COURT OF APPEALS

STATE OF NEW YORK

PEOPLE,

Appellant,

-against-

No. 25

KEITH JOHNSON,

Respondent.

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

Before:

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

Appearances:

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Official Court Transcriber

CHIEF JUDGE DIFIORE: Next on the calendar is number 25, People v. Keith Johnson.

Good afternoon, Counsel.

MR. CHAMOY: May it please the Court - - -

CHIEF JUDGE DIFIORE: Do you wish to reserve any rebuttal time, sir?

MR. CHAMOY: Yes, Your Honor. Three minutes, please.

CHIEF JUDGE DIFIORE: Very well.

MR. CHAMOY: Good afternoon. Noah Chamoy for the Bronx District Attorney Darcel Clark.

CHIEF JUDGE DIFIORE: Thank you.

MR. CHAMOY: Your Honors, the Appellate Division incorrectly applied the Bruton standard. Bruton applies to facially incriminating confessions of a non-testifying co-defendant, or at the most, powerfully incriminating extrajudicial statements that are equivalent to such confessions.

That's not what we have here. In fact, the majority opinion, even though they've reversed, found that the grand jury testimony in this case was intended as an innocent explanation of the events surrounding the alleged robbery and admitted no wrongdoing for either defendant. And on its face, the analysis should have ended there.

The problem is the Court went further. It is not officially incriminating confession, it does not point the accusative finger at Keith Johnson, but the Court went further and found incriminating inferences. It did so by linking its analysis to trial testimony, because there was no testimony in Rushing's grand jury testimony that there was any discussion outside the vehicle with the undercover officer. That was actually created by the Appellate Division; as part of its analysis, said there was an inference that there was.

In fact, Rushing's testimony said that Mr. Johnson exited the vehicle, went, got food, came back, and then someone else said they came up to the vehicle. And from that point, the testimony has no bearing and no connection to what actually happened regarding the robbery. And that's the most important part, is that the Appellate Division's decision addressed the wrong part of the statement which is - - -

JUDGE FAHEY: Though - - - you might be right about the logic of the decision as to inferential evidence as opposed to facially incriminating. Maybe that part - - - that's - - - I think you have an arguable point. What I'm worried

about, though, is as if the co-defendant Rushing, who makes grand jury testimony, says that he's got the buy money on him in the grand jury testimony, isn't that facially incriminating as to an element of crime? They're charged acting in concert, right?

MR. CHAMOY: Correct, Your Honor.

JUDGE FAHEY: So if they're acting in concert, then isn't that facially incriminating in and of itself? He's got the buy money on him.

MR. CHAMOY: No, Your Honor, for a number of reasons.

JUDGE FAHEY: Okay. Go ahead.

MR. CHAMOY: First he provided an innocent explanation for the buy money being on him.

JUDGE FAHEY: Well, that's a credibility question; that doesn't mean that the - - - I didn't say it was a proof beyond a reasonable doubt. You don't have to do that. The question is, is it incriminating?

MR. CHAMOY: Correct. The second reason is because it's a question whether or not it's incriminating as to the co-defendant Rushing - - -

JUDGE FAHEY: Uh-huh.

MR. CHAMOY: - - - or incriminating as to the defendant.

JUDGE FAHEY: But they're acting in concert; it's going to be incriminating to both of them, right?

MR. CHAMOY: That's not true. Mere presence in the vehicle - - - and this Court has held as much - - - mere presence is not sufficient to hold him accountable. And that's all that we have here, is - - - we have the presence of the co-defendant and the defendant in the vehicle, and the co-defendant is saying, I took the money.

Now, it's essential to look at the statement as far as what happened inside the vehicle. Because what happened inside the vehicle was someone comes up saying, where's the stuff, and holding money on him. And at that point, defendant did not - - - and these are the words - - - say anything at all. And co-defendant said noting either to this individual.

Instead, the co-defendant simply pulls off, the money drops, and then shots are fired. That's an entirely exculpatory statement. Under Gray, if this was the first thing introduced at trial, acquittal would be the only option for the jury based on that statement.

CHIEF JUDGE DIFIORE: But doesn't that

grand jury statement completely support or dovetail with the People's narrative of the robbery, of the undercover?

MR. CHAMOY: It does, Your Honor, and in fact the co-defendant and the defendant utilized the statement on their summations because they believed it did as well. The fact that it does dovetail - - - the fact that it does link with the outside trial doesn't create a Bruton violation because - - - that's under Richardson v. Marsh - - - because the instruction is presumed to have sufficiently prevented the jury from crossing that line and utilizing that statement against both defendants.

And the exception that they crafted, which is a very narrow exception under Bruton and was further limited under Richardson, is that when you have a confession, when you have a statement that says, I did it and I did it with him, or a statement that says, I didn't do anything, he did it, and you have it coming in from a non-testifying co-defendant, you can't then ask the jury to hear that statement, assess the credibility of that witness, and decide whether that person is guilty or innocent who has made that statement, and then entirely ignore that statement as to the defendant himself, because they

call it mental gymnastics; it's an overwhelming task the jury cannot be expected to do.

But here, what you have is a statement that did the opposite. You have a statement where the jury was being asked ultimately to disregard all of the innocent explanations for which co-defendant Rushing gave for everything that they did. That - - - the prosecutor herself was saying, you can't trust this statement to the extent it's providing innocent explanations. This is not reliable; it is a false exculpatory statement. And that is a major distinction because a false - - -

JUDGE PIGOTT: Well, the Appellate Division seem to think that that statement allowed the jury to speculate that it was your client that set up the buy that went wrong.

MR. CHAMOY: Not my client, Your Honor.

JUDGE PIGOTT: I'm sorry, you were - - - I got you - - - I'm so used to you being over here.

MR. CHAMOY: I know, Your Honor. It's an interesting inference that they made given that the opposite inference seems to have been made by the defense attorney below when the statement was first brought up as potentially being introduced.

By that I mean this. When the statement

was first given over to the defense and the defense had a chance to read it, they only read part of the statement, okay. And I point Your Honors' attention to pages - - - appendix pages 140 to 141 especially. Okay. That part of the statement was, we were looking for a stolen vehicle, we stopped, he got out to get some food, he comes back, a guy comes up saying where's the stuff, reaching money out, I pull off, money drops in the car, and then I start hearing gunshots and my friend gets hit and says, you know, I'm hit, I'm hit.

Defense counsel actually had no objection to that statement coming in. It happens to match up precisely to what the Appellate Division majority felt was an incriminating inference. But at the time that statement was first introduced, at the time we sought to introduce it, defense counsel actually felt that it didn't have any incriminating inference, at least from the fact that he didn't object, but that he could use it for his defense.

It was only later when he finished reading the grand jury testimony and found one line which was co-defendant saying, I took the money and I put it in my pocket, that he objected and he said, Your Honors, I move for a severance; that is the proceeds of the

crime, it's incriminating. And on that basis alone - - - on that basis, he felt it violated Bruton.

So what we have is an incriminating inference being drawn by the Appellate Division that seemingly defense counsel below didn't even draw. So it's clearly that they relied on trial testimony, that that's ultimately what the Appellate Division did. They linked the trial testimony of the undercover against the rule that was set forth in Richardson v. Marsh, and based on that, they came to the conclusion that there was this incriminating inference.

JUDGE PIGOTT: If - - - if - - - if you were in the situation where there was a - - - there was a statement similar to this that placed the defendant at the scene of the crime or the incident, and his position was that he was not there, would - - - that's not - - - that's not an incriminating statement; it's just a statement that he was there. Are you saying it wouldn't apply, that you could bring that statement in no matter what?

MR. CHAMOY: So, Your Honor, it applies to powerfully incriminating extrajudicial statements. And one situation in which it would be powerfully incriminating is - - - perfect example actually, one

that I actually thought of as well - - - is if the defendant's position was an alibi, because the Court would know about that in advance - - - which is essential to Bruton analysis; you look at it at the time trial's starting, not mid-trial when you've already heard the testimony - - - you'd know there's a potential alibi and it's conflicting.

And here's where the distinction lies. In that situation, what you have is, again, a co-defendant's statement that now directly conflicts with the defendant's defense where the jury is going to be asked to sow this impossible line, where they have to look at that statement that places him there in attributing guilt to the co-defendant and then completely ignore it as to the defendant, which under Bruton would cause a problem.

I'm not saying it would, and I believe Schneble v. Florida itself is a Supreme Court case where something similar to that took place, where the defense theory was, I wasn't there at the time that the co-defendant actually committed the murder, was actually the defense, and that's what created the Bruton issue.

But that's not what we have here. What we have here is the defendant saying, I was there - - -

not only saying I was there, saying I was there before the People sought to introduce the grand jury testimony.

JUDGE PIGOTT: Well, he had to be, because he got shot, right?

MR. CHAMOY: Correct. He got shot by an undercover officer. The only issue presented at this trial was, why did the undercover officer shoot him. Was it because this was a robbery with a gun and the officer was responding, or was it because of some other defense reason? And to date, the only defense that's ever been suggested to support the defense theory is the one that was presented at trial and is supported by the co-defendant's grand jury testimony.

There's never been a suggestion of an alternate defense that was lost as a result to the co-defendant's grand jury testimony coming in, such as an alibi or equivalent.

JUDGE FAHEY: You had heard in the earlier case where some discussion of the Jass case, the Second Circuit's test. What do you think about us adopting that?

MR. CHAMOY: In terms - - - well, I wouldn't be able to answer that question offhand because I haven't read that case, but - - -

JUDGE FAHEY: That's all right. There's a two-prong test that they developed and it's - - - I think it speaks to the need for a bright-line rule on Bruton cases that is easy for courts to follow, and how about that question?

MR. CHAMOY: Well, in terms of bright-line rule, there is one. I mean, the linkage standard that Richardson v. Marsh sets forth has been applied by the federal circuits, and we cite to many cases in similar circumstances to here where the question becomes whether or not it independently will incriminate the defendant and go to their guilt when it comes in at trial immediately, even as the first item at trial, or whether or not it requires that link, whether some testimony comes out.

And I would ask Your Honors to look at United States v. Rubio, and a more recent case that we brought to the Court's attention; Chrysler v. Guiney, November 19th 2015, where it's footnote 14, and I know it's dicta, but it's useful to note that in that case, it was grand jury testimony, and the Second Circuit said it didn't violate any Bruton rule. You would have needed only an instruction, it would have been fine, because it was an extensive grand jury testimony, similar to here, and it

provided - - - identified the defendant repeatedly through it and actually described his motive behind the murder, it described the weapon used that the co-defendant said he possessed; there were a number of incriminating statements that if brought out at trial, were - - - would link and would create this incriminatory reference, but as a statement itself did not facially incriminate the defendant, and I believe that that is the standard. I mean, it is a bright-line rule, it's already established, and it's been utilized since now 1983 in the Second Circuit with success.

So there's another issue here, of course, which is the harmless error issue, which in this case there was overwhelming evidence. The fact that it was an undercover officer making the buy is not the only piece of evidence here.

I see that my time is up; may I briefly address the officer?

CHIEF JUDGE DIFIORE: Finish.

MR. CHAMOY: Okay. In fact, he had corroborating witnesses of the eyes and ears of his field team; the gun and the buy money were recovered shortly thereafter; of course, the defense could see their presence there and being shot; but in addition,

you have the fact that this not equivalent to a confession, and as the verdict demonstrates, the defendant's guilt was based on his possession of the imitation gun. Most of all, that was their focus, his possession of the gun which the statement said didn't exist - - - the co-defendant here said it didn't exist - - - formed the basis for this defendant's guilt.

CHIEF JUDGE DIFIORE: Thank you, counsel.

MR. CHAMOY: Thank you.

MR. KLEM: Good afternoon, Your Honors.

CHIEF JUDGE DIFIORE: Good afternoon.

MR. KLEM: David Klem for Respondent Keith Johnson.

To start, the Appellate Division's finding in this case, that Rushing's grand jury testimony facially incriminated Mr. Johnson, presents a mixed fact and legal finding that should not be reviewed by this court. Reasonable minds may differ as to the inferences that can be drawn from that testimony, and therefore under this Court's ruling in Harrison, that is exempt from review. But - - -

JUDGE STEIN: But - - - but isn't the question of whether it's facially criminating under Bruton a legal question?

MR. KLEM: It - - - it can be in certain circumstances. Here, where there is record support for finding that and there is certainly record support for finding that it's facially incriminating - - -

JUDGE STEIN: Well, it - - - my understanding of that - - - when it's a mixed question is when - - - when there is a finding of fact. But I guess what I'm saying is, isn't whether it's - - - it's facially incriminating a legal conclusion that is reached from the underlying facts?

MR. KLEM: In a situation like this where that legal conclusion rests as to the different inferences that may be drawn from the testimony that is so intertwined with the factual questions that it is - - -

JUDGE STEIN: Isn't that then - - - isn't that the - - - every - - - every case in which there's a Bruton question, wouldn't you be saying it's a mixed question?

MR. KLEM: No, I don't think so. Most cases there isn't any inferences or questions to be drawn. But let me turn to the merits.

JUDGE STEIN: Okay. Go ahead.

MR. KLEM: Turning to the merits, I think

it's quite clear what the bright-line test is. It's whether or not it's facially incriminating. And Rushing's statement was certainly facially incriminating. It placed the buy money in joint possession of my client; that's the proceeds of the robbery. It didn't merely do that. Rushing provided a bit of an explanation for how the proceeds of the robbery came to be in their joint possession. While he didn't put the gun in my client's hand, he corroborated every other aspect of the case.

JUDGE PIGOTT: Yeah, but there is some - - - they held that Rushing's testimony was facially incriminating as to the defendant even though it was intended as an innocent explanation of the events of the evening and admitted no wrongdoing, which seems like an oxymoronic sentence, but they explained and they say, placed the defendant with Rushing throughout the ordeal, naming the defendant forty times, but there was never an issue as to whether or not they were together, as I understand it.

And then they go on to say it recounted that the UC asked where the stuff was and dropped pre-recorded buy money into the car, again something that wasn't disputed, and then they said, the statement created an inference that the defendant,

while outside Rushing's vehicle, had set up a deal for sale of contraband that would culminate in the vehicle.

And that, to me, seems like quite a leap. I - - - I - - - it seemed to me they created an - - - something incriminating by an inference from what was in the statement which they admittedly say there's nothing incriminating about it.

MR. KLEM: A number of responses to that. Let me start by saying that Rushing's grand jury testimony was meant to exculpate Rushing.

JUDGE PIGOTT: Uh-huh.

MR. KLEM: It did not actually exculpate Mr. Johnson. In fact, Rushing said, oh, I don't know what Johnson was doing, I didn't see his interactions, I don't know what caused the undercover officer to thrust money in the car at us. And it was that clear inference that Johnson had done something that shows that it's facially incriminating.

And I would like to talk about the use of the Appellate Division of the word "inference". They're allowed to draw inferences. That's exactly what Gray case in the Supreme Court takes about. Gray explicitly said, we concede that they must - - - we must use inferences to connect the statement, and

yet in Gray, by drawing those inferences, they said that's facially incriminating. It's not that the use of inferences isn't allowed in a Bruton analysis; it is. It's the - - -

JUDGE STEIN: Like the differences that here, standing alone, there are no inferences from that statement to be created. In other words, those inferences only follow from other testimony that comes after that. Isn't that - - -

MR. KLEM: I - - - I disagree with Your Honor's premise. There's part that isn't an inference at all. The proceeds of the robbery are in joint possession; that alone end - - - should end the inquiry. That makes it facially incriminatory; that doesn't require any inference.

JUDGE PIGOTT: How does that do that, because he admitted he was there, right?

MR. KLEM: He admitted he was there, but the buy money being dropped in the car could certainly have been in dispute. It couldn't be in dispute after the admission of the statement, but the defense here was that these police officers were making up a story in order to justify a bad shooting of my client, where he was shot in the back while fleeing the scene.

JUDGE RIVERA: This isn't needed to be more to establish that acting in concert.

MR. KLEM: I'm sorry, I'm - - -

JUDGE RIVERA: I'm sorry, he argued that they need - - - you needed to show more for the acting in concert. Not just the buy money was in the car.

MR. KLEM: Sure, is the statement itself mandates conviction? That's not the standard. The standard is whether it's facially incriminating. Could be - - -

JUDGE FAHEY: What we're talking here is evidence, right? That's what we're talking about. So buy money is always going to be evidence in a drug transaction. So if somebody possesses buy money, it doesn't mean it's dispositive, it doesn't mean it's a conviction, but it means that they have evidence - - -

MR. KLEM: Yes. Absolutely.

JUDGE FAHEY: And so, the inference problem, maybe it was just an unfortunate use of the word, because the way I read facially incriminating, it means I can look at that particular piece of evidence and say - - - without reading anything else and say, well, that would be evidence that will go -

- - could go to an element of the crime.

An inference would mean that the statement itself may infer that there is evidence out there, but not that there is anything that directly connects to an element of the crime, and so they might have been unfortunately using that analysis, but there is a clear distinction to be drawn and I think that you can still rely on the theory that the evidence in and of itself may be facially incriminating, but not dispositive.

MR. KLEM: Yes. And talking a little bit more about the inference, moving beyond the buy money, here we have Rushing talking about, you know, he doesn't know what happens when Johnson leaves the car, but Johnson comes back to the car, he's followed by this other guy, who we then learn is the undercover officer, who's thrusting money in the car, who's saying, give me the stuff, who drops the money in the car, and then they speed off.

There is certainly - - - and I think this is where you can use an inference - - - that's certainly the proper inference that could be drawn from that alone is that that just participated in a robbery, and that my client must have done something to cause that undercover officer to be throwing money

in the car.

JUDGE PIGOTT: Well, didn't the officer testify?

MR. KLEM: He did.

JUDGE PIGOTT: In great detail about what went on. I mean, then it had nothing to do with, you know, the fact that - - - you know, what Rushing said. I mean, he - - - he said, you know, your client said, give me the stuff - - - you know, give me the money first, give me the stuff first, and it was all - - - I mean, his testimony alone, it seems to me, is the incriminating part. It's not that Rushing said, yeah, he went out to get some food, we were looking for his stolen car.

MR. KLEM: His testimony is, of course, subject to all kinds of challenge with all kinds of bias there. We don't accept that his testimony alone would have led to this result by any means.

JUDGE PIGOTT: No, I understand that, but what I'm saying is when you - - - when you have that testimony, the fact that Rushing said he was - - - you know, he was there, that he went to get food, he was coming back, I mean, I don't - - - I don't - - - I'm missing the - - - where the inferences of criminality come from.

MR. KLEM: Normally, in order for someone, I think, to be throwing money in your car, that some action would have been taken to cause that individual to give up the money here. And while Rushing doesn't place a gun in my client's hand, or a toy gun in my client's hand, he says, I don't know what he did. The inference is that my client did something to cause the undercover officer to relinquish his cash, but even beyond that - - -

JUDGE PIGOTT: No, it would - - - I don't - - - I'll leave you alone after this, but he says - - - the cop says that your client said, give me the money, and the UC said, give me the stuff first, and as he's reaching into his groin area, the UC gives the money to Rushing, and as the UC leaned back out of the window, the defendant pulled a gun on him. That's what the cop says.

Now, I understand there's - - - you know, there's ways of challenging that, but I don't see where the statement from Rushing that essentially says, yeah, we were there together, we were looking for a stolen car, et cetera, is incriminating at all.

MR. KLEM: It - - - it's strange to be trying to link it to the police officer's testimony. I mean, I think we - - - we look at the statement and

whether the statement - - -

JUDGE PIGOTT: Right, but I'm - - - but you're saying, as the Appellate Division said, is you could draw inferences from the statement.

MR. KLEM: Yes.

JUDGE PIGOTT: And I can draw inferences from the statement too, but what I'm saying is that the case, as it was coming in, was in, you know, and now Rushing's testimony, all it does is say he was there.

MR. KLEM: His testimony does a lot more; it makes it impossible for the defense to challenge the buy money, the proceeds of the very robbery that my client is convicted of; it makes it impossible for the defense to challenge the fact that that is found in their joint possession.

JUDGE PIGOTT: Okay.

JUDGE ABDUS-SALAAM: And - - - and because of Rushing's statement that he doesn't know what Johnson did to have the undercover throw money in the car. But the implication is they did something - - - that Johnson did something.

MR. KLEM: Yeah. Human nature tells us people don't normally go throwing money in the car. Do we know exactly what from this statement? No.

But that's not the test. Is it facially incriminating?

JUDGE STEIN: What if anything is there to be gleaned from what he explains is the reason he's driving away?

MR. KLEM: I mean, it's also pretty incriminating as well. Someone throws money in the car and, you know, according to Rushing, he feels the need immediately to get out of there. Again, the inference to be drawn is they've done something illegal, they've taken the money, they're running from the scene, fleeing. I think that's a clear inference as well that can be drawn.

JUDGE RIVERA: Did he say, it's time for me to leave?

MR. KLEM: He did.

JUDGE RIVERA: I've been - - - I've had - - - I've been in this situation before?

MR. KLEM: I've been in the situation before - - -

JUDGE RIVERA: I don't want to be in this again.

MR. KLEM: Time to get out of here.

JUDGE RIVERA: Does suggest something other than money falling from the sky.

MR. KLEM: Yes.

JUDGE STEIN: Except that if they - - - getting back to an earlier point about - - - about mixed questions. I would agree that the Court's finding that it was intended as an exculpatory statement is a mixed question, at least, if not a question of fact. But something that we're - - - we're pretty bound by. And if that's the case, then if it's - - - if that's an inculpatory - - - I'm sorry, exculpatory statement as to Rushing, then that particular statement about driving off and so on, how can that not be exculpatory as to Johnson?

MR. KLEM: I - - - let me go back to the premise that the mixed question jurisdictional issue prevents this Court from looking at one word that the Appellate Division said in ruling in my client's favor. I don't think that's the proper application of the mixed question doctrine. It's whether or not the Bruton - - -

JUDGE STEIN: What I'm saying is if they're supporting the record for that finding, then - - - then we have to follow it, don't we?

MR. KLEM: I think it's whether or not there's support in the record for the finding that this was a Bruton error, then you have to - - -

JUDGE STEIN: Well, I know that that's how you want to say it. I'm parsing it out a little bit and - - -

MR. KLEM: I don't think the doctrine permits the parsing that - - - that finely, but - - -

JUDGE RIVERA: I've - - - I've - - - maybe I've misunderstood part of your argument; I thought part of your argument is that even a statement that exculpates Rushing, inculpates your client. And that's the point - - - that's the point.

MR. KLEM: Yes, that is, Judge Rivera.

JUDGE RIVERA: It may also - - -

MR. KLEM: Getting tied up in the weeds.

JUDGE RIVERA: It may also inculpate him, but let's assume for one moment it's, as they've - - - as they were describing, an innocent explanation about what happened and what he did, and so it exculpates him but that's not the question, because you're not representing him; he's not the one appealing. It's what's going on with Mr. Johnson and whether or not it inculpates him.

MR. KLEM: That - - - that's exactly right, Your Honor.

I would like to just spend my last minute on the Hinton issue in this case. The Court sua

sponte permitted UC 110 to testify anonymously, concluding that the defense was suffering no prejudice whatsoever by that.

JUDGE STEIN: Was there - - - was there a request for a second hearing on that? Was there an objection pointed to the second undercover?

MR. KLEM: It was a sua sponte ruling by the Court; nobody knew until the Court ruled that it was at issue.

JUDGE STEIN: Right.

MR. KLEM: It was immediately followed by an objection to the ruling with the objection being as noted. Clearly, the objection went to, there has not been a sufficient factual finding as to both of the undercover officers. I don't think anything further - - -

JUDGE STEIN: Or it could - - - or it could be interpreted as just to the - - - the hearing that had just taken place as to the one undercover officer.

MR. KLEM: Even if it's interpreted that way, the objection is the hearing wasn't sufficient to support that ruling, and it certainly wasn't sufficient to support the ruling as to UC 1110. I'll direct Your Honors' attention to Justice Smith's - -

- Judge Smith's concurring opinion at Williams, where it was the exact same preservation, and he in fact found it preserved in that case.

CHIEF JUDGE DIFIORE: Thank you, sir.

MR. KLEM: Thank you.

MR. CHAMOY: Your Honors, addressing the Hinton issue first, it is clearly unpreserved. The fact is the Judge issued two orders, one based on lengthy argument that happened immediately beforehand, and the other sua sponte with no argument. One regarding UC 44, one regarding UC 110. The response, "and note my objection" is not sufficient as to UC 110 under those circumstances. In fact, all defense counsel needed to say was, I'd like to know the identity of UC 110, which is what he said regarding UC 44.

The bigger problem with preservation on that issue is, there was never really a debate over the People - - - the sufficiency of the People's evidence as goes to the identity even of UC 44. It was basically admitted by the defense, yeah, we made out enough that his identity shouldn't be disclosed. So this objection was to the fact that it would provide - - - I believe it was an aura of secrecy and it would prevent them from finding information to

potentially impeach him. That was the objection that underlies this "note my objection".

It's a completely different objection than, Your Honors, the People failed to establish a sufficient case as to both of these witnesses as regards to a Waver claim and - - - under Stanard. And in both of those cases, of course, Waver and Stanard, it was specifically requested; it was the defense said, Your Honor, I would like to know the identity of this witness. So that's the Hinton issue; it is unpreserved. It should be remitted and considered by the Appellate Division in the first instance.

As far as the mixed question issue, this is a pure legal question as regards to the inference issue, and that it only because what we're asking is, where are you drawing the inference from? Not what inference you're drawing. Pure legal issue - - - where are you drawing it from? Richardson v. Marsh, Gray v. Maryland. If you're drawing it from trial testimony, that is improper. That is a matter of law. That's exactly the question that's being presented here. And Gray v. Maryland was a matter of law decided as such, and it's the most recent statement by the U.S. Supreme Court on the issue.

I'd also like to note out, as Judge Pigott noted, UC 44's testimony regarding what happened in the car, essential; because what's missed here by the Appellate Division on the merits is that it doesn't focus at all on what happened inside the car. But that's the basis for every charge that both of these defendants faced. That's the basis for every conviction.

What happened inside the car is what matters. What happened outside of the car wasn't relevant to that analysis. The robbery took place in the car - - - inside the car with a gun, with a discussion, trying to get money from this individual. That's UC 44's testimony. You take that and compare it to the co-defendant's testimony which was, no, we were inside the car, he said nothing, he was just there. I said nothing, the money dropped in the car and I pulled off.

JUDGE RIVERA: Right, but he admits that Johnson was outside of the car, he doesn't know what happened outside of the car, he just came in the car, he doesn't know what happened, the money gets thrown in and he says, I got to get out of here, I've been this way before, I don't want to be here, and I'm off. Why doesn't that suggest that although he is

trying to say, as you said before, I'm not to blame, I'm not the one who is here, but the inference is, maybe this guy did something, I don't know; I've got money being thrown in the car.

MR. CHAMOY: Well, there are many inferences that can be drawn, and one we point out is - - -

JUDGE RIVERA: Right, but the one we're talking about is the possible on that inculpates Johnson. So why isn't that enough?

MR. CHAMOY: Because it doesn't necessarily inculpate Johnson. In fact, it could be that an undercover officer - - - in this case, undercover officer, whoever it was, it doesn't actually say, but we'll assume an undercover officer - - - approached the vehicle wrongly, incorrectly, or, as the defense presented as their summation, accosted this guy and he ran away.

JUDGE RIVERA: But then aren't you doing exactly what you say we can't, which is looking at the trial testimony - - -

MR. CHAMOY: No, because - - -

JUDGE RIVERA: - - - rather than just the statement?

MR. CHAMOY: What I'm saying is if you look

at the statement alone within the four corners of the statement - - -

JUDGE RIVERA: Uh-huh.

MR. CHAMOY: - - - you're saying you can draw one inference; I'm saying you could draw 100 different inferences. And the fact is, that isn't Bruton. Bruton is a powerfully incriminating statement, direct incrimination; not inferential.

JUDGE RIVERA: Well, I think that's an easier argument if his only statement is, we're both sitting in the car minding our own business and all of a sudden someone throws money.

MR. CHAMOY: It is. However, this - - -

JUDGE RIVERA: That's the easier case for you, obviously; straightforward.

MR. CHAMOY: Correct. But in this case, Bruton is a high mark for these sorts of statements and it's a very narrow exception. And the fact is, this is not the equivalent of a confession that incriminates the defendant. This is no the equivalent of a statement that says, he did it.

JUDGE RIVERA: Is that what you always need?

MR. CHAMOY: Well - - -

JUDGE RIVERA: It always has to be, I

didn't do it, they did it?

MR. CHAMOY: Or - - -

JUDGE RIVERA: It's something, but they did it.

MR. CHAMOY: It has to be a powerfully incriminating extrajudicial statement, powerfully incriminating; it has to be something that goes to the strength - - - basically forms - - -

JUDGE RIVERA: Yeah, what I was saying is "powerfully incriminating", does it mean that I incriminate them specifically by pointing to them and saying they are culpable?

MR. CHAMOY: Well, that is the - - - that is the concept under Bruton, is that you are pointing the accusatory finger at the defendant through the statement.

JUDGE RIVERA: Yeah, but - - - but with words. I thought your point was with words.

MR. CHAMOY: Correct. But - - -

JUDGE RIVERA: My question is, can it be with inference?

MR. CHAMOY: With inferences, well, there are certain inferences that potentially could, however, they - - - they're powerful inferences, they're strong inferences that can be done based

solely on the statement itself from the four corners of the statement.

CHIEF JUDGE DIFIORE: How about the inference in the case we just heard where he said, Blank, a Latin King, went and stabbed somebody.

MR. CHAMOY: So Gray created an exception and it created the exception based on the fact that if the word "blank" or some equivalent is in the statement, the problem can happen in certain cases - - - and I can't speak to that case - - - but it's that if that is the first thing introduced at trial, the jury is going to see, I, blank, and whoever else went and murdered this person, basically. And they will see the word "blank" and they will immediately think when they look over at the defendant's table, "Blank" is that individual. That's Gray v. Maryland, but that's - - -

CHIEF JUDGE DIFIORE: That's different from here.

MR. CHAMOY: That's extraordinarily different because here what you have is a statement, again, where if it was the first thing admitted at trial, the jury wouldn't go, oh, he's guilty, he's guilty, or, that's evidence against him, that's evidence against him. They're going to read this

here and go, they're not guilty of anything, the Appellate - - - the majority in the Appellate Division said you look at the statement and they're admitting no wrongdoing. It's intended as an innocent explanation.

So if I don't have more time, I would ask that you please remand to the Appellate Division for consideration of remaining claims.

CHIEF JUDGE DIFIORE: Thank you, sir.

(Court is adjourned)

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

I, Meir Sabbah, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Keith Johnson, No. 25 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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