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COURT OF APPEALS

STATE OF NEW YORK

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PEOPLE,

Respondent,

-against-

No. 174

JULIO NEGRON,

Appellant.

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20 Eagle Street  
Albany, New York 12207  
October 21, 2015

Before:

CHIEF JUDGE JONATHAN LIPPMAN  
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM  
ASSOCIATE JUDGE LESLIE E. STEIN  
ASSOCIATE JUDGE EUGENE M. FAHEY

Appearances:

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Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: 174, People v.  
2 Negron.

3 Counselor, would you like any rebuttal  
4 time?

5 MR. RUDIN: Two minutes, Your Honor.

6 CHIEF JUDGE LIPPMAN: Two?

7 MR. RUDIN: Two minutes.

8 CHIEF JUDGE LIPPMAN: You've got it. Go  
9 ahead, counsel.

10 MR. RUDIN: Okay. May it please the court,  
11 I would like to begin with the Brady point and then  
12 address ineffectiveness, if time permits.

13 CHIEF JUDGE LIPPMAN: Go ahead; do the  
14 Brady point first.

15 MR. RUDIN: The prosecutor in this case  
16 opposed the defense third-party culpability proffer  
17 by misleading defense - - - the defense and the judge  
18 - - - about whether or not there was any nexus  
19 between the third party, Caban, and the shooting.

20 CHIEF JUDGE LIPPMAN: What was the nexus?

21 MR. RUDIN: The nexus was that not only, as  
22 the judge was told, did the shooter go into this  
23 three-unit apartment building, that Caban lived in  
24 that apartment building, and that he - - - he matched  
25 Negron in height, weight, age, race and - - - and

1 skin color, and he actually had facial hair which  
2 matched the description by two witnesses, unlike  
3 Caban, who did not.

4 But the fact that the prosecutor withheld  
5 and misled everyone about was the nexus. So the  
6 nexus was that Caban fled his apartment in a panic  
7 with bags of weapons and ammunition, ran through a  
8 neighbor's apartment, and went - - - then went to the  
9 roof of an adjoining building, tried to conceal the -  
10 - - the weapons cache there, and then tried to flee,  
11 just as the police were coming to his building,  
12 investigating the very shooting that had occurred  
13 several hours before.

14 JUDGE RIVERA: Well - - -

15 CHIEF JUDGE LIPPMAN: Do you think - - -  
16 what - - - what do you think is the motivation  
17 involved here? That the - - - in your mind that the  
18 police knew it was too close for comfort?

19 MR. RUDIN: That mean that the pol - - - I  
20 don't understand the question.

21 CHIEF JUDGE LIPPMAN: What's the motivation  
22 of not providing the - - - the - - -

23 MR. RUDIN: Oh, by the prosecutor?

24 CHIEF JUDGE LIPPMAN: Yeah.

25 MR. RUDIN: I - - - I - - - this is the

1 same prosecutor who handled the Caban case. He - - -  
2 he stated to the court - - - this is at page 740 of  
3 the appendix - - - "I believe it is irrelevant that  
4 there was another male Hispanic living in that  
5 building, arrested the next day for weapons  
6 possession, that was not even inside - - - the  
7 weapons weren't even inside that location of 583  
8 Woodward Avenue. The weapons were on the roof of the  
9 building adjacent. And all those weapons - - - none  
10 of those weapons matched the shell casings that were  
11 recovered at the scene."

12 So he's trying to argue to the judge that  
13 the fact that the weapons are recovered in an  
14 adjoining building somehow makes there less of an  
15 nexus than the fact that they're not recovered in  
16 Caban's apartment. And all along he knows, having  
17 handled the Caban case himself, that - - - about the  
18 circumstances, how Caban fled the building in this hi  
19 - - - in this panicked way as police approached  
20 investigating the shooting.

21 So I - - - I can't put myself in his mind,  
22 but I - - - I can say that when he knows that the  
23 court is dealing with the third-party culpability  
24 issue, and he knows that the court is focusing on the  
25 question of whether or not there's a clear link - - -

1           which of course, is the wrong standard, which he  
2           doesn't object to himself; he doesn't correct the  
3           court - - - but knowing that the court is looking for  
4           a link, he argues that there's no link and - - - and  
5           - - - and conceals from - - - from the defense and  
6           from the court evidence that tends to establish a  
7           much greater link. And that - - - that's a direct  
8           link between the police investigating the crime and  
9           the actions of Caban.

10                         CHIEF JUDGE LIPPMAN: What - - - what is  
11           the right standard?

12                         MR. RUDIN: The right standard is - - - is  
13           the standard that this court established in the  
14           People v. Primo, which is looking - - - the - - - the  
15           general evidentiary standard of generally presumably  
16           that relevant ev - - - evidence is admissible, but  
17           then looking at whether or not there are other  
18           considerations that should counsel the court not to  
19           allow the relevant evidence, such as distracting the  
20           jury and that kind of thing.

21                         JUDGE PIGOTT: Mr. Rudin - - -

22                         JUDGE ABDUS-SALAAM: Counsel, even though -  
23           - - I'm sorry.

24                         JUDGE PIGOTT: No, please go.

25                         JUDGE ABDUS-SALAAM: Even though the court

1           said it was looking for a clear link, and used that  
2           term, but later the court said, but I actually did  
3           apply the - - - the Primo - - - you call it [pree'-  
4           mo]- - - standard. So what are we to make of that?  
5           Did the court use - - - because it used clear link  
6           but it applied the Primo standard, what should we do?

7                       MR. RUDIN: Well, first of all, I don't  
8           think my brief made it clear enough that there were  
9           three occasions when the court used the term "clear  
10          link". At page 741 of the appendix, he said - - -  
11          this is the first thing he said to defense counsel as  
12          he made this proffer - - - "The case law is clear.  
13          You have to show a clear link between this person and  
14          the crime in question. You haven't shown that. I am  
15          denying your application at this time. I will allow  
16          you to renew it if you can show a clear link."

17                      So then counsel makes further argument, and  
18          how does he - - - how does the court resolve that  
19          argument? At page 744 of the appendix, he says "I'm  
20          going to deny your application. He has no clear link  
21          between Mr. Caban and this crime." At no point does  
22          the court engage in a balancing. At no time does it  
23          - - - does it indicate that it's - - - it's  
24          exercising its discretion to weigh the probative  
25          value against prejudicial effect.

1                   And we're talking about probative value on  
2 an issue that involves the fundamental right of a  
3 criminal defendant to present his defense; in this  
4 case, the defense is, someone else committed the  
5 crime.

6                   So I realize that - - - that [pry'-mo] - -  
7 [pree'-mo] - - - adopted the - - - the general  
8 relevancy standard, but it's in the context of the  
9 absolute Constitutional right that a criminal  
10 defendant has to present a defense - - -

11                   JUDGE STEIN: Now, you - - - you agree that  
12 in - - - in Primo, that the - - - the nexus was  
13 closer than in this case, right?

14                   MR. RUDIN: It was, Your Honor, absolutely.

15                   JUDGE STEIN: And - - - but in this case,  
16 the nexus was - - - I assume you would also agree - -  
17 - is closer to - - - is more than what they had in  
18 Schultz.

19                   MR. RUDIN: Much more.

20                   JUDGE STEIN: Okay. So - - - so you're  
21 saying that we sh - - - that this is enough to get us  
22 to Primo or - - - so that it would be admissible?

23                   MR. RUDIN: Well, the - - - the issue  
24 really is whether or not there was enough for a  
25 reasonable judge to have exercised his discretion to

1 allow the - - - the defense. I mean, this case is -  
2 - - this court has established in several different  
3 cases - - - in the context of the admissibility of  
4 evidence, in the context of a reverse-Batson  
5 situation, People v. Luciano; in the Sandoval  
6 context, People v. Williams; Judge Abdus-Salaam in  
7 Cortez, that's the context of the admissibility of  
8 evidence - - - that the defendant has a right to have  
9 the court exercise its discretion under the  
10 appropriate standard.

11 So here the problem is that the court  
12 exercise - - - the court didn't exercise its  
13 discretion under the appropriate standard. It didn't  
14 exercise its discretion at all. It just looked for a  
15 clear link and when it wasn't satisfied that there  
16 was a clear link, that was it.

17 JUDGE PIGOTT: Can - - - can I go back to  
18 your - - - your Brady issue for a minute? In - - -  
19 in his - - - in his brief, counsel argues that the  
20 People - - - because, of course, we're - - - we're  
21 reliving this whole thing - - - he says the People  
22 argue that because they disclosed the arrest of Caban  
23 and the existence of the weapons cache to the  
24 defendant at trial, the motion court properly  
25 rejected the Brady claim and that got affirmed.

1           What's the error there?

2                       MR. RUDIN:   The error is that on - - - as  
3           the Supreme Court said in Banks v. Dretke and as it  
4           said in a number of other cases, defense counsel was  
5           entitled to rely on the completeness and the accuracy  
6           of the People's Brady disclosure.  So the People know  
7           that the defense is trying to establish a link or a  
8           nexus, and the issue couldn't be clearer.  This is  
9           the pivotal issue of the trial.  It knows what the  
10          defense is looking for, and it with - - - not only  
11          withholds its knowledge, but makes a misleading  
12          argument.

13                      JUDGE PIGOTT:  But they have to, because  
14          there was a pending case involving this - - - if they  
15          say we've got this case, I would think that part of  
16          the argument might be, how much investigation do we  
17          have to do for you, Mr. Defendant?  We told you, you  
18          now go - - - go for it.

19                      MR. RUDIN:  Well, I think - - -

20                      JUDGE PIGOTT:  Or what?

21                      MR. RUDIN:  Judge Pigott, you - - - you - -  
22          - all the times I've argued in front of you, you were  
23          a very practical judge.  Here you have a situation  
24          where the defense counsel says - - - he says this is  
25          all the information I have.  He says - - - he says,

1 on page 742 of the appendix, "I am giving the jury  
2 all the information that is out there." He clearly  
3 doesn't know about it.

4 So this is not a game. The prosecutor  
5 knows he doesn't know about it. All the prosecution  
6 has disclosed is that there were weapons found that  
7 were - - - where the allegation was that Caban had  
8 been in possession of those weapons and he was  
9 criminally charged, not the circumstances of how he  
10 disposed of those weapons.

11 JUDGE PIGOTT: Was - - - was it - - - was  
12 your impression or the impression of - - - of counsel  
13 at the time that they were being misled by - - - by  
14 the - - -

15 MR. RUDIN: Clearly counsel was misled.

16 JUDGE PIGOTT: Pardon me?

17 MR. RUDIN: Clearly counsel was - - - was  
18 misled by the - - - by the remarks that the  
19 prosecutor made - - -

20 JUDGE PIGOTT: Intentionally or - - - I - -  
21 - I guess that's what I'm looking for. Are you  
22 suggesting that the People did it intentionally or  
23 they were just - - - did what they thought was enough  
24 and now they - - - and they're clearly wrong. I'm  
25 always curious about Brady, because it's not just

1 exculpatory, but that which might lead to exculpatory  
2 evidence and - - - and things like that.

3 MR. RUDIN: Well, if - - - if Your Honor is  
4 focusing on the initial disclosure - - -

5 JUDGE PIGOTT: Yeah.

6 MR. RUDIN: - - - the initial disclosure,  
7 merely that Caban was in possession of weapons,  
8 wasn't enough to indicate to the defense that if it  
9 investigated further, it would find out that he - - -  
10 the circumstances of - - - of how he disposed of  
11 those weapons. Why would defense counsel, who has so  
12 many things to do to prepare for trial, why would he  
13 know that there's favorable evidence there about how  
14 - - -

15 JUDGE STEIN: So you're - - - you're saying  
16 that when - - - when they initially made the  
17 disclosure, that was all the information they had?

18 MR. RUDIN: That's right.

19 JUDGE STEIN: But that more information  
20 came to light that they then should have disclosed to  
21 you?

22 MR. RUDIN: No, I think the prosecutor had  
23 this information all along. What happened was that -  
24 - -

25 JUDGE RIVERA: Who's prosecuting both?

1 MR. RUDIN: Who's prosecuting both. What  
2 happened was that several months before the trial in  
3 this case, there was a suppression hearing in - - -  
4 in the Caban case; whether or not that transcript was  
5 transcribed and placed in a court file in time for  
6 defense counsel to have discovered it, had he thought  
7 to look for it, is not in the record.

8 JUDGE FAHEY: What about the - - - the  
9 court said in its 440 motion that it was relying on  
10 Rosario material that was supposed to have been  
11 disclosed? I can't find it in the record, but I'm  
12 assuming that both parties - - - you can both address  
13 it, because I think the People have conceded that  
14 they - - - they don't have it in the record either.  
15 What - - - what was the court talking about?

16 MR. RUDIN: I have no idea. I mean, it was  
17 - - - the - - - we argued that part of the Brady  
18 violation was that there was .45-caliber ammunition  
19 found in the weapons cache on the roof, which was the  
20 same kind of ammunition used in the shooting, that  
21 that was some evidence - - - I mean, it's not  
22 overwhelming evidence - - - but that's some evidence  
23 that tends to show that Caban might have been  
24 involved in the shooting, and the People never  
25 disputed our claim that that was not disclosed to the

1 defense. That's a claim that we made on our 440  
2 motion - - -

3 JUDGE FAHEY: Right.

4 MR. RUDIN: - - - and all of the sudden,  
5 Judge Lasak in his decision says, oh, by the way,  
6 there's some - - - there's some receipt that  
7 indicates it was disclosed as part of a Rosario  
8 disclosure, and Mr. Branigan, to his credit, conceded  
9 at - - - during our leave application from Judge  
10 Smith, and I think the People have not retracted  
11 that, that they can't find anything in their file to  
12 indicate that there's any such document, and we asked  
13 the court - - - this court's clerk to search the  
14 record when - - - that was here in Albany, and he  
15 couldn't find any such receipt either.

16 CHIEF JUDGE LIPPMAN: Okay, counsel.  
17 You'll have your rebuttal. Let's hear from your  
18 adversary.

19 MR. RUDIN: Thank you, Your Honor.

20 MR. BRANIGAN: William Branigan for the  
21 People. Good afternoon, Your Honors, may it please  
22 the court.

23 CHIEF JUDGE LIPPMAN: Counsel - - -  
24 counselor, what about Brady? What - - - what did you  
25 know, and - - - and why wasn't it shared with them on

1 Caban?

2 MR. BRANIGAN: Well, Your Honor, basically  
3 what's disclosed on the record is that the - - - that  
4 this - - - this other man living in the building,  
5 whose photo was - - - Mr. Caban - - - was arrested  
6 the following day with a - - - with a stash of  
7 weapons. The - - - the court has also found that in  
8 addition, there was .45 - - - there was - - - there  
9 was a disclosure that .45-caliber ammunition was  
10 found in that stash.

11 So the - - - the People basically gave the  
12 - - - all the information that was - - - was needed  
13 to at the time. If there was some additional detail,  
14 the court - - - the defendant was, at that point, in  
15 a - - - in a position to get it. And the - - - this  
16 - - -

17 JUDGE PIGOTT: Here's the - - - here's the  
18 problem I have with these Brady things, is it's all  
19 one - - - one pur - - - it's all the People. In  
20 other words, you decide, first of all, if it's Brady,  
21 and quite often, if your - - - if there's going to be  
22 an error, my - - - my thought - - - I'm cynical - - -  
23 is that you'd err on the side of saying, well, it's  
24 not Brady.

25 Secondly, the - - - the decision is that,

1 well, it's not favorable to the defendant, and we  
2 overlook the fact that it's not only favorable to the  
3 defendant, but may lead to evidence that would be  
4 favorable to the defendant. And that part gets  
5 ignored too.

6 And you - - - you guys are so close to this  
7 thing. I just see two weapons things, a shooting,  
8 you know, guns and ammunition, all that - - - I would  
9 think that the whole thing would get disclosed,  
10 saying this is - - - this I what we got, not - - -  
11 not, well, you know, maybe this matches, maybe it  
12 doesn't, so we don't have to disclose it.

13 Why - - - why - - - why play it that  
14 tightly on Brady, knowing that no one - - - no one  
15 else knows what you know? We can't review it.

16 MR. BRANIGAN: Your - - - Your Honor, no  
17 one was - - - was playing tightly here. He disclosed  
18 - - - he disclosed that the - - - that Mr. Caban was  
19 arrested, that there were these weapons, that there  
20 was the - - - that the - - - it was on the following  
21 day.

22 The - - - the concern at the time, just to  
23 - - - just to fill in the record, is that there was a  
24 .45-caliber weapon recovered. That .45-caliber  
25 weapon was tested; it was found not to be the - - -

1 the weapon used. Now defendant's arguing that there  
2 was a consciousness of guilt claim, that the timing  
3 of this - - - that the timing of the weapons dump  
4 somehow demonstrated the - - - the innocence of the  
5 defendant. It just didn't. That's ex - - - it's  
6 extremely speculative. The - - - the police officers  
7 show up at his house - - -

8 CHIEF JUDGE LIPPMAN: You don't turn it  
9 over to them altogether?

10 MR. BRANIGAN: Well, it - - - it - - - Your  
11 Honor, again, it - - -

12 CHIEF JUDGE LIPPMAN: In other words, you  
13 give them what you're supposed to give them, and they  
14 - - - they try and defend their client as best they  
15 can. Why - - - I think it's - - - what I'm - - -  
16 what I'm getting towards is really what Judge Pigott  
17 was saying. You have control of all of it. So,  
18 yeah, if you pick and choose, yeah, that won't really  
19 show them anything. Why don't you just give it to  
20 them? Isn't that what Brady's supposed to be about?

21 MR. BRANIGAN: Okay, two things, Your  
22 Honor. First of all, there's an ethical obligation  
23 that the People have to disclose - - -

24 CHIEF JUDGE LIPPMAN: Yes.

25 MR. BRANIGAN: - - - exculpatory

1 information. And that comes up beforehand.

2 CHIEF JUDGE LIPPMAN: Or things that'll  
3 lead to further information.

4 MR. BRANIGAN: Right. Here we're - - -  
5 we're after the fact, so we're - - - we're addressing  
6 Brady. And Brady is addressing the materiality of -  
7 - - of this evidence at trial. So - - - so from that  
8 standpoint, the - - - we can look at - - - we can  
9 look at the record here. And if all the defendant is  
10 saying is that the - - - is that this - - - this  
11 could have provided for some kind of consciousness of  
12 guilt defense, it just doesn't rise to the level of  
13 Brady. Now you - - -

14 JUDGE PIGOTT: No, I just - - - I get  
15 mysterious, like - - - because suppose you disclosed  
16 that you were going to test this weapon. I think  
17 they would be interested in that. And then you would  
18 disclose, hey, we tested it and guess what, it's not  
19 the weapon.

20 And they say, let us test it. And wait a  
21 minute, we think it is the weapon. And now you've  
22 got - - - and now you've got a real controversy that  
23 wouldn't otherwise occur, because you - - - you  
24 tested it and you made the determination that it  
25 wasn't the weapon, when perhaps - - - I'm not

1 suggesting at all that there were some nefarious  
2 things going on here - - - but perhaps they want to  
3 test the weapon.

4 MR. BRANIGAN: Your Honor, again, that was  
5 known at the time. The fact that there was this .45-  
6 caliber weapon recovered, that it was - - - it was  
7 tested, that was all - - - that was all known.

8 JUDGE PIGOTT: Okay.

9 MR. BRANIGAN: And I - - - and just  
10 furthermore, I mean, to the extent that there might  
11 have been some carelessness here, this court, if you  
12 look at the record of the 440 proceeding, had the  
13 People retest the ballistic - - - ballistics evidence  
14 here to see if there was any link, any way to link  
15 that evidence to - - - to the - - - to the shells  
16 recovered from the scene, so all of this was - - -  
17 was done. This - - - this case was - - - was  
18 carefully managed from the start and it was really  
19 about a green car - - -

20 JUDGE PIGOTT: I'm sorry. Can I interrupt  
21 you? Did you say that was as part of the 440?

22 MR. BRANIGAN: During the 4 - - - yes, Your  
23 Honor. If you look at - - - there was - - - there  
24 wasn't a hearing in this case, but there were - - -  
25 there were court appearances during the 440 hearing

1 and during - - - and at that time, the - - - the  
2 court ordered the People to have the - - - the  
3 ballistics evidence that was recovered from Caban  
4 retested to see if - - - if there was any link  
5 between - - - between that ballistics evidence and -  
6 - - and the shells recovered from the scene.

7 JUDGE PIGOTT: That would lead me to think  
8 that there was a Brady violation. Am I wrong?

9 MR. BRANIGAN: No, Your Honor. The - - -  
10 again, the - - - Brady goes towards materiality. So  
11 yes, if the - - - if the court or if the People at  
12 that time had turned up something in addition linking  
13 that evidence, linking that - - - that ammunition to  
14 the - - - to the shells recovered at the scene, that  
15 could have made a difference in his - - - in his  
16 third-party culpability defense at the time, yes,  
17 then maybe we could get something. We could start  
18 rising towards Brady violation. But nothing was  
19 recovered.

20 And the fact is this case is about a green  
21 car. This defendant was driving a very distinctive  
22 green Monte Carlo on the night of the shooting - - -

23 JUDGE STEIN: Didn't somebody say it was  
24 blue and somebody said it was a two-door and somebody  
25 said it was a four-door?

1                   MR. BRANIGAN: Your Honor, if you - - - as  
2 far as the two-door, it was - - - it was at night so  
3 it's not surprising that someone might have called it  
4 green, but as far as the two-door vers - - - versus  
5 four-door, look at the - - - look at the picture of  
6 this car. It's a very distinctive car. It's a two-  
7 door sedan that's in the style of a four-door sedan.

8                   Three witnesses identified this car meeting  
9 it - - - immediately after the shooting. That's how  
10 the defendant's arrested. They get the car. It  
11 comes back to him. They go to the apartment where  
12 the - - - the shooter was seen going. He comes out.  
13 He admits - - - he admits that he's the only one  
14 driving the car.

15                  JUDGE FAHEY: Yeah, but do you know what  
16 the problem is, though? And this is what struck me  
17 in the cases. The car is better identified than the  
18 defendant is in this case. And point of fact, you  
19 know, you got three witnesses, the two Russian names  
20 which I don't remember. One of them couldn't  
21 remember - - - two of them couldn't identify him at  
22 trial. One said it wasn't the person who did it.

23                  The car itself seems to have more people  
24 identifying and linking it to the crime than people  
25 were able to actually link the defendant directly to

1 the crime. So you're right; it is all about the car,  
2 but you see the logical fallacy.

3 MR. BRANIGAN: Well, no, Your Honor, it's -  
4 - - it's very strong evidence. This is a very  
5 distinctive car. It was identified immediately after  
6 the shooting. The officers showed up on the scene,  
7 felt the hood of the car. It was still warm. So  
8 that's the strong evidence here. The one witness  
9 with - - -

10 JUDGE RIVERA: Did he feel any other hood?

11 MR. BRANIGAN: I'm so - - -

12 JUDGE RIVERA: Did he check any other car?  
13 No? Right.

14 MR. BRANIGAN: No. But he wouldn't have  
15 reason to. Three witnesses identified that car. Two  
16 are down the block. One was with the victim. So  
17 these - - - two of these witnesses didn't even know  
18 each other. And as far as the - - - the  
19 identification here, while the - - - the line-up was  
20 suppressed, only one of these witnesses had any good  
21 opportunity to identify the - - - to identify the  
22 defendant and that was the shooting victim.

23 JUDGE ABDUS-SALAAM: The person who was  
24 shot? Yeah, the person who was shot.

25 MR. BRANIGAN: Yes.

1                   JUDGE ABDUS-SALAAM: I'd - - - I'd just  
2                   like to go back to the Brady issue, just so I'm clear  
3                   about it. You're saying what was not material at  
4                   trial, that - - - that in Mr. Caban's cache there was  
5                   .45 millimeter ammunition? What - - - what was not  
6                   material that you thought you didn't have to turn  
7                   over and that they could find themselves and what - -  
8                   - what - - - how would they find that out?

9                   MR. BRANIGAN: Well, again, Your Honor,  
10                  it's - - - reviewing the record, reviewing the - - -  
11                  the Brady issue, what remains - - - because this - -  
12                  - the court, and that's an affirmed finding of the  
13                  fact, the court has stated that the - - - that forty  
14                  - - - that the fact that there was .45-caliber  
15                  ammunition was disclosed. So that's part of the  
16                  record. What remains is - - -

17                  JUDGE STEIN: So even - - - even though we  
18                  don't see that in the record, and everybody agrees  
19                  it's not in the record, do we still have to accept  
20                  that?

21                  MR. BRANIGAN: Yes, Your Honor. It's the -  
22                  - - the - - - it was af - - - it was affirmed by the  
23                  - - - the Appellate Division. It's beyond this  
24                  court's power to review.

25                  JUDGE RIVERA: Okay, I'm sorry. Did you

1 answer Judge Abdus-Salaam's question about what you -  
2 - - what you thought was not material?

3 MR. BRANIGAN: Again, reviewing the record  
4 here, the - - - the - - - the remaining claim is  
5 basically a consciousness of guilt claim. That is an  
6 extremely equivalent argument. Meaning, that the - -  
7 - the fact that he dumps these weapons when he sees  
8 the officer show up at his house is consciousness of  
9 guilt of the weapons he possessed. Notably, the  
10 actual shooting weapon is not in that stash.

11 And if the defendant who - - - if the  
12 defendant knew that the police were coming for him,  
13 because he just shot somebody outside of his house  
14 the previous night, he would have known - - - he  
15 would have known to get rid of those weapons the  
16 previous night. He wouldn't have been surprised when  
17 they showed up at his door the - - - the following  
18 afternoon.

19 CHIEF JUDGE LIPPMAN: Okay, counsel.

20 MR. BRANIGAN: Okay, thank you, Your  
21 Honors.

22 CHIEF JUDGE LIPPMAN: You're welcome.  
23 Thank you.

24 Counsel, rebuttal?

25 MR. RUDIN: Yes. First of all, on the

1           consciousness of guilt, it's an interesting contrast  
2           that Negrón fully cooperates with the police. He  
3           gives consent to search his car. He gives consent to  
4           search his apartment. They don't find any gun. They  
5           don't find any ammunition. They don't find any of  
6           the clothing that was described by the - - -

7                         JUDGE PIGOTT: What's the facial hair  
8           issue? I - - - I know there's one and I've forgotten  
9           what it all amounts to.

10                        MR. RUDIN: The - - - the facial hair issue  
11           was raised in the context of ineffectiveness that - -  
12           - that Cabán had - - - as you can see in the  
13           appendix; it's the next to last page of the second  
14           volume - - - that Cabán - - - this is at page 1070 -  
15           - -

16                        JUDGE PIGOTT: Oh, right, right.

17                        MR. RUDIN: - - - appears to have a beard  
18           and a moustache, and - - - whereas Negrón is clean-  
19           shaven. And Negrón testified that he was clean-  
20           shaven. Miley, one of the - - - the companion of the  
21           victim Fevrier, got a good look or should have had a  
22           good look, because he was - - - he was closer to - -  
23           - to the driver and the alleged shooter than Cab - -  
24           - than Fevrier was. And he said that - - - that the  
25           shooter had a beard and a moustache.

1                   And defense counsel failed to interview and  
2                   to present testimony from eleven witnesses who Negron  
3                   - - - Negron told him could have testified that he -  
4                   - - he - - - would not wear facial hair, and he  
5                   forgot - - - he did not elicit that from the two  
6                   witnesses he actually put on.

7                   JUDGE RIVERA:   What's the connection, the  
8                   car?   That it's his car?   Is that what connects him?

9                   MR. RUDIN:   Well, what - - - no, what I  
10                  wanted to say about the car is that, as - - - as  
11                  several members of the court pointed out, that the -  
12                  - - there's no right to a Wade hearing for a car.  
13                  There's no right to a photo-array for a car.   Here,  
14                  the car took on more importance than the  
15                  identification of the defendant.

16                  And the way it happened is that the two  
17                  witnesses who had the best view of the car, Fevrier  
18                  and Miley, said that the car was a four-door sedan  
19                  and then they left the scene.   Eventually Miley - - -  
20                  Miley comes back.   The three Eastern European  
21                  witnesses leave the scene.   They come back fifteen  
22                  minutes later.   And this is in the record that - - -  
23                  at page 552 to 553 of the appendix - - - one of those  
24                  witnesses testified that the police directed their  
25                  attention to his vehicle.

1                   So this is like a show-up with - - - with  
2                   the police and - - - and the other eyewitness Miley  
3                   are already gathered around the car. They've already  
4                   felt the car. They've already felt that it's warm,  
5                   which has very little probative value. There's  
6                   nothing in the record about how long a car stays  
7                   warm. This was a cast-iron vehicle. It could stay  
8                   warm for - - - the engine could stay warm for a long  
9                   time. There's no expert testimony about that. And  
10                  Negron testified that he drove home and parked the  
11                  vehicle about 2:30.

12                  CHIEF JUDGE LIPPMAN: Okay, counsel.

13                  JUDGE ABDUS-SALAAM: Did he - - -

14                  CHIEF JUDGE LIPPMAN: Thank you - - - I'm  
15                  sorry.

16                  JUDGE ABDUS-SALAAM: No, I just - - -

17                  CHIEF JUDGE LIPPMAN: No? Okay.

18                  JUDGE ABDUS-SALAAM: Never mind.

19                  CHIEF JUDGE LIPPMAN: Thank you both,  
20                  appreciate it.

21                  MR. RUDIN: Thank you.

22                  (Court is adjourned)

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

I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Julio Negron, No. 174, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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