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COURT OF APPEALS  
STATE OF NEW YORK

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THE PEOPLE OF THE STATE OF NEW YORK,  
  
Respondent,

-against-

SAMUEL J. SMITH,  
  
Appellant.

No. 44

-----

20 Eagle Street  
Albany, New York  
May 2, 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:

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Official Court Transcriber



1 CHIEF JUDGE DIFIORE: The next appeal on the  
2 calendar is appeal number 44, the People of the State of  
3 New York v. Samuel J. Smith.

4 CHIEF JUDGE DIFIORE: Good afternoon, counsel.

5 MR. DUBRIN: Good afternoon. Two minutes for  
6 rebuttal, please.

7 CHIEF JUDGE DIFIORE: Yes.

8 MR. DUBRIN: Drew DuBrin for the appellant,  
9 Samuel Smith.

10 The seminal case of People v. Gonzalez set forth  
11 not only what must be shown for a missing witness charge  
12 but also how that showing must be made. It is the "how"  
13 which is the issue in this appeal, the burden-shifting  
14 framework.

15 JUDGE FEINMAN: So before you go any further on  
16 that, are the arguments that you're making about who bears  
17 the initial burden actually preserved in front of the  
18 Supreme Court at the trial level?

19 MR. DUBRIN: There was no objection as to the - -  
20 - the issue as to who bears the burden was not raised.

21 JUDGE FEINMAN: It's not even discussed in front  
22 of the trial judge.

23 MR. DUBRIN: That wasn't discussed, and it's not  
24 clear what the court held as to who bears that burden. But  
25 there was no objection by defense counsel - - -



1 JUDGE FEINMAN: So let us - - -

2 MR. DUBRIN: But I would - - -

3 JUDGE FEINMAN: If we agree then that the People  
4 have - - - we agree with you, if we do, that the People  
5 have the initial burden, what is the appropriate corrective  
6 action then? Do we send it back to the Appellate Division,  
7 or do we have to send it back to the Supreme Court? What -  
8 - - what do we do?

9 MR. DUBRIN: If you agree that the People have -  
10 - - have that burden, and - - - and I would submit that's  
11 the case, then the appropriate remedy for this - - - for  
12 this court would be to reverse the order of the Appellate  
13 Division because the People would not have met that burden  
14 as a matter of law. The - - - where the burden lies I  
15 don't think is - - - is an issue that - - - that we would  
16 expect to be preserved or objected to by - - - by either  
17 party. The arguments are typically made, and they're  
18 addressed by the court.

19 So since the People here seem to concede that  
20 they did not meet that burden, and if you would indeed  
21 agree that the burden rests on their shoulders, then the  
22 appropriate remedy would be for this court to reverse the  
23 order of the Appellate Division and order a new trial.

24 It should go without saying that Gonzalez meant  
25 exactly what it said when it set forth its burden-shifting



1 framework, that the requesting party has the initial burden  
2 of establishing materiality and favorability and that's it.  
3 Gonzalez did not inadvertently omit - - - omit an  
4 additional prima facie showing of noncumulateness. We  
5 know this because the Gonzalez decision itself set forth  
6 the burden-shifting framework precisely this way, not just  
7 once but three times. And this court, in a series of  
8 cases, have - - - have placed the initial burden with  
9 respect to the question of cumulative squarely on the  
10 shoulders of the opposing party.

11 The only way in which the entire text of Gonzalez  
12 can be harmonized without ignoring the burden-shifting  
13 framework language completely is by reading it - - - it as  
14 first setting forth the pre-conditions for a missing  
15 witness charge, what must be shown, and then setting forth  
16 the burden-shifting framework which is how those pre-  
17 conditions are to be met.

18 To say that the pre-conditions and the burden-  
19 shifting framework are one and the same, as the Appellate  
20 Division did here, would render superfluous the language  
21 setting forth the burden-shifting framework. And this  
22 court's proclamations aren't typically intended to be  
23 construed as superfluous, particularly where they're  
24 repeated over time and they're a basis of future holdings,  
25 as the burden-shifting framework has been in Macana, in



1           Kitching, Keen, Fields, and in Gonzalez itself. It makes  
2           perfect sense that this court, in Gonzalez, would place the  
3           initial burden with respect to the questions of  
4           cumulativity on the opposing party.

5                    JUDGE GARCIA: Counsel, one of the problems, it  
6           seems to me, in this case is the lack of any record, right?  
7           I mean, it seems that there was some off-the-record  
8           discussion here, if I have this right, and then they put  
9           something on the record, right?

10                   So I guess, going back to Judge Feinman's case,  
11           if you - - - it seems to me if you look at this record,  
12           there's really no support, there's really no discussion of  
13           the cumulative standard. So in that sense, if you look at  
14           it that way, the burden becomes very important, right?  
15           Because if there's nothing on the record either way, and  
16           the People have the burden, if you're right, then the  
17           record's insufficient here to support - - - then the record  
18           supported giving the missing witness charge here and it  
19           wasn't given, right?

20                   MR. DUBRIN: If the People bear the burden and -  
21           - - and you're correct, in Gonzalez, this court said that  
22           it's incumbent on the parties to make their positions clear  
23           and to develop the record support. And the People here are  
24           to shoulder that burden. And they made no argument with -  
25           - - as to why the testimony of Dees would be cumulative.



1 They instead said that the burden - - - that the defense  
2 had not shown that Dees would testify any differently than  
3 Bullock, the one eyewitness called to testify, which is  
4 beside the - - - beside the point.

5 Furthermore, as this court said, importantly, in  
6 People v. Chester Thomas, it is - - - you - - - you can  
7 hardly expect that the requesting party know what the  
8 uncalled witness knows and to make an argument specifically  
9 as to what - - -

10 JUDGE GARCIA: I understand. I understand - - -

11 MR. DUBRIN: - - - the uncalled witness would  
12 testify to.

13 JUDGE GARCIA: - - - that argument.

14 MR. DUBRIN: So it would - - -

15 JUDGE GARCIA: But going back just for a second  
16 to what you just said on cumulative, and you know, we can  
17 assume now, for just our discussion here, it's - - - it's  
18 the People's burden, and they come forward and they say:  
19 we had one eyewitness; this is just another eyewitness. In  
20 your view, that's not enough, right?

21 MR. DUBRIN: That's not enough to - - - to - - -  
22 to defeat a missing witness charge or to - - - to meet the  
23 burden - - -

24 JUDGE GARCIA: What if it was two witnesses  
25 testified and you had a third; is that enough?



1 MR. DUBRIN: To defeat a missing witness charge  
2 for a finding that it's not cumulative, not - - - not  
3 likely, unless the testimony of the second - - - the second  
4 eyewitness was so strong that a jury would not reasonably  
5 expect to hear from the uncalled witness.

6 JUDGE FAHEY: So let me ask this. Is it not - -  
7 - is it because a witness, Bullock, the lady who was shot,  
8 is it - - - is it your argument because her testimony was  
9 so weak or - - - because certainly one eyewitness could be  
10 enough; there are situations where that could happen. You  
11 would concede that?

12 MR. DUBRIN: If identification wasn't an issue -  
13 - - it wasn't vigorously contested then - - - then of  
14 course there would be no need. A jury wouldn't expect to  
15 hear from a second, a third, fourth - - -

16 JUDGE FAHEY: I guess the problem I have is this  
17 is that, is a judge, when making a determination on whether  
18 or not the testimony of a second eyewitness would be  
19 cumulative, making a ruling at that point on the - - - the  
20 weight or the legal sufficiency of that initial eyewitness?  
21 Would a judge be required to do that?

22 MR. DUBRIN: The judge would have to make an  
23 assessment of whether or not a jury would reasonably expect  
24 to hear from another - - - a second eyewitness.

25 JUDGE FAHEY: I'm assuming that you're right that



1 the People have the initial burden. So they come forward  
2 and they say, okay, Bullock testified; that's enough.

3 MR. DUBRIN: Yeah. Yeah.

4 JUDGE FAHEY: And you say that's not enough as a  
5 matter of law. That's a more difficult call.

6 MR. DUBRIN: Well, the - - -

7 JUDGE FAHEY: Do you understand my question?

8 MR. DUBRIN: Your - - - I think I understand your  
9 question.

10 JUDGE FAHEY: Okay. All right.

11 MR. DUBRIN: And I think - - - I think that, in a  
12 circumstance like this, where you have a single eyewitness  
13 that suffered, and her eyewitness testimony suffered from  
14 significant infirmity, a jury would reasonably expect to  
15 hear from another eyewitness. So under - - -

16 JUDGE WILSON: And does the nature of the other  
17 eyewitness', you know, chance to observe, location,  
18 faculties, so on, bear on that? I mean, here it's somebody  
19 who was right at the scene, yes?

20 MR. DUBRIN: Absolutely. And the People don't  
21 contest that Dees was not knowledgeable about a material  
22 issue. And in fact, to get back to your question, Judge -  
23 - - Judge Garcia, defense counsel did point out that Dees  
24 was the first person to see the shooter, push - - -

25 JUDGE GARCIA: Also may have known the shooter,





1 right? Wasn't that an argument that Dees may have seen the  
2 shooter in a car or - - -

3 MR. DUBRIN: That knew - - -

4 JUDGE GARCIA: - - - in the car earlier, right?

5 MR. DUBRIN: - - - knew the individuals he was -  
6 - - that the shooter was with, that he called out to the -  
7 - - the driver and said, boy, boy. So that - - - that  
8 indeed appears to be the case.

9 JUDGE GARCIA: I see.

10 CHIEF JUDGE DIFIORE: Thank you, counsel.

11 MR. DUBRIN: Thank you.

12 CHIEF JUDGE DIFIORE: Counsel?

13 MR. GROSS: Good afternoon. Dan Gross on behalf  
14 of the respondent, the Monroe County District Attorney's  
15 Office.

16 We're here today seeking clarification on the  
17 burden-shifting framework for Gonzalez; that is, which  
18 party bears the burden. To establish - - -

19 JUDGE FEINMAN: So I just want to clarify the  
20 same questions I had for your adversary.

21 MR. GROSS: Yes, Your Honor. This was clearly an  
22 afterthought. The request for a missing witness charge  
23 occurred after they had taken a break for the weekend. And  
24 I believe it was the judge who reminded counsel, oh, yeah,  
25 you wanted to request a missing witness charge; let's put



1 this on the record really quickly. And then it was denied,  
2 and they moved on. So yes, there was no discussion on the  
3 record about whose burden it was, and there wasn't much of  
4 a discussion at all about a missing witness charge.

5 JUDGE GARCIA: If we agree with your opponent and  
6 it's the People's burden here, do you lose?

7 MR. GROSS: Again, one of the problems is there  
8 wasn't much of a discussion. But no, I don't think  
9 necessarily that we would lose. The attorney in this case  
10 pointed out that there was nothing else in the record to  
11 indicate that Mr. Dees had a better opportunity to observe  
12 the shooter.

13 I - - - I understand Judge Fahey pointed out  
14 right at the end that, yes, he was there and he was in a  
15 position, and that's all that Kitching requires, but I  
16 would submit that that's - - - that goes to the materiality  
17 prong.

18 JUDGE STEIN: But what about the strength of the  
19 victim's - - - the female victim's identification? Doesn't  
20 that enter into the picture? I mean, you know - - - well,  
21 I mean, it could be a slam dunk; if it was my - - - you  
22 know, my brother. I obviously know who my brother is and,  
23 or - - - you know, so there's a whole spectrum of how  
24 credible or how strong the - - - her ID testimony might be.  
25 So the court can't consider that?



1 MR. GROSS: I think the court can consider that.  
2 And in Gonzalez this court made clear that the trial  
3 court's going to be in the best position to determine  
4 whether something is going to be cumulative. And here,  
5 although this was a single witness ID, on its face, and  
6 that charge was read, in addition to that we have the  
7 surveillance footage from nearby, we have the 911 caller  
8 who sees the shooter run away from the scene. And then we  
9 have Mr. Lewis, who accompanies a person - - -

10 JUDGE RIVERA: Yeah, but the People in the store  
11 are not able to ID him, so the circumstantial evidence is  
12 particularly problematic too, I think.

13 MR. GROSS: I understand that argument, Your  
14 Honor. But I would point out that Ms. Bullock was able to  
15 identify the person depicted as the defendant, in the  
16 surveillance footage, as her shooter. I think the quality,  
17 which was sent along to the court, was very strong.

18 In addition to that, there's - - - there's no  
19 claim that her - - - her testimony wasn't credible.  
20 There's no weight argument alleged here at the Fourth  
21 Department or - - -

22 JUDGE RIVERA: But she is in a position, given -  
23 - - given the circumstances, that you've got, sort of, all  
24 of that indicia of eyewitness testimony that's particularly  
25 problematic, right? It's a stranger. It's a gun. It's a



1 shooting. She is actually shot. It's a very brief  
2 observation of the person.

3 MR. GROSS: Yes, I do understand that point. But  
4 - - - but again, I - - - I think her testimony wasn't as -  
5 - - although she was cross-examined on the point, she did  
6 give strong testimony that although I - - - I could only  
7 give a general description in the hospital, once I was  
8 moved to the ICU, I recognized his face the entire time.  
9 And then she was able to supplant that identification with  
10 her viewing of the surveillance footage with which they  
11 were then able to develop an identity.

12 JUDGE FAHEY: It seemed - - - there seemed to be  
13 more ambiguity in that. The way I got it is immediately  
14 after the shooting she told the police she couldn't ID him,  
15 and then - - - and that's - - - and then she says at trial  
16 she couldn't ID him by name but by face. But that's not  
17 what she told the police, was it?

18 MR. GROSS: I believe the testimony that was  
19 elicited at trial, from the police officer who met with her  
20 in the hospital shortly thereafter, was that she was able  
21 to give a general description.

22 JUDGE FAHEY: I see.

23 MR. GROSS: Keep in mind the circumstance where  
24 she had just been shot and it was - - -

25 JUDGE FAHEY: Sure, of course. And she was - - -



1 MR. GROSS: - - - bleeding out - - -

2 JUDGE FAHEY: She was a pregnant lady who had  
3 been shot; it is very serious.

4 MR. GROSS: - - - had to be moved - - -

5 JUDGE FAHEY: Sure.

6 MR. GROSS: - - - to the ICU.

7 JUDGE FAHEY: You're absolutely right about that.

8 JUDGE FEINMAN: So I just want to go back for one  
9 last second to clarify. If we would agree with your  
10 adversary about who has the burden, and - - - and we  
11 clarify that and basically say all four Appellate Divisions  
12 have been getting this wrong, so if we do that, do we remit  
13 back to the Appellate Division to apply the correct burden,  
14 or do we order a new trial? What's your position?

15 MR. GROSS: Well, between those two alternatives,  
16 remit it to the Appellate Division for a new determination  
17 because the majority - - -

18 JUDGE FEINMAN: And why is that the appropriate  
19 corrective action?

20 MR. GROSS: Because the majority applied what  
21 this court would consider to be the wrong standard in - - -

22 JUDGE STEIN: Why can't we apply that standard to  
23 the record?

24 MR. GROSS: Well, I - - - I suppose this court  
25 could - - - could say the Appellate Division got it wrong



1 and send it back for a new - - - a new - - - a new trial,  
2 which I understand - - -

3 JUDGE STEIN: And if we - - - if - - - again, if  
4 we were to conclude that it was error not to give the  
5 charge, why - - - on what basis would it be harmless error?

6 MR. GROSS: Well, as I was discussing, I  
7 understand that she was cross-examined on identification,  
8 but I don't believe - - - she was a compromised witness,  
9 and her identification of the shooter was the defendant, he  
10 looked at me, he smiled, and then he pulled the trigger,  
11 was supplemented by, again, a strong chain of  
12 circumstantial evidence that Judge Rivera pointed out.  
13 There was the 911 call.

14 JUDGE STEIN: And it's your argument that that's  
15 overwhelming?

16 MR. GROSS: In the - - - yes, it is my argument  
17 that this would be overwhelming in this case. In these  
18 types of case - - - and as a - - - as the panel pointed  
19 out, the Appellate Division has been interpreting this rule  
20 the same way for thirty years and has been putting the  
21 burden on the party request - - - not just the defense  
22 counsel but whoever is requesting the missing - - -

23 JUDGE STEIN: I don't know if I agree with you  
24 about that. I think some Appellate Division departments  
25 have, and some have inconsistently, but I'm not sure it's -



1 - -

2 MR. GROSS: Well, I think - - -

3 JUDGE STEIN: - - - quite as absolute as - - -

4 MR. GROSS: I think even the dissent in this case  
5 pointed out that - - -

6 JUDGE STEIN: Well, there's certainly a fair  
7 amount of - - - of case law doing that. But I think that  
8 could be because maybe we've gotten a little lax in how we  
9 describe the burden over the years.

10 MR. GROSS: Well, then this court would  
11 essentially be announcing a new rule, and we would have - -  
12 -

13 JUDGE STEIN: No. No change from Gonzalez. See,  
14 the way I see Gonzalez is is that you - - - and I think  
15 this was - - - was described earlier. But Gonzalez says  
16 this is what - - - what needs to be proven, overall, to  
17 entitle a judge or to make it not an abuse of discretion to  
18 - - - to have a - - - a missing witness charge.

19 But then the court goes on, in Gonzalez, to say:  
20 and here's first - - - first the proponent has to prove  
21 this, and then when the proponent has done that, then it  
22 shifts to the opponent to - - - to do this. And that's  
23 where, you know, the cumulative aspect comes into it.

24 So I don't see any other way to read - - - read  
25 Gonzalez. And I don't see any case that's actually changed



1 that, other than perhaps lopping off the second part, which  
2 is the burden-shifting part, and just saying this is what  
3 you have to prove to get - - - to get the - - -

4 MR. GROSS: Correct, and - - -

5 JUDGE STEIN: - - - to get the - - - the charge.

6 MR. GROSS: I understand that interpretation of  
7 Gonzalez, but I - - - I would point to Edwards where,  
8 albeit it was a short case and pretty much a memorandum  
9 decision - - -

10 JUDGE STEIN: Have you ever - - - can you point  
11 to any case in which we've made a complete change in the  
12 law without saying we're changing the law?

13 MR. GROSS: Well, it's - - - as you said, it's  
14 been different reiterations of the overall burden that  
15 needed to - - - needed to be shown. And in - - - it hasn't  
16 been the case where that burden-shifting framework had been  
17 recounted for - - - for the parties in each decision that  
18 this court has come out - - -

19 JUDGE STEIN: So but if we say it, wouldn't we  
20 just be recounting it rather than making new law?

21 MR. GROSS: No, again, I don't believe so. I  
22 believe that the way this has been interpreted by the  
23 courts below, who I would say see missing witness arguments  
24 fairly frequently, has placed the burden on the party that  
25 is seeking the missing witness charge to show that it would





1 be, presumably, noncumulative.

2 So again, I do have concern about this court  
3 clarifying in that manner because I believe we're going to  
4 see a lot more missing witness arguments, parties are going  
5 to feel more compelled to call more redundant witnesses. I  
6 think the easiest hypothetical to bring forward is - - -

7 JUDGE FEINMAN: Well, I mean, here the charge  
8 actually could have been easily defeated if the prosecutor  
9 had just said he's not under our control.

10 MR. GROSS: Well, you're right.

11 JUDGE FEINMAN: But that's a different case.  
12 That's not what was argued here.

13 MR. GROSS: That is true, and if I could just  
14 speak to that point, Your Honor. The favorability  
15 component, even assuming that the cumulative burden is on  
16 the party opposing the missing witness charge, if there is  
17 just materiality and favorability, favorability wasn't  
18 reached in this case because there's nothing in the record  
19 to show that Mr. Dees would have been under the  
20 prosecution's control.

21 CHIEF JUDGE DIFIORE: Thank you, Mr. Gross.

22 MR. GROSS: Thank you.

23 CHIEF JUDGE DIFIORE: Counsel?

24 MR. DUBRIN: If I could just address the last  
25 point there. People did not contend below that Dees was



1 not under their control, and for good reason: Dees was a  
2 victim of the shooting. And you would expect a victim to  
3 testify favorably for the prosecution.

4 And if I could just take a moment to comment on  
5 the strength of the People's proof of - - -

6 JUDGE RIVERA: I thought he was cooperating with  
7 them. Am I wrong about that?

8 MR. DUBRIN: He - - - he cooperated with the  
9 police, he responded. And that's further reason to expect  
10 that he would testify favorably for the prosecution. And  
11 so given that his relationship to the prosecution, as a  
12 victim and a cooperate - - - initial cooperator with the  
13 police, you would expect him to testify favorably for the  
14 prosecution.

15 And if I could just touch on the strength of the  
16 People's case, I - - - I - - - I don't see it as strong,  
17 especially if you don't view the evidence in a light most  
18 favorable to the People. There were - - - defense was able  
19 to point to many reasons to doubt the credibility and  
20 accuracy of - - - of Bullock's - - - eyewitness  
21 identification.

22 As you pointed out, Judge Fahey, she initially  
23 told police that she would not be able to identify the  
24 shooter in the case. Her observations were made quickly  
25 and from a distance. Her description of the shooter was



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extremely vague, no description at all about physical - - -  
characteristics: race, gender, height, size, et cetera.

The shooter was - - - as you point out, Judge  
Rivera, was - - - was a stranger. And Bullock demonstrated  
a significant cognitive impairment. She got confused over  
direction, left versus right, and distance, five feet  
versus across the street.

So under those circumstances, a jury would  
certainly reasonably expect to hear from the only other  
eyewitness.

Thank you.

CHIEF JUDGE DIFIORE: Thank you, counsel.

(Court is adjourned)



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

I, Sharona Shapiro, certify that the foregoing transcript of proceedings in the court of Appeals of People of the State of New York v. Samuel J. Smith, No. 44, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

*Sharona Shapiro*

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