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COURT OF APPEALS
STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

NO. 19

CARLOS TAPIA,

Appellant.

20 Eagle Street
Albany, New York
February 14, 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:

DANIEL A. RUBENS, ESQ.
ORRICK, HERRINGTON & SUTCLIFFE LLP
Attorney for Appellant
51 West 52nd Street
New York, NY 10019

JAMES J. WEN, ADA
BRONX COUNTY DISTRICT ATTORNEY'S OFFICE
Attorney for Respondent
198 East 161st Street
Bronx, NY 10451

Karen Schiffmiller
Official Court Transcriber



1 CHIEF JUDGE DIFIORE: The next case on this
2 afternoon's calendar is appeal number 19, The People of the
3 State of New York v. Carlos Tapia.

4 Good afternoon, counsel.

5 MR. RUBENS: Good afternoon. I'm Daniel Rubens
6 for Carlos Tapia. I'd like to request two minutes for
7 rebuttal.

8 CHIEF JUDGE DIFIORE: Two, did you say?

9 MR. RUBENS: Yes, two.

10 CHIEF JUDGE DIFIORE: Yes, sir.

11 MR. RUBENS: Thank you.

12 Carlos Tapia was convicted of assault with a
13 weapon, but there was no proof to connect him to a weapon
14 or that he knew or expected a weapon would be used during
15 the attack.

16 JUDGE FEINMAN: So I - - - I want to move you
17 right past that point, and talk about this use of the grand
18 jury minutes. Is it your position that the grand jury
19 minutes could never be used?

20 MR. RUBENS: Our position is they could not have
21 been admitted through past recollection recorded hearsay
22 exception.

23 JUDGE FEINMAN: So they could never be admitted
24 as a past recollection recorded?

25 MR. RUBENS: Well, in the circumstances of this



1 case where Lt. Cosgrove had complete lack of memory about
2 the - - -

3 JUDGE FEINMAN: Wait, wait. I'm - - - I'm just
4 talking hypothetically. Ever. Can they ever be admitted
5 as a past recollection recorded?

6 MR. RUBENS: Well, I could see a circumstance
7 where maybe there was partial recall by the witness, so
8 when the witness was on the stand, there could be some
9 opportunity for defense counsel to get traction and to test
10 the sufficiency of his account, because the key for this
11 point is, that the confrontation right requires an adequate
12 opportunity for cross-examination. Just physically having
13 someone in the courtroom on the stand - - -

14 JUDGE GARCIA: My understanding is, it's under
15 the federal Constitution, that once you have the witness on
16 the stand, and they're testifying, they're not taking the
17 Fifth, it isn't really a confrontation issue anymore. It
18 may be something else, but it's not a confrontation issue.
19 A confrontation is, I can't cross-examine the witness.
20 Here, you can cross. It's not section by section of their
21 testimony; it's, is the witness available for cross. Your
22 witness is available for cross. It's not a Constitutional
23 violation.

24 MR. RUBENS: Well, in Crawford, the Supreme Court
25 looked to whether there's an adequate opportunity to defend



1 or explain the testimony. Is - - - they did talk about
2 physical presence, but in the circumstance where the
3 witness has total memory loss, there's really no
4 opportunity for them to defend or explain their - - - their
5 account.

6 JUDGE GARCIA: In that case, I think it would be
7 very hard to get the testimony in, right? Because you'd
8 have to lay the foundation for past recollection recorded,
9 so I - - - I think that's your check on an evidentiary
10 basis. But in terms of a pure - - - we're going to - - - I
11 think be going out beyond what I understand the federal
12 courts at least have done, on what does it mean to have a
13 confrontation violation?

14 MR. RUBENS: Well, I don't think the federal
15 courts have squarely dealt with this issue post-co - - -
16 Crawford, but in any event, this state's policy on grand
17 jury testimony is clear. It's come up in this court's
18 cases on 670.10 of the Criminal Procedure Law. And this -
19 - - this court has said before that New York has a stricter
20 policy - - -

21 JUDGE FEINMAN: 670.10. Isn't that really the
22 codification of the common law exception to the hearsay
23 rule for prior testimony, right?

24 MR. RUBENS: That is what 670.10 does.

25 JUDGE FEINMAN: All right. So you have these



1 different exceptions to the hearsay rule, and I'm not sure
2 you can use, you know, one set of exceptions that's
3 codified in a particular section of the CPL, to then say,
4 well, this other exception is no longer a valid exception.

5 MR. RUBENS: Well, what 670.10 illustrates is the
6 need to have an opportunity for cross-examination, so - - -

7 JUDGE FAHEY: Well - - -

8 JUDGE STEIN: 670.10 talks - - -

9 JUDGE FAHEY: - - - you can - - - but can't you
10 argue - - - oh, I'm sorry; you go ahead, Judge.

11 JUDGE STEIN: - - - talk about ability to attend.
12 It doesn't have - - - say anything about availability.

13 MR. RUBENS: That's correct, Your Honor, but - -
14 -

15 JUDGE STEIN: So here we have someone who is
16 attending, right. So - - - so why doesn't - - - why don't
17 the - - - the requirements of 677 - - - 670.10 apply just
18 when the witness doesn't attend? And then you have other
19 rules that apply when the witness attends, but may or may
20 not be available for cross-examination.

21 MR. RUBENS: Yes, I agree that 670.10 applies
22 when the witness is unavailable, but - - -

23 JUDGE STEIN: Well - - -

24 MR. RUBENS: - - - this court's decision in Green
25 is really on point, and - - - and applied 670.10 in



1 circumstances that are really the same here, and it
2 recognized the confrontation problem.

3 JUDGE STEIN: Green didn't talk about
4 availability, though.

5 MR. RUBENS: But it was - - - the Appellate
6 Division decision did, and it said that the witness was
7 made available. This court had a - - -

8 JUDGE STEIN: That - - -

9 MR. RUBENS: - - - brief disposition.

10 JUDGE STEIN: That wasn't what was argued and
11 decided here at all.

12 MR. RUBENS: But the facts were din - - -
13 indistinguishable in every relevant sense here, because
14 both cases involved a witness who had memory loss after
15 making the identification. In both cases there is a - - -

16 JUDGE STEIN: Well - - -

17 MR. RUBENS: - - - hearsay exception applied to -
18 - -

19 JUDGE STEIN: But this child - - - to me, it
20 seems like the - - - that child was more like someone who
21 pleads the Fifth, basically said, I'm not testifying.
22 Period. And - - -

23 MR. RUBENS: Let me - - -

24 JUDGE STEIN: And I mean, we don't know what
25 would have happened because they didn't call the child to



1 the stand, but.

2 MR. RUBENS: But it was the same position,
3 because he was made available. They could have called him.
4 That was key to the Appellate Division. And the other key
5 to the Appellate Division decision there was the same line
6 of federal cases that says, physical presence - - - or it
7 suggests that physical presence may be enough. And this
8 court rejected that argument and held that it was a
9 reversible error to let the grand jury testimony in.

10 JUDGE STEIN: But here we have more than physical
11 presence. We have some fairly extensive cross-examination
12 of this witness on the stand.

13 MR. RUBENS: But because of his total memory
14 loss, there is no ability to test the accuracy of his
15 account, and that's what's critical. It's the same
16 position as if the people had just introduced his account
17 to a grand jury through an ex parte affidavit. The jury
18 was left in the same position, and that's exactly where the
19 confrontation right is designed to protect against.

20 Because he had a total lack of recall, there's no
21 ability at all to ask him about the events of the night,
22 and that's really what's missing here. In this - - - the -
23 - - I - - - I would point to this court's - - -

24 JUDGE STEIN: Well, what - - - what about Owens?
25 You know, there - - - there are some cases that talk about



1 this lack of memory. And - - - and how did Crawford call
2 that into question?

3 MR. RUBENS: Well, I mean, Crawford had the
4 language about the need to defend or explain the testimony.
5 In Owens, the witness there - - - he recalled that he had
6 made an identification and couldn't remember the basis for
7 the identification - - -

8 JUDGE STEIN: Well, isn't that what happened
9 here? The - - - the - - - the witness recalled that he had
10 testified before the grand jury, but he didn't remember the
11 basis of what he had said in - - - in that grand jury
12 testimony.

13 MR. RUBENS: I don't think he had any recall,
14 because the grand jury testimony was a few days after the
15 incident and that was all four years before the trial, so I
16 think that was a distinction.

17 JUDGE RIVERA: I thought that was why the
18 prosecutor said they're not calling the wit - - - he didn't
19 remember anything.

20 MR. RUBENS: Ex - - - exactly. That - - - that's
21 right.

22 JUDGE RIVERA: Isn't that what he said? I don't
23 remember anything.

24 MR. RUBENS: He had - - -

25 JUDGE RIVERA: It's so bad, even seeing the grand



1 jury testimony, couldn't remember anything.

2 MR. RUBENS: Yes, exactly. Even if - - - his
3 recollection was - - - he had no present recollection even
4 after seeing that transcript. So that's why it's really -
5 - -

6 JUDGE RIVERA: Would it had been different if it
7 had jarred his memory?

8 MR. RUBENS: I think that if - - - if - - - well,
9 I don't - - - first of all, if it had jarred his memory,
10 there might not have been a foundation for the past
11 recollecting recorded exception. But if - - - if he had
12 had a partial memory, I could see an argument that you
13 could actually impeach the account through cross-
14 examination, and that's really where the key is. Is there
15 any ability to have - - - kind of line up his testimony
16 against what else that the defense counsel knew and what
17 else was in the record about the incident in question.

18 I think another decision that illustrates the
19 problem here is Simmons, which talked about preliminary
20 hearing testimony, which is a form of enumerated testimony
21 under 670.10. And this court held there was error when,
22 during the preliminary hearing, there wasn't an adequate
23 opportunity for cross-examination, because the - - - the
24 hearing in question was focused on the issues of
25 identification, and there wasn't adequate opportunity to



1 cross-examine the witness on the substance of the
2 identification.

3 JUDGE FAHEY: Let - - - let me ask this. Can - -
4 - can 670.10 be seen in another way than just - - - and
5 granted it's - - - it's all - - - it's partially at least a
6 codification of the exceptions to the hearsay rules, but
7 can't it also be seen as an exception to the rights of
8 confrontation? And - - - and - - - and a restraint on the
9 exceptions to the right of confrontation?

10 MR. RUBENS: But only to the extent that the
11 forms of prior testimony allow a prior opportunity to
12 cross-examination.

13 JUDGE FAHEY: So - - - so you're saying that - -
14 - that it - - - it does not provide any - - - any restraint
15 on the rights to confrontation?

16 MR. RUBENS: Well, not the core right here, which
17 is the right to confront your accuser about their in - - -
18 inculpatory account.

19 JUDGE FAHEY: And - - - and the per - - - is it -
20 - - is the statute restrictive? Is it - - - is it just
21 dealing with this particular issue? Or - - - or does it
22 serve a broader purpose?

23 MR. RUBENS: Well, I - - - as this court said, it
24 reflects the policy against the use of grand jury
25 testimony, because it enumerates three categories, each of



1 which allows full cross-examination - - -

2 JUDGE FEINMAN: So - - - so I just want to
3 clarify that. So - - - so essentially what you're saying
4 is, because the legislature enacted 670.10, you can never
5 use grand jury testimony?

6 MR. RUBENS: That's not what I'm saying. 670.10
7 talks about three types of testimony, and there might be
8 other hearsay exceptions that were to let you in - - -
9 allow you to get it in, because there wouldn't be a
10 confrontation issue. For example, if they were a party
11 admission, then you wouldn't be in the same circumstance -
12 - -

13 JUDGE FEINMAN: So just bear with me a second.
14 So if somebody's assaulted, you know, whether it's a gun
15 shot, a stabbing, whatever, survives, gets to the grand
16 jury, and then after the grand jury returns the indictment,
17 but before it goes to trial, the witness expires, not
18 necessarily maybe due to the injury or maybe it's something
19 else. Now what?

20 MR. RUBENS: That doesn't come in. That's what
21 the legislature has said. By limiting 670.10 to - - -

22 JUDGE FEINMAN: So that - - - that whole
23 prosecution for that assault, unless there's another
24 eyewitness who's going to make out all the elements, goes
25 away?



1 MR. RUBENS: Well, I think that's the basis of
2 Crawford and the confrontation right. There might be some
3 prosecution - - -

4 JUDGE FEINMAN: All right. I - - -

5 JUDGE GARCIA: Is there - - -

6 JUDGE FEINMAN: - - - I just want to understand
7 what your position is.

8 JUDGE GARCIA: Could you cite one federal case,
9 and I think it's 803(5) is their rule, and this is a
10 federal claim, where they kept out grand jury testimony
11 based on a Crawford violation, because as I think the
12 Second Circuit at least, and I think it's Garcia, they let
13 it in. Or if not, it wasn't grand jury testimony; it was a
14 report, I think, or something, but what federal case have
15 they ever kept out grand jury testimony on their 803(5) on
16 a confrontation Crawford basis?

17 MR. RUBENS: I'm not aware of any federal case,
18 but this court has 670.10, and this court - - - I mean,
19 this state has its own policy about entering grand jury
20 testimony.

21 JUDGE GARCIA: Are you make a state
22 Constitutional claim here or did you - - -

23 MR. RUBENS: Well - - -

24 JUDGE GARCIA: - - - raise that at all?

25 MR. RUBENS: Yes, we because we've talked



1 consistently about 670.10 below, and that's what reflects,
2 as this court has said, this state's restrictive policy,
3 which is more re - - - more restrictive on grand jury than
4 the federal policy, where it could come in potentially,
5 under - - - as a residual hearsay exception. And - - -

6 JUDGE GARCIA: But it wouldn't be Crawford then,
7 because there - - - I cannot find a case under Crawford
8 where they did what you're asking us to do.

9 MR. RUBENS: Well, I - - - I'm not aware of how
10 this issue is played out in the federal system, but I think
11 it's clear under this court's precedence, and if it - - -
12 this testimony is allowed in, then nothing is going to stop
13 the routine use of grand jury testimony in criminal cases,
14 if the witness forgets, which is, you know, pretty like - -
15 - pretty likely to happen, given the delays in the trial
16 process.

17 CHIEF JUDGE DIFIORE: Counsel, what if in a
18 narcotics prosecution, the People call a chemist to the
19 stand, and the chemist in the course of her work had
20 recorded a numerical weight in her lab report, and then
21 she's on the stand, and she's testifies that she has no
22 independent recollection of that. Is that recorded
23 statement not admissible under your theory then?

24 MR. RUBENS: Well, I don't know if that would be
25 a testimonial statement at all. So it might be an entirely



1 different issue. I mean, grand jury - - -

2 CHIEF JUDGE DIFIORE: What wouldn't be a state -
3 - - a testimony - - -

4 MR. RUBENS: Whatever values she recorded might
5 not - - - I'm not sure if that would be - - -

6 CHIEF JUDGE DIFIORE: Well, if that goes directly
7 to the crime charged, the weight of the drugs.

8 MR. RUBENS: Well, if there's an opportunity to
9 impeach her account based on the reliability of her
10 methods, I mean, that's a different context, so maybe - - -

11 JUDGE FEINMAN: All right. What - - - what if
12 the defense sends out an investigator, gets a written
13 statement from somebody who's a witness, and that trial
14 comes along, and - - - and perhaps that statement was
15 helpful to the defendant. And now the person really, you
16 know, backs off; I don't - - - I don't remember - - - I
17 wasn't - - - I - - - I wasn't able to see as well as I, you
18 know, indicated. Now what?

19 MR. RUBENS: Well, there are different
20 considerations which the - - - this court's precedence
21 would recognize when the defense is using it or when it's
22 used for impeachment. There's a separate provision of the
23 CPLR, and it's not - - -

24 JUDGE FEINMAN: No, I'm not talking impeachment.
25 I'm talking about he wanted to put this on - - - this



1 witness on.

2 MR. RUBENS: Well, if the defense wants to do it,
3 then there are separate Constitutional issue - - - in terms
4 of the state.

5 JUDGE FEINMAN: So it's different whether it's
6 the prosecution versus the defense?

7 MR. RUBENS: Well, the confrontation right is, is
8 a right that specifically a defendant's.

9 JUDGE FEINMAN: Okay.

10 MR. RUBENS: There isn't a symmetry there.

11 JUDGE FEINMAN: Now let's say it was a sworn
12 statement?

13 MR. RUBENS: Well, either - - - right, that if
14 there wasn't an opportunity to cross-examine or - - - and
15 there's not an opportunity at trial to cross-examine, the
16 person who made that statement, because of total memory
17 loss, because their unavailable, then that - - - that
18 evidences a confrontation problem, if it's testimonial
19 evidence, so it's - - -

20 JUDGE STEIN: Is there - - - is there any
21 inconsistency in arguing that a witness is available for
22 purposes of a missing witness charge but unavailable for
23 purposes of confrontation analysis?

24 MR. RUBENS: Yeah, I do think there may be an
25 inconsistency and I recognize the way the issue played out



1 here in the trial court. But the trial court's ruling was
2 that it was not going to rule on this - - - on a missing
3 witness charge or the unavailability question for that
4 purpose. So defense counsel was presenting arguments to
5 try and understand exactly what Lt. Cosgrove knew or could
6 recall, and it played out the way it did, and then the
7 trial court never ruled on the missing witness.

8 JUDGE RIVERA: But I thought the - - - the
9 problem is - - - is not putting him on the stand. It's
10 trying to use the grand jury testimony. You can put him on
11 the stand - - -

12 MR. RUBENS: Yes.

13 JUDGE RIVERA: - - - he doesn't remember
14 anything. It's - - - it's the prosecutor wanting to admit
15 and being allowed to admit the grand jury testimony. That
16 what's - - -

17 MR. RUBENS: That's correct.

18 JUDGE RIVERA: - - - causes the tension.

19 MR. RUBENS: That's the confrontation problem.

20 JUDGE FAHEY: But let me - - - let me ask this.
21 Does Balbo's (sic) testimony - - - he was the other
22 policeman; I think that was his name, Balbo - - - does his
23 testimony - - - let's assume Cosgrove's testimony was error
24 on some point, whether under hearsay or 670.10. What - - -
25 would this make it harmless error, the admission of

1 Cosgrove's testimony? Isn't Balbo's testimony sufficient?

2 JUDGE WILSON: I thought it was Bello.

3 MR. RUBENS: No, it's - - - it's - - - Sgt.

4 Bello's testimony was not sufficient, because Lt. Cosgrove
5 was the only person to testify before the grand jury that
6 Mr. Tapia was kicking the victim in the head while - - -
7 when the police arrived, and that was really important, and
8 I think - - - I just wanted to call Your - - - Your Honors'
9 attention to the Appellate Division decision. It actually
10 misattributes the testimony about kicking to Sgt. Bello.
11 So if you look the record, the only person who said
12 anything about kicking was Lt. Cosgrove to the grand jury.

13 JUDGE FAHEY: Okay. Thank you.

14 MR. RUBENS: So I think that - - -

15 CHIEF JUDGE DIFIORE: Well, the significant
16 injury here, though, was the - - - the cut to the neck,
17 correct?

18 MR. RUBENS: That's right. And that goes to the
19 sufficiency argument. You know, our position on
20 sufficiency is that, because there was no evidence
21 connecting Mr. Tapia to the use of the weapon - - -

22 CHIEF JUDGE DIFIORE: Right.

23 MR. RUBENS: - - - that - - - that was
24 insufficient. So, yes.

25 CHIEF JUDGE DIFIORE: I was going to kick, when -



1 - - when you responding - - -

2 MR. RUBENS: Right.

3 CHIEF JUDGE DIFIORE: - - - to Judge Fahey's
4 question.

5 MR. RUBENS: Right. Well, you only reach - - -
6 yes, you would only reach this issue if you disagreed on
7 sufficiency, so.

8 JUDGE STEIN: And Cosgrove's testimony about when
9 that kick happened also has to do with when he - - - he
10 would have seen that the victim was bleeding, right?

11 MR. RUBENS: That's - - - that's right. There's
12 testimony about the position of Mr. Tapia, and - - - I
13 mean, this a case where the jury deliberated for four days,
14 had sixteen notes, asked for a readback of this testimony,
15 the prosecutor relied on it in for summation. So I don't
16 think this is an instance of harmless error.

17 CHIEF JUDGE DIFIORE: Thank you, counsel.
18 Counsel?

19 MR. WEN: James Wen for the Office of the
20 District Attorney, Bronx County. Good afternoon, Your
21 Honors.

22 So since we started with the grand jury
23 testimony, I guess I might as well start with the grand
24 jury testimony as well. It's - - - it's our position that
25 there was no problem with the admission of Lt. Cosgrove's



1 grand jury testimony, either under a 670.10 context or the
2 confrontation clause context. And also, in any event, if
3 there was any error, with - - - with respect to the
4 admission of his grand jury testimony, any error was
5 harmless.

6 JUDGE WILSON: If it - - - if it a violation of
7 670.10, does 670.10 disallow harmless error analysis?

8 MR. WEN: Well, 670.10 is a statutory - - -

9 JUDGE WILSON: Yes.

10 MR. WEN: - - - so - - - so - - -

11 JUDGE WILSON: But doesn't it prescribe a remedy
12 for a violation?

13 MR. WEN: So I don't - - - I don't think so. But
14 I mean, I - - - I - - - I considered 670,10, if there would
15 be, you know, harmless - - - harmless analysis in - - - in
16 the 670.10 ana - - - context. But I mean, starting with
17 670.10, I mean, 670.10 really speaks to something, you
18 know, very different that was done here. 670.10 allows
19 for, you know, the admission of just prior testimony
20 without any sort of testifying witness whatsoever. So - -
21 -

22 JUDGE WILSON: And so how do you distinguish
23 Green then?

24 MR. WEN: Well, so in Green - - - so in Green,
25 there was no testimony from any testifying witness. There



1 was no - - - there was no witness to actually go through
2 the admissions pro - - - admission procedure under past
3 recollection recorded. So and that - - -

4 JUDGE WILSON: And the witness - - - the witness
5 was a nine-year-old child - - - was made available and the
6 defense decided not to call him; is that right?

7 MR. WEN: That's correct. The defense was given
8 an opportunity to call him for the purpose of cross-
9 examination, but they did not. But Green also had, like -
10 - - there were - - - there were two prob - - - in Green,
11 there were two problems under 670.10 with the admission of
12 the testimony. Fir - - - the first problem was the fact
13 that the kid - - - the - - - the child in that case, you
14 know, was - - - was not unavailable under the meaning of
15 the statute, in that he was not, you know, deceased, or
16 incapacitated, or ill, or - - - or, you know - - - or
17 tampered with in - - - in any way.

18 And - - - and the second problem with the 6 - - -
19 the second problem is that, you know, the - - - the
20 testimony that they tried to illicit had - - - was - - -
21 did not fall under the enumerated kinds of testimony under
22 the statute. So, you know, those are two problems that are
23 not really present here. And also, you know, when we're
24 talking about the past recollection recorded - - -

25 JUDGE STEIN: Do the People dispute the



1 applicability of 670.10 in Green?

2 MR. WEN: I - - - I don't believe so. But - - -
3 but it, you know, in 67 - - - other 670.10 - - - this - - -
4 this was really, you know - - - it's our position that
5 670.10 is just simply not applicable to this case. This is
6 - - -

7 JUDGE FEINMAN: So - - - so - - -

8 JUDGE STEIN: But that argument wasn't made in
9 Green, that's - - -

10 MR. WEN: I - - - no, perhaps not. But - - - but
11 I think it's also important - - -

12 JUDGE FEINMAN: Let me ask you this.

13 MR. WEN: Yeah.

14 JUDGE FEINMAN: 670.10 is interpreted however
15 it's interpreted in Green. That's in 1991. The past
16 recollection recorded exception has been used by trial
17 courts and the Appellate Divisions uniformly to admit grand
18 jury testimony had - - - is there any precedent, either
19 from the Appellate Divisions or this court, since 1991, to
20 say, no, no, Green means you can't admit grand jury
21 testimony under the past recollection recorded exception?

22 MR. WEN: No, not squarely, no. And - - - and,
23 you know, as you - - - as you indicated, I mean, this is
24 consistently admitted - - - grand jury testimony is
25 consistently admitted as past recollection recorded in



1 departments of the Appellate Division.

2 JUDGE FEINMAN: So - - - so if we were to ma - -
3 - take a different approach, would that be a new rule?
4 Like, where - - - where is this going in terms of 440
5 applications?

6 MR. WEN: Yeah, I mean, it would be a new - - -
7 perhaps a new - - -

8 JUDGE FAHEY: Can I - - - can I - - -

9 MR. WEN: - - - rule. Yes, Your Honor, I'm
10 sorry.

11 JUDGE FAHEY: I was on the Fourth Department for
12 a while, about eight years. And my recollection is
13 different. In the Third and the Fourth Department, I
14 thought that the rule was it's - - - it's not admitted.
15 I'm assuming you're in what - - - what department are you
16 in?

17 MR. WEN: The First Department, Your Honor.

18 JUDGE FAHEY: You're in the First, okay, so. So
19 in fairness, I think in the First and Second, it is. And -
20 - - and I - - - I think that - - - I'm just thinking back
21 myself on a case, Flowers was a Fourth Department case that
22 - - - that I sat on that - - - where it was admitted. So
23 my experience in - - - and it's outside this, so I'm not
24 saying you're wrong, it's - - - it's just within your
25 experience. But my experience is a little bit different,



1 and in the Third and Fourth Department, I don't think
2 that's correct.

3 MR. WEN: Okay.

4 JUDGE FAHEY: I think it has been.

5 MR. WEN: Well, I - - - I do - - - you know, in
6 recent cases in the First Department and Second Department,
7 that's certainly the - - - the case.

8 JUDGE FAHEY: I think you're right about that,
9 yes.

10 MR. WEN: But also I want to, you know, im - - -
11 impress upon this court that, you know, the kinds of test -
12 - - this - - - this wasn't simply a procedure of just
13 admitting the grand jury testimony in lieu of any live
14 testifying witness. This was, you know - - - we're - - -
15 we're - - - what we're doing is we're eli - - - eliciting
16 the statement of the recollection, you know. It's not the
17 fact that it's testimony; it's just - - - it's the
18 recollection - - - Lt. Cosgrove's, like, recollection of
19 that evening.

20 And, you know, as for the - - -

21 JUDGE RIVERA: But isn't - - - if I'm
22 understanding what you just said, isn't that the problem,
23 that they can't cross-examine him, because of course, they
24 couldn't at the grand jury. And then they can't cross-
25 examine him on - - - on the witness stand because he has no



1 memory of it. He has absolutely no memory of it.

2 MR. WEN: Right.

3 JUDGE RIVERA: He's - - - he's reading an answer
4 off a transcript that he has already said, I don't remember
5 this at all.

6 MR. WEN: Right, and so they were - - -

7 JUDGE RIVERA: So how can they delve into the
8 substance of what's he's testifying to?

9 MR. WEN: Well, I mean, so when we get into the
10 question of confrontation, I mean, him - - - them talk - -
11 - you know, cross-examining him about his lack of memory is
12 very ripe for confront - - - for confrontation purposes in
13 cross-examination. And also the fact that - - -

14 JUDGE RIVERA: What does the Supreme Court say is
15 the - - - is the point of cross-examination? What - - -
16 what is it supposed to serve?

17 MR. WEN: Well, it's suppose - - - well, it is
18 supposed to put the witness in the crucible of cross-
19 examination. And it's supposed to be tested, you know.
20 His statements are supposed to be tested in - - - in this
21 context of confrontation in cross-examination. So, you
22 know, I - - -

23 JUDGE RIVERA: But you can't test anything - - -

24 JUDGE FEINMAN: And the purpose of that is to - -

25 -



1 JUDGE RIVERA: - - - excuse me - - -

2 JUDGE FEINMAN: Oh, I'm sorry.

3 JUDGE RIVERA: You can't test anything when he
4 has no memory of it. That's what I'm finding difficult
5 with your analysis. I agree with you, if - - - if there
6 was no grand jury testimony admitted, if all he did was get
7 up and say, I don't remember, and they want to cross him
8 and - - - and - - - on the fact that he doesn't have a
9 memory and what that might suggest about the events, that's
10 one thing. But to actually put in words in his mouth that
11 they cannot in anyway test, I'm having difficulty seeing
12 how that puts - - - puts into the - - - what did you call -
13 - - the crucible of cross-examination.

14 MR. WEN: Yes.

15 JUDGE RIVERA: How that's served - - - serves
16 that goal? Right, to challenge him?

17 MR. WEN: Right. But - - - but - - - but they
18 are challenging him in other ways, for example, his lack of
19 test - - - lack of memory. Under People v. Owens, it found
20 that a - - - a witness with no memory does not violate the
21 confrontation clause.

22 JUDGE RIVERA: Well, all I'm saying is, they get
23 to do that without the - - -

24 CHIEF JUDGE DIFIORE: Did the trial court
25 instruct him with respect - - - instruct the jury with



1 respect to how they received that testimony?

2 MR. WEN: Yes, so they in - - - instructed the -
3 - - the jury - - - the trial court instructed the jury
4 that, you know, this is auxiliary to the witness'
5 testimony. We take the fact that we have the witness here,
6 sitting here, able to ask - - - ask - - - able to, you
7 know, testify about what he can testify about, and
8 remember, he was not a - - - an empty vessel. He was able
9 to testify about, you know, basic facts about his career as
10 a police officer, that he was retired, that he was very
11 familiar with the area, that he - - - that Sgt. - - - Sgt.
12 Bello was his partner. And so this is not - - - this is
13 very different from the situa - - -

14 JUDGE RIVERA: He couldn't testify to what the
15 events are, which is what matters in the criminal trial,
16 correct?

17 MR. WEN: It is the most salient point, yes. It
18 is the most salient point about the events of the evening,
19 but - - -

20 JUDGE STEIN: But - - - but the other points go
21 to all the surrounding things that they question about,
22 including lack of memory, go to whether - - - how much
23 weight they should put on this testimony - - -

24 MR. WEN: Right.

25 JUDGE STEIN: - - - this grand jury testimony,



1 right?

2 MR. WEN: Yes. And - - - and, you know, to - - -
3 to respond to my adversary's point about the public policy
4 element, you know, I mean, we - - - we already touched upon
5 the fact that, you know, the - - - the People in this case
6 didn't really want to admit this kind of testimony in this
7 manner.

8 And there's a good reason why we didn't want to
9 do that, is - - - is - - - and that's because it's not very
10 convincing testimony. It's not as good as having a witness
11 sit on the stand and testify from memory. It's - - - it's
12 a far cry from that. It, you know - - - it - - - it's not
13 very convincing to a jury to have a witness who just claims
14 that he can't remember and has to read something off of,
15 you know, a piece of paper about something he testified
16 about, you know, five years ago, and then, you know, wonder
17 why Sgt. Bello, for instance, is able to remember very,
18 very accurately what happened that evening.

19 JUDGE STEIN: But you put - - - wouldn't it have
20 been within the court's discretion - - - if - - - if the
21 court heard the testimony and - - - and - - - I don't know
22 - - - concluded that - - - that Cosgrove was lying. That
23 he - - - that he really did have a recollection, but he - -
24 - he was, you know - - - he was doing this to avoid being
25 cross-examined on it.



1 MR. WEN: Right.

2 JUDGE STEIN: Could the court have excluded the
3 testimony - - - the grand jury testimony then?

4 MR. WEN: I think the court probably could have
5 instructed on it. And then it certainly probably left an -
6 - - an impression on the jury that, you know, perhaps, you
7 know, a - - - a negative one, given the fact that - - -

8 JUDGE STEIN: It would be a jury question?

9 MR. WEN: Yes.

10 JUDGE RIVERA: May I ask you? I know the red
11 light just went off.

12 MR. WEN: Sure.

13 JUDGE RIVERA: It's my last question.

14 MR. WEN: Yeah.

15 JUDGE RIVERA: How - - - how is the foundation
16 for this to get in? How - - - how did the ADA establish
17 that foundation?

18 MR. WEN: Sure.

19 JUDGE RIVERA: Because I'm having trouble just
20 with that first - - -

21 MR. WEN: Of course.

22 JUDGE RIVERA: - - - question.

23 MR. WEN: Okay. So you know, you know, under
24 Taylor, you know, we know the four prongs that we need to
25 meet in order to - - - to establish - - - to - - - to admit



1 the past recollection recorded. And here, you know, the -
2 - - I - - - though - - - is - - - is your question about
3 the third prong, whether we properly admitted the third
4 prong of - - -

5 JUDGE RIVERA: Yes.

6 MR. WEN: Yes. Okay. So - - - and that's - - -
7 that's about, you know - - - so there, you know, Lt.
8 Cosgrove testified that, you know, when he testified at the
9 grand jury, it - - - oh, I'm sorry. The - - - so the third
10 prong is whether the witness can presently testify that the
11 record correctly represented his knowledge and recollection
12 when made. And so the defendant is arguing right now that
13 we failed to establish that prong because there was perhaps
14 a - - - a typo in the grand jury transcript, and that tran
15 - - - that typo is, you know, the difference between one
16 letter - - -

17 JUDGE FEINMAN: Parked and marked.

18 MR. WEN: Yes, parked and marked. And so that -
19 - - to the - - - and according to the defendant, that
20 raises a - - - a foundational issue as to the third prong
21 under - - - under Taylor. And our - - - our argument is,
22 no, not at all, because what we're talking about - - - he's
23 trying to interpose a requirement that we need prompt
24 verification of the grand jury transcript. So for example,
25 that would involve Lt. Cosgrove, after testifying to the



1 grand jury, immediately reviewing the min - - - you know,
2 the - - - the transcript and, you know, checking - - -
3 ticking off a check box and saying, yes, this is accurate.

4 CHIEF JUDGE DIFIORE: It's a certified
5 transcript.

6 MR. WEN: That's right. It was a certified
7 transcript. And Lt. Cosgrove testified on - - - under
8 oath, and he also stated that, you know, I - - - well,
9 basically saying that - - - stated that, you know, if I
10 said it at the grand jury, then it's true. I - - - and so
11 that is sufficient, you know, assurance of accuracy for the
12 purposes - - -

13 JUDGE RIVERA: Even - - - even if he can't say
14 when I read it, I knew that that's what I said.

15 MR. WEN: That's - - - well, it's true, he could
16 not even say that whether it was truly a typo or not. So,
17 but - - - but, yes, there's sufficient assurance of
18 accuracy, is the fact that it's - - - he's given this
19 testimony under oath, and that it was recorded by a grand
20 jury stenographer, and this is coming from a certified
21 transcript. This is not like a situation where, you know,
22 we're trying to use the past recollection recorded coming
23 out of, say a child's diary or something like that.

24 CHIEF JUDGE DIFIORE: Thank you, counsel.

25 MR. WEN: Thank you, Your Honor.



1 CHIEF JUDGE DIFIORE: Mr. Rubens?

2 MR. RUBENS: Thank you.

3 If Lt. Cosgrove had described the incident in an
4 affidavit, and the People tried to introduce that affidavit
5 at trial, that would clearly be a confrontation violation.
6 Here, what happened is functionally the same. His lack of
7 memory didn't - - - it didn't discredit him or impeach his
8 testimony in any way. It was completely plausible, given
9 that four years had elapsed between the incident and his
10 grand jury testimony.

11 So the confrontation right, as my adversary said,
12 it's about subjecting testimony to the crucible of cross-
13 examination. And the jury here was told, you can consider
14 the grand jury testimony together with the present
15 testimony of the witness. That's again the same as
16 treating it as akin to an affidavit, because it's present -
17 - -

18 JUDGE FEINMAN: But is - - - is part of the
19 crucible of cross-examination that to test of reliability
20 of statements that are made, correct?

21 MR. RUBENS: That's correct.

22 JUDGE FEINMAN: So in using hearsay exceptions,
23 such as past recollection recorded, aren't we also looking
24 - - - the whole reason we don't allow hearsay, it's a - - -
25 because there's a concern about its reliability, but if you



1 get into an exception, the presumption is, it's reliable.
2 So - - -

3 MR. RUBENS: The legislature has spoken to that
4 in 670.10. And it didn't include grand jury testimony as
5 the type of prior testimony that it - - -

6 JUDGE GARCIA: 670.10, if - - - the way I look at
7 it and - - - is 670.10, I think, is incorporating a
8 confrontation issue, right? So if the witness is
9 unavailable, there are certain categories of things you can
10 put in, and they've been tested in this way - - -

11 MR. RUBENS: You - - - correct.

12 JUDGE GARCIA: - - - previously. But in order to
13 get into here, you need to fit into the unavailability
14 prong. So my problem is the before 670.10 problem, because
15 I don't get to 670.10 unless there's a confrontation
16 problem. And again, as I read Crawford and no case in New
17 York - - - I'll put Green aside for a second - - - I don't
18 read any case as saying, when you have a witness on the
19 stand who is cross-examined, that you have a confrontation
20 clause problem. So this doesn't apply.

21 All this says if you don't have a witness on the
22 stand, maybe it's even more limited as you say, you can
23 only put in these certain categories of things, and we're
24 going to be very tight about those in New York. But you
25 still have to get into the statute; you still have to get



1 into the confrontation clause. And my problem is, no court
2 has ever said we're into the confrontation clause in this
3 situation.

4 MR. RUBENS: Well, I don't understand why you
5 would treat prior testimony as - - - as more reliable when
6 it hasn't been subjected to cross-examination than treat
7 what with cross-examination here.

8 JUDGE GARCIA: But it's - - - it's - - - it's a
9 confrontation clause issue, so where is it in the law that
10 you have a live witness testifying, that that is a
11 confrontation clause violation. I see the Fifth Amendment
12 context. They're essentially not there. They're not
13 answering. But in this case, you're questioning them. And
14 I - - - again, I don't see a court that has placed that
15 scenario within the confrontation clause bucket, let's call
16 it. So therefore, I don't see getting to 670.10.

17 MR. RUBENS: Well, we cited a decision at a
18 Missouri - - - Mississippi Supreme Court, which actually
19 held this much as a lack of recall that caused a
20 confrontation violation, when you just put the witness on
21 the stand and they couldn't recall.

22 And the longest date does not - - - whatever the
23 Appellate Division's been doing the past few years, this
24 court, every time it's considered grand jury testimony,
25 it's - - - it's - - - as a hearsay exception, has mentioned



1 this - - - the policy against introducing it in this state.
2 It's mentioned that the policy is more restrictive than
3 under the federal Constitution.

4 JUDGE GARCIA: I - - - I also in - - - in some
5 ways - - - and approaching this case, I thought grand jury
6 testimony - - - the grand jury testimony was, you know,
7 five questions and answers that they put in in this case;
8 is that right, approximately? And there were two that were
9 actually pretty relevant to the crime. It wasn't that they
10 put in the grand jury transcript, right? They put in a
11 small section of the grand jury - - -

12 MR. RUBENS: But it was about the critical issue
13 in the case - - -

14 JUDGE GARCIA: Right.

15 MR. RUBENS: - - - which is exactly what happened
16 in the few seconds when the officers didn't see what was
17 going on, and this whole case turns on, can you draw the
18 inference that Mr. Tapia knew there was a weapon or he'd
19 slashed him, so it went to that issue, and that was really
20 critical, and it could have made all the difference.

21 JUDGE GARCIA: It really seems to me, though,
22 that you look at the statements that are coming in, the
23 hearsay exception, whether you have a person on the stand
24 to be able to cross-examine, and then you can make the
25 arguments under abuse of discretion, whether past



1 recollection should have been entered in. Under Taylor,
2 did they make the foundation? And there are legitimate
3 hurdles to get through for that, and I think Judge Rivera
4 was asking about some of them. But under a confrontation
5 clause violation, I just - - - I have difficulty placing it
6 within that Crawford context.

7 MR. RUBENS: Well, I think if you look at the - -
8 - what Lt. Crawford (sic) could say on the witness stand
9 about the crucial issue, which was what was happening
10 during this attack, what was used, when was it used, when
11 was he bleeding, if you just look at what the framers
12 intended when they had the confrontation clause and didn't
13 want ex parte affidavits, I think it's the exact same
14 concern.

15 CHIEF JUDGE DIFIORE: Thank you, counsel.

16 MR. RUBENS: Thank you.

17 (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 The People of the State of New York v. Carlos Tapia, No. 19 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



Signature: _____

Agency Name: eScribers
Address of Agency: 352 Seventh Avenue
Suite 604
New York, NY 10001
Date: February 20, 2019

