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COURT OF APPEALS

STATE OF NEW YORK

PEOPLE,

Respondent.

-against-

No. 194

DERRICK HILL,

Appellant.

20 Eagle Street
Albany, New York 12207
October 16, 2014

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE VICTORIA A. GRAFFEO
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE ROBERT S. SMITH
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA

Appearances:

JONATHAN GARELICK, ESQ.
LEGAL AID SOCIETY
Attorneys for Appellant
199 Water Street
5th Floor
New York, NY 10038

PHILIP MORROW, ADA
NEW YORK COUNTY DISTRICT ATTORNEY'S OFFICE
Attorneys for Respondent
One Hogan Place
New York, NY 10013

Janice Brea
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: Number 194, People v.
2 Hill.

3 MR. GARELICK: Good afternoon.

4 CHIEF JUDGE LIPPMAN: Counselor, you want
5 any rebuttal time?

6 MR. GARELICK: I'd like two minutes,
7 please.

8 CHIEF JUDGE LIPPMAN: Two minutes?

9 MR. GARELICK: Yes.

10 CHIEF JUDGE LIPPMAN: Sure; go ahead.

11 MR. GARELICK: I think it's worth reviewing
12 the exceedingly perfunctory exchange that occurred in
13 this case which purportedly opened the door to
14 evidence of the defendant's pre-trial silence. This
15 is the whole thing.

16 Defense counsel asks the officer, "When you
17 got to the precinct, you read him his rights?"

18 "Yes.

19 "He read the form?

20 "I read the form to him. I read each part
21 out. I asked him if he understood; he would answer
22 yes or no" - - -

23 JUDGE PIGOTT: Yeah, we've got all that in
24 the record. And you're saying that that didn't open
25 the door?

1 MR. GARELICK: I'm saying - - - yeah, I
2 mean - - - well, the reason I was reciting it, Judge,
3 and I apologize for doing that, but - - -

4 JUDGE PIGOTT: No, it's all right.

5 MR. GARELICK: - - - it's really - - - it's
6 very, very short and it's very hard to see how that
7 created such a misimpression for the jury with
8 respect to a material - - -

9 JUDGE SMITH: Well, what about the part
10 where it says - - - see, now I'm going to - - - Judge
11 Pigott can be mad at me, because I'm going to do what
12 you were doing.

13 "Q. Throughout this process, you asked him questions.

14 "A. Yes.

15 "Q. He answered the questions that you asked him?

16 "A. Yes, he did."

17 Couldn't - - - didn't that open the door to
18 saying, didn't he tell you he didn't want to answer
19 any more?

20 MR. GARELICK: I'm sorry, Judge. Could you
21 - - -

22 JUDGE SMITH: Oh, you want the page
23 reference, huh? It's going to take - - - it's
24 between 95 and 102, but I can't be more precise right
25 now.

1 MR. GARELICK: I mean, the - - - it was
2 pretty clear, putting it in the context of the
3 record, the entire record, that defense counsel's
4 purpose in asking these questions was simply to
5 establish that appellant was, you know, reasonably
6 cooperative with the police. And there was really no
7 evidence to the contrary.

8 CHIEF JUDGE LIPPMAN: How damaging was it
9 that this stuff came in anyway? I mean, it was kind
10 of - - - it was brief, you know, the judge did an
11 adverse inference charge, it was - - - what's the big
12 deal?

13 MR. GARELICK: It was - - - okay, let's - -
14 -

15 CHIEF JUDGE LIPPMAN: How was he hurt by
16 this? Even if we accept the fact that maybe the door
17 wasn't so wide open and there wasn't - - -

18 MR. GARELICK: Right.

19 CHIEF JUDGE LIPPMAN: - - - any great
20 purpose to - - - to letting this in. So what?

21 MR. GARELICK: Well, in a - - - first of
22 all, I mean, the court has recognized that there's a
23 grave risk of prejudice with this kind of - - - with
24 this kind of - - -

25 CHIEF JUDGE LIPPMAN: I understand. But in

1 this particular circumstance, given its briefness,
2 the judge's instruction, it's brief, it's discrete -
3 - - okay. So - - -

4 MR. GARELICK: Right.

5 CHIEF JUDGE LIPPMAN: - - - let's assume,
6 for the sake of argument, that maybe the door wasn't
7 so open.

8 MR. GARELICK: As to the count of - - -

9 CHIEF JUDGE LIPPMAN: And they did accept -
10 - - and the jury did accept his - - - did credit his
11 claim of non-intoxication up to a point. I mean, you
12 know, so - - - because he was not guilty on one of
13 the charges. What's so terrible?

14 MR. GARELICK: Well, I mean, the fact that
15 he is acquitted on the driving while intoxicated
16 count - - -

17 CHIEF JUDGE LIPPMAN: Yeah.

18 MR. GARELICK: - - - does indicate that
19 there was a potential for harm on the count of
20 driving while impaired. He is convicted on a count
21 of that.

22 CHIEF JUDGE LIPPMAN: Yeah, but there's
23 other - - - other things that the jury obviously gave
24 credit to. Right?

25 MR. GARELICK: Right. I mean, the risk - -

1 - the risk with this kind of evidence is that - - -

2 CHIEF JUDGE LIPPMAN: You know, to the
3 tests and all of that?

4 MR. GARELICK: - - - the jury is given
5 undue - - -

6 CHIEF JUDGE LIPPMAN: Yeah.

7 MR. GARELICK: - - - undue attention. Now,
8 with respect to the per se count, the defense was
9 that - - - you know, counsel raised questions about
10 the reliability of the exam, and that was the defense
11 as to that count. And appellant was entitled to have
12 the jury consider that count, you know, fully and
13 fairly, and again, I mean, not to overly reiterate
14 this, but it's really been emphasized that there's a
15 grave risk for prejudice with this kind - - -
16 specific kind of evidence. This court has taken
17 special concerns around this.

18 CHIEF JUDGE LIPPMAN: Well, the judge tried
19 to - - - to alleviate that concern, right?

20 MR. GARELICK: With respect to the
21 curative, it's true that defense counsel drafted the
22 - - - drafted the curative and the court gave the
23 curative that defense counsel asked for, but there
24 was a situation here where - - - if you have a
25 situation where there really is no legitimate use for

1 the evidence, then defense counsel is really in a
2 bind. I mean, the judge can tell the jury what not
3 to use it for, but how is defense counsel supposed to
4 include in that instruction any indication what the
5 jury - - - what the jury is supposed to use it for,
6 if there's no legitimate use?

7 So in this case, the jury - - -

8 CHIEF JUDGE LIPPMAN: So you think once
9 there's really - - - let's say we accept that there's
10 no legitimate use; there's really no way that can be
11 corrected? If it's - - - once it's let in, there's
12 just - - -

13 MR. GARELICK: In a situation where there's
14 no legitimate use, I think it's questionable whether
15 or not a curative instruction could - - - could cure
16 the prejudice.

17 JUDGE PIGOTT: Doesn't that happen a lot?
18 I mean, there's always questions asked in the course
19 of a trial, and the judge will say, you know, I'm
20 going to sustain that objection and direct the jury
21 to disregard it. And sometimes you wonder if they're
22 going to or not, but, I mean, we don't grant
23 mistrials every time.

24 MR. GARELICK: I under - - - I understand
25 that, Judge, but, you know, this is no - - - I don't

1 think this is just some ordinary error. This is a
2 particularly egregious type of error. This court has
3 recognized that.

4 JUDGE SMITH: Would you admit that there
5 are - - - in principle, it's possible to open the
6 door to a refusal to answer questions? That is, if
7 you had - - - if trial counsel had made a big deal
8 for hours and hours about how cooperative your client
9 was, then - - - then the prosecution would be allowed
10 to say, hey, he wasn't so cooperative after you gave
11 him Miranda warnings, was he?

12 MR. GARELICK: I think that - - - I mean,
13 to answer your first question, are there scenarios
14 where it would be potentially admissible; sure. I'm
15 sure that there are. Was this such a scenario? No,
16 because there are no - - - there are no circumstances
17 in this case that made it particularly probative of
18 the defendant's level of cooperativeness that he
19 declined to answer questions.

20 JUDGE SMITH: Well, what was the point - -
21 -

22 MR. GARELICK: There could be such
23 scenarios, but they were not here.

24 JUDGE SMITH: What was the point of the
25 original cross-examination about how cooperative he

1 was, he was cooperative at the scene, he was
2 cooperative at the station house? Why - - - wasn't
3 that an attempt by defense counsel to paint a
4 portrait of an innocent man?

5 MR. GARELICK: Well - - -

6 JUDGE SMITH: Guy who had nothing to hide,
7 was perfectly eager to cooperate.

8 MR. GARELICK: I don't think that it was an
9 attempt to - - - that he was a guy with nothing to
10 hide, but rather that his cooperativeness, his
11 demeanor was not indicative of drunkenness.

12 JUDGE SMITH: So you're saying he was
13 trying to prove sobriety, not an - - - not an absence
14 of consciousness of guilt.

15 MR. GARELICK: I think that's right, Judge,
16 but I also think - - -

17 JUDGE SMITH: Can't it be read the other
18 way, at least some of the questions?

19 MR. GARELICK: Even if it could, unless
20 this court's prepared to conclude that a mere
21 exercise of the right to silence is evidence of a
22 lack of cooperation - - - and I don't think this
23 court should do that, because it's been recognized
24 that - - - normally---

25 JUDGE SMITH: Well, obviously you can

1 debate it. But we're - - - but the point - - - as I
2 understand it, the prosecution's point here is that
3 the defendant chose to suggest to the jury that a
4 willingness to cooperate with law enforcement is the
5 hallmark of an innocent man. If the defense is
6 trying the case on that theory, doesn't that exempt
7 the prosecution from the usual rule which says you
8 cannot - - - you cannot use his unwillingness to
9 cooperate against him?

10 MR. GARELICK: You know, I just think that
11 on - - - on this record and under the circumstances
12 of this case, it's just not sufficiently probative of
13 a lack of cooperation - - -

14 CHIEF JUDGE LIPPMAN: He just wants to show
15 that he's not inebriated, that's all.

16 MR. GARELICK: But even to the extent that
17 he wanted to show that - - -

18 JUDGE RIVERA: But - - -

19 CHIEF JUDGE LIPPMAN: In your mind, that's
20 all he's trying to do.

21 MR. GARELICK: Yes, but - - -

22 JUDGE RIVERA: But counsel, if you - - - I
23 guess one could argue that if he - - - if he shows he
24 exercised his rights under Miranda, he's certainly
25 not inebriated. Doesn't it help you in that way?

1 The presence of mind to say, you know what, no, I
2 don't want to talk to anybody. He's not so drunk,
3 let me just say that.

4 MR. GARELICK: Right. I think in the - - -
5 in the end, Judge, what went on here was - - - you
6 know, the context of this questioning about Miranda.
7 He asked him this question - - - first he said, did
8 you handcuff him? Yes, I handcuffed him. Did he
9 resist? No. Was he cooperative at the scene? Yes.

10 Okay, then he asked him, you know, when you
11 read him - - - essentially, he's saying, when you
12 read him the Miranda rights, did he cooperate with
13 that process? Yes. Okay? Was he cooperative - - -
14 did he take the breathalyzer cooperatively? Did he
15 do the coordination test cooperatively? And the
16 answer to all of that was, yes.

17 So is this court prepared to say that my
18 client's choice, after being advised he has a right
19 to remain silent, it's his choice to remain silent,
20 is sufficiently probative on the issue of
21 cooperativeness? I mean, in other contexts, the
22 court said it has to be highly probative.

23 CHIEF JUDGE LIPPMAN: Okay, counselor.
24 You'll get your rebuttal.

25 MR. MORROW: May it please the court;

1 Philip Morrow for the respondent.

2 CHIEF JUDGE LIPPMAN: Counsel, what's the
3 possible bearing of letting this in on whether he's
4 intoxicated or not?

5 MR. MORROW: The - - -

6 CHIEF JUDGE LIPPMAN: What's the utility
7 here? Why would the judge let this in?

8 MR. MORROW: The judge didn't let it in in
9 terms of whether or not defendant was intoxicated.
10 The judge let this in to refute the misleading
11 impression created by the defense that the defendant
12 was cooperative.

13 JUDGE PIGOTT: Wasn't he?

14 CHIEF JUDGE LIPPMAN: What - - - exactly.
15 Go ahead.

16 JUDGE PIGOTT: He was - - - he was
17 cooperative. I mean, the police officer said, yeah,
18 he did everything we asked him to. He was
19 cooperative. We - - - you know, we gave him his
20 rights, et cetera, and I could see where somebody
21 could make the leap that somehow we've got to refute
22 that. I don't know why.

23 But if it bleeds over into - - - into
24 making a big deal out of someone exercising his
25 Constitutional rights as if somehow they're guilty,

1 that would be a problem, wouldn't you agree?

2 MR. MORROW: Yes, but here you have
3 cooperation defined by the defense in opening and
4 summation and during the colloquy of the judge as
5 doing everything that the police asked him to do,
6 which, you know, we know from the purported evidence
7 - - -

8 CHIEF JUDGE LIPPMAN: Yeah, but add in to
9 that - - -

10 MR. MORROW: - - - wasn't the case.

11 CHIEF JUDGE LIPPMAN: Add in to that that
12 he's got a Constitutional right to be silent.

13 MR. MORROW: Oh - - -

14 CHIEF JUDGE LIPPMAN: Doesn't that change
15 the context a little bit, that it's kind of - - - I
16 mean, is this kind of silly what - - -

17 MR. MORROW: Well - - -

18 CHIEF JUDGE LIPPMAN: Even given - - - and
19 I give you that the judge certainly made an effort to
20 limit, you know, the - - - what was going in and why
21 it was going in, but I don't even understand that - -
22 - that explanation that the judge gives, to complete
23 the narrative or whatever. What does that mean? Why
24 - - - why is that - - - how did that help?

25 MR. MORROW: The judge was explaining that

1 defense counsel walked the officer through the
2 Miranda waiver form; he asked him, did you - - - did
3 you advise defendant of his rights, did he read the
4 form, did he sign the form? And he left out the part
5 of the form that was, are you willing to answer
6 questions, so the jury was left with an incomplete
7 picture of the defendant's - - -

8 CHIEF JUDGE LIPPMAN: The picture is the
9 guy is basically cooperative. What - - - what's - -
10 - and he has a right to remain silent. Isn't that
11 the picture?

12 MR. MORROW: Well, he has a right to remain
13 silent, but he can't attempt to convince the jury
14 that, you know, he was willing to answer questions
15 and he was willing to cooperate. If - - -

16 CHIEF JUDGE LIPPMAN: Obviously, he wanted
17 to show that he wasn't intoxicated.

18 MR. MORROW: But the - - - the colloquy
19 that preceded the ruling - - - defense counsel
20 doesn't mention that I was doing this to show that my
21 client was sober and he understood what was
22 happening; he said that I did this to show that he
23 was cooperative. He did what they asked him to do.
24 And - - -

25 JUDGE SMITH: Was he - - - was he - - -

1 JUDGE GRAFFEO: Why is he not allowed to
2 show that, if in fact the officer is agreeing and
3 saying, yes, he did this; yes, he did that?

4 MR. MORROW: He can - - - he can ask the -
5 - - he can ask the officer about their - - - their
6 interactions on the scene and all of those questions,
7 but when he brings up the Miranda warning form, asks
8 him whether he signed the form, he was advised of his
9 rights, and then was he cooperative at the precinct,
10 that - - -

11 JUDGE SMITH: Is it possible that the
12 defendant - - - defense lawyer was basically doing
13 this, essentially, to get good-guy points, to make
14 the jury think well of his client, that it wasn't - -
15 - it wasn't - - - it didn't go directly either to
16 sobriety or to consciousness of innocence, but just
17 that - - - just - - - so we say something nice about
18 my client, make the - - - put the jury in a good
19 mood? Isn't that what was really going on?

20 MR. MORROW: No, Judge, I think that what
21 was going on here is that a central theme of the
22 defense argument was that a blood test was a more
23 reliable way to determine the defendant's blood-
24 alcohol content. So defendant wants to convince the
25 jury that, well, if defendant did everything he was

1 asked, then if the police had asked him to submit to
2 a blood test, he would have done that, and in a - - -
3 in our appendix on page 49, you see defendant saying,
4 oh, my - - - defense counsel was saying, my client
5 was cooperative; he did everything they asked him to
6 do - - -

7 JUDGE SMITH: So you're saying that to
8 refute the he would've - - - he-would've-taken-a-
9 blood-test-if-we'd-asked-him-to argument, you're
10 allowed to say, well, he wouldn't answer questions
11 when we asked him to.

12 MR. MORROW: Well, it's not - - - no, no,
13 it's not refuting that argument; it's that, you know,
14 he wanted to establish that he was cooperative to
15 further the argument about the blood test, and our
16 position is that it's the - - - the questioning about
17 the Miranda waiver form followed by questions about
18 whether you're cooperative at the precinct giving a
19 misleading impression to the jury that the People
20 were entitled to correct. It's not merely mentioning
21 the blood test or saying that the - - - the police
22 should have used different investigory (sic) - - -
23 investigatory techniques.

24 JUDGE SMITH: What, exactly, is the
25 misleading impression that was given?

1 MR. MORROW: Because the jury would not
2 have known if defendant - - - if it's established
3 that defendant read the form, he signed the form, the
4 jury doesn't know what the - - - don't know what the
5 signature conveys. The jurors might think the
6 signature conveys, yes, I - - - I was read my rights
7 and I agree to waive them and speak with the police.
8 And - - -

9 JUDGE SMITH: If the jury's watched Law and
10 Order, they've probably figured out that this guy
11 didn't - - - did not give a statement to the police,
12 or they would have seen it.

13 MR. MORROW: Well, that's all speculation
14 because the jury might actually think that there was
15 a statement that defendant gave that for whatever
16 reason, the People might not have thought was
17 helpful, so they were hiding something from the jury
18 if that didn't come into evidence.

19 JUDGE PIGOTT: No, that's - - - you
20 wouldn't do that, and that would be Brady and that
21 would have come out anyway.

22 MR. MORROW: Well, I think that there's
23 probably a good chance that defense counsel would
24 have introduced that, but the jurors, I don't think,
25 are familiar with Brady, but what they are familiar

1 with is that the defendants have a right to remain
2 silent in this situation.

3 And as was touched upon during the previous
4 argument, the reference to silence was very brief; it
5 was two questions and two one-word answers, which the
6 judge instructed the jurors they couldn't draw any
7 negative inference from, and of course, the jurors
8 are presumed to follow these instructions.

9 JUDGE SMITH: On the other hand, you had a
10 - - - I mean, are you arguing harmless error here?

11 MR. MORROW: Well, we argue that the trial
12 judge correctly applied the Miranda rule - - -

13 JUDGE SMITH: Well, it sounds to me like
14 you - - - you could answer that one yes or no. Are
15 you arguing harmless error?

16 MR. MORROW: Yes, we are arguing harmless
17 error in our brief.

18 JUDGE SMITH: But isn't your case somewhat
19 less than overwhelming? I mean, the BAC wasn't
20 exactly through the ceiling.

21 MR. MORROW: Well, the - - - the blood-
22 alcohol content was .10, and also, I mean, you have
23 the evidence here that defendant admitted that he had
24 been drinking. He had a beer in his car.

25 JUDGE SMITH: But the whole question at the

1 trial was whether - - - whether the BAC was really -
2 - - I mean, the defense was the BAC could well have
3 been just a little lower than that instrument showed,
4 and in that case, he's not guilty.

5 MR. MORROW: That was the defense argument
6 at trial, but when - - -

7 JUDGE SMITH: And it was not - - - it was
8 not a ridiculous argument. It's not as though you
9 had a .25, which we had in the other case.

10 MR. MORROW: That's true, but the defense
11 argument about the reliability of the breathalyzer
12 would not have been undermined by the jury hearing
13 two questions that - - -

14 JUDGE SMITH: Yeah, but that - - - but I'm
15 talking about harmless error. Don't you have to have
16 an overwhelming case to establish harmless error?

17 MR. MORROW: You don't have to have an
18 overwhelming case. It's - - - if the - - - this is
19 an evidentiary determination, so if the probability
20 that the outcome would have been different - - -

21 JUDGE SMITH: So you say - - - you say that
22 even when the evidence is not overwhelming, there are
23 some errors that are just so minor that they're
24 harmless anyway.

25 MR. MORROW: There are - - - there are some

1 errors that would not have contributed to the outcome
2 of this case. And this - - - this is - - - if the
3 court were to find an error, this is one of them,
4 because it did not call into question the reliability
5 of the breathalyzer and as Judge Rivera pointed out,
6 the evidence that defendant had the wherewithal to
7 say, I'm going to evoke my right to silence, I'm not
8 going to answer your questions, might have actually
9 helped him on the other count of which he was
10 convicted of, the lesser included offense.

11 CHIEF JUDGE LIPPMAN: Okay, anything else,
12 counsel?

13 MR. MORROW: If there are no more
14 questions, I would rest on the brief. Thank you.

15 CHIEF JUDGE LIPPMAN: Okay. Thank you.
16 Counsel, rebuttal.

17 MR. GARELICK: Very briefly. I just - - -
18 Judge Smith made a reference to some additional
19 questioning here. There was some questioning that
20 occurred on the scene that was pre-Miranda. I'm not
21 sure if that's what you were referring to.

22 JUDGE SMITH: Yeah, on page 99. That - - -
23 yeah.

24 MR. GARELICK: The pre-Miranda questioning
25 is not relevant.

1 JUDGE SMITH: Well, but - - - is that what
2 the jury's thinking: oh, well, that's pre-Miranda,
3 that's a whole different thing? I mean, you - - -
4 defense counsel is bringing out how cooperative this
5 man was - - -

6 MR. GARELICK: Right.

7 JUDGE SMITH: - - - specifically, how
8 willing he is to answer questions. And isn't that at
9 least reasonably interpreted as saying, this is
10 obviously a man who has nothing to hide, because he's
11 willing to answer questions? And isn't it rational
12 to say, yeah, so how come you lost your interest in
13 answering questions as soon as you heard your Miranda
14 warnings, if you had nothing to hide?

15 MR. GARELICK: Well, he may - - - first of
16 all, he was under arrest, and secondly, he was
17 advised that he had the right to remain silent. I
18 mean, this court has recognized that that could be a
19 reason why somebody remains silent, because they're
20 told - - -

21 JUDGE SMITH: Okay - - -

22 MR. GARELICK: - - - they have the right to
23 do so.

24 JUDGE SMITH: - - - our law generally goes
25 on the premise that the exercise of the right to

1 remain silent is not any indication of guilt. But
2 what about when you have a defendant who says, I was
3 not silent, I was answering questions, and that
4 proves I'm innocent? Can't you then use the right to
5 remain silent - - - exercise the right to remain
6 silent?

7 MR. GARELICK: You know, I think you have
8 consider, Judge, is that the reason that - - - for
9 the questioning on the scene about what happened on
10 the scene was primarily, if not exclusively, to
11 establish that on the scene, immediately after the
12 accident, he gave what the police officer
13 acknowledged was a cogent and plausible explanation
14 for the accident.

15 JUDGE SMITH: And I guess I - - - to be
16 fair, because I did - - - I did crop what I read you
17 before, I'll read the next - - - after "He answered
18 the questions you asked him", "A. Yes, he did."
19 "Q. He didn't answer different questions?

20 "A. No."

21 So you're saying the real point was to
22 prove his - - - his coherence, his logical coherence.

23 MR. GARELICK: Exactly, Judge.

24 And the other thing I would just want to
25 mention is, my adversary pointed out that the fact

1 that he was asked if he would speak to the police and
2 he said no was omitted from the exchange. But that's
3 not all that was omitted; everything about the
4 Miranda warnings was omitted. He didn't go through
5 the Miranda warnings and leave that out. So there
6 was no situation created where the jury was going to
7 be confused by anything that happened or mislead by
8 anything that happened.

9 CHIEF JUDGE LIPPMAN: Okay. Thank you.
10 Appreciate it.

11 (Court is adjourned)

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

I, Janice Brea, certify that the foregoing transcript of proceedings in the Court of Appeals of Derrick Hill v. People, No. 194 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



Signature: _____

Agency Name: eScribers

Address of Agency: 700 West 192nd Street
Suite # 607
New York, NY 10040

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