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COURT OF APPEALS  
STATE OF NEW YORK

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PEOPLE,

Respondent,

-against-

NO. 119

KENNETH GARCIA,

Appellant.

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20 Eagle Street  
Albany, New York  
November 20, 2024

Before:

CHIEF JUDGE ROWAN D. WILSON  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE MICHAEL J. GARCIA  
ASSOCIATE JUDGE MADELINE SINGAS  
ASSOCIATE JUDGE ANTHONY CANNATARO  
ASSOCIATE JUDGE SHIRLEY TROUTMAN  
ASSOCIATE JUDGE CAITLIN J. HALLIGAN

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Official Court Transcriber



1 MR. FITZMAURICE: Good afternoon, Your Honors.

2 David Fitzmaurice from Appellate Advocates for  
3 the appellant Kenneth Garcia. I'd like to reserve three  
4 minutes for rebuttal?

5 CHIEF JUDGE WILSON: Yeah.

6 MR. FITZMAURICE: Your Honors, when the  
7 prosecution and - - - show that a showup happened close in  
8 time and place to the incident, that's only the first half  
9 of their burden of Wade hearing.

10 The second half is that they also must show  
11 evidence that the procedure itself was not unduly  
12 suggestive. So basically, they must explain kind of what  
13 steps were taken to reduce suggestiveness or why no such  
14 steps were possible.

15 JUDGE SINGAS: And what law are you citing for  
16 that proposition?

17 MR. FITZMAURICE: So I think that - - - that  
18 dates back to - - - that's a combination of Chipp and  
19 Riley. So I guess the, must provide evidence demonstrating  
20 that the procedure was not unduly suggestive, that's a  
21 direct quote from Chipp. And then the, must explain what  
22 steps were taken, that's a quote from this court in Riley.  
23 And I think these standards are pretty well-settled. Which  
24 is why this case - - - you know, isn't asking for anything  
25 extraordinary or new or novel. It's just asking for those



1 standards to be applied. Because when those standards are  
2 applied to the undisputed factual record here, we see two  
3 extremes. We see one suspect who they have an adamant,  
4 definite, detailed description, on and on, over and over.  
5 Very sure about one person. And then we have my client,  
6 Kenneth Garcia, for whom they have virtually no description  
7 other than him being Hispanic.

8 So applying these well-settled standards to this  
9 undisputed factual record, I'd submit that the burden at  
10 the Wade hearing is to show what steps were taken to ensure  
11 that the identification of Kenneth Garcia, my client,  
12 didn't simply flow from the evident familiarity between the  
13 complainant and Luis Garcia.

14 JUDGE SINGAS: Did you make that argument below,  
15 about the collective nature of the procedure, or were you  
16 just arguing that the fact that they were flanked by police  
17 officers just was - - - you spoke to the suggestiveness of  
18 it versus the collective nature of it?

19 MR. FITZMAURICE: No. I think that the argument  
20 below has always been that - - - that bringing - - - the  
21 argument below has always been that the lack of - - - the  
22 lack of specific description for Kenneth Garcia and the  
23 fact that they were brought out together with no one else  
24 present, and how there was other steps that could have been  
25 taken to reduce that procedure and weren't taken.

1                   So I think that - - -

2                   JUDGE SINGAS: Well, that's not the testimony, is  
3 it? That there were no other people present?

4                   MR. FITZMAURICE: No other people were escorted  
5 out by the officers. That is the testimony. There - - -  
6 you're right. I think what Your Honor's getting at is that  
7 there was a crowd present, absolutely. And I think,  
8 actually - - - you know, when we think about a crowd, we  
9 actually think that that's a potential way that this could  
10 have been ameliorated.

11                  For instance, while the officers are upstairs in  
12 the apartment, and there's a crowd gathering, I don't think  
13 it will be too much to ask the complainant whether anyone  
14 in the crowd looks familiar. Which I think is something  
15 that - - - you know, a few months ago this court in Rice  
16 had a showup situation and it - - -

17                  JUDGE TROUTMAN: What was to stop the complainant  
18 from looking around at everybody that was out there and  
19 point out someone else?

20                  MR. FITZMAURICE: Nothing would stop the  
21 complainant from doing that, but I think that this is a  
22 police controlled - - -

23                  JUDGE TROUTMAN: And isn't that better? There  
24 were people around. This isn't one where they take him to  
25 an isolated area where there are no other civilians around.

1 People were coming and going. There was activity. And  
2 quite frankly, though, when you have a showup, isn't there  
3 suggestiveness always present?

4 MR. FITZMAURICE: There is - - - you're right.  
5 There is inherent suggestiveness in every showup. The  
6 police are necessarily going to be involved in every  
7 showup. There's going to be an assumption that the police  
8 have - - - are conducting a showup with someone who they  
9 probably think meets the criteria. But I don't think the  
10 crowd here puts it in the prosecutor's favor, because we  
11 don't know any information about who's in the crowd, do  
12 they match the descriptions? And actually, I'll note that  
13 at the suppression hearing, there was an attempt to cross-  
14 examine the officers about the crowd and whether there any  
15 effort to ask questions about anyone else. And that was  
16 was objected to and sustained. So we don't have a  
17 situation where, in Rice - - - you know, prior to actually  
18 getting to the showup, tis court was able to point to the  
19 fact that the officers had asked this - - - the witness  
20 whether other people were familiar along the way and had  
21 elicited negative identifications.

22 So we don't have that here. What we have is a -  
23 - - you know, collect - - - we got a situation where we  
24 have two extremes and brought outside together. And I  
25 submit that faced with the burden to show steps they took

1 to reduce the suggestiveness by putting everyone together  
2 surrounded by officers, they're actually showing steps in  
3 the opposite direction.

4 CHIEF JUDGE WILSON: What is the relief you would  
5 want here?

6 MR. FITZMAURICE: Well, I think the relief - - -  
7 since this is a - - - an issue that was raised at the Wade  
8 hearing, with no independence - - - independent source.  
9 There -- you know, there's no - - - there was no subsequent  
10 - - - there was no subsequent lineup. I - - - the relief  
11 here is dismissal. The relief here is absolutely  
12 dismissal.

13 CHIEF JUDGE WILSON: Why is the relief not  
14 remittal for a independent source hearing? And there was  
15 in-court identification, yes?

16 MR. FITZMAURICE: There was - - - by - - - at  
17 what stage, Your Honor?

18 CHIEF JUDGE WILSON: At trial?

19 MR. FITZMAURICE: At trial there was an - - - but  
20 I think that would be tainted by the unduly suggestive  
21 showup. So if we're analyzing the - - - if we're analyzing  
22 - - -

23 CHIEF JUDGE WILSON: How do we know that?

24 MR. FITZMAURICE: How do we know that it was  
25 tainted by the unduly suggestive showup? Well, we know

1 that because there wasn't much information at trial other  
2 than the fact that he was identified in the showup. There  
3 was a lot of information about the codefendant for whom  
4 they had an adamant, detailed description. There was video  
5 evidence of that codefendant. There was video evidence of  
6 him standing outside and going inside.

7 There's not a single piece of video showing  
8 Kenneth Garcia leaving that building or coming back at any  
9 time that day. So I'm - - - when we think about the - - -  
10 the taint of the showup on the trial identification, we  
11 actually learn a few details about the showup. A few  
12 additional details, including the fact that the  
13 complainant's brothers are now - - - are all of a sudden  
14 present and shouting while the showup's taking place.

15 So I think that the - - - we should take no  
16 comfort in the fact that the trial ameliorated any of the  
17 problems associated with the unduly suggestive procedure.

18 I think that when we have a situation where - - -

19 JUDGE RIVERA: So is it your position that at any  
20 time there's more than one person that's going to be  
21 identified by a witness, that they cannot be brought out  
22 together, regardless of the circumstances that the police  
23 face in the moment?

24 MR. FITZMAURICE: No. That would not be my  
25 position. And I think it's - - - this area of the law

1 doesn't necessarily - - - doesn't easily lend itself to the  
2 kind of per se rules. My position is just, applying the  
3 burden at the Wade hearing, and analyzing whether there are  
4 steps in the record showing efforts to reduce  
5 suggestiveness. When we have a situation where one suspect  
6 is completely detailed, familiar, and then - - - you know -  
7 - -

8 JUDGE TROUTMAN: Does it matter here there were  
9 no guns drawn; people weren't handcuffed?

10 JUDGE CANNATARO: No one's in the back of a car?

11 MR. FITZMAURICE: No one's in the back of a car.  
12 There's no guns drawn. There's no handcuffs. And that's  
13 because there was no arrests. So we often - - -

14 JUDGE TROUTMAN: And timing-wise, with respect to  
15 identification; does it matter that it occurred rather  
16 quickly?

17 MR. FITZMAURICE: So - - - okay. So there's two  
18 questions. I'm going to get to both of them, right? So I  
19 guess, the timing thing? I think that's - - - there's no  
20 dispute that - - - yeah, when we think about timing, we  
21 think about that it was reasonable for them to do a showup  
22 instead of a lineup. And that's not in dispute here. I  
23 submit that under these circumstances it is reasonable.  
24 You know, it's about an hour later. It's reasonably close.  
25 It's a few blocks - - -

1 JUDGE TROUTMAN: But I mean, the timing of them  
2 even coming out?

3 MR. FITZMAURICE: So - - - yes.

4 JUDGE TROUTMAN: It wasn't that they were  
5 standing out there for a long period of time?

6 MR. FITZMAURICE: It's not, no. But I think  
7 that, when we think about the absence of - - - of the cuffs  
8 and the - - - you know, and - - - and the - - - they're not  
9 in the back of a car. You know, it is important to note  
10 that they're not under arrest. So when we think about  
11 situations where people are - - - suspects are arrested, a  
12 lot of the time the argument is, well, the - - - there were  
13 cuffs present and that tainted it. And sometimes it does,  
14 and sometimes it doesn't. But I don't think an officer's  
15 decision to not put cuffs on someone, who's not arrested,  
16 can be now credited as a way they reduced the  
17 suggestiveness of the procedure. When the suggestiveness  
18 of the procedure is because there was a risk that the  
19 identification of someone, who they had a lot of  
20 information about, would flow and taint - - -

21 JUDGE CANNATARO: Well, would - - -

22 JUDGE HALLIGAN: I - - -

23 JUDGE CANNATARO: - - - would you at least  
24 concede that it reduces the suggestiveness of the procedure  
25 if you accept Judge Troutman's earlier premise, that

1 there's activity in the area? They're just sort of  
2 blending in with everybody else walking around who doesn't  
3 have handcuffs on and isn't formally under arrest? They're  
4 just part of the street scene?

5 MR. FITZMAURICE: I'm not sure - - - I'm not sure  
6 the record can support that. The record that there were  
7 five officers inches away. So while there are no cuffs, I  
8 think it's very clear that they were escorted down by two  
9 officers. They met three officers down at - - -

10 JUDGE HALLIGAN: But - - -

11 MR. FITZMAURICE: - - - at the bottom. And the -  
12 - - and then the showup is happening. He's asked to - - -  
13 does anyone look familiar only when there's this cluster of  
14 people clumped together within inches of each other. So I  
15 don't think it's - - - I don't think this could be confused  
16 for just passers-by. I - - - it's not - - - this isn't a -  
17 - -

18 JUDGE CANNATARO: Are they being restrained in  
19 any way by the - - - the officer?

20 JUDGE SINGAS: There was a question asked from  
21 the judge. I'm looking at page A389. And said - - - of  
22 the complainant. "Were you able to tell who was walking  
23 out with officers and who was just walking out themselves?"  
24 And the witness said no.

25 MR. FITZMAURICE: So I - - -

1 JUDGE SINGAS: So I think that cuts against your  
2 argument that it was only when they figured out that the  
3 people who came out with the officers were the people that  
4 he needed to identify. He's saying there were people  
5 walking in and out of the building and I couldn't even tell  
6 who was with the officers and who wasn't.

7 MR. FITZMAURICE: So I think what Your Honor's  
8 quoting is the trial testimony?

9 JUDGE SINGAS: Yes.

10 MR. FITZMAURICE: That fact is not established at  
11 the hearing where they have the burden to come up with  
12 these facts. I mean, we talk about burdens, not to be  
13 pedantic or to some kind of formulas. We talk about  
14 burdens because the police and the prosecutors are the only  
15 ones who know what happened. So if a situation like that -  
16 - - if that kind of testimony came out at the - - - Wade  
17 hearing, it might be slightly different because - - -

18 JUDGE HALLIGAN: But I thought at the hearing,  
19 the testimony indicated - - - maybe I'm conflating it with  
20 the trial, so tell me if I am. But that they went upstairs  
21 and asked whether or not they preferred to speak outside -  
22 - - outside the presence of the family. And I thought that  
23 the officer who escorted them them down the stairs was not  
24 - - - said that he was not in contact with the officer who  
25 was outside. So it wasn't obvious to me, from the record,

1 that the intent was to take them down for a showup as  
2 opposed to take them down to - - - you know, continue the  
3 conversation they had begun upstairs?

4 MR. FITZMAURICE: So I think, Your Honor, there  
5 is - - - he admits several times at this - - - at the Wade  
6 hearing that he had instructed the complainant to remain  
7 with the officer outside. And that when he went up, he  
8 went up with the purpose of - - -

9 JUDGE HALLIGAN: Can I - - -

10 MR. FITZMAURICE: - - - speaking to them,  
11 canvassing, and also to conduct a showup. He said it  
12 multiple times.

13 JUDGE HALLIGAN: - - - I - - - but I thought  
14 there were two officers, right? I thought one was  
15 downstairs with the victim, and I thought that the person  
16 who - - - I forget the name. Perhaps it's Anderson, but  
17 you'll correct me - - -

18 MR. FITZMAURICE: Anderson's downstairs. Boyce  
19 is upstairs.

20 JUDGE HALLIGAN: Boyce is upstairs.

21 MR. FITZMAURICE: Yeah.

22 JUDGE HALLIGAN: I thought that the officer who  
23 escorted the individuals downstairs said that he had not -  
24 - - he - - - he was not speaking at the time with the  
25 office who was downstairs. I'm just asking whether it's

1           apparent that - - - that the purpose was to take them down  
2           for the showup as opposed to have a conversation, and  
3           whether that matters?

4                   MR. FITZMAURICE: It was. And actually the - - -  
5           the officer downstairs maintained that no showup happened  
6           and she tried to quibble with the definition of a showup.  
7           But the officer who went upstairs, Ofc. Boyce, did testify  
8           that he went upstairs with the intention of conducting a  
9           showup, knowing that he had instructed the complainant to  
10          wait downstairs.

11                   So while he didn't necessarily radio, that  
12          doesn't excuse the fact that - - - you know, when he went  
13          into the - - - I know - - - and I know my light is on. But  
14          when he went into the - - - to the room and he saw someone  
15          who matched the detailed and adamant description and then  
16          he saw someone who just really only met the description of  
17          - - - of race, alarm bells should have been ringing on his  
18          way back down. Because he's in control of the situation.  
19          They're not under arrest. There's no cuffs. He's in  
20          control. They're cooperating. He should be thinking - - -  
21          and we want him to be thinking, there's a risk that if I  
22          put them in a group, that an identification of familiarity  
23          can flow and I - - - Wade instructs us. You know, the Wade  
24          hearing and the two-part burden, it instructs us that - - -  
25          that these are the kind of things that officers should be

1 sensitive to and prosecutors should be trying to establish.

2 JUDGE RIVERA: You mentioned that they instruct  
3 the victim to wait - - -

4 MR. FITZMAURICE: Yes.

5 JUDGE RIVERA: - - - while they go upstairs. Is  
6 there any statement of what's the intent of going upstairs?

7 MR. FITZMAURICE: The intent is to canvass. It  
8 is to look for the suspects. This is a police activity.

9 JUDGE RIVERA: Based on what the victim told  
10 them?

11 MR. FITZMAURICE: Absolutely, yeah. And the - -  
12 - and the victim was able to point them in the direction of  
13 the building. And - - - and he is canvassing and he's  
14 meeting people. And he gets a tip. And he gets a second  
15 tip. And he goes upstairs. And he sees the three people  
16 and he - - -

17 JUDGE RIVERA: The - - - the victim's - - -

18 MR. FITZMAURICE: - - - decides to bring them  
19 back down.

20 JUDGE RIVERA: - - - what the victim communicates  
21 is that, at least one of them went upstairs?

22 MR. FITZMAURICE: Yes. Yeah, yeah, yeah. There  
23 - - - and there's no - - - you know. So the victim does a  
24 lot here. You know, he points them to the - - - to the  
25 direction. So they are looking for suspects. They are

1 about to do an identification procedure. And he brings  
2 them downstairs knowing that, yes, he'll get to talk to  
3 them but also that an identification procedure can happen.

4 JUDGE RIVERA: But your reading of the record is  
5 that the victim understands that that is the process? That  
6 is - - - is occurring?

7 MR. FITZMAURICE: I - - - I'm not sure - - - I  
8 don't - - - well, typically the prosecution don't call the  
9 - - - the complainants at Wade hearings - - -

10 JUDGE RIVERA: No, I know that.

11 MR. BLIRA-KOESSLER: - - - so it's good to know.

12 JUDGE RIVERA: I understand that.

13 MR. FITZMAURICE: But yeah. I mean, I think what  
14 he's - - - when he's been talking to multiple different  
15 officers and he's - - - he's giving a description, he's  
16 adamant, on and on and on and on. And then when the  
17 officers go in, and they see somebody who not only matches  
18 the description but he's changing his clothes, and he makes  
19 a statement, and then there's a decision to bring them back  
20 down, that's what I submit we want officers in that  
21 situation to have alarm bells ringing that - - -

22 JUDGE SINGAS: But we - - - we've said in places  
23 like Howard that far more suggestive circumstances of an  
24 identification are okay. So how would you reconcile that?

25 MR. FITZMAURICE: So I think Howard - - - Howard

1           - - - you know, my understanding of Howard, I'm not quite  
2           sure - - - my argument here is very narrow. It's about an  
3           initial burden not being met. I'm not sure the suppression  
4           hearing record in Howard, at what stage the initial burden  
5           was met and then transferred over to the ultimate issue of  
6           suggestiveness, which would be a mixed question of law. I  
7           know one of the issues in Howard as about a - - - there was  
8           an argument that the time was per se unreasonable. It was  
9           too long. So that's not at issue here.

10                         And I'll also note in Howard that they did find  
11           the complaining witness' wallet and identification. So  
12           there wasn't really the same risk of misidentification.  
13           They had a lot to go with.

14                         Whereas here, we really have a situation where  
15           someone's brought downstairs, cooperating, not under arrest  
16           - - - you know, and volunteering to come down with no  
17           incriminating evidence. And I think in that situation we  
18           want officers to be thinking and we want prosecutors to be  
19           asking - - - you know, how did you reduce the  
20           suggestiveness or how do you explain - - -

21                         JUDGE SINGAS: How do you suggest they would have  
22           reduced the suggestiveness? Do you think if they had  
23           brought them out one at a time, each escorted by an  
24           officer, that would be more or less suggestive?

25                         MR. FITZMAURICE: Well, I think that would be

1 less suggestive. Well, A, by the way, I would submit that  
2 it would be at least a step in the record. So we - - - we  
3 might be - - - we might be in the situation where the  
4 burden then shifted to the defendants to argue, and then  
5 that's a mixed question for this court.

6 But if that - - - let's say, Your Honor's  
7 hypothetical, let's say they did separate, which is  
8 something that the prosecution conceded below that they  
9 could, at least we'd avoid a situation where the  
10 identification is - - - that's them, that's him, him, him.  
11 They guy in the yellow shirt. He cut me. He cut me. You  
12 know, that kind of identification couldn't happen if they  
13 were brought out separately. And I'd submit, since they  
14 had so little information about my client, Kenneth Garcia,  
15 if he comes out first, then there's no risk that  
16 familiarity with Luis Garcia or anybody else is tainting  
17 his identification because we're not having the - - - we're  
18 not having the situation where it can flow.

19 He's coming out first with one officer. So in  
20 that situation it's a very, very different record.

21 JUDGE RIVERA: Well, yes and no. I get your  
22 point. But perhaps it's not the obvious association,  
23 right? Because they're together as the three attackers  
24 were. But obviously, if you're strolling out three people  
25 in a row, it does influence the thinking, potentially, of

1 the victim, that these are the three?

2 MR. FITZMAURICE: It does. But I - - -

3 JUDGE RIVERA: Because there's no one after the  
4 third one.

5 MR. FITZMAURICE: It does. But I think we're  
6 back to the land of showups being inherently suggestive and  
7 a certain degree of it is tolerated. So because we  
8 tolerate a certain degree of it, we just want some effort -  
9 - - we just want some testimony about how they tried to do  
10 - - - you know, make it a little bit better. So in this  
11 situation, yeah, maybe it still would be suggestive. Maybe  
12 a defendant - - - a defense counsel would still argue, but  
13 there'd be a - - -

14 JUDGE RIVERA: What if the officer - - -

15 MR. FITZMAURICE: - - - step.

16 JUDGE RIVERA: - - - what if the officer had  
17 testified. It's a hypothetical. I know it's not in the  
18 record. Had testified, well, we thought about it, but we  
19 thought that would be more suggestive. One at a time.

20 MR. FITZMAURICE: I'd actually thought about that  
21 question myself, and - - - and - - -

22 JUDGE RIVERA: Okay, good.

23 MR. FITZMAURICE: Yeah. It's a good hypo. We -  
24 - - we, obviously - - - you know. So I think in that  
25 situation - - - in that situation we would at least have -

1 - - you know, we would at least have some testimony in the  
2 record where, in line with that second step of the burden,  
3 there's an effort to show what steps were taken or that  
4 none were possible, you know. So in that situation, it  
5 might not be unduly suggestive if the officer is saying,  
6 well, it was six in one and half a dozen in the other.  
7 Where we don't have a situation where there's no effort  
8 made and there's just kind of an indiscriminate collective  
9 showup, even though they know that they have two very  
10 different suspects inside it.

11 So in that situation, not that we should be  
12 hinging on - - -

13 JUDGE RIVERA: If that calculation is based on  
14 something any member of this court could also make, then  
15 why can't this court do that?

16 MR. FITZMAURICE: Say that again.

17 JUDGE RIVERA: If that calculation - - - six of  
18 one, half a dozen of the other - - - is something that's  
19 simply based on, well, if they're one at a time, that's - -  
20 - if - - - if not more, at least as suggestive. Right?  
21 That's sort of that context.

22 MR. FITZMAURICE: Because we - - -

23 JUDGE RIVERA: Couldn't a judge just come to the  
24 same - - - I mean, all I'm saying is there some particular  
25 expertise that's necessary - - -

1 MR. FITZMAURICE: Well, I - - -

2 JUDGE RIVERA: - - - to weigh that?

3 MR. FITZMAURICE: - - - I don't understand  
4 exactly, but I think we should be very reluctant to be  
5 putting words in prosecutors' mouths when we're talking  
6 about the initial burden. I mean, like I said earlier,  
7 they're the ones with all the information. They're the  
8 ones who have talked to the witness, talked to the cops,  
9 talked to - - - you know, prosecutors. You know, the  
10 defendant does not know what steps were taken or what steps  
11 were possible or how - - - you know. Let's say  
12 hypothetically, there's a situation where there's a police  
13 procedure and there's an optimum ratio of officers to  
14 suspects in a showup, you know. That's something that  
15 would need to be said. Because defendant - - - the defense  
16 counsel won't know that. So we have an initial burden  
17 because otherwise we're in the dark. And I think the fact  
18 that we're hear so many shifting positions on appeal,  
19 whether that's not police controlled or exigency or yes,  
20 they could be brought outside, no they couldn't be brought  
21 outside. You know, the - - - that the fact that we can't  
22 show where in the record a step was taken to reduce the  
23 risk that Kenneth Garcia was - identified because of the  
24 complainant's obvious and accepted familiarity with Luis  
25 Garcia, and that to me, I think, is why the Wade hearing

1 here, the prosecution - - - you know, it's unusual, but  
2 they didn't carry their initial burden on these facts and -  
3 - - and if there are no other questions, I'll sit down.

4 CHIEF JUDGE WILSON: Thank you.

5 MR. BLIRA-KOESSLER: Thank you, Your Honors. May  
6 it please the court.

7 Christopher Blira-Koessler for the Office of  
8 Melinda Katz, Queens County District Attorney for  
9 respondent.

10 So just to start with preservation, all the  
11 claims they're raising are unpreserved. They never raised  
12 anything about the group nature of the showup. They never  
13 asked for some special rule regarding group showups to wit  
14 that we have to show why it was not possible to do this in  
15 a sequential manner and why the police did it in a group  
16 manner. That claim never came up. So that's entirely  
17 unpreserved.

18 And if you're going to argue for a new rule of  
19 law, you kind of should raise it before the hearing court  
20 in the first instance and have that court consider it.  
21 That they failed to do.

22 This is really little more than a mixed question  
23 of law and fact; it's been considered by this court on  
24 previous occasions in Howard, Cenedo, as long as there are  
25 record facts that support the lower court's decision, this

1 court is compelled to affirm.

2 As far as the burden goes - - - as far as the  
3 burden goes, our burden has been called by this court,  
4 minimal. That's in Ortiz. We have the burden of producing  
5 some evidence relating to the showup itself. Not all the  
6 evidence. Not explaining every last thing that the police  
7 do in order to demonstrate that the procedure was not  
8 unduly suggestive. This court further said, the people's  
9 procedural burden of production in this respect is minimal.  
10 It requires merely some proof of the circumstances of the  
11 onsite identification procedure.

12 We don't meet that burden where there's a  
13 complete absence of proof addressing suggestiveness. So we  
14 just have to produce some proof. We don't have to explain  
15 every last thing that the police do. Why they didn't do  
16 this? Why they didn't do that? It's different in the  
17 context of a precinct showup.

18 JUDGE RIVERA: So how did you meet the minimal  
19 showing here?

20 MR. BLIRA-KOESSLER: By showing a lot of the  
21 things that we've already discussed. There were no cuffs.  
22 There were no restraints. They weren't in a police car.  
23 They weren't being held. There were no suggestive gestures  
24 or words spoken by the police. There were other civilians  
25 around at the time of the identification. All these

1 factors are factors that this court has considered in other  
2 cases like Howard, like Duuvon, a long line of cases.

3 JUDGE RIVERA: Well, that's just listing  
4 everything that was not done - - -

5 MR. BLIRA-KOESSLER: Basically.

6 JUDGE RIVERA: - - - without - - - yes. And I  
7 think you're right. That that does indeed presents some  
8 evidence. But it doesn't address the suggestiveness of  
9 what was done.

10 MR. BLIRA-KOESSLER: Well, I mean, it kind of  
11 does. Because that's what's been done in every single case  
12 that this court has considered. It's basically a series of  
13 negatives. We affirmatively show a series of things that  
14 were not done.

15 The only things that they argue below, was that  
16 the presence of the police and the lighting conditions made  
17 this showup suggestive.

18 JUDGE TROUTMAN: Did you argue exigency below?

19 MR. BLIRA-KOESSLER: Well, we elicited evidence  
20 regarding exigency. When the prosecutor made her  
21 arguments, she relied mostly on time and place.

22 JUDGE TROUTMAN: But before the suppression  
23 court?

24 MR. BLIRA-KOESSLER: Before the suppress court,  
25 she - - - she elicit there - - -

1 JUDGE TROUTMAN: She elicited testimony - - -

2 MR. BLIRA-KOESSLER: Right.

3 JUDGE TROUTMAN: - - - but didn't utilize it as  
4 an argument?

5 MR. BLIRA-KOESSLER: It didn't come out in the  
6 argument. She relied mainly on time and place. That it  
7 happened within an hour, three to five blocks away. That  
8 doesn't mean that the Appellate Division reached something  
9 that it shouldn't have, and I would cite to People v.  
10 Nicholson 25 NY 3d, where the court gave a general ruling  
11 that our presentation of a rebuttal witness was, quote,  
12 "proper rebuttal". And the prosecutor's argument was to  
13 show that the defense witness had lied.

14 On appeal the Appellate Division said, oh, the  
15 witness' testimony was proper but it went to bias and  
16 motive. So the argument made before this court was, well,  
17 that's a different ground, you can't do that. And this  
18 court said you can look to the entire record, the arguments  
19 of counsel, the decision of the court below, as well as any  
20 inferences to be drawn therefrom, in order to reach the  
21 unarticulated basis of court's decision, and here I think  
22 you can do the same thing.

23 CHIEF JUDGE WILSON: So suppose the - - - sorry.  
24 Straight ahead of you.

25 MR. BLIRA-KOESSLER: All right.

1 CHIEF JUDGE WILSON: Suppose the - - - suppose  
2 defense counsel at the suppression hearing had said exactly  
3 the argument that's being made now, right? One person  
4 highly - - - be identified, yellow shirt, all these  
5 indicia. Other person, nothing about, and this is  
6 inherently suggestive because you've got one - - - you  
7 bring three people out - - - you made that whole argument.  
8 Would you meet your minimal burden by saying it was light  
9 out and there were no handcuffs?

10 MR. BLIRA-KOESSLER: Well, I think we did more -  
11 - -

12 CHIEF JUDGE WILSON: But just what I'm ask - - -  
13 right. Does the minimal burden have to meet whatever the  
14 argument is made?

15 MR. BLIRA-KOESSLER: Well, I mean, it's not  
16 really our burden to show. I mean, there's no case in this  
17 court that says it's our burden to show that why they did -  
18 - - did this in a group fashion rather than sequentially.  
19 There's a single observation that this court made in Adams.  
20 And what this court stated in Adams, with respect to a  
21 group showup that took place inside a precinct. So there  
22 was a lot of other suggestive factors going on, it wasn't  
23 just a group setting. What this court stated, I just want  
24 to quote the exact language. So from Adams, this court  
25 said, "showing this - - - these suspects together also

1 enhanced the possibility that if one of them were  
2 recognized by - - - that if one of them were recognized by  
3 the other victims, the others would be identified as well."  
4 And this court said that hinged on the fact that one of the  
5 defendants in the showup was arrested at the scene. So the  
6 victims saw him being arrested. The other - - - the other  
7 one got arrested hours later.

8 Here we don't have anything like that. He knew  
9 Mr. Garcia, that's Luis Garcia, from a previous occasion,  
10 not affiliated with the crime. Just he - - - he saw him in  
11 the street a couple of times, basically. So there's no  
12 factor here that says that there was some suggestiveness as  
13 to - - - you know, one of the defendants' involvement in  
14 the criminality that would have made them identify the  
15 others.

16 And there's certainly no reason - - -

17 JUDGE RIVERA: He knew him by association,  
18 because he doesn't have any description of this defendant.  
19 Right? Other than he's a Latino male or Hispanic male.  
20 Excuse me. Which - - - there's a lot of people who fit  
21 that particular description. Right? Doesn't help you that  
22 way. But even if they wanted to bring them out in that  
23 cluster, why not bring out the one that hasn't been  
24 described first? That way it's not someone who's  
25 associated with the one he's over and over says that's the

1 one, that's the one who attacked me, that's him, that's  
2 him. Right?

3 MR. BLIRA-KOESSLER: Well, I mean, it's kind of  
4 hard to expect the police to parse all of this out during a  
5 showup which is supposed to be prompt, you know. You had a  
6 victim there - - -

7 JUDGE RIVERA: I know. But they're in the  
8 apartment. They're taking time to walk down the stairs.  
9 I'm not saying there's not - - -

10 MR. BLIRA-KOESSLER: Right.

11 JUDGE RIVERA: - - - exigency. I absolutely  
12 understand your position on that.

13 MR. BLIRA-KOESSLER: Right.

14 JUDGE RIVERA: But they are making a decision  
15 about how to come out of the building?

16 MR. BLIRA-KOESSLER: I really don't know that  
17 this was like a conscious decision to just present them  
18 like that rather than sequentially, because there's nothing  
19 that shows that that is less suggestive. Again, it's just  
20 that line from this court in that one decision involving a  
21 precinct showup. Not an on-the-scene showup.

22 So you know, I - - - I think it kind of defeats  
23 the purpose of a showup which is supposed to be - - -

24 JUDGE RIVERA: But isn't it common sense if a  
25 victim can clearly articulate the description of one

1 person, because they're the attacker perhaps, and has a  
2 little bit of a description of another one but not much on  
3 the third. That's - - - it's a nondescript description. I  
4 mean, it's not going to help you. Lots of people on the  
5 street fit that description - - -

6 MR. BLIRA-KOESSLER: No, sure. I mean, it was a  
7 general description - - -

8 JUDGE RIVERA: Right? If you - - - and it's  
9 numerical, it's three of them.

10 MR. BLIRA-KOESSLER: Right.

11 JUDGE RIVERA: And you bring out the three  
12 together, with the one who seems to really fit the  
13 description and another one that - - - you know, a 1,000  
14 people fit that description, this nondescript. Perhaps,  
15 there is a likelihood that the victim might, in the moment,  
16 find - - - identify them by association as opposed to - - -  
17 based on what is their recollection of that person?

18 MR. BLIRA-KOESSLER: But I mean, the officers  
19 testified that the victim identified everybody by their  
20 roles in the crime.

21 JUDGE RIVERA: Yes.

22 MR. BLIRA-KOESSLER: Said Mr. Garcia wearing the  
23 yellow shirt, Mr. Luis Garcia, was the one who cut him.

24 JUDGE RIVERA: Yes. Yeah.

25 MR. BLIRA-KOESSLER: And he said the other two

1 were the ones who were kicking and punching him. So that's  
2 - - -

3 JUDGE RIVERA: Well, the other two attacked - - -

4 MR. BLIRA-KOESSLER: - - - still a little general  
5 but still - - -

6 JUDGE RIVERA: - - - the other two attackers were  
7 doing the following. But that's not about identifying the  
8 attacker. That's just identifying the role of whoever was  
9 the attacker.

10 MR. BLIRA-KOESSLER: Right.

11 JUDGE CANNATARO: Can we just explore the - - -  
12 the details of that last thing? Because my understanding -  
13 - - please correct me if I'm wrong - - - is that during the  
14 initial encounter with the police, he described what the  
15 assailants did. One cut, other's kicked or whatever they  
16 did.

17 MR. BLIRA-KOESSLER: Yeah. Correct.

18 JUDGE CANNATARO: But then at the showup, my  
19 understanding was simply that the identification was  
20 something along the lines of that's them. Did the victim  
21 actually say those people - - - at the identification, did  
22 the victim actually say, that's - - - that guy is the guy  
23 who cut me and the other ones were kicking me and beating  
24 me?

25 MR. BLIRA-KOESSLER: Well, what Anderson



1 testified to - - - I just want to read this quickly. Yeah,  
2 what Anderson testified to was that he stated, those are  
3 the guys that jumped me. And then he referred to Mr. Luis  
4 Garcia, the yellow shirt, as stating that he is the one who  
5 had cut him and that the other two kicked and punched him.  
6 And that's - - -

7 JUDGE CANNATARO: That's what he said at the  
8 showup?

9 MR. BLIRA-KOESSLER: That - - - according to  
10 Anderson, that's what he said at the showup. That's what  
11 he said. It's true that the - - - just to get back to what  
12 we were discussing about the description. Sure, it's a  
13 general description, but we have to contextualize it a  
14 little bit, I think.

15 Because this victim was found right there in  
16 front of the building. The police encountered him. It was  
17 a pickup. It wasn't like a 911 call. And he said they  
18 went in there. This is what they're wearing. There - - -  
19 the - - - there's no indication in the record that they  
20 have to get more of a description from him or that it was  
21 necessary. Because Boyce went to the front door,  
22 encountered somebody - - - a woman that said, yeah, my  
23 brother just got into something. And there was a resident  
24 of the apartment in front that had let him in.

25 So this wasn't like a widespread canvass where

1           you would need more of a description.  So it's reasonable -  
2           - -

3                         JUDGE RIVERA:  Yeah.  But isn't that, in part,  
4           the point?  I'm not sure you're making really your point  
5           there.  It just goes to sort of the - - - the train has  
6           left the station.  I found three people.  One of them fits  
7           the bill.  These other two likely are the two who were with  
8           him.  Whereas the other two may have been somewhere else in  
9           the building, or maybe just the person who is this third  
10          person, who is identified later on as the defendant, is  
11          somewhere else or in another apartment, or next door?

12                        MR. BLIRA-KOESSLER:  Well, there are all sorts of  
13          possibilities, but we - - -

14                        JUDGE RIVERA:  There are all sorts - - -

15                        MR. BLIRA-KOESSLER:  - - - we don't have to  
16          produce evidence disproving every possibility of something  
17          that could, might have in some - - -

18                        JUDGE RIVERA:  No.  I'm just - - -

19                        MR. BLIRA-KOESSLER:  - - - you know, that might  
20          have occurred?

21                        JUDGE RIVERA:  - - - saying that that - - -  
22          that's the concern.  Right?  That that's perhaps the  
23          concern.  That it's by association, when you have such a  
24          limited description that it's a nondescription.  If that's  
25          all - - - let's say it had just been one person - - - for

1           one moment.  If that's the only description.  The one  
2           that's attached to this defendant.  If the victim had given  
3           that description, the police are not finding that person  
4           any time soon.

5                       MR. BLIRA-KOESSLER:  Well, I - - - I mean, if  
6           they have the victim standing in front of the building and  
7           saying he went in there - - -

8                       JUDGE RIVERA:  Yeah.

9                       MR. BLIRA-KOESSLER:  - - - and then encounter a  
10          sister and who lives there and lets them up there.

11                      JUDGE RIVERA:  And fifty Latino men of that age  
12          live there?

13                      MR. BLIRA-KOESSLER:  Excuse me?

14                      JUDGE RIVERA:  And fifty Latino men of that age  
15          live there?

16                      MR. BLIRA-KOESSLER:  Well, according to the  
17          record - - -

18                      JUDGE RIVERA:  How is that going to help?

19                      MR. BLIRA-KOESSLER:  - - - that we have, that's  
20          not true.

21                      JUDGE RIVERA:  Well, but - - -

22                      MR. BLIRA-KOESSLER:  According to the record we  
23          have, that's not true - - -

24                      JUDGE RIVERA:  I've been giving you the  
25          hypothetical about the point about the association.  Right?

1           That that's the concern - - -

2                   MR. BLIRA-KOESSLER: Right. But I - - -

3                   JUDGE RIVERA: - - - of the suggestiveness.

4                   MR. BLIRA-KOESSLER: - - - sorry. Go ahead.

5                   JUDGE RIVERA: No, no.

6                   MR. BLIRA-KOESSLER: I didn't mean to interrupt.

7                   JUDGE RIVERA: But that's the concern about the  
8 suggestiveness.

9                   MR. BLIRA-KOESSLER: Yeah. Yeah. But I - - - I  
10 mean, again, I can only address the facts of this case.  
11 There weren't - - - according to this record, there was  
12 just two women and some children in that apartment. These  
13 were the only males in the apartment. So it - - - it's not  
14 an apartment where you got fifty people in there. And I  
15 still think it's pretty - - -

16                   JUDGE RIVERA: How long after the actual attack  
17 were they in the apartment?

18                   MR. BLIRA-KOESSLER: It was less than an hour.  
19 He - - - he was ID'd less than an hour after the attack.  
20 About fifty minutes, let's say. Okay. But you know, they  
21 were the only three found there. And you know, the rule  
22 they want here about for explaining everything, again, that  
23 applies to precinct showups. Because there we have to  
24 explain why did you conduct a precinct - - - a showup in a  
25 precinct, rather than a lineup? That rule has never been

1 applied in a setting like this, because precinct showups  
2 are different. They involve this extreme degree of  
3 unreliability. This court has never said that a group  
4 showup has an extreme degree of reliability because it just  
5 doesn't. It's just one more factor that goes into  
6 determining whether the showup was not unduly suggestive.

7 All this court said in Adams, which again, is a  
8 precinct showup case. But all this court said was, showing  
9 the suspects together enhanced the possibility that if one  
10 were recognized the others would be identified. It didn't  
11 say anything like it said in Riley, which is a precinct  
12 showup case. A pure precinct showup case, but also one  
13 that had a group showing. Two people were shown at the  
14 same time.

15 In that case, this court stated, "Unreliability  
16 of the most extreme kind infect showup identifications of  
17 arrested persons held at police stations." So in a  
18 situation like that, we have to put forward evidence as to,  
19 well, why did the police do a showup in a precinct instead  
20 of a lineup. Right? And when we don't you'll - - - in - -  
21 - in Riley, the evidence, there was no evidence to that.  
22 Because the police mainly said well, the lineup room was  
23 being renovated. And they said, well, we just want to do  
24 it quickly. Well, that's not good enough.

25 CHIEF JUDGE WILSON: You think it will be

1 unreasonable for me to think that if I were forty-five  
2 years younger, and brought out instead of Kenneth Garcia, I  
3 would have been identified?

4 MR. BLIRA-KOESSLER: If you were - - - if - - -  
5 if you were brought out and - - - and - - - instead of  
6 Kenneth Garcia?

7 CHIEF JUDGE WILSON: No, no, I'm too old now.  
8 But yeah, if I were nineteen?

9 MR. BLIRA-KOESSLER: I mean, if you have a  
10 picture of yourself from - - - you know, all - - - all  
11 those years ago, maybe I can take a look at it and give you  
12 an answer. But I have no idea what you looked like forty-  
13 five years ago.

14 CHIEF JUDGE WILSON: Fair enough.

15 MR. BLIRA-KOESSLER: You know - - - but you know,  
16 the description wasn't exactly a hundred percent bare  
17 bones. It wasn't specific detailed down to like - - -

18 JUDGE RIVERA: What else, other than Hispanic?  
19 Sorry. Hispanic male - - -

20 MR. BLIRA-KOESSLER: Late teens - - -

21 JUDGE RIVERA: - - - in a particular age-group?

22 MR. BLIRA-KOESSLER: Right. Late teen - - -

23 JUDGE RIVERA: What, other than that?

24 MR. BLIRA-KOESSLER: Late teens or early twenties  
25 - - -

1 JUDGE RIVERA: I got it. Other - - -

2 MR. BLIRA-KOESSLER: - - - one of whom was  
3 wearing a yellow shirt.

4 JUDGE RIVERA: No, no. About the one that's  
5 identified as the defendant?

6 MR. BLIRA-KOESSLER: As - - - as to him?

7 JUDGE RIVERA: Yes.

8 MR. BLIRA-KOESSLER: Well - - -

9 JUDGE RIVERA: Yeah. What is the - - -

10 MR. BLIRA-KOESSLER: One of them was identified  
11 as heavy-set. And when Boyce went in - - -

12 JUDGE RIVERA: That's not this one.

13 MR. BLIRA-KOESSLER: No, no. This - - - this  
14 defendant?

15 JUDGE RIVERA: This defendant was a heavy person?

16 MR. BLIRA-KOESSLER: Well, not so much in the  
17 description. Three of them - - - I mean, he - - - he's  
18 describing all three.

19 JUDGE RIVERA: Yes. Yes.

20 MR. BLIRA-KOESSLER: Describes them as - - -  
21 again, three - - -

22 JUDGE RIVERA: Yes.

23 MR. BLIRA-KOESSLER: - - - Hispanic males, late  
24 teens, early twenties. One of them heavy-set, one of them  
25 wearing a yellow shirt. They go in and Boyce, during his

1 testimony at the hearing, described Mr. Garcia. This Mr.  
2 Garcia, not Mr. Luis Garcia as heavy-set. So it had that  
3 one additional added detail.

4 I would point out, though, that in Howard it was  
5 a pretty general description as well. The only description  
6 was a certain number of African American males wearing  
7 hoodies inside a grey or silver Honda. When they found the  
8 defendants, I think only one was wearing a hoodie and it  
9 was a Pontiac. So all - - - you know, cases sometimes have  
10 variations in description. But still this court found that  
11 that was a mixed question of law and fact and that the  
12 record supported the hearing court's determination.

13 These descriptions - - - you know, because there  
14 - - - there can be all sorts of reasons why you don't have  
15 more of a description. As I said before, maybe the police  
16 just didn't ask because they didn't have to because they  
17 were right there. They were going in the building.  
18 There's no need to get more of a description if you know  
19 where you're going, you've got guidance up to the  
20 apartment. You know who you'll - - - that the people who  
21 you are looking for might be there. This is not a case of  
22 a widespread canvass. All right.

23 So - - - but again, our burden is very minimal.  
24 There is absolutely no law, no science, whatsoever that  
25 says doing a group showup is more suggestive than a

1 sequential showup. You could have a sequential showup,  
2 first person - - - first person gets ID'd, and the  
3 argument's going to be the same. Oh, well, that led them  
4 to identify the next person, that made it suggestive.

5 There's no distinction between the two that says  
6 one is the proper procedure, rather than the other, such  
7 that you have to explain why you did this as in a - - -

8 JUDGE RIVERA: But it might be more suggestive to  
9 start out with the one who is more vividly remembered by  
10 the defendant? As opposed to the one where all you've got  
11 at best - - - I'll give you the heavy-set - - - is Hispanic  
12 male of a particular age-range, who's heavy-set?

13 MR. BLIRA-KOESSLER: Start out meaning bring him  
14 out - - - bring out - - -

15 JUDGE RIVERA: Yeah. Yes.

16 MR. BLIRA-KOESSLER: - - - Luis Garcia first?

17 JUDGE RIVERA: Correct. Start - - - yes.

18 MR. BLIRA-KOESSLER: I mean, but then the  
19 argument's going to be well, he knew him well, so then that  
20 led him to identify the other two. You know? I just don't  
21 think a showup is really amenable to all this - - - you  
22 know, this amount of planning. Because it's - - - it - - -  
23 it's supposed to be prompt. You know, you got a victim,  
24 got the ambulance there. The police didn't know the extent  
25 of his injuries. You know, he could have had brain trauma.

1 They actually did - - - if you look at the medical records,  
2 they did a CT scan, I think. You know, thankfully he  
3 didn't have that trauma. But there, on the scene, when the  
4 police have a victim who could have all sorts of injuries -  
5 - - you know, could - - - you know, who know what's wrong  
6 with him, standing there and saying, you know, should we  
7 group them together? Or maybe we'll bring this one down  
8 first or - - - you know, maybe we should bring the other  
9 one down first. It kind of defeats the purpose of doing a  
10 showup, which is supposed to be prompt, close in time to  
11 the crime, done as quickly as possible so you can ID the  
12 perpetrators. You know, find the weapon if there is a  
13 weapon, allow the victim to get to the hospital to get the  
14 treatment that he needs. And that's how the police  
15 performed the showup here, and that's why it wasn't unduly  
16 suggestive.

17 There's no need, therefore, to create a separate  
18 rule, like the rule that you have with precinct showups  
19 which are - - - you know, per se, infected with extreme  
20 unreliability. That just doesn't exist here and there's no  
21 law or science that says otherwise.

22 CHIEF JUDGE WILSON: Thank you.

23 MR. BLIRA-KOESSLER: Thank you.

24 JUDGE HALLIGAN: Counsel, can I ask you to  
25 clarify your view about what the people's burden is? Is it

1 that the people have to establish what happened at the  
2 showup, the circumstances? So the court can assess whether  
3 there was undue suggestiveness, or are you taking the  
4 position that the people have to demonstrate that specific  
5 steps were taken to minimize or reduce the suggestiveness?

6 MR. FITZMAURICE: So the people's burden actually  
7 applies across all police arranged identifications. It  
8 certainly isn't limited to precinct showups. Chipp,  
9 actually, I think might have been even a lineup case. So  
10 the burden is reasonableness - - - establish reasonableness  
11 and then make an initial showing - - - not the ultimate  
12 showing, but an initial showing of a lack of undue  
13 suggestiveness.

14 JUDGE HALLIGAN: I understand that. But does  
15 that require, in your view, the people to demonstrate - - -  
16 to put on some evidence about what happened in the course  
17 of the showup? Or are you - - - I just couldn't tell from  
18 your brief. Are you taking the position that the - - -  
19 that the people have to show I took the following steps in  
20 order to minimize the suggestiveness?

21 MR. FITZMAURICE: I - - - I think it's a little  
22 more than just describing the showup.

23 JUDGE HALLIGAN: So are - - - is your position  
24 that they do have to show specific steps to minimize  
25 suggestiveness?

1 MR. FITZMAURICE: I think that this court has  
2 articulated, you know, show what steps were taken to  
3 reduce. And I think that language is applicable here.

4 JUDGE HALLIGAN: And where in your cases - - - in  
5 our cases do you see some requirement that the people show  
6 they took specific steps as opposed to elucidating the  
7 facts enough for the court to gauge whether it was unduly  
8 suggestive?

9 MR. FITZMAURICE: Well, I think it stems from the  
10 fact that the starting point is, it's a suggestive  
11 procedure. It's an inherently suggestive procedure.

12 JUDGE HALLIGAN: Right. I'm just asking if  
13 there's any specific cases that you could point us to that  
14 require that - - -

15 MR. FITZMAURICE: I just think that in this  
16 situation we have, whether it's Riley or Adams or Gordon,  
17 we have - - - we have steps going in the opposite  
18 direction. We have steps - - - you know, making things  
19 more suggestive instead of less suggestive. So this is  
20 kind of an unusual situation because I agree, this is a  
21 minimal burden. It should have been very easy to meet in  
22 this situation. The police were in total control,  
23 cooperation, no arrests. You know, this - - - this - - -  
24 if there's ever an ability for police to - - - to arrange a  
25 - - - you know, and - - - and cater to make sure that

1 suggestive - - - an identification isn't unduly suggestive,  
2 it's when there - - - it's when an hour later they have  
3 people who are voluntarily leaving an apartment to come  
4 outside. So this makes it very difficult from a situation  
5 where it's a continuous chain of events.

6 JUDGE CANNATARO: Counsel, this argument about  
7 steps implies a certain amount of intentionality in putting  
8 together this showup. And your adversary argued a few  
9 moments ago that these are kind of fluid, evolving  
10 situations. You could have an injured victim. You don't -  
11 - - maybe Ofc. A doesn't know who Ofc. B is bringing  
12 downstairs, whether it's one, whether it's all three of  
13 them. And I think his response to that was what you end up  
14 with is a situation where you have to show what didn't  
15 happen. Because it's too hard to show - - - or maybe even  
16 impossible to show that level of intentionality, that we  
17 made a plan?

18 MR. FITZMAURICE: Absolutely. You couldn't - - -

19 JUDGE CANNATARO: Do you accept that?

20 MR. FITZMAURICE: I absolutely accept that. And  
21 I'll even go one further. I accept that there are certain  
22 situations which are so time-sensitive that, not only is a  
23 showup appropriate and reasonable under step one, but  
24 actually - - - we actually do apply a kind of discounted  
25 version to step two, because it's a continuous chain of

1 events.

2 So let's say in Duuvon, where there's only two or  
3 three minutes between - - - you know, happening. This  
4 court doesn't want to come along - - - no court wants to  
5 come along and say, well, in that three minutes there was  
6 this thirty-second period where you could have taken a  
7 step. So we already apply that discount in true exigency,  
8 continuous chain-of-events cases. And if there's one thing  
9 that I can apprise this court is, this is the exact  
10 opposite situation. It's a situation where a showup, yes,  
11 it is reasonable because it's close enough and it's - - -  
12 it's prompt enough. But that can't end the inquiry.

13 And I think what we're having a situation where -  
14 - - where everyone stops at promptness. But we already - -  
15 - true promptness, two minutes. The situation in Rice, you  
16 know, they arrive and - - - right, and he's still at the  
17 scene and then they chase him. I mean, we know what true  
18 promptness looks like. We accept a kind of a discounted,  
19 you know, consideration for due process in that situation.  
20 It's offset.

21 We have to know this is - - - this couldn't be  
22 further from that. You know? In Rice a few months ago,  
23 this court found it to be a mixed question because it  
24 looked at the record and it said even though they arrived  
25 at the scene minutes later, saw him still at the scene, and

1 he fled, and they're chasing him. So it meets every  
2 definition in the traditional sense of promptness and  
3 exigency, they still asked whether other people looked  
4 familiar, and they still brought the - - - to do separate  
5 showups.

6 So they were still - - - so this idea that I'm  
7 looking for a perfect showup and a perfect list of every  
8 exclusion, absolutely not. I'm looking for them to come in  
9 and articulate something on the record that is attentive to  
10 the risk that when they have this extreme situation of  
11 someone being so familiar and someone being so vague, that  
12 in that situation, there has to be more than just, well, we  
13 didn't cuff him. Particularly when they're admitting that  
14 the reason they didn't cuff him was because he hadn't been  
15 arrested, you know. So it would be different if they even  
16 said we didn't cuff him because we didn't want to bias an  
17 identification. So we really just have - - - it's as if  
18 this record doesn't have step two at all.

19 JUDGE CANNATARO: Can you tell us what you would  
20 have wanted them to say?

21 MR. FITZMAURICE: Well, what I would have wanted  
22 who to say? What I would have wanted - - -

23 JUDGE CANNATARO: To justify the lack of  
24 suggestiveness in the showup procedure used?

25 MR. FITZMAURICE: What I would have wanted? I

1 would have wanted a - - - you mean, they being the police  
2 officers?

3 JUDGE CANNATARO: Yeah.

4 MR. FITZMAURICE: I would have wanted the  
5 prosecution to elicit testimony that - - - you know, there  
6 was some timing component that couldn't happen or - - - you  
7 know, or - - - or that - - - that they - - - that they - -  
8 - there was some moving factor on the ground. Or - - - you  
9 - - - something that was at least attuned to the risk.  
10 Because this isn't a new risk. These cases, yes, they  
11 might have happened at precincts, but they're thirty, forty  
12 years old. The idea that - - - that if one witness is more  
13 familiar, it can affect the identification of a second  
14 witness.

15 This isn't new for police to know. We expect  
16 them - - - you know, Duuvon actually has a - - - I think it  
17 might be the final paragraph of Duuvon. It has a very  
18 interesting part from this court where it talks about how  
19 it's directed straight at law enforcement, that says that  
20 we have these burdens so that law enforcement,  
21 specifically, will know that their evidence gathering  
22 process, quote, "won't be tolerated if undue suggestive  
23 procedures become routine." So we are doing this with an  
24 eye to influencing prosecutors at hearings that then  
25 trickles down to police in real-time. And no - - - you

1 know, setting aside the - - - setting aside this  
2 identification does not interfere with the huge public  
3 policy in true exigency cases of police making - - - you  
4 know, not - - - not having their - - -

5 JUDGE RIVERA: But you agree that they - - -

6 MR. FITZMAURICE: - - - split second - - - second  
7 guessed.

8 JUDGE RIVERA: - - - but you agree that they  
9 could have - - - I mean, I know you're arguing they didn't  
10 have, and I think in part that seems to be what the ADA is  
11 arguing here. That they could have concluded, whether it  
12 took moments to do that or not, that it would be either  
13 more or at least as suggestive to do it individually?

14 MR. FITZMAURICE: They could have. And since I'm  
15 here, in a really unusual posture where I'm taking issue  
16 with an initial minimal burden.

17 JUDGE RIVERA: Yes.

18 MR. FITZMAURICE: Maybe. And maybe that would  
19 have been enough, and it would have converted it then. It  
20 would have shifted to the defendant to ultimately prove and  
21 carry their burden of actual persuasion. Which this court  
22 typically does not need to be involved with as a mixed  
23 question.

24 JUDGE RIVERA: Right.

25 MR. FITZMAURICE: But I think we've a situation

1 where we have so little offered by the prosecution, who are  
2 in control of all the facts and all the knowledge, and we  
3 have just no articulation of anything in the record. This  
4 is why the - - - it shifts from not police control - - -  
5 you know, to exigency, to - - - oh, with a logistical  
6 problem, oh it would have been dangerous, you know. The -  
7 - - the reason we're doing this and having these  
8 discussions is because there's no point in the record where  
9 we can point to and say, right there is where they at least  
10 tried to take a step or explain why they couldn't.

11 And I think, I - - - I'll just note before I sit  
12 down that it's hard to defend the integrity of an  
13 identification procedure when one officer at the  
14 suppression hearing refuses to admit the procedure even  
15 happened, when the second officer misidentifies the  
16 defendant at the procedure, when the - - - a statement  
17 notice is served on the wrong defendant, when the  
18 prosecutor at the Wade hearing can't even correct the  
19 record as to who the statement notice should go to, and  
20 then, when at the trial the complainant who's adamantly  
21 over and over and over describes this person and is  
22 familiar with this person misidentifies them too. So on -  
23 - - on that situation, we have a sincere risk of  
24 misidentification by association, and then at trial, guilt  
25 by association. And that's why I think, on this unusual

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posture, I think that this pre-trial identification procedure should be suppressed, and the indictment should be dismissed.

CHIEF JUDGE WILSON: Thank you.

MR. FITZMAURICE: Thank you, Your Honor.

(Court is adjourned)



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

I, Chrishanda Sassman-Reynolds, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Kenneth Garcia, No. 119 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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