as going to
24 confrontation.

25 MS. GORSKI: No. It doesn't. And you know, the

1 court didn't understand it that way either and - - -

2 JUDGE HALLIGAN: So what is he trying to
3 communicate if not a Confrontation Clause concern with that
4 statement?

5 MS. GORSKI: He is communicating that without the
6 victim's live testimony, the People could not establish
7 every element of the charged crimes. He's saying that the
8 testimony that came in through the police officers was not
9 enough, that the victims needed to be there. And I believe
10 in the course of his motion, he says that Violando was the
11 only person that could testify to certain elements of the
12 charged crimes.

13 CHIEF JUDGE WILSON: Well, he's surely not saying
14 the more testimony that I would like to bring out through
15 cross-examination is testimony that would make this legally
16 sufficient?

17 JUDGE HALLIGAN: Right.

18 MS. GORSKI: I'm sorry. I don't think I
19 understood your question.

20 CHIEF JUDGE WILSON: Sure. It seems to me you
21 were saying, the way to understand his complaint about lack
22 of cross-examination is that he would have brought out more
23 testimony on cross-examination, right? That's the first
24 thing you said, I think.

25 MS. GORSKI: Well, yes, it's - - -

1 CHIEF JUDGE WILSON: Okay.

2 MS. GORSKI: He's not - - -

3 CHIEF JUDGE WILSON: And so it is not - - - it
4 can't be the case that the more testimony that he wants to
5 bring out is testimony that would make the case legally
6 sufficient.

7 MS. GORSKI: Yes.

8 CHIEF JUDGE WILSON: Right?

9 MS. GORSKI: He's saying - - - well, true. I
10 think he was a little confused between weight of the
11 evidence and legal sufficiency, and that's why the judge
12 said, but the issue is taking the People's evidence however
13 lousy or not lousy it is.

14 JUDGE HALLIGAN: But he can't, I don't think, be
15 understood to be saying there's a sufficiency problem, and
16 I would like to - - - I'm complaining because I didn't have
17 the opportunity to elicit even more evidence. I - - - that
18 doesn't seem logically to make sense - - -

19 JUDGE RIVERA: I want to elicit more evidence for
20 purposes of making the People's case against - - -

21 JUDGE HALLIGAN: Yes.

22 JUDGE RIVERA: - - - my client.

23 JUDGE HALLIGAN: Yes.

24 JUDGE GARCIA: Is there - - -

25 MS. GORSKI: That's correct.

1 JUDGE GARCIA: Is there - - -

2 MS. GORSKI: He wanted to elicit that the victims

3 - - -

4 JUDGE RIVERA: Well, how could that be?

5 MS. GORSKI: - - - were not credible.

6 JUDGE RIVERA: To undermine the People's case,
7 not - - - that's on the confrontation side. That's not to
8 establish the sufficiency of the People's case. He's not
9 trying to make the People's case against himself.

10 MS. GORSKI: Right. He's trying to disprove it.
11 He's - - -

12 JUDGE HALLIGAN: Well - - -

13 MS. GORSKI: He's saying it can't go forward.

14 JUDGE HALLIGAN: He's saying it's not - - -

15 JUDGE GARCIA: But Counsel, is there anything in
16 the record to indicate that there was some confusion over
17 sufficiency in weight of the evidence review?

18 MS. GORSKI: The judge said that the issue before
19 me is whether the People's evidence, in the light most
20 favorable to the People, is sufficient. And they asked, is
21 it sufficient? And he said no. And he went on to state
22 that the only person that can testify to these certain
23 elements was the victim. And as one of Your Honors had
24 mentioned, you know, he says, if you're asking me whether
25 or not this is legally sufficient, my answer is no. And

1 then he proceeded - - -

2 JUDGE RIVERA: Right. In response to that direct
3 question. That's not a question about the Confrontation
4 Clause. But let me ask you the same question I asked your
5 friend on the other side here. Let's assume for one moment
6 that we conclude that the judge did not appreciate that
7 this was a Confrontation Clause argument, but that it - - -
8 that it was preserved under our jurisprudence. Why don't
9 they get the benefit of that?

10 MS. GORSKI: Because - - -

11 JUDGE RIVERA: Does the judge have to understand
12 in order for the preservation bar to be addressed?

13 MS. GORSKI: Well, I don't think it's fair to
14 make the assumptions that they are making on the existing
15 record when the record was not developed to ascertain
16 whether or not there was an ongoing emergency when the
17 officers arrived on the sidewalk. It's a record issue.
18 But even assuming that this - - -

19 JUDGE RIVERA: No. I'm talking about the
20 preservation question.

21 MS. GORSKI: Yes. Even - - - okay. Even
22 assuming that this is preserved - - -

23 JUDGE RIVERA: Let me put it another way. Do we
24 resolve preservation questions, that is whether or not the
25 party who's arguing, they've preserved - - - sufficiently

1 preserved by looking to see whether or not the judge
2 understood their argument?

3 MS. GORSKI: No. It's whether or not they made
4 an argument sufficient to put the court on notice of the
5 exact argument that they are going - - -

6 JUDGE RIVERA: Whether or not the judge figured
7 it out, you say that's not relevant to that analysis on the
8 preservation - - - just on the preservation?

9 MS. GORSKI: Yes. It's the defendant's burden to
10 preserve - - -

11 JUDGE RIVERA: Fair enough.

12 MS. GORSKI: - - - and make the court known.

13 JUDGE HALLIGAN: So if we look at page 567,
14 right? The first statement that seems relevant to me from
15 defense counsel is, in addition to that, since we don't
16 have the complainants, the People have rested without the
17 complainants, and the jury is left with a wrong impression
18 as to the physical and mental condition of Alexa Violando
19 at the time of the incident. So if defense counsel is
20 arguing that the evidence that is before the jury is
21 insufficient, why would counsel say the jury is left with
22 the wrong impression? That doesn't seem to me to logically
23 bear on what defense counsel would have to be arguing,
24 which is the evidence that's already in is insufficient.

25 MS. GORSKI: I - - - the defense attorney needed

1 to draw the court's attention to the police officer's
2 testimony that they are challenging on appeal.

3 JUDGE HALLIGAN: Uh-huh.

4 MS. GORSKI: Nothing that he said there was
5 adequate to draw the court's attention to the specific
6 issue.

7 JUDGE HALLIGAN: But what could he have meant by
8 saying the jury is left with a wrong impression?

9 MS. GORSKI: Because he wanted to elicit that she
10 had a drug issue and maybe became - - -

11 JUDGE HALLIGAN: Yeah, but the point is that he
12 wasn't able to, and so the testimony that he might have
13 elicited about those conditions was not something he was
14 able to elicit, right? So why is telling a court, gosh, if
15 the witness had been here, I would have put in evidence
16 that would make this even more insufficient? I can't
17 understand how defense counsel could mean to communicate
18 that. Now, maybe the references to confrontation are, you
19 know, slim or perhaps lacking, whatever, but I just don't
20 see how you make sense of that statement or the statement,
21 there's no ability to cross-examine.

22 MS. GORSKI: Just because it was in the context
23 of a legal sufficiency motion, and the standard is much
24 different than if he is moving to strike the testimony.

25 JUDGE HALLIGAN: How did those particular

1 statements bear on sufficiency from the defense counsel's
2 perspective? Why, as defense counsel, would you say that
3 if you are arguing insufficiency?

4 MS. GORSKI: Because he was saying that you
5 needed the live victim - - - the victim's live testimony to
6 establish every element of the crime. That's legal
7 sufficiency. He had a perfect opportunity to clarify his
8 position when the prosecutor repeatedly said that, even
9 though the victims did not testify, their testimony to the
10 officer's testimony as to their statements was in evidence
11 as fact. She repeatedly stated that, and the defendant
12 took no objection or any challenge to that statement.

13 JUDGE TROUTMAN: And what do you say with respect
14 to - - - if we got to the merits, as to the exception of an
15 ongoing emergency?

16 MS. GORSKI: Yes. The victim's statements here
17 were not testimonial. The defendant's argument evaluates
18 whether there was an ongoing emergency in hindsight. When
19 the officers found the victims on the platform, they had no
20 reason to believe that the emergency was limited to just
21 them. There were four 911 calls for an assault in
22 progress. It was bystanders on the sidewalk who directed
23 them onto the platform. On the platform, they see two
24 bloody and hysterical victims, and they have no indication
25 that this was a private dispute, and they have no

1 indication of how these victims sustained their injuries.
2 They also see the defendant running down the subway tracks.
3 In addition to not knowing what risk he posed to people at
4 the next station, he is now at risk of being struck by a
5 train or electrocuted. Given all of this uncertainty, the
6 officers testified that they were focused on getting the
7 victims medical attention, getting more information, and
8 locating the person that was on the tracks. This shows - -
9 -

10 JUDGE SINGAS: So when you say that, locating the
11 person that was on the tracks, there is no evidence that
12 they used that information and radioed it forward to
13 anybody else to try to get him at another station. So - -
14 - or can you point me to any evidence that shows that, that
15 that was - - -

16 MS. GORSKI: Well, there's - - -

17 JUDGE SINGAS: - - - what they were doing to
18 confront this ongoing emergency?

19 MS. GORSKI: There's no explicit evidence, again,
20 because the parties never litigated below whether or not
21 this was an ongoing emergency. But we do know that
22 additional officers were called to the scene. All train
23 traffic in the area was stopped. The power to the tracks
24 was shut off, and a sweep of the tunnels was conducted to
25 locate the defendant.

1 JUDGE RIVERA: And did this information that was
2 derived regarding the description, all of that, was that
3 communicated? Is that in the record that it was
4 communicated - - -

5 MS. GORSKI: I think - - -

6 JUDGE RIVERA: - - - to all these additional
7 officers?

8 MS. GORSKI: I think a good inference can be made
9 that it was because - - - and again, they didn't have this
10 information until they spoke to the victims on the
11 sidewalk. When they spoke to the victims on the sidewalk,
12 that's when they learned that there were two assailants,
13 and they got the description of both of those assailants.

14 JUDGE SINGAS: And when was the defendant
15 arrested?

16 MS. GORSKI: I believe a month later.

17 JUDGE SINGAS: And how did that information come
18 out? And when?

19 MS. GORSKI: The detective - - - there was a
20 detective assigned to this case.

21 JUDGE SINGAS: Uh-huh.

22 MS. GORSKI: He met with the victims on a few
23 occasions, and I believe one of those was a few hours after
24 the incident. And I think - - -

25 JUDGE SINGAS: So how about, like, immediately

1 after the incident? Was there any information about the
2 person's name or what he looked like, or descriptions, or
3 did that have to wait until the detectives got involved?

4 MS. GORSKI: Well, immediately after is on the
5 sidewalk. It's the statements that were at issue. And - -
6 -

7 JUDGE RIVERA: It's not immediately after?

8 MS. GORSKI: It is immediately after. It was
9 within moments - - -

10 JUDGE RIVERA: Isn't it several minutes, they
11 leave the platform, they come up?

12 MS. GORSKI: Yes. And they - - -

13 JUDGE RIVERA: Yes.

14 MS. GORSKI: And they - - - officers testified
15 that they took the victims upstairs specifically to get
16 medical treatment - - -

17 JUDGE RIVERA: Okay.

18 MS. GORSKI: - - - and more information. I don't
19 think the - - -

20 JUDGE CANNATARO: And they did get names during
21 that upper part questioning, didn't they?

22 MS. GORSKI: They got nicknames, so they did - -
23 -

24 JUDGE CANNATARO: They got Zibo, I think, and
25 they got Carlos, which is actually not a nickname. Carlos

1 is - - -

2 MS. GORSKI: Yeah.

3 JUDGE CANNATARO: - - - actually Carlos.

4 MS. GORSKI: Well, not full names and addresses
5 as they did in Michigan v. Bryant.

6 JUDGE CANNATARO: No, no, no. But I'm saying
7 they got some identifying information.

8 MS. GORSKI: Yes.

9 JUDGE CANNATARO: Right? So - - -

10 MS. GORSKI: Yes. And I believe that that was
11 relevant to the officers conducting a sweep of the tunnels
12 because they needed to know - - -

13 JUDGE RIVERA: How would knowing Zibo and Carlos
14 help you find the person?

15 MS. GORSKI: Well, if they find - - -

16 JUDGE RIVERA: In the moment as an emergency, in
17 the tunnel going to the next station, how does knowing Zibo
18 and Carlos help you?

19 MS. GORSKI: Well, maybe not necessarily the
20 names, but their descriptions. Their descriptions are
21 certainly helpful.

22 JUDGE RIVERA: What were the descriptions?

23 MS. GORSKI: I believe they gave the color of
24 shirt and pants that they were wearing, their skin tone.

25 JUDGE RIVERA: Okay.



1 MS. GORSKI: I'm not sure on the exact specifics.
 2 But contrary to the defense argument, I do not believe the
 3 record supports - - - and I know my time is up. Just very
 4 quickly, I don't believe the record supports that these
 5 statements were elicited after the victims were treated by
 6 the EMTs. We know that after the EMTs treated the victims,
 7 they were not discharged at the scene. They were brought
 8 to the hospital. And there are a few times in the
 9 officer's testimony - - - it's actually right after the
 10 point where they say, after they were meeting with the
 11 EMTs, we took a report. Immediately following that, the
 12 officer had brought out the fact that he needed a
 13 description of the assailants. And the prosecutor takes
 14 the officer back a step and says - - -

15 JUDGE RIVERA: So let me ask you this. What's
 16 your rule? So what is the limiting principle? At what
 17 point in time would gathering information be so distant
 18 from the urgency of the emergency that we can say that it's
 19 no longer an emergency?

20 MS. GORSKI: When the officers have enough
 21 information to be able to assess the situation unfolding in
 22 front of them. If their primary purpose is to get that
 23 basic level of information of what we need to do right now
 24 to solve the situation, those statements elicited are
 25 nontestimonial. If the officers go beyond that, they



1 figure out, okay, nothing else needs to be done here. This
2 was a private dispute. No one else is in danger, then I
3 think the conversation will likely switch over to
4 testimonial.

5 JUDGE RIVERA: So if they ask, how you know them?

6 MS. GORSKI: I'm sorry. Can you - - -

7 JUDGE RIVERA: If they asked, how do you know
8 them?

9 MS. GORSKI: I - - - it's hard to say specific
10 questions. It's the entirety of the circumstances.

11 JUDGE CANNATARO: It sounds a little bit to me
12 like you were about to say before that because the
13 ambulance was coming and they weren't discharged at the
14 scene, that they went to the hospital, this was the
15 officers', I guess, last opportunity to get actionable
16 information at the scene before they were taken away to the
17 hospital. Is that the implication of your argument, or is
18 it - - -

19 MS. GORSKI: Well - - -

20 JUDGE CANNATARO: - - - something different?

21 MS. GORSKI: Well, no, I don't know if that's
22 necessarily the case that they were trying to gather as
23 much information as possible before the victims left the
24 scene. I think their testimony negates the argument that
25 this conversation occurred after medical treatment as

1 opposed to before and during.

2 JUDGE CANNATARO: Oh, so you're just saying the
3 timing is not what you might think.

4 MS. GORSKI: Correct. It was - - - it was not,
5 you know, thirty minutes, an hour, two hours later after
6 the victims are discharged from the hospital. This was
7 immediately.

8 JUDGE RIVERA: And if it was after medical
9 treatment, does that then fall outside your rules, so then
10 it wouldn't be within the emergency exception?

11 MS. GORSKI: Well, I think a good contrast is the
12 detectives at the hospital, right? Because now this has
13 been several hours after the incident, they're much farther
14 away from the crime scene, and the detectives, being
15 detectives, it's their job to investigate. These are not
16 the first responders trying to figure out what action needs
17 to be taken next.

18 JUDGE RIVERA: Although, if these are dangerous
19 individuals and they're still on the loose, I thought you'd
20 argue it's still an emergency.

21 MS. GORSKI: Well, the Supreme Court has held
22 that it's not going to be an ongoing emergency so long as
23 this individual is unapprehended. It's a totality of the
24 circumstances. So again, how long after the crime scene?
25 Is this a secure location? What is the purpose of their

1 interrogation? And as a detective, when you know that the
2 responding officers got enough information to be able to
3 take next steps, now you're coming in as a secondary and
4 trying to narrow down - - -

5 JUDGE RIVERA: But was he correct, if I
6 understood him - - - if I'm wrong, he'll correct me - - -
7 that the - - - the testimony from the officers is - - -
8 took the information and then put it in a report?

9 MS. GORSKI: I think the officer was speaking
10 very generally about the fact that, when there is no longer
11 a - - - a suspect on the scene - - -

12 JUDGE RIVERA: One - - - one would be surprised
13 that if, really, you did pass that on to others because
14 you're in the middle of an emergency, that you somehow
15 forgot to say that during the testimony.

16 MS. GORSKI: I don't think so because the
17 testimony was just setting up, in general, how a case ends
18 up in a detective's hands.

19 JUDGE RIVERA: Did they ever say it was an
20 emergency?

21 MS. GORSKI: They did not explicitly state that
22 they were responding to an emergency, but they did state
23 that their reasoning for bringing the victims up onto the
24 sidewalk was to get them prompt medical treatment, more
25 information, and to be able to locate the person that they

1 saw on the tracks.

2 CHIEF JUDGE WILSON: And was the report that was
3 used at the scene the one that was used to refresh the
4 officer's testimony at trial?

5 MS. GORSKI: It was used to refresh his
6 recollection. It was not admitted into evidence. It was
7 not marked for identification. The officer never testified
8 when exactly he filled it out, whether he filled it out as
9 he was speaking to the victims. He used it as a - - -
10 within a bunch of the police paperwork because it was his
11 job to complete all of that day's paperwork. So it not
12 only included the complaint report, but the record also
13 shows included memo books and aided cards.

14 JUDGE CANNATARO: Does that usually happen? Does
15 paperwork like a DD-5 or something like that get filled out
16 at the scene?

17 MS. GORSKI: I'm sure it depends on each
18 situation. But here, the detective - - - not the
19 detective, I'm sorry. The officer responded that after the
20 victims were transported to the hospital, as the recording
21 officer, he had no other responsibility besides to complete
22 paperwork, which he noted would complete - - - would
23 include the report.

24 JUDGE CANNATARO: There was no testimony - - - or
25 correct me if I'm wrong, it doesn't seem that there was any

1 testimony in the record about what he was writing when he
2 was collecting information at the scene.

3 MS. GORSKI: There - - -

4 JUDGE CANNATARO: Like, it could have been the
5 memo book, but it could have been something else, right?

6 MS. GORSKI: There was no testimony at all that
7 he was writing anything down.

8 JUDGE CANNATARO: Oh. So we know nothing about -
9 - - so the part about refreshing the recollection, we don't
10 know when that was created at all?

11 MS. GORSKI: No. But as I was saying, I think
12 the best inference to make based on his testimony is that
13 he had completed it after the victims had been - - -

14 JUDGE RIVERA: So he didn't testify he's taking
15 notes?

16 MS. GORSKI: No. He testified that all of the
17 testimony came out as the officer was refreshing his
18 recollection with his notes. But he did not testify that
19 he was actively taking notes at the scene. And if Your
20 Honors have no further questions, I rest on the brief.

21 CHIEF JUDGE WILSON: Thank you.

22 MS. GORSKI: Thank you.

23 MR. DEGER-SEN: Thank you, Your Honor. I think
24 that it was interesting to hear that the limit - - - the
25 limiting principle that we heard of the emergency exception

1 was - - - as far as I could understand it, was that the
2 person has to already be transported to the hospital. So
3 that, I think, underscores just sort of how frighteningly
4 broad the way in which the government is interpreting the
5 emergency exception here. And I think what that will mean
6 in practice is that, in any case, it would make sense for
7 the government simply to, you know, take a - - - take
8 information into this - - - into a complaint report and
9 then have your officers read that information into the
10 record. Because, of course, this was a witness who had
11 maybe drug problems, was falling asleep during the
12 interrogation. There's all kinds of stuff that was very
13 impeachable. This was a witness that wasn't going to be
14 very credible. And a prosecutor is always going to make
15 the decision that it makes a lot more sense to not produce
16 that witness for trial, and rather, have an officer read
17 that information into the record if - - -

18 JUDGE CANNATARO: So what would you propose as
19 the correct limiting principle for the emergency exception?

20 MR. DEGER-SEN: I think it's the one that the
21 Supreme Court has articulated in Bryant, which is that, as
22 a reasonable observer looking at all of the factors think
23 that the primary purpose is investigatory. And I think the
24 fact is, as we specify in our brief, like the timing - - -
25 the amount of time, like the movement from one place to

1 another, and you know, the note-taking, and it - - - we've
2 cited multiple places in our - - -

3 JUDGE CANNATARO: You would have to concede,
4 wouldn't you, that there could be a rather extended period
5 where the primary purpose is not investigatory, where it's
6 dealing with an ongoing emergency?

7 MR. DEGER-SEN: Absolutely. And as the Supreme
8 Court said, frequently, these situations evolve from one
9 thing to another and - - -

10 JUDGE CANNATARO: Yes, they change. But they - -
11 - they can be emergency for - - - you know, I'm - - - for
12 whatever reason, I'm thinking about the person who was
13 accused of shooting the CEO of United Healthcare, that
14 emergency seemed to go on and - - - from where I was
15 sitting, for days.

16 MR. DEGER-SEN: Right.

17 JUDGE CANNATARO: They were looking for someone,
18 and it was - - - everyone was afraid that people were
19 getting shot in the streets. So I'm just saying, there are
20 circumstances where the emergency is not abbreviated.

21 MR. DEGER-SEN: Correct, Your Honor. And that's
22 exactly why the presence of an emergency - - - the fact
23 there's an emergency happening, going on, is not the test.
24 The test is what is the interrogation about? So
25 absolutely, there can be an emergency going on. Anyone

1 would think that's an emergency. But you look at the
2 circumstance of the interrogation and you think, this is
3 the thing. Is it a cry for help? That's a narrow
4 exception. It's - - - this is a cry for help, or it's
5 something that will allow the officer to immediately end
6 the threatening situation. And this is not one of those
7 things because, you know, in - - - if you wait the amount
8 of time that they wait - - - and below, you know, they - -
9 - they know that there was, you know, potentially fourteen
10 to twenty minutes from the time the officers has arrived,
11 that's what they - - - that's at page 35 of their brief
12 below. That's what they said was the amount of time. If
13 you wait that amount of time, take him to a new place, and
14 you start taking notes - - - we cite places in the record
15 where they do take notes. They specifically say he was
16 taking a report. They've never disputed until right here
17 at oral argument that he was taking notes at the time. So
18 all of those things are factors that you consider - - -

19 JUDGE RIVERA: But when they get down to the
20 platform, again, as I mentioned before, they do see someone
21 running in that tunnel.

22 MR. DEGER-SEN: It - - - it - - -

23 JUDGE RIVERA: So they're still close in time to
24 the alleged perpetrator - - -

25 MR. DEGER-SEN: Well - - - and - - -

1 JUDGE RIVERA: - - - being nearby.

2 MR. DEGER-SEN: And we've never disputed that
3 those statements are nontestimonial. So the stuff - - -

4 JUDGE RIVERA: No. I understand that.

5 MR. DEGER-SEN: - - - that was said down there
6 was non-testimonial. This is almost like a - - - and going
7 back to my law school, you know, what is it? This is like
8 almost a 1L issue spotter, you know, you've got these
9 nontestimonial statements - - -

10 JUDGE RIVERA: No. I understand. But my point
11 about that is about the timing because you said all this
12 time had passed. But the reality is, when they arrive, it
13 appears that the perpetrator is still there, or still
14 nearby.

15 MR. DEGER-SEN: The - - - yeah. The - - - they
16 arrive a few minutes. So I think it's the 911 call was at
17 3:18. You know, it's - - - they arrive by 3:25. The
18 perpetrator is still there. But then in the brief below,
19 they say there's another fourteen to twenty minutes. And
20 that's - - - and the relevant statements, the ones where
21 they go above ground, medical attention comes, they're
22 waiting all this time, no reasonable person thinks, oh,
23 yeah, there's an ongoing emergency. Something really
24 dramatic is happening right now. And you wait fourteen to
25 twenty minutes. That's not a normal - - -

1 JUDGE RIVERA: So she disputes, I think, this
2 timeline that you're now arguing about when the medical
3 attention was provided and when the questioning was
4 conducted.

5 MR. DEGER-SEN: Well, I'm - - - except for their
6 brief below, and they've never suggested otherwise, is that
7 the medical - - - the questioning only begins after medical
8 attention begins. That's at 3:32. Even if it's 3:32,
9 that's still seven minutes from when the officers arrive.
10 In their brief below, they said fourteen to twenty minutes.
11 They've now gone back on that. And then the only testimony
12 about timing is - - - the question is after - - - you know,
13 after the EMTs arrive, you know, what did you say? And
14 that's - - - so it seems like it has to at least be after
15 3:22. So the timeline, you know - - - the key point about
16 it, though, isn't fourteen versus seven. It's, it was not
17 immediate. It wasn't the stuff on the subway platform. It
18 was the stuff above ground after they moved location and
19 after they started taking notes. I just have a couple of
20 things to say on remedy on waiver, but I'm happy to rest if
21 you guys - - - if the bench is tired.

22 JUDGE RIVERA: Can you just quickly address this
23 issue raised, again, by your friend on the other side, that
24 it - - - it was a motion based on insufficiency, whether or
25 not - - - as I asked her, does it matter that the relief

1 requested may not have been adequate or appropriate to a
2 Confrontation Clause claim?

3 MR. DEGER-SEN: No. Because I think just - - -
4 just as with the substance of you don't have to say
5 Confrontation Clause, you know, in the same way, you don't
6 necessarily have to say motion for exclusion. If you say
7 motion for sufficiency and then the substance of it is,
8 it's insufficient because this evidence was - - - is stuff
9 that I should have been able to cross-examine as, I think,
10 the colloquy you had with the other side explains, there's
11 no - - - there's no way of understanding the substance of
12 what he was saying as anything other than, I was deprived
13 of my ability to impeach this person. The jury is now
14 going to get the wrong impression, and that's the sense in
15 which it's insufficient. It's insufficient because you got
16 to subtract the impermissible stuff, not that the
17 impermissible stuff, you know, without my impeachment is
18 not persuasive, and the jury couldn't possibly believe it.

19 JUDGE CANNATARO: But isn't the way to subtract
20 the impermissible stuff to strike it?

21 MR. DEGER-SEN: Yeah. And that is - - - I think
22 what he's saying is, that's kind of what has to happen
23 here. You've got to disregard it, Judge, because that's
24 impermissible. So don't look at that anymore. And - - -

25 JUDGE CANNATARO: So it's a motion to strike the

1 testimony of the witness by implication?

2 MR. DEGER-SEN: No. No. He's - - - it's a
3 motion for sufficiency. He's saying that evidence is all a
4 Confrontation Clause violation, so that can't come in to
5 the jury's thinking. And the - - - and when you look at
6 the rest of it, it's insufficient.

7 JUDGE GARCIA: Except that there is a colloquy
8 after he says, I didn't have a chance to cross. And he - -
9 - the judge says, it doesn't matter if the evidence is
10 lousy or not. He says - - - the judge says, you know, is
11 it sufficient? It's not whether it's lousy or not.
12 Anything further on that? And the defense counsel says,
13 okay. So I tend to agree there were photos, and he's
14 talking about all the things that are in, and the police
15 officers say her nose was bleeding from whom - - - who hit
16 her. It's very difficult for the People to make out a case
17 when the complaining witnesses do not come to testify.
18 That's an incomplete picture. And in the flow of that
19 colloquy, after the judge says, it's not evidence that's
20 lousy or not lousy, it's they get every inference. What do
21 you got? The defense counsel starts laying out, well,
22 here's what's there.

23 MR. DEGER-SEN: Yeah. He's - - - he - - -

24 JUDGE GARCIA: I mean, at that point - - -

25 MR. DEGER-SEN: He - - -

1 JUDGE GARCIA: - - - it seems pretty obvious that
2 the defense counsel is making on this record, it's just not
3 sufficient, not you have to take this part out.

4 MR. DEGER-SEN: Well - - -

5 JUDGE GARCIA: And then it's not sufficient.

6 MR. DEGER-SEN: - - - he's saying both things.
7 He's - - - I think, exactly, as he's saying, look, this is
8 the evidence. There's not much evidence. Look, there's
9 not much evidence. And then he goes back and says, it's
10 very difficult to make out a case without a complaining
11 witness. It's going to give a, quote, "incomplete
12 picture." And then he - - -

13 JUDGE GARCIA: But it's not he goes back, it's
14 all part of that one statement to the court about - - -

15 MR. DEGER-SEN: Yeah.

16 JUDGE GARCIA: - - - why this record isn't lousy.
17 It's, you know, why, if you accept it and you give every
18 inference, it's not enough.

19 MR. DEGER-SEN: Well, no, because he says, I
20 think it's going to give an incomplete picture. And he's
21 saying, because he - - - he can't cross-examine that
22 person. So that - - - that's the part that - - - it is - -
23 - it's - - - I'm not saying it's not a little jumbled.
24 Now, obviously - - -

25 JUDGE CANNATARO: Okay.

1 MR. DEGER-SEN: - - - it's - - - you know, it's -
2 - - we - - - but we don't - - - this is why it's substance
3 over form. You know, these are - - - you know, defense
4 attorneys have lots of cases. These are high pressure
5 situations. Sometimes they don't speak with perfect
6 clarity. You know, waiver is an incredibly harsh remedy,
7 as this court has recognized. And in Garcia, it was way
8 less - - -

9 JUDGE GARCIA: Although, it's preservation,
10 right? So if the judge is saying - - - basically
11 indicating, here's how I'm taking what you're saying, it's
12 not lousy or not lousy. It's this standard. What have you
13 got?

14 MR. DEGER-SEN: But it makes sense in context
15 because what he's saying is, look, this - - - all this
16 other evidence is insufficient. And then when he discusses
17 the government's evidence - - - the witnesses, what he's
18 saying about them is not - - - you know, those guys just
19 weren't credible. And if he'd said that - - - if he had
20 said, you know, no one could possibly believe that, that
21 wasn't credible. He's - - - he never says that. What he
22 says is, I should have had the chance to impeach them. I
23 should have had the - - - I should have had the chance to
24 bring Violando in and elicit more testimony. And so that's
25 the part - - - that's where the government's case is

1 breaking down because they're relying so much on this
2 thing, and I never had an opportunity. And I think the
3 government's theory in this case is basically, if he said a
4 whole heck of a lot less, you know, maybe he would have
5 been able to preserve it, you know, but because Garcia is a
6 whole heck of a lot less. You know, they say that Garcia -
7 - -

8 JUDGE GARCIA: But you keep comparing that and
9 saying it's a whole lot less, it's a whole lot more. And
10 to me, it seems like you look at what is the context, what
11 was said? So it may be less in one situation where the
12 context is clear, and it may be more in a con - - - where
13 it's totally confusing and you can't make out what the
14 objection is. So I find - - - I have a hard time following
15 that. You know, oh, in Garcia, they said X, so that's
16 enough. Garcia is a motion to strike. So maybe X is
17 enough there. Here we have a colloquy on sufficiency.
18 What's enough to raise this particular issue here?

19 MR. DEGER-SEN: Yeah. And I think - - - it's - -
20 - as the government argued in Garcia, it's not clear, when
21 we don't have the witness here, exactly what that's
22 referring to. This court said it was enough. They - - -
23 they described - - - they said, oh, the key thing is that,
24 in the charge conference, he then reiterated again that
25 objection. That's not true. In Garcia, at the charge

1 conference, he made a hearsay objection. And that, if you
2 go to look at the record in Garcia, we looked this up at A-
3 20 to 20 - - - at - - - at A-120 to - - - -

4 JUDGE GARCIA: But I think the point - - -

5 MR. DEGER-SEN: - - - 121.

6 JUDGE GARCIA: - - - I - - - Counsel, is - - -
7 that I'm just trying to make here with you is, it really
8 depends on what is the context of the back and forth, the
9 colloquy with the court.

10 MR. DEGER-SEN: A hundred percent.

11 JUDGE GARCIA: - - - and what are the words that
12 have been used. So it's very hard to import specific
13 language from one and say, well, that was enough here.
14 It's enough here.

15 MR. DEGER-SEN: I - - -

16 JUDGE GARCIA: I take your point that that was
17 enough in that context, and it could be interpreted various
18 ways, but I think what we're left with here is what was
19 actually said and how can that - - -

20 MR. DEGER-SEN: I - - - I don't disagree with - -
21 -

22 JUDGE GARCIA: - - - reasonably be interpreted by
23 a judge.

24 MR. DEGER-SEN: I don't disagree with any of
25 that. I think what Garcia reflects is that we don't

1 elevate form over substance, that we do - - - we - - - that
2 - - - that this court has - - - you know, appreciates that
3 sometimes objections are not made in exactly the most
4 perfect way. But I completely agree, you have to look at
5 the substance of the colloquy. And I think after being
6 here for forty minutes, I think the key thing is you look
7 at the substance of that colloquy, it is impossible to
8 understand how that makes sense as a sufficiency objection
9 in the way the government is describing it. It doesn't
10 make any sense as a sufficiency objection that way. It
11 only makes sense as a Confrontation Clause objection, and
12 that should be enough. And - - -

13 CHIEF JUDGE WILSON: Thank you.

14 MR. DEGER-SEN: Thank you. Well, I ask one last
15 thing, which is, if the court - - - court has any questions
16 on the jury issue, I'm happy to answer them just to give
17 you the opportunity to ask questions, but I'm not going to
18 force you to stay. Thank you.

19 (Court is adjourned)

20
21
22
23
24
25

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, Brandon Deshawn, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Zavearr Bacon, No. 60 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Brandon Deshawn

Signature: _____

Agency Name: eScribers

Address of Agency: 7227 North 16th Street
Suite 207
Phoenix, AZ 85020

Date: May 21, 2025

