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COURT OF APPEALS

STATE OF NEW YORK

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PEOPLE,

Respondent,

-against-

No. 40

RICHARD GARCIA,

Appellant.

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PEOPLE,

Respondent,

-against-

No. 41

JOSHUE DEJESUS,

Appellant.

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20 Eagle Street  
Albany, New York 12207  
February 17, 2015

Before:

CHIEF JUDGE JONATHAN LIPPMAN  
ASSOCIATE JUDGE SUSAN PHILLIPS READ  
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



1 CHIEF JUDGE LIPPMAN: Number 40 and 41,  
2 People v. Garcia and People v. DeJesus.

3 Counselor, would you like any rebuttal  
4 time?

5 MS. ROLAT: I'd like to reserve one minute  
6 for rebuttal, please.

7 CHIEF JUDGE LIPPMAN: One minute, go ahead.  
8 You're on.

9 MS. ROLAT: Thank you. Amanda Rolat on  
10 behalf of the defendant, Mr. Garcia. As the  
11 Appellate Division in this case found, the trial  
12 court should have provided a limiting instruction  
13 with respect to the decedent's sister's testimony,  
14 that her brother had been having a problem with Mr.  
15 Garcia - - -

16 CHIEF JUDGE LIPPMAN: But why wasn't it  
17 harmless that they didn't provide it?

18 MS. ROLAT: In - - - in this case, the harm  
19 cannot be overstated. To begin with - - -

20 CHIEF JUDGE LIPPMAN: Why? Tell us.

21 MS. ROLAT: Because this was a single  
22 witness identification case, and it wasn't a  
23 particularly - - -

24 CHIEF JUDGE LIPPMAN: What did this  
25 information about the sister do to that case? You

1 had one witness, and then you had the sister saying,  
2 well, she knew him, and there's trouble with him.  
3 How did that change the - - - the way the - - - the  
4 evidence was viewed?

5 MS. ROLAT: There was no other evidence in  
6 this case aside from this hearsay that actually  
7 connected Mr. Garcia to the decedent.

8 CHIEF JUDGE LIPPMAN: It - - - but - - - so  
9 you're arguing - - -

10 JUDGE READ: The witness. There was an  
11 eyewitness.

12 CHIEF JUDGE LIPPMAN: Yeah.

13 MS. ROLAT: Well, as - - - there was an  
14 eyewitness, but that eyewitness didn't actually know  
15 Mr. Garcia. She had never - - -

16 CHIEF JUDGE LIPPMAN: Yeah, but your - - -  
17 your - - - in essence, your argument is that - - -  
18 that this bolstered the eyewitness ID?

19 MS. ROLAT: It bolstered it - - -

20 CHIEF JUDGE LIPPMAN: I mean, is that the  
21 thrust of what you're saying?

22 MS. ROLAT: It also - - - it also - - -

23 CHIEF JUDGE LIPPMAN: You can't do that,  
24 because it's hearsay or whatever?

25 MS. ROLAT: Well, it - - - it not only

1           bolstered it, it actually added more information that  
2           connected Mr. Garcia - - -

3                   JUDGE RIVERA: It provided a motive, is  
4           that your argument? It provided a motive of some  
5           sort?

6                   MS. ROLAT: Well, there was a problem that  
7           was specific to Mr. Garcia and the decedent. The - -  
8           - the eyewitness, upon walking out of the building,  
9           was engaged in conversation, admittedly didn't  
10          necessarily remember what it was that she had  
11          overheard. It was years earlier. Also, the  
12          eyewitness didn't actually know Mr. Garcia and the  
13          decedent.

14                   JUDGE PIGOTT: Doesn't it all go to the  
15          weight?

16                   MS. ROLAT: No, because in this case, it  
17          goes to harm, because - - -

18                   JUDGE PIGOTT: Well, of course, it goes to  
19          harm, but I mean, did - - - you're - - - you want to  
20          say that she should not have been allowed to testify  
21          at all?

22                   MS. ROLAT: The decedent's sister? The  
23          hearsay?

24                   JUDGE PIGOTT: Yeah.

25                   MS. ROLAT: Well, it was unfronted. I

1 mean, it was hearsay. There was no opportunity to  
2 actually figure out what this problem was. It could  
3 have been - - - it could have really been nothing.  
4 It could have been exaggerated in the jury's mind.  
5 It was also that they had known each other for a  
6 while, which the prosecution actually relied on in  
7 its opening statement. The prosecutor told the jury,  
8 Mr. Garcia confronted somebody whom he had known for  
9 awhile. There was no other evidence in the case that  
10 supported the prosecutor's claim.

11 JUDGE READ: Well, I thought part of it was  
12 to fill out the narrative and - - - and - - - so that  
13 the jury wouldn't speculate as to why the police  
14 focused on your client.

15 MS. ROLAT: Well, perhaps the jury would  
16 have speculated about why Mr. Garcia became a  
17 suspect; perhaps they wouldn't have. But this court  
18 has never actually held that the background exception  
19 applies to how a defendant becomes a suspect. That  
20 would significantly alter the scope of what this  
21 court has understood the background exception to be.

22 This court has only recognized it in two  
23 situations. One, where the defense has opened the  
24 door, and two, in all of the other cases that address  
25 the background exception, there was some aggressive

1 police conduct, some improper conduct that as this  
2 court expressed in Morris, there is a real danger  
3 that the jury would have discredited the police  
4 officer's testimony because it's speculating about  
5 conduct - - -

6 CHIEF JUDGE LIPPMAN: Counselor, but - - -  
7 but you're really saying that - - - in essence,  
8 you're saying it - - - it was offered for the truth  
9 of it. Right?

10 MS. ROLAT: It wasn't - - -

11 CHIEF JUDGE LIPPMAN: I mean, what you're  
12 saying is without it, there wasn't enough evidence,  
13 and this was, in essence, really for the truth of it,  
14 and therefore, we should - - - we should throw it  
15 out? Is that the argument?

16 MS. ROLAT: Even if the evidence was  
17 sufficient, the argument is that in this case, it  
18 didn't come in for the background; it came in for the  
19 truth, because it - - -

20 CHIEF JUDGE LIPPMAN: That's what I'm  
21 asking you. That is your argument - - -

22 MS. ROLAT: Yes.

23 CHIEF JUDGE LIPPMAN: - - - that it really  
24 is not offered - - - Judge Read is saying that that -  
25 - - this whole issue which we know about, context.

1           You're saying, not context; it's offered for the  
2           truth and, in effect, tilted the scales the other way  
3           with the limited one-witness ID?

4                   MS. ROLAT: In this case, it was improper  
5           to have come in even for context. But in this case,  
6           without the limiting instruction, it didn't come in  
7           for context. It - - -

8                   JUDGE READ: So would - - - would it have  
9           been okay - - - would it have been okay if the judge  
10          had given a limiting instruction?

11                   MS. ROLAT: In this case, no. It still  
12          would have exceeded the background exception, because  
13          this really came in - - - how - - - it how - - - how  
14          a defendant becomes a suspect in a case, that's not  
15          an exception, but a - - -

16                   JUDGE READ: So what should the judge have  
17          done?

18                   MS. ROLAT: Well, this shouldn't have come  
19          in at all, because it exceeds the background  
20          exception, but in this case, the lack of a limiting  
21          instruction means that it came in for its truth. It  
22          didn't come in for the background exception. It came  
23          in and it was for its truth.

24                   CHIEF JUDGE LIPPMAN: Either way, your view  
25          is it's no good?

1 MS. ROLAT: Yes.

2 CHIEF JUDGE LIPPMAN: Okay, let's hear from  
3 your adversary and then you'll have rebuttal.

4 MR. JOHNSON: Good afternoon, David Johnson  
5 for the People. Your Honors - - -

6 CHIEF JUDGE LIPPMAN: But, counsel - - -  
7 how could this really be anything but offered for the  
8 truth? You have one witness ID and this thing comes  
9 in. Don't you think that has a tremendous effect on  
10 the jury?

11 MR. JOHNSON: No, because this came in  
12 after the defense had already put before the jury the  
13 notion that the eyewitness failed to identify the  
14 defendant in a photo array. So the People were  
15 entitled to explain why - - -

16 CHIEF JUDGE LIPPMAN: Yeah, but - - - but  
17 the idea of this is not to bolster the - - - the - -  
18 - the ID. In other words, that's not it. It's not  
19 offered for the truth. It's offered to - - -  
20 contextually, right?

21 MR. JOHNSON: Exactly.

22 CHIEF JUDGE LIPPMAN: Yeah, but - - - but  
23 in effect - - - in reality, could it be anything else  
24 but considered that, ah ha, so there really is some  
25 basis to all of this?

1 MR. JOHNSON: No, I don't - - - I don't  
2 think so, because - - -

3 CHIEF JUDGE LIPPMAN: You think it falls  
4 squarely within the - - - the completing the  
5 narrative type argument?

6 MR. JOHNSON: Yes. And I think it was  
7 important - - -

8 JUDGE FAHEY: Usually though you don't - -  
9 - you don't get the prosecutor asking for a limiting  
10 instruction in this situation. Isn't that what we  
11 had here?

12 MR. JOHNSON: Excuse me, Your Honor?

13 JUDGE FAHEY: Wasn't the prosecutor asking  
14 for a limiting instruction in this case?

15 MR. JOHNSON: Yes, because that would have  
16 been proper.

17 JUDGE FAHEY: I see. So there should have  
18 been a limiting instruction, then?

19 MR. JOHNSON: Yes.

20 JUDGE FAHEY: So it was error for the court  
21 to do that?

22 MR. JOHNSON: Yes, but it was harmless,  
23 beca - - - because again, there - - - there was an  
24 eyewitness - - - eyewitness to this - - - to this  
25 crime - - -

1 JUDGE STEIN: But there were some questions  
2 about that eyewitness' credibility. And - - - and  
3 that was the whole purpose was to - - - to bolster  
4 that eyewitness' testimony, wasn't it?

5 MR. JOHNSON: No, and it - - - and it  
6 didn't bolster it. The eyewitness was about ten feet  
7 from - - - from the shooting. She had - - - she had  
8 known the defendant from around the neighborhood.  
9 She identified him in a lineup without hesitation.  
10 This didn't bolster; this just explained why the  
11 police looked for him - - -

12 CHIEF JUDGE LIPPMAN: You don't think that  
13 ID was at all - - - at all shaky, in terms of how  
14 well she knew this person and - - - seen him a couple  
15 of times in the neighborhood; you don't think that -  
16 - - that this particular other information would have  
17 bolstered and made much more solid that - - - that  
18 ID?

19 MR. JOHNSON: Respectfully, Your Honor, no,  
20 because again, two years later, she - - - she  
21 identified the defendant without hesitation.

22 JUDGE STEIN: Well - - -

23 CHIEF JUDGE LIPPMAN: Well, she didn't  
24 identify him in the - - - in the photo array, right?

25 MR. JOHNSON: Well, she - - - she stated

1 that she was uncomfortable with identifying anyone,  
2 because people can look different in a photo - - -

3 CHIEF JUDGE LIPPMAN: Yeah, but what I'm  
4 saying is, it's not the strongest, most perfect ID,  
5 and in this context, does this really wound up - - -  
6 wind up being more than a completing the narrative,  
7 and really, as Judge Sti - - - Stein said, in effect,  
8 bolstering what - - - what is not a perfect ID?

9 MR. JOHNSON: No, because a - - - again,  
10 the - - - the testimony was that the sister said that  
11 there was a problem between the two. A problem can  
12 mean anything. That's not - - - it's very  
13 nonspecific. And the fact that they knew each other  
14 for a while, again, that doesn't really bolster  
15 anything to do - - -

16 JUDGE STEIN: Well - - -

17 JUDGE RIVERA: So but your - - - your  
18 argument is, you - - - she - - - she has a problem  
19 with the photo array, but she does eventually  
20 identify him. So that's the testimony you could have  
21 - - - could have put and should have put to the jury.  
22 I - - - it sounded to me like your argument was the  
23 reason that you wanted this information is - - - was  
24 because you wanted to explain why the police officer  
25 went back to the well after she - - - the eyewitness

1 didn't pick him out. And you felt that was that - -  
2 - that was the gap that you were filling.

3 MR. JOHNSON: Well, I think we - - -

4 JUDGE RIVERA: It sounds to me that that's  
5 a creditability issue, right, whether you believe her  
6 or not, wha - - - did she know who she was picking  
7 out the first time or the second time?

8 MR. JOHNSON: I don't think it's for the -  
9 - - for - - - for the credibility, Your Honor. I - -  
10 - I think it was just simply to explain a gap, and  
11 the - - - and the two years between - - -

12 JUDGE STEIN: Well, he - - - he - - -

13 JUDGE RIVERA: But the - - - what I'm  
14 saying - - - I'm sorry. The ga - - - just to clarify  
15 - - - the gap that you're talking about is the fact  
16 that she couldn't pick him the first time, but picked  
17 him later? And the reason why the ca - - - the  
18 police officers even asked her to look again, is that  
19 what you mean is the gap?

20 MR. JOHNSON: Well, no - - - no, she never  
21 said that she couldn't identify anyone the first  
22 time. She said that she was not comfortable with  
23 doing so. She said right away that I would feel com  
24 - - - feel - - - I - - - I would prefer to identify  
25 someone in person.

1 JUDGE STEIN: So - - - so what's the  
2 narrative that you're trying to complete? I mean,  
3 here he turned himself in. Isn't that enough to  
4 explain why the identification took place two years  
5 later? As I say, he turned himself in two years  
6 later.

7 MR. JOHNSON: No, because it was important  
8 to avoid having the jury speculate as to why there -  
9 - - there was that two-year gap. For instance - - -

10 JUDGE STEIN: Why was that important? How  
11 - - - how did that change the case?

12 MR. JOHNSON: Well, it - - - it could have  
13 led to any number of other conclusions from the jury  
14 that they might have - - - they might have felt that  
15 the police, for some reason, were aggressively  
16 pursuing him for two years. They might have thought  
17 that - - - that - - -

18 JUDGE STEIN: Then - - - then - - - then  
19 that would be true in any case, wouldn't it?

20 MR. JOHNSON: Yes.

21 JUDGE STEIN: So - - - so you're - - - so  
22 basically what you're saying is that the exception  
23 here, the narrative exception, basically swallows the  
24 rule, doesn't it?

25 MR. JOHNSON: No, it - - - it depends on -

1           - - on the situation. And here, because there - - -  
2           there - - - because there was the two-year gap, and  
3           because the defense had already put forth the idea  
4           the idea that the defendant - - -

5                   JUDGE STEIN: So how much of a gap do you  
6           need? Is - - - is six months enough of a gap? Is a  
7           month enough of a gap? How about a week? I mean,  
8           where are you going to draw the line?

9                   MR. JOHNSON: Well, I don't - - - it's - -  
10          - it's not a time-based analysis, Your Honor. Again,  
11          it also goes to the fact that the defense attorney  
12          pointed out that - - - or claimed that the eyewitness  
13          failed to identi - - - identify the defendant in the  
14          photo array. So I think it was important to fill in  
15          that gap.

16                   CHIEF JUDGE LIPPMAN: Okay.

17                   MR. JOHNSON: Thank you.

18                   CHIEF JUDGE LIPPMAN: Thanks, counsel.

19                   Counselor, rebuttal? What about the gap  
20          your adversary says you need - - - they needed it to  
21          fill the gap, the two-year gap?

22                   MS. ROLAT: Well, first of all, jury  
23          speculation cannot become a pretext for allowing in  
24          inadmissible evidence to fill in gaps, and it - - -  
25          to say that the evidence came in to fill in this gap,

1 would again significantly - - -

2 CHIEF JUDGE LIPPMAN: Is there a gap?

3 MS. ROLAT: There's not a gap, because it -

4 - -

5 JUDGE PIGOTT: Well, wait let me ask you  
6 this. I - - - I - - - this - - - this reads to me  
7 like a normal investigation. I mean, if - - - if  
8 instead of Lucy Colon, he said I got an anonymous  
9 phone call that said I should go here. Either he had  
10 one or he didn't have one. Then - - - then the  
11 question is, detective, are you lying that you - - -  
12 that you had a - - - an anonymous phone call?  
13 Here's he saying, Lucy Colon, you know, said this.  
14 Are you lying to us, detective, and making a pretext,  
15 because you had some reason to go after this guy  
16 unjustifiably?

17 MS. ROLAT: There - - - there needs to be a  
18 limit to the concern for jury speculating be - - -  
19 for jury speculating. It cannot just be filled with  
20 inadmissible evidence. The court could tell the jury  
21 that issue is not before you. You cannot be  
22 speculating. This court has been concerned with  
23 aggressive police conduct that would otherwise be  
24 improper and therefore needs explaining.

25 JUDGE PIGOTT: That's sort of the point,

1           isn't it? In other words, the defense wants to leave  
2           the impression that this was either racially  
3           motivated or the police had some reason that they  
4           were rousting this defendant. The police want to  
5           say, this is why - - - I - - - you know, this woman  
6           told us this, and that's why we went after this  
7           person. Why is that improper?

8                       MS. ROLAT: Because in this case, the  
9           defense didn't make any of those challenges. They  
10          didn't challenge - - -

11                     JUDGE PIGOTT: But you're saying that's the  
12          reason. That's why I raised it. I didn't - - - I  
13          didn't suggest that you raised it, but you're saying,  
14          you know, that - - - it seems to me that your  
15          argument inures to the benefit of the prosecution.  
16          You said we're trying to explain how this whole thing  
17          unfolded. I mean, you got a - - - a two-year pursuit  
18          that seemed pretty energetic.

19                     MS. ROLAT: That would be limitless. In  
20          every case, it starts with the defendant being a  
21          suspect, and to be concerned that the jury is going  
22          to speculate as to whether the police unfairly went  
23          after the defendant in the initial stages of making  
24          the defendant a suspect, there's no end to that.

25                     JUDGE PIGOTT: So you - - - the speculation

1 here is that Lucy Colon was lying, that there was not  
2 - - - or that she was telling the truth, and you  
3 believe she was lying and that there was no animosity  
4 between these two - - -

5 MS. ROLAT: There - - -

6 JUDGE PIGOTT: - - - and that was invented  
7 by the police.

8 MS. ROLAT: My argument is that in this  
9 case, there was no was no speculation. And in this  
10 case, it didn't even come in for the background. It  
11 came in without a limiting instruction. It came in  
12 for its truth.

13 CHIEF JUDGE LIPPMAN: Does it matter - - -  
14 does it matter that the defendant turned himself in?

15 MS. ROLAT: It does matter, because it - - -  
16 - in thi - - - this court has always paid attention  
17 in the cases involving the background exception to  
18 the aggressive police conduct surrounding the arrest,  
19 and in those very limited circumstances, that the  
20 jury might discredit everything else that the - - -

21 JUDGE ABDUS-SALAAM: So aren't you - - -  
22 are - - - what you're really saying here is that,  
23 this is the classical hearsay situation that is not  
24 an emergency; it's not something else, it's - - -  
25 that would allow hearsay testimony. This is classic

1 confrontation.

2 MS. ROLAT: Pre - - - precisely, and also  
3 that in this case, it - - - it goes without saying  
4 thi - - - we can debate whether it really did come in  
5 for the - - - pursuant to the background exception  
6 properly or not, but in this case, without a limiting  
7 instruction, it didn't come in to explain the police  
8 investigation in the background; it came in for its  
9 truth, without a limiting instruction. That is how  
10 the jury received it, for its truth - - -

11 CHIEF JUDGE LIPPMAN: Okay, counsel,  
12 thanks.

13 MS. ROLAT: Thank you.

14 CHIEF JUDGE LIPPMAN: Thank you both.  
15 Appreciate it.

16 Let's go to 41, People v. DeJesus.

17 MS. EVERETT: Good afternoon, Abigail  
18 Everett for appellant, Joshue DeJesus.

19 CHIEF JUDGE LIPPMAN: Counsel, what's the  
20 difference, if any, in circumstance between these two  
21 cases?

22 MS. EVERETT: Well, there's not a big  
23 difference. Both of these cases are situations where  
24 there was a weakness in the prosecution's case - - -

25 CHIEF JUDGE LIPPMAN: How good was the ID

1 in your case?

2 MS. EVERETT: The ID was terrible in this  
3 case. You have - - -

4 CHIEF JUDGE LIPPMAN: Why?

5 MS. EVERETT: - - - somebody who had been  
6 drinking. He'd been smoking marijuana. Initially,  
7 he told the police that he hadn't seen the crime.  
8 Then he told the police he could make an ID, but he  
9 still put himself in a position that respondent says  
10 wouldn't have given him an opportunity to see. He's  
11 claimed at one point that he knew Mr. DeJesus'  
12 nickname, Sway, but he never told the police when  
13 they asked him the nickname.

14 CHIEF JUDGE LIPPMAN: Do you want any  
15 rebuttal time? I'm sorry.

16 MS. EVERETT: I'm sorry, yes, a minute,  
17 please.

18 CHIEF JUDGE LIPPMAN: One minute, go ahead,  
19 continue. Go - - -

20 JUDGE READ: Well, there - - - there was -  
21 - - there was an in limine - - - there was an in  
22 limine hearing here, right?

23 MS. EVERETT: There - - - there was before  
24 the trial, and there the judge ruled specifically  
25 that the People could ask whether it was during the

1 course of the investigation they've had a suspect,  
2 but that - - -

3 CHIEF JUDGE LIPPMAN: So what happened to  
4 violated - - - did violate that rule? I gather you -  
5 - - you claim that they violated the rule.

6 MS. EVERETT: Yes, and defense counsel  
7 immediately saw, once the actual examination began,  
8 that this was a far more pointed effort to establish  
9 that this was a specific suspect, that - - - and in  
10 particular, the focus on the timing, that it was very  
11 - - -

12 JUDGE ABDUS-SALAAM: Don't we need - - -  
13 don't we need a statement, counsel, to say, that this  
14 was some kind of confrontation problem? Is there any  
15 evidence, direct or even indirect, that there was - -  
16 - the police had a statement from some witness that  
17 said, focus in on DeJesus?

18 MS. EVERETT: Well, there - - - cases have  
19 recognized that hearsay can be inferential. It could  
20 be implicit. You don't need to actually have  
21 testimony that the declarant said something. And in  
22 this case, when the officer said that he - - - um - -  
23 - that specifically, at 4 o'clock, he got information  
24 that gave him a name and it gave him an address, and  
25 specifically that this was before they spoke to

1 Carrasco - - -

2 JUDGE STEIN: Well, that wasn't in the  
3 testimony. In the testimony they asked the question  
4 of whether - - - at the point that you had a specific  
5 subject that you were look - - - well, they - - - I'm  
6 sorry. They asked "without telling us specifically,  
7 was that as a result of your investigation that you  
8 began looking for the defendant" and - - - and the  
9 police officer said yes. They didn't say anything  
10 about name and address until the closing - - - until  
11 the summation.

12 MS. EVERETT: Well, they said it in the - -  
13 -

14 JUDGE STEIN: That was not in the - - -

15 MS. EVERETT: - - - summation, but they  
16 also said it during that direct examination of  
17 Officer Rivera. They said, on page 1075 of the  
18 appendix - - - let's see, they start - - - the  
19 prosecutor started off, "Did there come a time during  
20 the day on June 9th that you were looking for a  
21 specific suspect?" Objection overruled. Then they  
22 get to the question that Your Honor just mentioned -  
23 - -

24 JUDGE STEIN: Right, but they're not - - -  
25 they don't - - - they're not testifying to a specific

1 statement or - - - nor could you - - - would you  
2 necessarily infer from that testimony that there was  
3 a hearsay statement. It could have been - - - it  
4 could have been a video of - - - of - - -

5 MS. EVERETT: I think that - - -

6 JUDGE STEIN: - - - the scene.

7 MS. EVERETT: - - - it's pretty clear that  
8 something happened specifically at 4 o'clock to  
9 inform that police that there was a reason that Mr.  
10 DeJesus was the shooter, and it - - - certainly on  
11 summation, that's what the DA argued.

12 JUDGE ABDUS-SALAAM: Well, that's true,  
13 counsel, something, but is that a statement?

14 MS. EVERETT: I think it's an implicitly -  
15 - - it's a confrontation issue. It's a statement,  
16 and we know - - - although the jury didn't - - - that  
17 what the detective said was that a family member of  
18 the deceased reported an anonymous phone call. And  
19 this is - - - this double hearsay is the weakest sort  
20 of evidence that we didn't get a chance to confront.  
21 We don't know whether the family member actually  
22 received the phone call. We - - - if the family  
23 member did get the phone call, we don't know what the  
24 basis of this anonymous tip - - - certainly this  
25 court has seen many times that anonymous tips cannot

1 be reliable. What - - -

2 CHIEF JUDGE LIPPMAN: But it can't be  
3 harmless in this case?

4 MS. EVERETT: It's not harmless in this  
5 case, for the reasons I said initially, about how  
6 weak the identification was. And I do want to stress  
7 the way it was used on summation, where the  
8 prosecutor said that the only purpose of showing the  
9 photos to Carrasco, who's the only person who  
10 actually came in who was subject to cross-  
11 examination, was to "to confirm" what the police  
12 already knew as of 4 o'clock that Joshue DeJesus had  
13 killed Julio Montes.

14 This was very significantly pointing the  
15 jury to the truth of the fact that the police had  
16 gotten this information and we never had an  
17 opportunity to confront it. It's well preserved as a  
18 confrontation issue. And the People suggest, well,  
19 maybe the jury thought that this was some kind of  
20 scuttlebutt that the officer had somehow picked up,  
21 but I think that the specificity of the examination  
22 of Officer Rivera shows that the offi - - - that the  
23 prosecution wanted a much more pointed conclusion.

24 JUDGE RIVERA: What - - - what - - - what  
25 is it that the jury heard, then, with respect to what

1           came in - - -

2                   MS. EVERETT:   They heard - - -

3                   JUDGE RIVERA:   - - - about this  
4           investigation?

5                   MS. EVERETT:   They heard that the - - -

6                   JUDGE RIVERA:   Because the question is  
7           pointedly about the investigation.

8                   MS. EVERETT:   There - - - there was a  
9           question about the investigation.  "At that point,  
10          you were looking for a specific suspect you were  
11          looking for in connection with the shooting.  At that  
12          point you began looking - - - or had the name Joshue  
13          DeJesus as a suspect.  Now, once around 4 o'clock in  
14          the afternoon on June 9th you had a suspect, Joshue  
15          DeJesus, please tell the jury on that day, at that  
16          time, what you started to do?  And at approximately 4  
17          o'clock in the afternoon on June 9th, did you obtain  
18          an address for Mr. DeJesus?"

19                   So it's clearly walking the jury through a  
20          specific piece of information that the police have  
21          gotten that we had never had an opportunity to  
22          confront.

23                   CHIEF JUDGE LIPPMAN:  Okay, counsel.

24                   MS. EVERETT:   Thank you.

25                   CHIEF JUDGE LIPPMAN:  Thanks, counsel.

1 Counselor?

2 MS. WISEMAN: May it please the court, my  
3 name is Alice Wiseman. I'm appearing on behalf of  
4 the People. Your Honor - - -

5 CHIEF JUDGE LIPPMAN: Do you think the  
6 court's order was violated?

7 MS. WISEMAN: I don't, Your Honor.

8 CHIEF JUDGE LIPPMAN: Why not?

9 MS. WISEMAN: The court's order was that we  
10 could bring out that as a result of the police  
11 investigation, they developed a suspect. Now, this  
12 was in response to a request by the People to  
13 introduce this anonymous - - - or the fact that  
14 police learn about an anonymous phone call, and  
15 clearly, as the People expressed, the intention was  
16 to explain why they focused on defendant as a  
17 suspect.

18 CHIEF JUDGE LIPPMAN: You - - - you don't  
19 think as practice, that it bolstered a - - - a - - -  
20 an ID that - - - that had its weak points?

21 MS. WISEMAN: Your Honor, first of all, I -  
22 - - I would take issue. I think this is a very  
23 strong ID, but - - - I'll get to that, but - - -

24 CHIEF JUDGE LIPPMAN: Assume it had its  
25 weak points. You don't think it bolstered it?

1 MS. WISEMAN: No, because it's not telling  
2 the jury - - - all it is telling the jury is that at  
3 some point on that afternoon, the police, as a result  
4 of their investigation, determined defendant to be a  
5 suspect. Now, that's implicit in most cases where  
6 you're going to have a lineup ID or somebody's put in  
7 a photo array. At some point - - -

8 CHIEF JUDGE LIPPMAN: But don't you have a  
9 right - - - don't - - - if - - - if the - - - in this  
10 case, if the Constitutional claim is preserved, don't  
11 you have a right to - - - to know what it is and to  
12 confront it?

13 MS. WISEMAN: Well, there's no - - -

14 CHIEF JUDGE LIPPMAN: Rather than get it,  
15 sort of, secondhand?

16 MS. WISEMAN: There's no content to the  
17 statement here to be confronted. The statement is,  
18 he's a suspect. There's no out-of-court statement.  
19 There are any number of ways in which he might have  
20 become a suspect. And we all are talking as we know  
21 that as about 4 o'clock, the police received  
22 information via anonymous phone call. The jury has  
23 no idea of that. So - - -

24 JUDGE STEIN: What about the summation  
25 where - - - where they indicate - - - where the

1 People indicate that the "police already knew that -  
2 - - that the defendant DeJesus, whose name and  
3 address they had as of 4 o'clock that afternoon".  
4 How else would you get a name and address unless  
5 somebody told you that?

6 MS. WISEMAN: Well, I mean, it certainly  
7 came in that they developed a name and address. He  
8 became a suspect. Once he's a suspect, they know his  
9 name. They can find out his address. Again, the  
10 jury is not told that somebody reported this address.  
11 Now, that - - -

12 JUDGE STEIN: But how else - - - how would  
13 - - - how else would they get that information unless  
14 somebody told them that?

15 MS. WISEMAN: Well, at some point,  
16 obviously, in any chain of anybody becoming a  
17 suspect, anytime you put a picture in a - - - in a  
18 photo array or put somebody in a lineup, somebody has  
19 identified that person. He was a person of interest.

20 JUDGE STEIN: Well, not necessarily.  
21 There's a whole - - -

22 MS. WISEMAN: But - - -

23 JUDGE STEIN: - - - there are whole - - -  
24 there's a group of people in a lineup, and - - - and  
25 not all of them have been identified as a suspect.

1 They're being used for the lineup.

2 MS. WISEMAN: It's true, but it's unlikely  
3 that a jury would imagine that - - - you know, that  
4 the police are showing witnesses random selections of  
5 people from the streets in a lineup. So I think this  
6 is - - - this statement here doesn't go much beyond  
7 what is inherent in every case. Now, in this case -  
8 - -

9 JUDGE STEIN: Except for that there - - -  
10 there was - - - there was an ID here. So maybe - - -  
11 even if the ID was weak, that's what leads the  
12 police.

13 MS. WISEMAN: Well, in this instance - - -  
14 and again, there's particular reason why this very  
15 minimal general testimony was particularly relevant  
16 in this case, and that's because the main defense in  
17 this case, however weak the defense now claims this  
18 ID was, but it wasn't weak, and the real defense was  
19 that Lenny Carrasco was framing the defendant to  
20 protect a friend of his.

21 JUDGE RIVERA: Lenny, or in general, he was  
22 being framed?

23 MS. WISEMAN: That - - - specifically Lenny  
24 Carrasco. And realistically, even before the case  
25 starts, that's obviously going to be the defense,

1 because the fact is, Lenny Carrasco knows the  
2 defendant. He testified - - - there's testimony - -  
3 - they lived one block from each other - - -

4 CHIEF JUDGE LIPPMAN: Yeah, but doesn't  
5 that show that it's really for the truth - - - that  
6 it's being offered for the truth? If that's - - -  
7 if, you know - - - if - - - if that's what you're  
8 trying to answer, is - - - isn't that again, that  
9 it's - - - that it's for the truth of what you're  
10 saying, not just contextual?

11 MS. WISEMAN: Not for its truth, Your  
12 Honor, but just to rebut the claim the defense  
13 ultimately made, which is that Lenny Carrasco has  
14 decided to introduce the defendant in this case; that  
15 he's the one who gave the name, essentially.

16 There's no way - - - you know, the - - -  
17 the prosecutor's statement in summation is one line  
18 in a sixty-three page summation that drew no  
19 objection from the defense, and I think the reason is  
20 because that's not what this case was about. That's  
21 not what the summation was about. You know, right  
22 now - - -

23 JUDGE ABDUS-SALAAM: And was there an  
24 objection to the ruling that the judge made that - -  
25 - that the People could say subject - - - or pursuant

1 to the investigation, defendant became a suspect?

2 MS. WISEMAN: There was not, Your Honor.

3 The People had originally asked to introduce the fact  
4 of the anonymous phone call. The defense objected to  
5 that, but when the judge said, well, the People can  
6 say this, the defense didn't object to that.

7 And as I think we explained in our brief in  
8 detail, although the defense objected at some point  
9 as to some of this coming in subsequently, the only  
10 remotely contemporaneous sort of objections that he  
11 made that he gave a reason for in the middle of  
12 Rivera's testimony was essentially ignoring that  
13 ruling, and saying, oh, the - - - the People have  
14 brought in this anonymous phone call - - -

15 CHIEF JUDGE LIPPMAN: Okay, counselor.  
16 Thanks, counsel.

17 MS. WISEMAN: Thank you.

18 CHIEF JUDGE LIPPMAN: Let's have - - -  
19 let's have rebuttal.

20 MS. EVERETT: The People have pointed that  
21 it's unlikely in every case that - - - that a jury  
22 would not know that there might have been some reason  
23 for somebody's photo to be shown to a witness.

24 JUDGE ABDUS-SALAAM: Once you've - - - once  
25 the defense didn't object to the court's ruling that

1 the People could say pursuant to our investigation,  
2 why is saying the time of day or anything else about  
3 when the defendant became a suspect a problem here?  
4 Why is that a confrontation problem?

5 MS. EVERETT: Because of its specificity.  
6 That - - - I think that the - - - the defense lawyer  
7 immediately perceived that what was happening was not  
8 the usual background pursuant to the investigation,  
9 did you have somebody's photo to put in the photo  
10 array? It was a specific name that you got at a  
11 specific time with a specific address. And because  
12 the defense counsel contemporaneously perceived that  
13 this was going beyond what the defense lawyer  
14 originally thought the judge's ruling would be,  
15 that's when he objected.

16 JUDGE ABDUS-SALAAM: Well, I - - - I find  
17 it kind of curious in the last case, in the Garcia  
18 case, you have a named individual who says, you know,  
19 my brother had a prob - - - the victim had a problem  
20 with - - - with the defendant. That's direct  
21 hearsay. Now, you're saying inferentially there's  
22 some hearsay because of the time frame in which the  
23 police say they found out about - - -

24 MS. EVERETT: Right.

25 JUDGE ABDUS-SALAAM: - - - this defendant,

1 Gar - - - I'm sorry, Mr. DeJesus' name, and the time  
2 that they actually found out his name and address,  
3 that's - - - but I - - - I see some difference here -  
4 - -

5 MS. EVERETT: Well, it's - - - there's a  
6 difference, but in some ways, this case is more  
7 problematic, because the jury doesn't know how weak  
8 this information is. The jury doesn't know that it's  
9 double hearsay. They don't know that the origin of  
10 the suspicion - - - the specific suspect - - - is an  
11 anonymous phone call that the family member passed on  
12 to the police. In many ways, this is worse than when  
13 the jury actually has more particulars so they could  
14 put it in context.

15 JUDGE RIVERA: So - - - yeah, so you're - -  
16 - so you're saying in - - - in part, it - - - it - -  
17 - it would violate the defendant's rights to  
18 interpret the confrontation clause or the law to mean  
19 that the People could use generality and an undefined  
20 set of answers to plant the seeds that there's more  
21 going on here that - - - that brings the  
22 investigation to the doorstep of the defendant - - -

23 MS. EVERETT: Yes.

24 JUDGE RIVERA: - - - than if they had  
25 actually pointed out that so-and-so, and she got it

1 through an anonymous phone call.

2 MS. EVERETT: Right, and I think that the  
3 People's point is that that could happen in every  
4 case. You'll always - - -

5 CHIEF JUDGE LIPPMAN: Okay, counsel

6 MS. EVERETT: - - - will have weaknesses.

7 CHIEF JUDGE LIPPMAN: Thanks, counsel.

8 MS. EVERETT: Thank you.

9 CHIEF JUDGE LIPPMAN: Thank you all.

10 Appreciate it.

11 (Court is adjourned)

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

I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Richard Garcia, No. 40, and People v. Joshue DeJesus, No. 41, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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