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COURT OF APPEALS  
STATE OF NEW YORK

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THE PEOPLE OF THE STATE OF NEW YORK,  
Respondent,

-against-

CLARENCE ROUSE,  
Appellant.

NO. 93

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20 Eagle Street  
Albany, New York  
October 24, 2019

Before:

CHIEF JUDGE JANET DIFIORE  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE LESLIE E. STEIN  
ASSOCIATE JUDGE EUGENE M. FAHEY  
ASSOCIATE JUDGE MICHAEL J. GARCIA  
ASSOCIATE JUDGE ROWAN D. WILSON  
ASSOCIATE JUDGE PAUL FEINMAN

Appearances:

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1 CHIEF JUDGE DIFIORE: The next appeal on the  
2 calendar is appeal number 93, The People of the State of  
3 New York v. Clarence Rouse.

4 (Pause)

5 MR. VANG: Yes, good afternoon, Your Honors, and  
6 may it please the court, John Vang for Clarence Rouse. I  
7 respectfully request two minutes for rebuttal, please.

8 CHIEF JUDGE DIFIORE: Of course.

9 MR. VANG: Numerous trial errors here denied Mr.  
10 Rouse a fair trial, and I'd like to talk about the  
11 evidentiary rulings here.

12 First, the court wrongly precluded the defense  
13 from crossing police witness Steven Lopez about his lies to  
14 a federal prosecutor. The lies was here - - - here was as  
15 follows.

16 During trial preparation of the federal  
17 prosecutor, in a separate and unrelated criminal matter - -  
18 -

19 JUDGE GARCIA: Counsel, if we were to find for  
20 you - - - assuming we were to find for you on the judicial  
21 determinations, how much of this would get in as a ma - - -  
22 as a result of that?

23 MR. VANG: How much would these lies? I mean,  
24 this would - - - it would come in, because he - - -

25 JUDGE GARCIA: Isn't that part of the basis of



1 the federal judge's decision in terms of credibility?

2 MR. VANG: They're both of them, yes. Williams  
3 and Russell both involved a situation where the judge  
4 deemed Steven Lopez incredible, because in part - - - not  
5 only because of the facts of those cases, but in part  
6 because he lied to the federal prosecutor.

7 JUDGE GARCIA: So let's stay with that for a  
8 second. So assuming it comes in or no discretion was  
9 exercised, perhaps here, and the argument would be - - -  
10 and it goes back, and there's a determination that these  
11 credibility determinations can be used on cross.

12 What information from those determinations would  
13 you suggest would be used?

14 MR. VANG: Well, you could certainly - - -  
15 there's a number of things, because the court found him  
16 incredible based on the facts of those cases. So you could  
17 certainly say, you know, was it true that you claimed to  
18 have seen - - - you know, in the - - - the Williams case -  
19 - - was it true that you claimed to have seen that the - -  
20 - the back license plate was obscured, when in fact, it  
21 wasn't? You know, was it - - - was it true that - - - and  
22 also, was it true that you - - - you both claimed to have  
23 seen this car driving at a certain speed, and it wasn't?

24 You could ask about the underlying facts - - -

25 JUDGE WILSON: It almost sounds - - - it almost



1 sounds like you're going to retry the Williams case in this  
2 case.

3 MR. VANG: Well, you wouldn't be tr - - -  
4 retrying the Williams case. And - - - and the key thing  
5 about that is the courts would be able to have the  
6 discretion to limit the scope of cross-examination. The  
7 court could decide that certain questions are resulting in  
8 that - - - that would result in a retrial.

9 CHIEF JUDGE DIFIORE: So - - - so if the witness  
10 admits to the ticket-fixing -- -

11 MR. VANG: Sure.

12 CHIEF JUDGE DIFIORE: - - - does that - - - does  
13 a prior judicial determination with respect to him lying  
14 about the ticket-fixing come in?

15 MR. VANG: Well - - -

16 CHIEF JUDGE DIFIORE: Or is it enough that he's  
17 admitted to the bad act?

18 MR. VANG: - - - well - - - well, I would just  
19 like to clarify, because these facts are - - - the - - -  
20 the issue in the case was that - - - in the Williams case,  
21 was that he did not admit that he had lied about the  
22 ticket-fixing to the federal prosecutor, and then he lied  
23 to the federal prosecutor. That was the fact that came out  
24 at the hearing.

25 JUDGE FAHEY: Isn't - - - analytically, it seems



1 we have three steps here. The first is the ticket-fixing -  
2 - -

3 MR. VANG: Right.

4 JUDGE FAHEY: - - - which he admits to. He  
5 admitted that - - - that he was involved in a ticket-fixing  
6 scheme.

7 Second is did he lie to the federal prosecutor  
8 about the ticket-fixing scheme? And it's been  
9 characterized as a misstatement or a lie, depending on how  
10 you want to look at it.

11 And the third are the two cases that involved the  
12 stops with him and his partner - - -

13 MR. VANG: Right.

14 JUDGE FAHEY: - - - the Williams and the Russell  
15 cases.

16 MR. VANG: Right.

17 JUDGE FAHEY: So analytically, those are  
18 different things.

19 MR. VANG: Right.

20 JUDGE FAHEY: The ticket-fixing clearly gets in.  
21 They can cross-examine him about that.

22 MR. VANG: Right.

23 JUDGE FAHEY: The lies, I'm not sure if they do  
24 or not, but that may be a discretion thing - - - and  
25 there's a stronger case to be made on the two judicial



1 determinations.

2 Isn't that what you're arguing? Isn't that the  
3 core of it?

4 MR. VANG: Well, yeah, I mean, that - - - that is  
5 the core of it. I mean, the key thing to remember here,  
6 though, is that - - -

7 JUDGE FAHEY: I - - - I would be careful about  
8 which questions you're going to ask, because a - - - a  
9 judge - - - you know, you - - -

10 MR. VANG: Right.

11 JUDGE FAHEY: - - - Judge Wilson's totally - - -

12 MR. VANG: Right.

13 JUDGE FAHEY: - - - you're - - - you're not going  
14 to - - - you're not going to try the Williams case over  
15 again.

16 MR. VANG: And - - - and the important thing to  
17 remember here is that we're - - - we're examining what  
18 questions the court is going to allow defense counsel to  
19 ask, but we didn't even get there. I mean, the point here  
20 is that the court never even exercised discretion at all  
21 here.

22 JUDGE FAHEY: Excuse me. But really isn't the  
23 point not what questions they had to ask; the point is is  
24 that - - - was the evidence overwhelming? Which it wasn't.  
25 This is a - - - this is an officer - - -



1 MR. VANG: Yes.

2 JUDGE FAHEY: - - - identification case. So that  
3 being the case, so are these questions necessary, because  
4 the key witnesses, their credibility is at stake here?

5 MR. VANG: They're absolutely necessary here,  
6 because the defense was that the officers mis-ID'ed Mr.  
7 Rouse. Then after assaulting him, leaving him with five  
8 staples in his head, leaving him - - - his shoulder  
9 potentially dislocated, leaving it in a sling, leaving him  
10 bloodied, they tried to cover up that conduct by - - - by -  
11 - - by saying that he actually was the gunman.

12 These acts of testimonial dishonesty, defense  
13 counsel should have been able to explore that.

14 JUDGE FAHEY: But for us, so the question is a  
15 little narrower.

16 MR. VANG: Sure.

17 JUDGE FAHEY: The question is, is - - - is not -  
18 - - is not that question, but really, did the court  
19 properly exercise its discretion to challenge the  
20 credibility of the officers.

21 MR. VANG: And the court - - - and there was no -  
22 - - first of all, there - - - I would - - - I would  
23 actually maintain that there actually was no exercise of  
24 discretion here, because the court categorically rejected  
25 this line of cross altogether.



1 JUDGE STEIN: Is that also true of the 911 calls?

2 MR. VANG: The - - - well, with respect to the  
3 911 call, yes, because the court categorically rejected the  
4 defense's right to cross about the 911 calls, because the  
5 court deemed them extrinsic evidence of collateral matters.

6 But that is an absolutely erroneous  
7 interpretation of the collateral evidence rule. The very  
8 issue that the jury had to decide in this case was whether  
9 Mr. Rouse was the - - - was the gunman. And to that end,  
10 the jury had to believe or decide whether or not to believe  
11 the officers' version of the events.

12 The officer testified that after the gunman  
13 dropped the gun and ran, he was able to accurately track  
14 the gunman, who also was wearing a white T-shirt - - -  
15 accurately track the gunman, because there was "no one on  
16 the stairs" and also "not many people on the street at that  
17 time".

18 But the 911 calls disputed that. They described  
19 a chaotic event where there were at least fifteen to twenty  
20 kids at that intersection who - - - who scurry or who flee  
21 in different directions after the gunshot was fired.

22 There's also testimony - - - there's also - - -  
23 the 911 calls also provide that many of these people at the  
24 top of the stairs were wearing white T-shirts, which was a  
25 key defining trait of the gunman.



1           So what you have here is the court preventing the  
2 defense from - - - from introducing a version of events  
3 that completely contradicted the prosecution's version but  
4 also that supported the defense's version, which was that  
5 the police were misidentifying Mr. Rouse.

6           JUDGE FAHEY: Do - - - do you want address all  
7 the analytical framework that you would recommend to the  
8 court as to how this court should approach these kind of  
9 cross-examination problems? Should - - - there's some  
10 federal case law that has a more - - - seven-factor test.  
11 Or we have People v. Smith, which is relatively recent by  
12 this court, which sets out a framework.

13           MR. VANG: So I - - - if I'm understanding your -  
14 - - your - - - Your Honor's question, you're relating - - -

15           JUDGE FAHEY: Which - - -

16           MR. VANG: - - - to the - - - the prior judicial  
17 decisions.

18           JUDGE FAHEY: Right.

19           MR. VANG: How should the court analyze that?  
20 Well, the Second Cir - - -

21           JUDGE FAHEY: How - - - how we've analyzed it - -  
22 -

23           MR. VANG: Sure.

24           JUDGE FAHEY: - - - and how they've analyzed it.  
25 You - - - you - - - we would have to do it under one of two



1 basic approaches. What are you advocating?

2 MR. VANG: Well, Your Honor, I - - - first of  
3 all, can I just step back and say that the Federal Rule is  
4 completely consistent with this court's rules governing  
5 bad-acts crosses.

6 JUDGE FAHEY: Um-hum.

7 MR. VANG: The court says, actually, in Cedenó,  
8 in White, that these are just nonexhaustive factors. So  
9 the court isn't say you only look at these. The court says  
10 these are factors that the court can consider, in its  
11 discretion, in deciding whether or not the prior judicial  
12 determinations are probative and relevant to this  
13 particular case.

14 This court is free to accept or reject that. But  
15 this court has already ruled in its longstanding case law  
16 that a broad range of conduct can be the subject of cross-  
17 examination as long as it demonstrates an untruthful bent  
18 or shows a willing - - - a witness' willingness to place  
19 their individual self-interest above society.

20 In deciding whether or not to allow a defendant  
21 to cross about that, this court also, like the federal  
22 courts, provides the trial court with a considerable amount  
23 - - - amount of discretion in deciding what questions get  
24 asked. And it - - - it always - - - the trial court never  
25 loses its authority to impose lim - - - reasonable limits



1 on - - - on cross-examination to ensure that they're  
2 sufficiently tethered to this case.

3 JUDGE FAHEY: So your point is that either test  
4 is sufficient in this case?

5 MR. VANG: Either test would be sufficient in  
6 this case. But I - - - I think there's already - - -  
7 there's already longstanding precedent in this court with  
8 respect to bad-acts crosses, that this court can simply  
9 apply, and the court can accept or reject what the federal  
10 courts have provided.

11 JUDGE FEINMAN: Mr. Vang, if I may - - -

12 JUDGE RIVERA: There's no constitutional concern  
13 because this is not the defendant's bad acts?

14 MR. VANG: This is not the defendant, exactly.  
15 The same constitutional concerns don't apply to prosecution  
16 witnesses.

17 Yes, sir?

18 JUDGE FEINMAN: So I - - - I'm having a little  
19 trouble with your characterization that the Supreme Court  
20 didn't exercise its discretion regarding the judicial  
21 determinations. And - - - you know, and I guess it matters  
22 to the extent of - - - of how we would review this, because  
23 you know, on the one hand you could analyze it under  
24 whether the court abused its discretion versus whether it  
25 didn't exercise any discretion whatsoever.



1 MR. VANG: Yes.

2 JUDGE FEINMAN: Those analyses may lead to the  
3 same result, but analytically, it's important for how - - -

4 MR. VANG: Sure.

5 JUDGE FEINMAN: - - - we were - - - would  
6 rationalize any reversal.

7 MR. VANG: I would say - - - if I could just  
8 answer Your Honor's question. So the court - - - and I'll  
9 just quote from the transcript, actually. The court said,  
10 "I don't believe any state court has adopted this. You're  
11 arguing a federal principle which is applicable and  
12 utilized in federal court. Federal rules are 'surprisingly  
13 different than state cases'." And then rejected this line  
14 of cross altogether.

15 I would argue that that is a - - -

16 JUDGE GARCIA: But didn't he - - - I'm sorry. I  
17 thought one of his bases was that if you do this you're  
18 really substituting the federal court's determination of  
19 credibility - - -

20 MR. VANG: Right.

21 JUDGE GARCIA: - - - for the role of this jury in  
22 determining credibility.

23 MR. VANG: Right.

24 JUDGE GARCIA: But that would apply to every  
25 situation where you had a prior determination?



1 MR. VANG: Yes, absolutely. Right.

2 JUDGE GARCIA: And I would imagine there could be  
3 an instruction to the jury here that you're the ultimate  
4 determine - - - you know, you're - - -

5 MR. VANG: Absolutely, yes. Thank you.

6 JUDGE RIVERA: Can I just ask - - - before you  
7 sit down - - -

8 MR. VANG: Sure.

9 JUDGE RIVERA: I thought in - - - from what you  
10 were reading, does the judge not at some point say: I've  
11 considered the White factors?

12 Even though he didn't go through them, I - - -  
13 you're absolutely correct about that.

14 MR. VANG: I think in the context, if the - - -  
15 if the court looks at the - - - the colloquy between  
16 defense counsel and the court, the court, in passing, says  
17 yeah, I've considered the factors, but it - - - it's more  
18 of a brush-off rather than a true consideration of the  
19 factors.

20 If the court had truly considered the factors, we  
21 would expect that the court would have set forth the  
22 reasons in the factors why this court didn't - - -

23 JUDGE FEINMAN: In any multifactor test, when  
24 you're making a quick ruling - - -

25 MR. VANG: Right.



1 JUDGE FEINMAN: - - - in an evidentiary context  
2 of a trial, have we ever said the court must enumerate on  
3 the record its analysis of each and every factor?

4 MR. VANG: No - - -

5 JUDGE FEINMAN: I don't think we've said that.

6 MR. VANG: - - - no, no. But in examining  
7 whether the court actually did that in this case, we - - -  
8 we would look at that. And the - - - and the overarching  
9 thing that shadowed over this was the court's ruling that,  
10 look, this a federal rule, it doesn't apply in the state  
11 courts, you cannot cross about it.

12 JUDGE RIVERA: But you're not arguing that there  
13 had not elapsed enough time for the judge to have  
14 considered the factors? Right, between the point in time  
15 when the issue is obviously presented to the judge - - -

16 MR. VANG: Right.

17 JUDGE RIVERA: - - - and when the judge makes his  
18 ruling, you're - - - you're not arguing that happened in -  
19 - - in minutes or moments - - -

20 MR. VANG: No. I'm not arguing that it happened  
21 in minutes or moments.

22 JUDGE RIVERA: - - - or would say, regardless of  
23 what the judge says on this record - - -

24 MR. VANG: Right.

25 JUDGE RIVERA: - - - it's moments. Certainly you



1 could not have gone through that process?

2 MR. VANG: Right. But based on - - - based on -  
3 - -

4 JUDGE RIVERA: You're not making that argument?

5 MR. VANG: Yes. No, I'm not making that  
6 argument.

7 CHIEF JUDGE DIFIORE: Thank you, Counsel.

8 MR. VANG: Thank you.

9 CHIEF JUDGE DIFIORE: Counsel?

10 MR. MCIVER: May it please the court, Robert  
11 McIver on behalf of the Bronx County District Attorney's  
12 Office.

13 Defendant's primary contention regarding the use  
14 of these federal findings in cross-examination is  
15 unpreserved and wholly inapplicable to the People's main  
16 witness at trial, which is Ofc. Christopher Lopez. It's  
17 also meritless.

18 With respect to the federal cases, the court  
19 exercised its discretion by both considering the federal  
20 rule and the factors and weighing that against the  
21 potential for juror confusion.

22 Those - - - the potential for juror confusion  
23 here, with respect to federal findings of credibility, is  
24 immense. The pre - - - it would have a preclusive - - -

25 JUDGE GARCIA: But wouldn't that - - - then why



1 would you need to exercise discretion? Because in every  
2 case, why wouldn't you say well, the federal judge found  
3 this, and if I tell the jury that, they're going to  
4 substitute the federal judge's - - - credibility  
5 determination for their own and abdicate their role as a  
6 jury here?

7 MR. MCIVER: I think that that's always a concern  
8 with respect to this issue, but I still think that there's  
9 an opportunity to exercise discretion, under the  
10 circumstances protected by - - -

11 JUDGE GARCIA: What discretion - - - I'm having  
12 some trouble seeing what discretion was exercised here,  
13 because it seemed to be the main - - - I think the only  
14 thing the judge really articulated.

15 MR. MCIVER: I - - - I disagree with that,  
16 because I think that as was mentioned earlier, the judge  
17 had said: I've considered the White factors. I don't  
18 think there needs - - -

19 JUDGE GARCIA: I think, if you read the record,  
20 you know, they hand up the case, right, and then the judge  
21 says I've considered the factors and I'm denying it. I  
22 mean, there's no analysis of any factors. There's no - - -  
23 you know, there's no indication there was any real time  
24 lapse there.

25 MR. MCIVER: With respect to that, this was also



1 the subject, briefly, of a pre-trial motion in limine. So  
2 those - - - those court cases had been put before the  
3 court.

4 I think with respect to the court saying I have  
5 considered these factors, it had taken those home,  
6 essentially, and slept on those factors, and ultimately had  
7 considered and weighed them.

8 I would note, I'm not asking this court to adopt  
9 the federal rule. Far from it. But I do think that this  
10 would also be a proper exercise of discretion, applying  
11 those factors, in - - -

12 JUDGE FAHEY: But you - - - so - - - so you're  
13 not asking us to - - - to adopt White. But what about  
14 under People v. Smith? We - - - isn't there still a  
15 problem with this failure to allow this cross-examination  
16 to go forward?

17 MR. MCIVER: No, because of the third factor  
18 under People v. Smith, the potential for juror confusion.

19 When we compare the allegations in Smith, Smith  
20 involves a situation in which they're putting unproven  
21 allegations before a jury. A jury is well-equipped to  
22 handle unproven allegations. It's the essence of what it  
23 does.

24 By contrast, when you're asking a jury to look at  
25 federal credibility determinations, it's a situation in



1           which it's evaluating an evaluation. And that evaluation  
2           is being put - - -

3                   JUDGE FAHEY: So you understand the logic of what  
4           you're saying? You're a police officer. You testify  
5           probably once a month on a suppression hearing. If you lie  
6           twelve times a year, at every one of those, none of that  
7           can come in to challenge his credibility?

8                   MR. MCIVER: No. I think that if the court is  
9           going to refine Smith - - -

10                   JUDGE FAHEY: Um-hum.

11                   MR. MCIVER: - - - to the situation at hand, I  
12           think that there are situations in which there could be an  
13           improvident exercise of discretion. What we would have to  
14           look for is either some form of demonstrably false  
15           testimony or - - -

16                   JUDGE FAHEY: Well, I guess here - - - here's the  
17           problem. I don't mean to - - - excuse me. I don't mean to  
18           interrupt you, but I want to stay on this point.

19                   The - - - I can't think of a - - - of a stronger  
20           determination than a determination by another judge, even  
21           if it's in a different jurisdiction, about the actions of a  
22           person. Why wouldn't that be the best proof possible in  
23           testing someone's credibility?

24                   MR. MCIVER: Because it involves an entirely  
25           different situation, and because you don't necessarily have



1 the - - -

2 JUDGE FAHEY: No, but the - - - the question is  
3 not does it involve a situation, but the question is, is -  
4 - - is - - - is this a person who's truthful, who's shown  
5 regard for the truth in the enforcement of his law  
6 enforcement duties?

7 MR. MCIVER: But even - - -

8 JUDGE FAHEY: We're not talking about him skip -  
9 - - missing a loan payment on their car.

10 MR. MCIVER: Sure.

11 JUDGE FAHEY: We're talking about testimony  
12 that's given in a court of law.

13 MR. MCIVER: So the problem is - - - I - - - I  
14 agree with you that this is certainly relevant on those  
15 issues. But the problem becomes how does it come in.

16 JUDGE FAHEY: So it's relevant, it's material.  
17 It - - - it goes to the - - - two witnesses who identify  
18 the - - - really locking the identification - - -

19 MR. MCIVER: Reserved as to one, but yes.

20 JUDGE FAHEY: Okay. Well, I think you get Steven  
21 and Christopher Lopez, but okay. Leaving - - - leaving  
22 that alone, I think they're both pretty strong on the  
23 identification.

24 And you're saying that none of that can come in  
25 because the judge couldn't explain to the jury what these



1 were?

2 MR. MCIVER: I think with respect to that issue,  
3 ultimately yes, there's a potential for there - - - maybe  
4 they could have handled this with a lengthy jury  
5 instruction - - -

6 JUDGE FEINMAN: I mean, it sounds to me what  
7 you're - - - you're saying is that the - - - yes, they're  
8 probative, but the prejudice to the People is so  
9 overwhelming, we're not going to allow this.

10 But the problem is that when we talk about that  
11 kind of a prejudice versus a probative analysis, that's in  
12 the context of defendants and criminal defendants and not  
13 non-defendant witnesses. And - - - and - - -

14 MR. MCIVER: I think I should be very clear on  
15 this point.

16 JUDGE FEINMAN: And - - - and maybe, you know,  
17 it's - - - it's different here.

18 MR. MCIVER: The issue is not just that it's  
19 undue prejudice to the People, but rather the juror  
20 confusion on this point.

21 JUDGE STEIN: Well, but how - - - but - - - what  
22 is every - - -

23 JUDGE RIVERA: What's to be confused about that -  
24 - - the - - - the point is that the two officers have been  
25 found to have lied by two separate federal judges. The



1 judge could limit cross accordingly, could give appropriate  
2 instructions. What - - - what's to be confused about?

3 MR. MCIVER: So limiting cross appropriately, it  
4 goes back to the point as to how this would come in, in  
5 this trial would ultimately be - - -

6 JUDGE RIVERA: Well, we won't know.

7 MR. MCIVER: - - - a trial within a trial.

8 JUDGE RIVERA: We don't know, at this stage,  
9 right?

10 MR. MCIVER: Sure. But it is certainly the  
11 potential - - - I mean, just looking at these factors. For  
12 example, when we look at the U.S. v. Williams situation - -  
13 - or I'm sorry - - - yes, the U.S. v. Williams. So Steven  
14 Lopez's testimony fell short of establishing a VTL  
15 violation. The court ultimately found him cred - - -  
16 incredible on that basis, as well as the unrelated basis,  
17 on the ticket-fixing scandal.

18 But ultimately the issue was that those  
19 credibility determi - - - determinations did not matter,  
20 because this - - - the U.S. Attorney's Office was arguing  
21 that this was an objectively reasonable mistake of law.

22 How does a jury evaluate that without getting  
23 into the nuance on federal criminal procedure?

24 JUDGE STEIN: The People can argue that in - - -  
25 in summation. I mean, there are all sorts of ways to



1 properly instruct a jury as to how they should evaluate  
2 this testimony. Just - - - you know, I - - - I'm thinking  
3 about out if - - - if you have a - - - if you have a  
4 cleric, you know, very high up in whatever religious  
5 denomination you're talking about, and that person is come  
6 - - - is testifying on the stand, that's for some people,  
7 the type of testimony that people would - - - would, you  
8 know, just be inclined to believe. Oh, this - - - this  
9 person wouldn't lie.

10 And similar to - - - to me, there's some  
11 similarity between that and a judge saying oh, I didn't  
12 believe this - - - these people.

13 But there are ways, if necessary, to instruct the  
14 jury on how they are to evaluate themselves the credibility  
15 of the witnesses testifying before them.

16 MR. MCIVER: And if you have a situation here  
17 where the defense isn't saying - - - maybe this curative  
18 instruction would help. I don't think it's an abuse of  
19 discretion to look at all of that and say this is going to  
20 be a trial within a trial.

21 JUDGE GARCIA: But is there anywhere on the  
22 record where the People made this argument you just made  
23 about the finding in that criminal case being - - - it went  
24 to this type of federal law and it didn't translate, and  
25 then the judge could have looked at that and said, you



1 know, you're right, Prosecutor, I think weighing that  
2 against confusion to the jury, I would exclude this  
3 testimony? It doesn't seem to me that happened.

4 This is like a post hoc justification for a  
5 failure to exercise - - -

6 MR. MCIVER: I - - - I think that goes - - -

7 JUDGE GARCIA: - - - discretion.

8 MR. MCIVER: I think that goes back to my  
9 original point that these issues were put before the court  
10 in terms of analyzing how this would have come in, in this  
11 trial. I give the judge credit in terms of looking at that  
12 and saying - - - even though these weren't the exact words  
13 that the People were using at that point in time, analyzing  
14 the possibility of having these come in, would have  
15 ultimately both been preclusive and then also the - - - the  
16 court was analyzing the - - - the potential for how this  
17 would have come in.

18 They were - - - they had cross-examined - - - or  
19 I'm sorry - - -

20 JUDGE WILSON: Where's the - - - where's the  
21 potential prejudice for the excluded test - - - excluded  
22 cross about the lies to the prosecutor?

23 MR. MCIVER: Sorry, say it again, Your Honor?

24 JUDGE WILSON: Where - - - where's the - - -  
25 we've been talking about prejudice from findings. But as



1 to the officer not revealing to the federal prosecutor,  
2 when asked a couple different times, until he's confronted  
3 with a wiretap that he was involved in the ticket-fixing,  
4 where - - - that was excluded from cross, but what - - -  
5 there's no - - - what's the prejudice from that?

6 MR. MCIVER: So there's - - - there's two issues  
7 with respect to that. The first is that the ultimate - - -  
8 it goes to the initial offer. But there were two ticket-  
9 fixing scandals that were widely known in the Bronx, or at  
10 least one that was widely known in the Bronx that was  
11 prosecuted by my office. That involved bribes and  
12 kickbacks and Ofc. Steven Lopez. And the ticket-fixing  
13 only applied to Steven Lopez.

14 That - - - he was not involved in that. And  
15 that's where the confusion comes from.

16 JUDGE STEIN: But he could - - - that can always  
17 be explained in the process of the trial. I mean, this - - -  
18 - to - - - to me, the - - - this is - - - again, perhaps -  
19 - - I don't know if it's an unusual case, but it - - - this  
20 case centered on basically the main evidence that - - -  
21 that this defendant was the shooter - - -

22 MR. MCIVER: Sure.

23 JUDGE STEIN: - - - came from these two officers.

24 MR. MCIVER: Um-hum.

25 JUDGE STEIN: Their credibility and their



1 willingness to lie to get - - - to keep from getting in  
2 trouble in one way or another, is - - - is the crux, to me,  
3 of this case, of - - - of the defense that's being asserted  
4 here, that they - - - that they picked the wrong guy, and  
5 they were a little overeager in how they took him down, and  
6 now they're covering this whole thing up, and they're  
7 standing by their testimony. And there - - - there's all  
8 this evidence that they're willing to lie, that in fact  
9 they did lie about what the circumstances were in the chase  
10 and all that.

11 And the judge isn't letting any of this in. I -  
12 - - I don't understand why that's collateral here; why it  
13 can't be managed in terms of how a judge manages, you know,  
14 any trial.

15 MR. MCIVER: So with respect to the AUSA  
16 conversation, let's assume that I'm wrong as to the initial  
17 proffer and the confusion between the ticket-fixing  
18 scandals, that would still be confusing, because it would  
19 have been put before the jury devoid of any con - - -  
20 reference to the over fed - - - the federal litigation. So  
21 putting that before the jury apropos of nothing is  
22 ultimately going to ask the jury - - -

23 JUDGE STEIN: Well, couldn't - - - couldn't that  
24 be a request of the judge, that if you're going to allow  
25 this in, then - - - then there's got to be a little context



1 here so we know what we're talking about.

2 MR. MCIVER: And ultimately, I don't think that  
3 the - - - the failure to wade into this trial within a  
4 trial is an improper exercise of discretion. That I think  
5 is the problem.

6 With respect to the harmlessness analysis on  
7 that, this is similar to the Smith defendant within this  
8 consolidated case, People v. Smith, the primary issue that  
9 everybody's taking with this case.

10 Here, Steven Lopez's testimony was fully  
11 corroborated by Christopher Lopez, who was not subject to  
12 the AUSA testimony. None of the ticket-fixing scandals  
13 implicated him, just as in the Smith defendant's case, the  
14 error is harmless there, because it was fully corroborated  
15 by a witness who was not subject to the impeachment  
16 inquiry.

17 CHIEF JUDGE DIFIORE: Counsel, do you want to  
18 take a moment and address the 911 calls.

19 MR. MCIVER: The 911 calls ultimately - - - I  
20 think the most important factor with respect to the 911  
21 calls is that they did not identify the gunman, and they  
22 observed a different area from the shooting. They  
23 addressed 169th and Clay. This shooting actually occurred  
24 going down Clay away from that intersection.

25 It's also not inconsistent with the officer's



1 observation, because it was never contended that the basis  
2 for the ID was that the defendant was the only person  
3 wearing a white shirt. They observed him at close range.  
4 They observed his distinct shorts, which I do note are - -  
5 - a picture of the shorts are in the compendium of cited  
6 materials, or at least the defendant wearing those shorts.  
7 They are unique plaid shorts.

8 Viewing him at close range and wearing those  
9 shorts, that's the basis for the identification. So  
10 ultimately the 911 call was not remotely relevant to the  
11 actual issue, which is - - - defendant is claiming it's  
12 relevant to identity. It's really not.

13 CHIEF JUDGE DIFIORE: Thank you, Counsel.

14 MR. MCIVER: Thank you, Your Honor.

15 MR. VANG: If I could just answer that last  
16 point? All these arguments that my adversary is making go  
17 to the weight of the evidence. The problem here is that  
18 the court didn't even allow us to get that far, because the  
19 court relied on an erroneous application of the law.

20 I also want to go back to the bad-acts piece.  
21 You know, all these concerns about prejudice to the People  
22 or concerns about trial within a trial, I mean, these are  
23 the same concerns that - - - that exist in uncharged  
24 allegations, that this court has already said is a proper  
25 subject for cross.



1           But - - - and - - - and to my adversary's point  
2           that, you know, there's no refining Smith to this  
3           situation; Smith ruled that unproven allegations can be the  
4           proper subject of cross. If that's so, then the actual  
5           determinations of a court that a witness is incredible as a  
6           matter of law, certainly should be and certainly is proper  
7           fodder for cross, under that analysis.

8           JUDGE FEINMAN: Would you agree that if we  
9           resolve this case in your client's favor, on the cross-  
10          examination issue, that we don't need to reach the 911  
11          issue, because it would be nothing more than an advisory  
12          ruling on a retrial?

13          MR. VANG: It - - - to the extent that the - - -  
14          I mean, the - - - sure, yes. But - - - but I would also  
15          argue, too, however, that if this is going to result in a  
16          retrial, one of the ultimate issues that would have to be  
17          decided is the admissibility of these 911 calls - - -

18          JUDGE FEINMAN: Yeah, but you would get a - - -

19          MR. VANG: - - - on retrial, yes.

20          JUDGE FEINMAN: - - - to reargue that.

21          MR. VANG: Yes.

22          JUDGE FEINMAN: There's no binding ruling on the  
23          judge of coordinate jurisdiction on that.

24          MR. VANG: The - - - I - - - the final thing I  
25          would actually point out - - - respond to is my adversary's



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point that this was somehow partially unpreserved with respect to Christopher Lopez. You know - - - and these are the - - - with respect to the - - - to the underlying - - - to the prior judicial determinations.

Defense counsel had made this point apparent to the court. Defense counsel was under no obligation to renew his objections to the court after the court had vehemently rejected defense counsel's proffer.

So for these reasons, we ask that the court reverse the order of the Appellate Division. Thank you.

CHIEF JUDGE DIFIORE: Thank you.

(Court is adjourned)



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

I, Penina Wolicki, certify that the foregoing transcript of proceedings in the Court of Appeals of The People of the State of New York v. Clarence Rouse, No. 93 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

*Penina Wolicki*

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