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COURT OF APPEALS

STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

No. 109

CHARLES SMITH,

Appellant.

PEOPLE,

Respondent,

-against-

No. 110

TYRELL INGRAM,

Appellant.

PEOPLE,

Respondent,

-against-

No. 111

ISMA MCGHEE,

Appellant.

20 Eagle Street
Albany, New York 12207
June 01, 2016

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Before:

CHIEF JUDGE JANET DIFIORE
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
ASSOCIATE JUDGE MICHAEL J. GARCIA

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1 CHIEF JUDGE DIFIORE: The first matter on
2 today's calendar is number 109, People v. Charles
3 Smith.

4 MS. FLORES: Good afternoon, Your Honors;
5 Claudia Flores, Center for Appellate Litigation for
6 the appellant, Charles Smith. I'd like to request
7 two minutes of my time for rebuttal.

8 CHIEF JUDGE DIFIORE: You may have two
9 minutes, Ms. Flores.

10 MS. FLORES: Thank you, Your Honor. The
11 trial court in this case should not have completely
12 restricted defense counsel from inquiring about the
13 federal civil rights lawsuits filed against the two
14 officer witnesses. First, the court erred in
15 concluding that the lawsuits had no relevance to the
16 officers' credibility. This is a case where the
17 officers' credibility was a key issue and a close
18 issue. It was the centerpiece of defense counsel's
19 strategy. And all three of - - -

20 JUDGE ABDUS-SALAAM: Counsel, did - - - did
21 defense counsel make the argument that it was about
22 credibility or was that a general argument or did
23 defense counsel make some other arguments?

24 MS. FLORES: Yes, Your Honor, the defense
25 counsel explicitly said this - - - this goes directly

1 to the officers' credibility, and the trial court
2 responded with this - - - there's nothing to this
3 that goes to credibility. So the trial court ruled
4 on the grounds that these lawsuits were not relevant
5 to credibility, and that was error. These lawsuits
6 are relevant to credibility and defense counsel
7 should have not been completely restricted from
8 inquiring about them. The trial court certainly had
9 dis - - - the discretion to limit the method and the
10 extent of the questioning, but it did not have the
11 discretion to limit - - -

12 JUDGE RIVERA: So what - - - what could you
13 have asked?

14 MS. FLORES: Defen - - -

15 JUDGE RIVERA: What - - - what would trial
16 counsel have asked?

17 MS. FLORES: Correct, and - - - and some of
18 the questions defense counsel may have posed, for
19 example, may not have been the perfect questions to
20 ask, but defense counsel certainly could have asked -
21 - -

22 JUDGE RIVERA: You mean you - - - you agree
23 that - - - that counsel could not ask have you been
24 sued?

25 MS. FLORES: Correct.

1 JUDGE RIVERA: Okay. Tell me what - - -

2 MS. FLORES: Counsel could not have asked
3 you - - - have you been sued, should not have asked
4 how much - - - you know, were - - - was this settled
5 for 50,000 dollars. But defense counsel certainly
6 could have asked about the underlying acts alleged in
7 the lawsuit. So he could have asked is it true that
8 you arrested Mr. Ambos or Mr. Logalici and actually
9 you did have - - - you had no grounds for that
10 arrest. You actually did not, in fact, witness a
11 drug sale and yet, you went forward with that arrest
12 anyway even though he had committed no crime.

13 JUDGE FAHEY: Well, wouldn't he - - -
14 wouldn't defense counsel have to establish - - - you
15 can't ask somebody if they've - - - if they have
16 committed a crime unless they've been conv - - -
17 since he hasn't been convicted. You can't ask
18 somebody if there's an allegation against them and
19 that would be - - - so where is the foundation, I
20 guess, is what I'm wondering, to ask these questions.
21 I understand what questions they could ask but that
22 doesn't establish the foundation to ask the
23 questions.

24 MS. FLORES: Correct. The foundation comes
25 out of the lawsuits themselves and that's where - - -

1 JUDGE FAHEY: Well, okay. So defense
2 counsel come in and say these are the lawsuits, put
3 them in the record, put the papers in the record.
4 Did - - - did he say that these are the questions
5 that I would be asking regarding these lawsuits to
6 the underlying facts of the lawsuits themselves to
7 establish a proper foundation and then from there - -
8 - outside the presence of the jury, and then from
9 there go forward. Was that done at all?

10 MS. FLORES: It was attempted. Defense
11 counsel said I have federal documents. The court
12 said do you have them? He said I do have them. I
13 have one lawsuit that was settled for this amount. I
14 have two other lawsuits against the other witness.
15 These are very similar facts. These involve - - -

16 JUDGE FAHEY: So - - - so your - - - your
17 position is - - - I don't mean to cut you off just to
18 kind of - - - because you only have so much time.

19 MS. FLORES: Yeah.

20 JUDGE FAHEY: So your position is then that
21 he attempted to establish a foundation and the trial
22 court cut him off?

23 MS. FLORES: Correct. He did attempt. He
24 - - - he laid out all the necessary information that
25 the trial court needed to know that there was a good

1 faith basis here for questioning. And cert - - -

2 JUDGE RIVERA: So were there answers filed
3 in the lawsuits denying the allegations?

4 MS. FLORES: I believe there were. They -
5 - -

6 JUDGE RIVERA: So - - - so he's going to
7 say - - - he's going to deny, right? You expect
8 something else?

9 MS. FLORES: He might deny. But the - - -
10 but the jury should still get to assess his demeanor
11 as part of his credibility. If this isn't something
12 he was expected, he might not be prepared to deny.
13 We - - - we don't know. The point is if this was any
14 other type of witness, not a police officer, he - - -

15 JUDGE RIVERA: Were you attempting to have
16 the actual documents of the lawsuit submitted into
17 evidence?

18 MS. FLORES: No, Your Honor. This is - - -

19 JUDGE RIVERA: Could you?

20 MS. FLORES: No, Your Honor.

21 JUDGE RIVERA: Ruled in favor of your
22 client, could you? Would that be the next step?

23 MS. FLORES: Not necessar - - - perhaps.
24 The - - - the record here is not fully developed
25 enough in this case to determine whether this

1 actually would have gone to a material issue at
2 trial, say a scheme by these officers to consistently
3 lie about observation drug sale cases, then it would
4 have been a really a material issue where the
5 extrinsic evidence would have been admissible. But
6 if we're just talking about credibility, about
7 attacking that, no, they - - - they shouldn't have
8 introduced it.

9 JUDGE ABDUS-SALAAM: Do you - - -

10 JUDGE RIVERA: As some settlements do,
11 sometimes the party agree basically to a gag order.
12 Could you have asked if there was - - - if that was
13 included in the settlement?

14 MS. FLORES: That - - - that's another - -
15 - that's a more complicated question. The - - - the
16 point is, going back to the trial court's ruling,
17 which is that this wasn't relevant at all, if - - -
18 if these had been any other witnesses, if these had
19 not been police witnesses, they could have asked
20 about these allegations and it wouldn't have mattered
21 where the allegations came from. For example, if I
22 hear, you know, talking about any kind of - - -

23 JUDGE GARCIA: But counsel - - -

24 MS. FLORES: - - - prosecution - - -

25 JUDGE GARCIA: Counsel, just to interrupt

1 you, but that's not what they were proffering, they
2 wanted to ask. I mean there's a proffer of what this
3 defense counsel wanted to ask, and it goes to the
4 settlement amounts and were the underlying arrest
5 cases dismissed. So what you're asking us to do - -
6 - I mean and that's the judge ruled on. But now
7 you're asking us to look underneath the proffer the
8 defense counsel made that we have a record of and say
9 there might have been facts in an underlying suit
10 that, apparently, are not part of this record that we
11 have that they could have asked about. And - - - and
12 I don't see how we can do that.

13 MS. FLORES: Well, the record is not
14 entirely clear. It - - - it is a cold record, and it
15 is hard to tell exactly what defense counsel was
16 trying to ask about and what he could have asked
17 about had the court not shut him down. As soon as he
18 introduced the topic, the court said no, and the
19 court said absolutely not. And eventually, after he
20 proposed a line of questioning, said I will not do
21 this, I'm taking the jury. So we don't know exactly
22 what defense counsel could have asked - - -

23 JUDGE GARCIA: But yes, we do, because he
24 said he was going to ask were you involved in the
25 arrest of this person. If so, isn't it true that the

1 case you made in an arrest and you said that this
2 person was guilty of a drug sale and yet the cases
3 were later dropped; isn't that a fact. And that's
4 when the court says absolutely not.

5 MS. FLORES: And that way - - -

6 JUDGE GARCIA: So do you think that's an
7 appropriate question to ask on cross?

8 MS. FLORES: The part about the charges
9 being dismissed is not. But - - - but the problem
10 here - - - so - - - so the heart of his question was
11 appropriate. The heart of his question about was did
12 you participate in this arrest and wasn't it not
13 true. That's really what he was getting at. Whether
14 he was asking about the dismissal of the charges is
15 sort of a matter of semantics. What he's implying is
16 that because the charges were dismissed, you must
17 have been lying. That wouldn't have been the
18 appropriate way to ask it, the way he was proposing,
19 but it - - - it doesn't mean that he shouldn't have
20 gotten to ask it a little bit differently. But the -
21 - -

22 JUDGE STEIN: And then the court said
23 absolutely not. And he said no, could I, and then
24 the court turned him down.

25 MS. FLORES: Exactly.

1 JUDGE STEIN: So we don't even - - - we - -
2 - we - - -

3 MS. FLORES: We don't know what - - -

4 JUDGE STEIN: We have no idea what he was
5 going to say.

6 MS. FLORES: We don't know what he could
7 have said as an alternative. He wasn't given the
8 opportunity to proffer an alternative because the - -
9 - the real basis the court denied this request on was
10 relevance. They - - - she said - - - or Judge Mullen
11 said that this is absolutely not relevant to
12 credibility, so we don't know what - - - how Justice
13 Mullen would have curtailed the questioning or framed
14 it.

15 JUDGE ABDUS-SALAAM: Could I take you back
16 to something you started to say, and it goes to
17 something that Judge Fahey raised, whether you'd need
18 a good faith basis or something else, foundation.
19 What is - - - what is it that you say? Do you have
20 to have a foundation and a good faith basis or just a
21 good faith basis?

22 MS. FLORES: Well, they - - - they could be
23 the same thing. I - - - I think you only need to
24 have a good faith basis here. Looking to the cases
25 where we look at credibility for any other witnesses

1 or we look at prior bad acts that are not stemming
2 from civil rights lawsuits, all that counsel has to
3 show is a good faith basis. So, for example, in
4 another context counsel could have wanted to ask a
5 prosecution witness about an incidence of domestic
6 violence. It could have been enough that counsel was
7 told about that incident by the witness's wife.
8 That's a good faith basis. He wouldn't have needed
9 to introduce documents to lay that foundation.

10 CHIEF JUDGE DIFIORE: Thank you, counsel.

11 MS. FLORES: Thank you, Your Honor.

12 CHIEF JUDGE DIFIORE: Counsel.

13 MS. CURRAN: Good afternoon, Your Honors;
14 may it please the court, my name is Patricia Curran,
15 and I represent the People on this appeal. First of
16 all, the trial court properly precluded the proposed
17 line of questioning that the defense counsel asked
18 when he wanted to talk to the officers about pending
19 and settled lawsuits.

20 JUDGE STEIN: How do we know what counsel
21 would have asked if the court hadn't interrupted him?

22 MS. CURRAN: Your Honor, I don't believe
23 the record shows that the court restricted defense
24 counsel from making a full record. If you look at
25 the transcript, you will see that there is a back and

1 forth between defense counsel and the judge for a
2 page-and-a-half, almost two pages about this. He
3 wasn't precluded him from making any record that he
4 wanted to. If he wanted to put the federal documents
5 that he referenced into marked as an exhibit - - -

6 JUDGE STEIN: But what - - - what did he
7 need to - - - to have said?

8 MS. CURRAN: He needed to have said that he
9 wanted to ask about specific prior acts of misconduct
10 by these officers, and he needed to show that in the
11 federal complaints, that he referenced but never
12 marked as an exhibit, that he could show the two
13 officers at issue here, Zambrano and Lotufo, that
14 they were actually charged with and there were
15 allegations of specific misconduct by them.

16 JUDGE STEIN: So it's not enough to say I
17 have the pleadings here. This is my - - - and - - -
18 and it says that this is my good faith basis? You -
19 - - it has to be marked into evidence?

20 MS. CURRAN: Well, he could - - -

21 JUDGE STEIN: It has to be a formal
22 proffer?

23 MS. CURRAN: He could have read it into the
24 record, but he certainly had to either read it into
25 the record or show somewhere in the documents,

1 you've got the complaint. The complaint says I was
2 standing on the corner listening to music. Officer
3 X, actually names the officer, came up, pushed me up
4 against the wall, and arrested me. He arrested me
5 without probable cause. The charges were dismissed.
6 Is that enough? How much - - - do you need more
7 specificity?

8 MS. CURRAN: That certainly gives the
9 defendant a good faith basis for a specific act.
10 However, I don't think the inquiry is over at that
11 point.

12 JUDGE RIVERA: Um-hum.

13 MS. CURRAN: The court, the trial court,
14 still has the obligation to weigh the prejudicial
15 value versus the probative value in these cases.

16 JUDGE RIVERA: Okay. But you - - - you
17 would say that that is specific enough?

18 MS. CURRAN: It can be. Or - - -

19 JUDGE PIGOTT: Aren't - - - aren't you
20 making the arguments that perhaps the court should
21 have made at the time that this was being discussed?
22 In other words, you say well, in the - - - in the
23 complaint there's just general allegations. It never
24 got that far. He's - - - he's making the - - - the
25 motion and he gets halfway through his sentence

1 saying, "and the city settled for a large sum of
2 money" and the court says no.

3 MS. CURRAN: Well, because, Your Honor,
4 below defense counsel focused solely on the pending
5 and settled lawsuits. He doesn't - - -

6 JUDGE PIGOTT: What's wrong with that? And
7 what I'm saying is you were saying well, the lawsuit
8 has general allegations. The judge didn't know that.
9 For all she knew, they - - - they could have been
10 specific alleg - - - she didn't let - - - she didn't
11 let anybody discuss what was going to be brought in;
12 isn't that true? I mean she simply said no.

13 MS. CURRAN: I disagree with you, Your
14 Honor. I think - - -

15 JUDGE PIGOTT: What does no mean? It - - -
16 it says, "And the only other question I have as far
17 as cross-examination is concerned, Your Honor, is
18 there are a number of federal cases against the
19 officers in question for civil rights violations
20 under very similar facts where they made a narcotics
21 arrest, very similar on the facts, and the case was
22 then dropped by the DA and the city settled for a
23 large sum of money." The Court "No."

24 MS. CURRAN: But then the record goes on
25 for another page-and-a-half, Your Honor, where

1 they're talking - - -

2 JUDGE PIGOTT: I understand that.

3 MS. CURRAN: - - - about this.

4 JUDGE PIGOTT: But what I'm saying is you
5 were making arguments that the - - - the documents
6 say one thing, the documents say another thing, there
7 could be these allegations. She's saying no.

8 MS. CURRAN: I disagree that this court
9 restricted this defense counsel from making a fuller
10 record, particularly because he goes on to make a
11 fuller record about why he thinks questions about
12 lawsuits are appropriate and simply were not.

13 JUDGE PIGOTT: She says, "Do you actually
14 have federal documents?" He says, "Absolutely, I
15 have one case for Zambrano. And it's the two cases
16 for Zambrano. Two defendants seem actually
17 innocent." "Are they pending matters?" He says
18 "Okay" and then - - - and then goes into a good
19 description of them. And then before he gets done
20 she says, "Absolutely not." Defense, "Nor could" - -
21 - and the court says "We don't know why the cases
22 were dismissed. We don't know." Well, ask. I mean
23 why - - - it - - - it seemed clear to me that this
24 judge was not going to allow these in, period. And
25 every time the - - - the lawyer wanted to make a

1 record with respect to this, he got a no, an
2 absolutely not, and - - - and then finally she says
3 I'm calling the jury in. Let's go.

4 MS. CURRAN: But, Your Honor, if he had
5 wanted to talk about why the cases were dismissed, he
6 could have. It's more likely from this record that
7 he didn't have that information.

8 JUDGE PIGOTT: Let's assume for a minute
9 that he did, but we could put that aside. Do you
10 think under any circumstances information such as was
11 being offered here are admissible?

12 MS. CURRAN: No, because they're only
13 assertions.

14 JUDGE PIGOTT: Well, so I'm - - - what I'm
15 trying to get at, do you see any way that an
16 officer's - - - an officer can be impeached by
17 conduct that predates the - - - the case in front of
18 the judge?

19 MS. CURRAN: Yes. If there are specific
20 factual allegations, not mere accusations that - - -

21 JUDGE ABDUS-SALAAM: But have we allowed
22 accusations to be the good faith basis upon which
23 defense counsel or any counsel can cross-examine a
24 witness on credibility?

25 MS. CURRAN: You could. The bar for good

1 faith basis is fairly low, but it also has to be a
2 reasonable basis in fact, but it has to be specific.
3 Here, this lawyer focused totally on pending and - -
4 - and settled lawsuits, not about the specific acts
5 that he claimed, at least, or he claims now, not
6 below.

7 JUDGE RIVERA: Well, but - - - but counsel
8 is starting at that point saying this is the source
9 of my knowledge about these bad acts. There are
10 actual lawsuits. Doesn't the fact that one could
11 see, reasonably, that an - - - an attorney might want
12 to point to the existence of a filing, a federal
13 filing, to in fact impress upon the judge that these
14 are not fly-by-night assertions, mere speculations,
15 or someone who's just said something without risking,
16 perhaps, sanctions.

17 MS. CURRAN: Defense counsel needed to do
18 more. He needed to talk about what the specific
19 allegations may have been.

20 JUDGE RIVERA: Okay. So why was it - - -
21 you said before no, these are mere assertions. But
22 when I gave you my hypothetical, you said that sounds
23 fine, now we've got to get to the prejudice prong.
24 What's the difference between what I described and
25 what you say is deficient in these lawsuits, in the

1 allegations?

2 MS. CURRAN: Because what the lawyer - - -

3 JUDGE RIVERA: Because I only gave you
4 allegations, right?

5 MS. CURRAN: I understand. What the lawyer
6 wanted to ask here was simply about a pending
7 lawsuit. He wanted to say, "Were you involved in the
8 arrest of Joseph Logalici, and if so, isn't it true
9 that you made an arrest and you said Mr. Logalici was
10 guilty of a drug sale and yet the cases were later
11 dropped; isn't that a fact?" But he doesn't go and -
12 - -

13 JUDGE RIVERA: Well, could he ask were you
14 involved in the arrest?

15 MS. CURRAN: Without - - -

16 JUDGE RIVERA: Why couldn't he ask that?

17 MS. CURRAN: Could he ask if he were
18 involved in the arrest of this person?

19 JUDGE RIVERA: Correct.

20 MS. CURRAN: Perhaps, but it's still
21 subject to the probative value prejudice test, and
22 I'm not sure that just asking that is going to be
23 sufficient.

24 JUDGE ABDUS-SALAAM: Well, how did - - -
25 how does counsel get to the point where he can ask

1 specific questions about a particular scenario or
2 incident without at least setting some kind of
3 context like this was an arrest? I'm - - - I'm just
4 unclear. Is - - - is counsel supposed to just say
5 something like is it a fact that you mistreated
6 somebody named - - - or - - - or you severely
7 restricted the rights of somebody named Logalici. I
8 - - - I'm not clear how one would get into that
9 without saying - - - giving some kind of context or
10 background for the questions.

11 MS. CURRAN: Well, let's take an easier
12 example. Let's assume there was a - - - a federal
13 complaint pending that said the plaintiff in the
14 federal lawsuit had observed Officer Jones steal
15 property from the plaintiff on such-and-such a date
16 and such-and-such a time when he was arresting him.
17 That's a specific allegation of an officer who was
18 testifying at the time. Obviously, a theft is
19 something that goes to the credibility of - - - of
20 the officer, and there's a specific allegation of
21 conduct.

22 As opposed to what's in these federal
23 documents that they proffer only on appeal and never
24 to the second - - - on the second trial, by the way,
25 never to the second judge. These are only general

1 allegations of misconduct by a group of officers.
2 They don't name, with one minor exception, the two
3 officers who testified here at all. This lawyer had
4 to do a little bit more research and come up with
5 more specific allegations against these officers
6 before he could be allowed to ask those questions.

7 JUDGE PIGOTT: Wouldn't it - - - wouldn't
8 it have been - - - it strikes me that would have been
9 nice coming from the trial judge, but - - - but she
10 didn't do that. She didn't - - - you know, she cut
11 him off at every turn. And I didn't think it was a
12 bad point to say I understand, you know, that the
13 city paid 50,000 dollars for something involving
14 this, and - - - and we never - - - the record doesn't
15 clarify it for us because she says that - - - that's
16 simply nothing that goes to the officer's
17 credibility.

18 MS. CURRAN: Well, and I - - - I take issue
19 with - - - with what defense counsel argued earlier
20 which is that the interpretation of this record means
21 that the judge thought these allegations did not go
22 to credibility.

23 JUDGE PIGOTT: No, my - - - my question to
24 you was wouldn't it have been nice if the judge was
25 making the arguments that you're now making, which

1 would have given the defense lawyer an opportunity to
2 address those things?

3 MS. CURRAN: Well, I'm not sure the judge
4 needs to do the - - - the job of the defense attorney
5 for him.

6 JUDGE PIGOTT: No, you're not doing the job
7 of the defense attorney. You're doing the job, you
8 know, of - - - of the judge here in saying this is -
9 - - this was not made clear to her, and what I'm
10 suggest - - - suggesting is wouldn't it have been
11 nice if she had said you're not making it clear to
12 me?

13 MS. CURRAN: Okay. I do want to make
14 clear, though, that the credibility which he thought
15 wasn't going to the officer's credibility, was just
16 the piece about the 50,000 dollars. It wasn't that
17 there could be specific allegations that might affect
18 the officer's credibility.

19 CHIEF JUDGE DIFIORE: Ms. Curran,
20 notwithstanding the fact that your light is on, I'm
21 going to take a moment and ask you a question. You -
22 - - with respect to the second trial - - -

23 MS. CURRAN: Yes.

24 CHIEF JUDGE DIFIORE: - - - were these
25 issues raised at the second trial?

1 MS. CURRAN: No.

2 CHIEF JUDGE DIFIORE: Was it the same
3 judge?

4 MS. CURRAN: No.

5 CHIEF JUDGE DIFIORE: How does that impact
6 your argument here today, if it does at all?

7 MS. CURRAN: Well, it doesn't impact our
8 argument. It means that none of the defense
9 arguments are preserved for the second trial at all.
10 They never raised the proposed line of questioning
11 about civil lawsuits at the second trial. There's
12 nothing about federal documents at the fed - - - at
13 the second trial. They argue that the court should
14 take judicial notice of the federal documents, but it
15 would be particularly unfair in this instance if the
16 court would do that because the court is asked to
17 decide whether the trial court exercised appropriate
18 discretion. And because the argument was never made
19 to the second judge and no federal documents were
20 ever shown to the second judge, that evaluation would
21 not be a fair evaluation.

22 CHIEF JUDGE DIFIORE: Thank you, Ms.
23 Curran.

24 MS. CURRAN: Thank you very much.

25 CHIEF JUDGE DIFIORE: Ms. Flores.

1 MS. FLORES: Just going back briefly to
2 Judge Rivera's question about whether - - - what
3 would have happened if these lawsuits had a gag
4 order. In - - - in that situation, there would have
5 been a countervailing State interest to think about,
6 to think about protecting someone's privacy, perhaps
7 or - - - privacy of the officers or privacy of the
8 plaintiffs. And respondent talks about the
9 prejudicial versus probative analysis here, but we
10 really - - - it - - - it's not really appropriate in
11 this case, with respect to witnesses who are not the
12 defendant. There was no - - - nothing to protect
13 here, no one's privacy. These are public lawsuits.
14 These are not, like, the police personnel records at
15 issue in Gibson (ph.) - - -

16 JUDGE STEIN: But - - - but isn't that
17 something that a judge has to consider in every
18 evidentiary ruling in a trial?

19 MS. FLORES: The prejudicial versus prob -
20 - -

21 JUDGE STEIN: Yeah.

22 MS. FLORES: Yes, and it comes into it, but
23 in a - - - in a different context. Here what - - -

24 JUDGE STEIN: Then it gets a little more
25 leeway.

1 MS. FLORES: Absolutely, and - - - and it's
2 a much more appropriate analysis when we're talking
3 about the prejudice to the defendant because the
4 prejudice to the defendant is he could be improperly
5 convicted based on propensity evidence or something
6 like that. But here, it's - - - it's hard to
7 articulate what would be the prejudice to these
8 officers or to the People.

9 JUDGE STEIN: Well, confusing the jury and
10 - - -

11 MS. FLORES: Exactly.

12 JUDGE STEIN: Yeah.

13 MS. FLORES: And that is the appropriate
14 analysis, Your Honor, that the court had the - - -
15 the leeway to not confuse the jury, to not mislead
16 the jury, to not distract from the issues at hand.
17 But here credibility was a relevant issue. It was a
18 main issue, and it was the centerpiece of defense
19 counsel's strategy. So - - -

20 JUDGE RIVERA: What about the preservation
21 at the second trial?

22 MS. FLORES: So defense counsel was so shut
23 down at the first trial. He was told, essentially,
24 these are not legally relevant, these lawsuits. You
25 - - - it was not even a discretionary ruling. It was

1 a legal ruling, and so it would have been futile for
2 defense counsel to - - -

3 JUDGE RIVERA: But what's he got to lose, a
4 new judge, new judge, new day.

5 MS. FLORES: He may have asked again, and -
6 - -

7 JUDGE RIVERA: What's the point of a second
8 trial if not a new - - - new opportunity?

9 MS. FLORES: Correct, and he - - - he did
10 have - - - he certainly could have asked. We're not
11 arguing that he couldn't have. But he - - - he
12 didn't need to - - - to preserve the issue for appeal
13 because he got a definitive legal ruling at the first
14 trial. He didn't have any new law to rely on at the
15 second trial that would have supported his argument
16 the second time around.

17 JUDGE ABDUS-SALAAM: So how is a definitive
18 legal ruling of relevance or not before a trial judge
19 who has one set of facts before her or him binding on
20 a - - - essentially, another judge of the same
21 accordant jurisdiction? I don't - - - I don't see
22 that, counsel.

23 MS. FLORES: Certainly, defense counsel
24 could have asked but he was - - - it - - - it was
25 made futile for him because he was told this is

1 legally irrelevant, this is not going to happen. And
2 he doesn't have an Appellate Division decision to
3 point to. He doesn't have anything else. He's had
4 one trial - - -

5 JUDGE PIGOTT: Yeah, but you know - - - you
6 know if you got a new trial, it's a - - - it's a new
7 game. You can - - - you can introduce the same
8 evidence, different evidence, anything.

9 MS. FLORES: Yes, and he certainly could
10 have asked, but he didn't, and all we're arguing is
11 that his request at the first trial was sufficient to
12 preserve it for appellate review at the second trial.
13 Thank you, Your Honor.

14 CHIEF JUDGE DIFIORE: Thank you. The next
15 matter is number 110, People v. Tyrell Ingram.

16 MS. MITSOGLOU: Good afternoon, Your
17 Honors; my name is Elsa Mitsoglou. I am from the
18 Cardozo Criminal Appeals Clinic, and I'm representing
19 the appellant, Tyrell Ingram, and I request two
20 minutes for rebuttal, please.

21 CHIEF JUDGE DIFIORE: You may have your two
22 minutes.

23 MS. MITSOGLOU: Thank you. So the issue in
24 this case, just like in the previous case of Charles
25 Smith, is the same, is whether the abuse - - -

1 whether the court abused its discretion by entirely
2 prohibiting the defense from cross-examining key per
3 - - - prosecution witnesses about their prior bad
4 acts alleged in the federal civil rights lawsuit.

5 CHIEF JUDGE DIFIORE: And the question
6 posed was?

7 MS. MITSOGLOU: The unfortunate first
8 question posed was have you ever been sued, and as -
9 - - as we - - - as Judge Rivera noted in the - - - in
10 the last case, it was only the start - - - it was
11 supposed to be only the start of the questioning. I
12 - - - and again, even though it was unfortunate, it
13 was only the first question and as a way of laying
14 foundation or showing the presence of good faith.

15 CHIEF JUDGE DIFIORE: And how was the
16 attorney prevented from - - -

17 MS. MITSOGLOU: The prosecution objected
18 immediately to - - - to the question and then the
19 court basically requested time to review case law and
20 discuss it more. The - - - then the defense lawyer
21 presented the case law which, by the way, was all
22 about prior bad acts. It didn't - - - it was not
23 just about the mere fact of the lawsuit or the mere
24 fact of the existence of the lawsuit. It was of all
25 the cases that she cited in her argument were about

1 prior bad acts.

2 JUDGE GARCIA: But did they make a proffer?
3 Did the defense counsel make a proffer of specific
4 bad acts from these lawsuits that they wanted to ask
5 about?

6 MS. MITSOGLOU: We - - - we say yes. The
7 spec - - -

8 JUDGE GARCIA: Where is that?

9 MS. MITSOGLOU: The specific bad acts were
10 the act on - - - where they - - - where the defense
11 counsel said that the - - - the victim who made the
12 lawsuit, Marcus Reyes, he was striking his body three
13 - - - into the - - - his back three times, was
14 unnecessarily tightly handcuffed and strip searched.
15 So those - - - those are all specific acts.

16 JUDGE GARCIA: So those were the acts that
17 they proffered and that we're reviewing for an abuse
18 of discretion that we're excluding?

19 MS. MITSOGLOU: Yes.

20 JUDGE GARCIA: All on the excessive force
21 issue you just described?

22 MS. MITSOGLOU: Excessive force and, I
23 mean, it - - - you know, it's not part of the record
24 because the - - - you know, the defense counsel
25 didn't continue speaking. He wasn't allowed to

1 continue speaking about the - - -

2 JUDGE GARCIA: But the defense counsel here
3 had overnight to make this record, right? It isn't
4 absolutely not and we have a page. It's come back
5 tomorrow with your cases.

6 MS. MITSOGLOU: Yes.

7 JUDGE GARCIA: So I - - - I think it's - -
8 - I had a little trouble getting how he was cut off
9 from making that record.

10 MS. MITSOGLOU: Well, she wasn't cut - - -
11 I - - - I didn't mean to suggest she was cut off from
12 - - - I mean she - - - she did make a record by
13 citing the four cases, that I just referred to, which
14 were the - - - you know, the cases of People v.
15 Marzed, People v. Santos, People v. Gissendanner, and
16 I think the third one was People v. Hudy. And those
17 cases were all about the prior bad acts. So as far
18 as - - -

19 JUDGE RIVERA: But that - - - but that's
20 not usually enough, right, to get up and just say on
21 the strength of X case and not - - - not explain
22 exactly what - - - what your proffer is.

23 MS. MITSOGLOU: You're - - -

24 JUDGE RIVERA: You're looking for an
25 objection, right?

1 MS. MITSOGLU: You're totally right, Your
2 Honor. But she - - - defense counsel did explain how
3 - - - how the cases were important to her theory of
4 the case, that they - - - they went to the - - - to
5 the credibility of the cops. They then to her - - -
6 also that they went to her theory of the case that
7 she - - -

8 CHIEF JUDGE DIFIORE: Did she tie that
9 specifically to this case?

10 MS. MITSOGLU: Yes, to - - - to - - -

11 CHIEF JUDGE DIFIORE: How did she do that?

12 MS. MITSOGLU: She said that I think this
13 goes directly to my - - - to my theor - - - to the
14 theory of the case that they are rogue cops. And it
15 was - - - that sentence was right - - -

16 CHIEF JUDGE DIFIORE: That's specific
17 enough that they are rogue cops?

18 MS. MITSOGLU: Well, it - - - it
19 especially tied with the - - - read contextually with
20 also her saying that it went to the cred - - - their
21 credibility. I - - - yes, I would say so and then
22 also each explanation of each case and of how that
23 tied to both of those points.

24 JUDGE RIVERA: I'm sorry. So let - - -
25 just to clarify. You're not suggesting that the

1 allegations in the - - - in the cases are the same
2 allegations that the defendant was making, or are
3 you, about - - - about what is rogue about these
4 cops.

5 MS. MITSOGLU: The allegations, you mean,
6 in the cases she cited or in the complaint that - - -

7 JUDGE RIVERA: Both.

8 MS. MITSOGLU: In the cases she cited, no.
9 She was only saying that look, here, these prior bad
10 acts were found out and these were good enough - - -
11 good faith basis and they went to the credibility and
12 the credibility was a material issue and it was
13 allowed so we should do the same here. In terms of
14 the complaint, the acts alleged, the prior bad acts
15 alleged in the lawsuit against the police officers
16 were very similar to the ones that could have also
17 happened in - - - in this case.

18 JUDGE ABDUS-SALAAM: And these - - - all of
19 these police officers were involved in those
20 lawsuits?

21 MS. MITSOGLU: All of them. All of them.
22 Yes, so - - - and since - - - since it was standard.
23 I mean this was a standard impeachment of
24 credibility. It was - - - there was good - - - there
25 was good faith basis in - - - given in the lawsuits

1 that are federal civil rights lawsuits that are
2 attested to by the lawyer who is bound by ethical
3 obligations not to lie, who is bound by legal
4 obligations to not file frivolous lawsuits, to
5 investigate and make sure there's reasonable basis to
6 - - - to file the lawsuits. So the - - - there was
7 good - - - good faith basis in them. And, you know,
8 even in comparison to People - - - a case like People
9 v. Alamo, the good faith basis there, we argue, is
10 much less than the good faith basis found in these
11 lawsuits.

12 So since it was standard impeachment, all
13 credibility of key prosecution witnesses in a case
14 where credibility was the key issue, there was
15 nothing else tying the defendant-appellant Mr. Ingram
16 to the - - - the gun, and it was - - - there was - -
17 - there was nothing else except the testimony of
18 those police officers. And defense counsel tried - -
19 - attempted to question Sergeant Deevy, who was the
20 main - - - the key prosecution witness, and I think
21 Officer - - - Officer Sanchez who also key
22 prosecution witness for - - - for the story of the
23 prosecution against Mr. Ingram. So since there was a
24 good enough good faith basis, credibility was a key
25 issue. These were key prosecution witnesses. They

1 are not defendant witnesses, so there was not the
2 extra protections that all of the - - - the defendant
3 witnesses are supposed to get. There's - - - there
4 shouldn't have been any basis to completely exclude
5 cross-examination into these - - - into these acts.

6 JUDGE RIVERA: Well - - - well, if - - - if
7 the cases are pending and they make some statement in
8 this lawsuit, aren't they perhaps prejudiced in those
9 other lawsuits - - - I mean in - - - excuse me, in -
10 - - in the defendant's criminal case, aren't they
11 perhaps prejudiced in their civil lawsuits?

12 MS. MITSOGLU: Can you - - - in what way?

13 JUDGE RIVERA: Well, let - - - let's say
14 the judge lets - - - lets defense counsel ask a
15 series of questions. Is it - - - is it possible that
16 that officer, depending on the answer or a failure to
17 answer, might, indeed, put him or herself in a less-
18 than-positive position for the civil lawsuits, if
19 they're pending?

20 MS. MITSOGLU: I suppose so, yes. But
21 it's - - -

22 JUDGE RIVERA: And if so, is that a factor
23 for the judge to consider in determining whether or
24 not to permit the questioning?

25 MS. MITSOGLU: Absolutely, but to permit

1 the questioning entirely or to permit the
2 questioning, the - - - to limit the - - - you know,
3 the nature and the extent of the cross-examination?

4 JUDGE RIVERA: Because if your question is
5 basically reading the allegation in the lawsuit,
6 which if there's been an answer, the officer's
7 counsel would have already presumably denied or
8 there's some explanation anyway, if, indeed, an
9 answer aligns with any statement that's already been
10 made in the civil lawsuit, I - - - I get your point.
11 But I guess where - - - what - - - what I'm asking is
12 let's assume there is some line of questioning that
13 is permissible. That there would be a rule crafted,
14 potentially, that permits this line of questioning.
15 Is - - - is it an appropriate factor under such - - -
16 potentially such a rule, as you have suggested, where
17 a court should also consider the potential adverse
18 consequences or impact on the officer, the witness
19 who's testifying as a defendant in this lawsuit?
20 You're arguing the witness is not a defendant, so
21 there's nothing prejudicial that would befall that
22 witness in being asked these questions.

23 MS. MITSOGLU: Well, I am arguing about
24 that - - -

25 JUDGE RIVERA: But they're not - - - right,

1 they're not the defendant in a criminal prosecution.

2 MS. MITSOGLOU: Exactly, and certainly not
3 in this criminal prosecution. And again, if this - -
4 - the - - - you know, the balance, if you consider
5 the balance or the factor affecting the police
6 officer in this - - - in his civil rights lawsuit
7 versus the freedom of the defendant in this criminal
8 action, then, I mean, still the balance - - -

9 JUDGE RIVERA: Well, no, he knows it might
10 inculcate him, right, depending - - - or her,
11 depending on the conduct in a criminal act; is that
12 not possible?

13 MS. MITSOGLOU: I'm sorry; say that again?

14 JUDGE RIVERA: In a criminal act is that
15 not possible? The officer may have done something
16 that's alleged in that civil action that has - - -

17 MS. MITSOGLOU: That's - - -

18 JUDGE RIVERA: - - - possibility of
19 suggesting there's criminal actions involved?

20 MS. MITSOGLOU: Yes, that could be the case
21 but - - - but still, I think, as my revered counsel
22 Flores suggested is that there - - - the jury should
23 - - - it would still be useful to the jury to observe
24 the demeanor of the police officer being asked, at
25 least, a or two questions about it.

1 JUDGE RIVERA: Okay.

2 CHIEF JUDGE DIFIORE: Thank you, counsel.

3 MS. MITSOGLU: Thank you.

4 CHIEF JUDGE DIFIORE: Counsel.

5 MS. GIANFRANCESCO: Good afternoon; may it
6 please the court, Raffaolina Gianfrancesco on behalf
7 of James A. McCarty, appointed special acting
8 district attorney for Bronx County in this matter.
9 Although provided ample opportunity to do so, defense
10 counsel failed to suggest to the trial court in this
11 case that she wished to ask the police officers about
12 any facts, and - - - and specifically any facts that
13 alleged, with regard to these officers, in the
14 underlying lawsuit.

15 JUDGE PIGOTT: If she had, would they have
16 been admissible then?

17 MS. GIANFRANCESCO: Excuse me, Your Honor?

18 JUDGE PIGOTT: If she had done what you had
19 just said she failed to do, would that evidence then
20 be admissible?

21 MS. GIANFRANCESCO: If she had done that
22 then she - - - she would have laid the good faith
23 basis in a reasonable basis in fact. And then - - -

24 JUDGE STEIN: When she asked whether the -
25 - - or she said that the lawsuit was evidence of - -

1 - of prior bad acts. Can't we infer that she was
2 going to ask about those acts?

3 MS. GIANFRANCESCO: Absolutely not, Your
4 Honor. I know defense counsel suggests that by
5 presenting the court with cases that weren't actually
6 even on point with regard to this issue that the
7 inference was there. This record fully supports the
8 Appellate Division's decision that the defense
9 counsel never asked, though given plenty of
10 opportunity. The prosecutor several times in this
11 case when they were discussing - - - when she sua
12 sponte started asking that question and it was
13 immediately objected to and sustained, the prosecutor
14 says the fact of being sued is not permissible
15 impeachment material.

16 JUDGE PIGOTT: I disagree. I think that's
17 funny that we - - - we've said that several times
18 now. Now if there's a good faith basis, if
19 somebody's been sued, and - - - and they settled the
20 case admitting that they were wrong, there's nothing
21 wrong with asking have you been sued, because the
22 next thing coming up is yes, and then you can get
23 into the facts. So that, you know, this isn't some
24 big red light in courts that say, you know, you can
25 never ask if anybody's been sued. So I'm not sure -

1 - - I'm not sure that's the - - - the appropriate
2 approach here. And what I asked you before and I was
3 asking - - - I was wondering if you could tell me,
4 are there circumstances under which prior police bad
5 acts can be introduced in a case, such as these, to
6 impeach the - - - the testimony of a - - - of an
7 arresting officer?

8 MS. GIANFRANCESCO: Yes, Judge Pigott.

9 JUDGE PIGOTT: And - - - and what would
10 those - - - and what would, in your view, be the
11 foundation upon which you could do that?

12 MS. GIANFRANCESCO: Okay, I know you're
13 using the word foundation to lay that for the
14 evidentiary admissibility of that, but if we're
15 looking at it in terms of what is the standard here
16 for anyone, either a prosecutor or a defense counsel,
17 to impeach a witness, it is is there a good faith
18 basis and a reasonable basis in fact. So where do we
19 look at first? We look at what is the source of
20 information.

21 JUDGE PIGOTT: No, no, no. Let's keep
22 going. You said, all right, there has to be a good
23 faith basis.

24 MS. GIANFRANCESCO: Correct. So - - -

25 JUDGE PIGOTT: All right. So let's assume

1 they have a good faith basis. What's next?

2 MS. GIANFRANCESCO: Okay. So they have a
3 good faith basis. Then we go to the next step, and
4 we have the trial court weigh what those questions
5 are or what are - - -

6 JUDGE PIGOTT: Why, why, why?

7 MS. MITSOGLOU: - - - the underlying - - -

8 JUDGE PIGOTT: I mean I've got a good faith
9 basis. I say you've been sued, the - - - the People
10 object, overruled. And - - - because as a judge, I -
11 - - I've got a good faith basis for this. The next
12 question is answer that question. Yes, I have. All
13 right, and were you sued for police brutality on - -
14 - you know, on a certain date? No. End of inquiry.
15 Yes, I was. Tell us about it. It's a false
16 accusation. It was made against me because of this,
17 that, and the other thing. Let's move on. But the
18 idea that you can't even get there is what troubles
19 me.

20 MS. GIANFRANCESCO: Okay. Judge, well, I
21 would equate that to the question of have you, in
22 fact, been sued is similar to the question have you
23 ever been arrested or und - - - are you under
24 indictment. This court has not allowed those
25 questions. In People v. Miller this court has said

1 you cannot ask someone if they've been arrested.

2 CHIEF JUDGE DIFIORE: Can you go right to
3 the underlying acts?

4 MS. GIANFRANCESCO: Exactly, if you lay
5 that good faith basis, Your Honor.

6 CHIEF JUDGE DIFIORE: What's the good faith
7 basis? How do you get there?

8 MS. GIANFRANCESCO: The good faith basis is
9 do you have a reliable source of information. And
10 this court held in - - -

11 JUDGE FAHEY: But - - - but wait a minute.
12 You're outside the presence of the jury. Forget
13 about the inartful question have you ever been sued
14 because you're - - - I - - - I agree with you there.

15 MS. GIANFRANCESCO: Right.

16 JUDGE FAHEY: It's - - - it's an artful
17 question. I think even the opposing side would agree
18 with that. But nonetheless, you come into court, you
19 have - - - you have papers that say Officer X is
20 being sued, with a series of factual allegations
21 against a series of officers. The judge says do you
22 have a good faith basis? Yes, I do, Your Honor. I
23 have all the papers here that - - - that make
24 allegations against him. I want to ask him about
25 those allegations. Now whether the question's

1 phrased can you be sued or not, isn't the mere
2 production of the documents sufficient, not to
3 establish a foundation, but to establish a good faith
4 basis for your questions in cross-examination?

5 MS. GIANFRANCESCO: Your Honor, I would put
6 it as a two-prong requirement.

7 JUDGE FAHEY: Um-hum.

8 MS. GIANFRANCESCO: It is where's your
9 source of information, so I'm coming in with this - -
10 -

11 JUDGE FAHEY: All right, I say - - - I tell
12 you.

13 MS. GIANFRANCESCO: I'm coming in - - -
14 yeah.

15 JUDGE FAHEY: No, slow down. So I tell
16 you, it's right here, Judge.

17 MS. GIANFRANCESCO: Okay.

18 JUDGE FAHEY: It's this federal number,
19 whatever. You can get them off the Internet. We all
20 can.

21 MS. GIANFRANCESCO: Which - - - right.

22 JUDGE FAHEY: Yeah, right.

23 MS. GIANFRANCESCO: Which is - - - I
24 presume is what happened in this case even though
25 defense counsel doesn't even note to the court that

1 she has this information from PACER or actually even
2 has the lawsuit with her. So she brings in the
3 lawsuit but then you have to ask the next question.
4 What are the specific bad acts that you now allege -
5 - -

6 JUDGE FAHEY: Well, all right. Now let's
7 take - - - let's take that. What you're saying is
8 you have to vet each question, it sounds like to me,
9 in cross-examination, and I don't think that's ever
10 been the rule on cross-examination that you have to
11 vet each question ahead of time before you can ask
12 it. There are rare circumstances where it does
13 happen, but specifically, is vetting of questions - -
14 - of course, if I'm the People in this instance, I
15 would always want that because then I have heard the
16 question ahead of time and the answers can then be
17 anticipated for the witness - - -

18 MS. GIANFRANCESCO: Correct.

19 JUDGE FAHEY: - - - or the people out
20 there. But that totally undermines the purpose of
21 cross-examination, totally under - - -

22 MS. GIANFRANCESCO: I agree with that.

23 JUDGE FAHEY: Your proposed rule totally
24 undermines the purpose of cross-examination. It
25 creates a situation where cross-examination is - - -

1 is effectively negated. Its effectiveness is - - -
2 is destroyed.

3 MS. GIANFRANCESCO: I understand - - - I
4 understand what's troubling you, Judge. That - - -
5 right, there is no rule. We're not req - - -
6 requiring a motion in limine for the defense in order
7 to ask these questions. However, when you're
8 approaching it the way the defense attorney did in
9 this case and the question is have you ever been
10 sued, of course that's going to prompt an objection
11 by the People and a sidebar.

12 JUDGE FAHEY: Per - - - perhaps a
13 justifiable objection.

14 MS. GIANFRANCESCO: So - - - correct.

15 JUDGE FAHEY: Right?

16 MS. GIANFRANCESCO: So and - - - and I
17 think this was - - - the court properly sustained the
18 objection in this case.

19 JUDGE ABDUS-SALAAM: So, Counsel, could - -
20 - assuming the - - - the judge wouldn't allow the
21 questions but the trial went on, and then defense
22 counsel, without doing the vetting, asked a specific
23 question about misconduct, so you're saying the judge
24 might not have allowed that question because it
25 wasn't vetted by, you know, saying I have a good

1 faith basis?

2 MS. GIANFRANCESCO: No.

3 JUDGE ABDUS-SALAAM: I'm sure that the
4 prosecution would have objected.

5 MS. GIANFRANCESCO: Correct, yeah.

6 JUDGE ABDUS-SALAAM: And then defense
7 counsel would have said here's my good faith basis.

8 MS. GIANFRANCESCO: Correct. Right.

9 JUDGE ABDUS-SALAAM: I have these lawsuits.

10 MS. GIANFRANCESCO: Yes.

11 JUDGE ABDUS-SALAAM: Right. So - - -

12 MS. GIANFRANCESCO: Judge, and I think
13 that's the way it would have been handled. I - - -
14 what I'm trying to say is that it's not that the
15 question can't be asked. It's not that the defense
16 counsel must come to the court. Though, in the other
17 two cases, there was opportunity for all the parties
18 to engage in this conversation with regard to what
19 the allegations are and where they're coming from.
20 That's never been a requirement for cross-
21 examination. How - - -

22 JUDGE PIGOTT: So what would you think is
23 the rule? I think you agree that under certain
24 circumstances a police officer can be cross-examined
25 like any other witness, including prior bad acts.

1 MS. GIANFRANCESCO: Absolutely.

2 JUDGE PIGOTT: Okay. What's the rule that
3 you would apply in these cases?

4 MS. GIANFRANCESCO: I would apply the rule
5 that has always been applied, that seems to always
6 been applied by all Fourth Departments in this court,
7 have you presented a good faith basis and a
8 reasonable basis in fact, and are you requesting to
9 ask questions with regard to specific allegations
10 which would allow the jury to make a determination
11 with regard to this witness's credibility. And
12 that's not what occurred in this case. Defense
13 counsel, when they were vetting this after the
14 objection was made, was given every opportunity to
15 present what she would have believed to have been
16 specific prior bad acts committed by - - - who - - -
17 Detective Sanchez who was on the stand at the time.
18 The only thing that she told the court was that this
19 lawsuit is indication of a prior bad act. It's not.
20 We know that. The same way an arrest or an
21 indictment is not indication of - - -

22 JUDGE PIGOTT: How - - - how do we know
23 that?

24 MS. GIANFRANCESCO: Because the courts have
25 told us. The mere fact that you've been arrested or

1 under indictment - - -

2 JUDGE PIGOTT: No, no, no. No, I
3 understand that. I'm - - - I'm still not giving up
4 on you can ask if somebody's been sued. But the fact
5 of the matter, let's assume for a minute that - - -
6 that he bopped, you know, somebody over the head and
7 he got sued for it. Have you been sued? Yes. And
8 isn't it a fact that you were sued because you bopped
9 somebody over the head? Yes. Did you bop somebody
10 over the head? No.

11 MS. GIANFRANCESCO: I understand you're
12 troubled by the question of have you been sued but
13 that is not what the - - -

14 JUDGE PIGOTT: No, no. I'm not. I'm not.

15 MS. GIANFRANCESCO: Right. Okay.

16 JUDGE PIGOTT: I just want to get rid of
17 that.

18 MS. GIANFRANCESCO: Right.

19 JUDGE PIGOTT: Here's my point. You have -
20 - - you have a right as a prosecutor to say if the
21 defendant takes the stand I can ask him about prior
22 bad acts and I intend to. Can the Peop - - - can the
23 defense do the same thing?

24 MS. GIANFRANCESCO: No. The defense
25 actually - - - the prosecutor has a higher burden.

1 We have to have a Sandoval ruling. We have to
2 inquire - - -

3 JUDGE PIGOTT: Ventimiglia.

4 MS. GIANFRANCESCO: - - - beforehand.

5 JUDGE PIGOTT: I'm not - - -

6 MS. GIANFRANCESCO: The defense - - -

7 JUDGE PIGOTT: I'm not suggesting Sandoval.
8 I'm suggesting Ventimiglia.

9 MS. GIANFRANCESCO: Oh - - -

10 JUDGE PIGOTT: I'm - - - I'm saying that if
11 you've got prior bad acts of the defense, you can - -
12 - you can - - - of the defendant you can question him
13 about that. Now the judge may want to know what they
14 are, you know.

15 MS. GIANFRANCESCO: Right.

16 JUDGE PIGOTT: But I think the same thing
17 here. Can you say I'm going to - - - I'm going to -
18 - - I fully intend to ask him about the fact that
19 he's been sued in federal court fifteen times.

20 MS. GIANFRANCESCO: But not the fact that
21 you've just been sued, Judge. The - - - you have to
22 also look at the specific bad acts because what
23 you're asking a jury - - -

24 JUDGE PIGOTT: But do you understand what
25 I'm saying?

1 MS. GIANFRANCESCO: Um-hum.

2 JUDGE PIGOTT: The answer to that is of
3 course. But you can't say you can't ask if he's been
4 sued because if you can't ask that, then how are you
5 going to get over here. I'm saying everybody says,
6 oh, you know, you can say have you been sued. You've
7 got to have a good faith basis to ask that. And the
8 answer has got to be yes. You can't say have you
9 been sued and - - - and not know the answer. So then
10 you - - - and then you go into what you're - - - what
11 you now want to say - - -

12 MS. GIANFRANCESCO: Right.

13 JUDGE PIGOTT: - - - and you have to get
14 specific.

15 MS. GIANFRANCESCO: Right.

16 JUDGE PIGOTT: I guess that's all I'm
17 trying to say.

18 MS. GIANFRANCESCO: Okay. That's fine.

19 JUDGE RIVERA: Counsel, in - - - in the
20 mechanics - - -

21 JUDGE PIGOTT: We're at peace.

22 MS. GIANFRANCESCO: Okay.

23 JUDGE RIVERA: I'm sorry. In the
24 mechanics, is it - - -

25 MS. GIANFRANCESCO: Um-hum.

1 JUDGE RIVERA: - - - what you're saying
2 that the first question is not have you been sued but
3 you've got to get to the facts.

4 MS. GIANFRANCESCO: Correct.

5 JUDGE RIVERA: I mean you or another
6 prosecutor stands up and says I object.

7 MS. GIANFRANCESCO: Right.

8 JUDGE RIVERA: That at that point, if - - -
9 if - - -

10 MS. GIANFRANCESCO: Right.

11 JUDGE RIVERA: - - - defense counsel hasn't
12 already done it - - -

13 MS. GIANFRANCESCO: Right.

14 JUDGE RIVERA: - - - has to then say this
15 is my source. So now let's get to the real point - -
16 - here. So the my source - - -

17 MS. GIANFRANCESCO: Um-hum.

18 JUDGE RIVERA: - - - do you agree that an
19 existing or prior lawsuit can be a good - - - can
20 provide a good faith basis - - -

21 MS. GIANFRANCESCO: Correct, yes.

22 JUDGE RIVERA: - - - for these questions?

23 MS. GIANFRANCESCO: Yes. Yes.

24 JUDGE RIVERA: So you don't object to the
25 fact that the source is a lawsuit?

1 MS. GIANFRANCESCO: No. No. It is the - -
2 - that's a fine source. If it's a lawsuit that's
3 been filed, then you have to go - - -

4 JUDGE RIVERA: What if - - - what if it's
5 been settled?

6 MS. GIANFRANCESCO: Well, in - - - in the -
7 - - if it's been settled, I would say that's
8 something that the court could look at. Depends on
9 is it settled - - - is it dismissed, is it dismissed
10 on the merits, have there been no admissions of guilt
11 by the defen - - - by the officers.

12 JUDGE RIVERA: You're more likely than not
13 going to get that in a settlement, but there's no
14 admissions of guilt, how is that any different from
15 it's a pending lawsuit and we haven't worked out - -
16 -

17 MS. GIANFRANCESCO: Well - - -

18 JUDGE RIVERA: - - - we haven't yet figured
19 out whether or not, in fact - - - I won't say guilt,
20 liability, right - - -

21 MS. GIANFRANCESCO: Correct. Right.

22 JUDGE RIVERA: - - - the - - - the
23 defendant is liable.

24 MS. GIANFRANCESCO: Right. I - - - I think
25 it's just one thing that I would assume that if it -

1 - - if it's for the prosecutor, in their respect,
2 they're going to raise it to the court. I think it's
3 just part of the - - - the whole question of whether
4 or not the - - - the cross-examination. But in this
5 case, it's clear on this record that the defendant
6 was never precluded from asking about the underlying
7 facts. Thank you.

8 CHIEF JUDGE DIFIORE: Thank you. Counsel.

9 MS. MITSOGLOU: I would just like to
10 address the - - - the argument that there was no good
11 faith basis because of this - - - the lack of
12 specific factual allegations, as Judge Garcia asked
13 before. This is on - - - on page 12 of our opening
14 brief and onwards. We cite the entirety of the
15 record where - - -

16 JUDGE GARCIA: Are those allegations,
17 though, against this Detective Sanchez? I mean he's
18 - - - the - - - the proffer is that there were these
19 - - - this excessive force used to show there were
20 rogue cops. But is there any indication that the
21 specific allegations here go to the - - - actually
22 the witness who's actually testifying?

23 MS. MITSOGLOU: Well, I - - - our argument
24 for that would be that, again, like Judge Pigott
25 suggested, you could still just ask about them and

1 that he can - - - their witness can try to - - - you
2 know, can answer and specify, no, I wasn't involved.

3 JUDGE GARCIA: But then what's your good -
4 - - then I think you've got a good faith basis
5 problem. Like, to go to Judge Rivera's point, let's
6 say you have a gun case, right, and there's a - - -
7 there's a gun on the floor, they arrest somebody,
8 it's dismissed, that defendant brings a future civil
9 rights suit. Same cop arrests a defendant, gun
10 possession, similar circumstances. You want to come
11 in and you want to say did you arrest so-and-so. You
12 know, didn't you claim there was a gun on the floor?
13 Wasn't that - - - an objection, good faith basis,
14 there's this lawsuit. I think we all agree that's
15 fine. But what you're doing here is saying there's a
16 general lawsuit, I guess against the group, there's
17 some excessive force allegation. But you've got one
18 detective on the stand you want to cross about that.
19 So where is your good faith basis for asking this
20 witness did you strike someone in the back, did you
21 strike him in the body. I mean putting aside the
22 relevance of the issues in this case.

23 MS. MITSOGLOU: Well, I - - - I mean I - -
24 - we don't see any difference between the - - - the
25 scenario that you just described and what happened

1 here. I mean you could have one police officer
2 committing bad acts on his own and you could have
3 eight police officers committing bad acts as a group.
4 And two of them could be beating, two of them could
5 be watching, two of them could be lying. It's not -
6 - - I mean, and all of these bad acts individually
7 and together are prior bad acts together. And in
8 People v. Alamo, for example, the good faith basis
9 there was it was just merely the information that was
10 given to the prosecution by a police officer that the
11 defendant was merely in the room with two other
12 people and some keys from stolen taxis. I don't see
13 how - - - we don't see how that's less - - - you
14 know, or more - - - more good faith basis than the
15 one that exists here.

16 JUDGE RIVERA: I'm sorry. Are you - - -
17 are you saying given the nature of the work of an
18 officer that even not acting when there is certain
19 bad conduct by a group of officers is enough to ask
20 about?

21 MS. MITSOGLU: I - - - I - - -

22 JUDGE RIVERA: Of course, I'm observing the
23 other officers beat up someone.

24 MS. MITSOGLU: And I do not - - -

25 JUDGE RIVERA: And I'm an officer, I do

1 nothing, and I don't report it later.

2 MS. MITSOGLU: Yes, I would - - - we would
3 consider that that as a prior bad act.

4 JUDGE GARCIA: But would you then consider
5 that person watching a rogue cop?

6 MS. MITSOGLU: Well, if you - - - if part
7 of your not being a rogue cop is reporting other
8 rogue cops, then not doing so is being a rogue cop.

9 CHIEF JUDGE DIFIORE: Thank you, counsel.

10 MS. MITSOGLU: Thank you.

11 CHIEF JUDGE DIFIORE: Next is 111, People
12 v. Isma McGhee.

13 MR. ZENO: Good afternoon; Mark Zeno for
14 Appellant Isma McGhee. I'd like to reserve two
15 minutes for rebuttal.

16 CHIEF JUDGE DIFIORE: Certainly, sir.

17 MR. ZENO: What distinguishes this case
18 from the prior two is the state of counsel's
19 application. Counsel specifically did not want to
20 ask about the fact that a lawsuit was filed or a
21 lawsuit was settled. He wanted to ask about the
22 underlying facts of the lawsuit themselves. He
23 wanted to ask the right question, where you involved
24 in false arrests and - - - and the facts underlying
25 those false arrests. The court found that that was

1 irrelevant. The court found that the defense counsel
2 had established a good faith basis for those
3 questions but that they were irrelevant.

4 JUDGE STEIN: Well, is - - - isn't there
5 another distinction here, which is a little bit more
6 problematic, which is that the witness in question
7 was not the person that had conducted the - - - the
8 arrest or the buys or anything? It was somebody who
9 was supervising other judges - - - other police.

10 MR. ZENO: Well, he - - -

11 JUDGE STEIN: Other police.

12 MR. ZENO: They did present Detective
13 Rivera as the supervising officer of the - - - of the
14 operation at the Lincoln Houses. They chose to
15 present him not only as the supervising officer, but
16 as the officer through whom they explained their
17 case. He was the lead detective in the case. He was
18 the most important witness. There were other
19 witnesses who - - - how performed the underlying
20 buys, but he was the - - - the lead detective.

21 JUDGE ABDUS-SALAAM: But does it really
22 matter - - -

23 CHIEF JUDGE DIFIORE: What were the
24 specific allegations that - - - that were to be
25 raised?

1 have some leeway. That's not the basis on which the
2 court precluded the questioning here. The court
3 found it was irrelevant, it didn't - - - it didn't
4 find, as a matter of discretion, that the questioning
5 shouldn't happen because he was only a secondary
6 witness. I would say that that's - - -

7 JUDGE RIVERA: Well, what - - - why isn't
8 that subsumed under it's irrelevant?

9 MR. ZENO: Its relevance is a legal
10 determination. It's not - - - the - - - if something
11 is relevant, it is admissible unless there's an
12 exclusionary rule to preclude it. Once it's found to
13 be relevant, then the court has to weigh prejudice
14 versus probative value. But the court never got
15 there. The court found here that it was irrelevant
16 because the allegations hadn't been proven yet; that
17 the lawsuit alone wasn't enough to establish its
18 relevance, and that's clearly not the case. The
19 lawsuit didn't have to be proven. Didn't - - - the
20 defendant didn't have to win the lawsuit - - - well -
21 - -

22 JUDGE RIVERA: Let - - - let's say we were
23 to agree with you. Why isn't it harmless?

24 MR. ZENO: Why isn't it harmless? Getting
25 back to, again, the People chose to present Detective

1 Rivera as the lead witness. He was the narrator of
2 the People's case. If the defendant had been able to
3 establish that he was a liar, that his testimony
4 shouldn't be - - - be believed, then - - - then the
5 jury might well have disregarded all the testimony.

6 JUDGE ABDUS-SALAAM: There was - - -

7 MR. ZENO: He was supervising the
8 operation.

9 JUDGE ABDUS-SALAAM: Yeah, but, okay, maybe
10 that's true, but there were several buys here made by
11 different undercover officers who testified to those
12 direct buys. So assuming Detective Rivera was the
13 supervisor and he laid out, you know, what the
14 overall operation was, I - - - don't you still have
15 overwhelming evidence of the defendant's guilt of the
16 buys - - -

17 MR. ZENO: No.

18 JUDGE ABDUS-SALAAM: - - - through the - -
19 - through the undercover detectives who actually
20 participated in them?

21 MR. ZENO: No, notwithstanding the fact
22 that there were, I think, ten alleged buys, there was
23 no buy money recovered, there were no audio tapes,
24 videotapes, fingerprints. They - - - they executed a
25 search warrant in my client's apartment. There was

1 nothing there to suggest he was involved in drug
2 dealing.

3 JUDGE RIVERA: That's a significant leap
4 that - - - that you're making there that a jury, if -
5 - - if it were to agree that - - - or conclude that
6 Rivera is just not trustworthy given - - - given the
7 lawsuits, that therefore every other officer who gets
8 up is not trustworthy.

9 MR. ZENO: Well, the - - - the question is
10 under Crimmins is there a - - - assuming there's a -
11 - - even if there's overwhelming evidence, you have
12 to go to the next step. If - - - if the questioning
13 had been allowed and the defense had been successful
14 in establishing that - - - that Officer Rivera was
15 not credible, would that have affected the verdict?
16 Is there a reasonable possibility that it affected
17 the verdict? And if the People's lead witness is - -
18 - is attacked and proven to be a liar, I - - - I say
19 - - -

20 JUDGE RIVERA: Did they call him the lead
21 witness?

22 MR. ZENO: Did they call him the lead
23 witness?

24 JUDGE RIVERA: Did they present him as the
25 case turns on this person?

1 MR. ZENO: No. They did not use tho - - -
2 those are my words, Your Honor. He was - - - but he
3 was the narrator of the People's case. He was - - -
4 collected all of the evidence, he supervised the
5 evidence as the buy operation unfolded, and he
6 presented the case to the jury. He was the person
7 through whom the case was comprised. So there's just
8 - - - if he had been shown to be incredible, there's
9 no way a jury would have disregarded that and found
10 the People had proven their case.

11 CHIEF JUDGE DIFIORE: Mr. Zeno, you've
12 raised a second issue, I believe, on the propriety of
13 the defendant's sentence. You want to spend a little
14 bit of time with that?

15 MR. ZENO: Sure, Your Honor. The defendant
16 was sentenced as a second felony drug offender whose
17 prior conviction was a violent felony on the basis of
18 a third degree criminal possession of a weapon
19 conviction. The statute, 70.70 and 70.02, at the
20 time that the defendant committed the - - - this
21 crime, did not list CPW 3 under subdivision 4 as a -
22 - - as a violent felony, and for that reason, it did
23 not give the defendant fair notice of the - - - of
24 the penalty that he would face. If the defendant
25 looked at the statutes at the time he was - - - he

1 was - - - committed this crime and wanted to
2 determine the sentence he would receive, he would not
3 have found under 70.02 the conviction under CPW 3(4),
4 and - - - and it would be unfair to - - - to sentence
5 him to a sentence which he did not receive fair
6 notice of.

7 JUDGE FAHEY: There was also the question
8 of the photo array?

9 MR. ZENO: That's right, Your Honor. The
10 photo array, which step - - - taking a step back, the
11 officer who viewed the photo array two months after
12 the crime had provided a description of the
13 perpetrator as having one eye that's kind of off.

14 JUDGE STEIN: I - - - I looked at that
15 photo array.

16 MR. ZENO: Um-hum.

17 JUDGE STEIN: And as far - - - and I can't
18 really even see his - - - I mean there's nothing that
19 stands out to me about his eye. I mean maybe he's
20 looking in a slightly different direction or
21 something, but I - - - I just - - - I'm not sure - -
22 -

23 JUDGE FAHEY: It doesn't - - - doesn't
24 appear to be exaggerated. I agree with the judge. I
25 looked at it too.

1 JUDGE STEIN: Yeah, I'm - - - I'm not sure
2 what makes it suggestive.

3 MR. ZENO: Well, what makes it suggestive
4 is, again, if you look - - - it's - - - if you look
5 at the photo, there are five men who are staring
6 directly at the camera and there's one who's loo - -
7 - looking off up to the right, I believe.

8 JUDGE STEIN: Yeah, maybe a little bit.
9 Yeah.

10 MR. ZENO: With one eye looking even more -
11 - - more further to the right.

12 JUDGE FAHEY: You know, it's - - - it's - -
13 - looking at the photo array made me think of how
14 would one identify Mike Tyson, somebody with a facial
15 tattoo, say, that kind of situation. And - - - and
16 it doesn't seem like there's a practical way to cover
17 up - - - part of somebody's tattoo and still go
18 through a normal identifying process. I suppose
19 twenty years from now, when tattoos - - - when judges
20 all have tattoos, it will be more of a common
21 problem. But at this point in our jurisprudence, we
22 haven't reached that level, thank god, yet. So - - -
23 but it - - - it will be a - - - become a problem I
24 think where facial identifying characteristics will
25 not be able to be covered up or be made so

1 standardized. But in this point, I - - - it's - - -
2 I'm not sure how you say the - - - the medical
3 condition strabismus? Is - - - is that it? Do you
4 know what - - -

5 MR. ZENO: Can you repeat that?

6 JUDGE FAHEY: Strabismus? Is that - - - is
7 that the medical condition that he has?

8 MR. ZENO: I'm not sure.

9 JUDGE FAHEY: Anyway - - -

10 MR. ZENO: I would - - - it would call it a
11 walleye.

12 JUDGE FAHEY: I see.

13 MR. ZENO: I think that a - - - I see my
14 time is up but just - - -

15 JUDGE FAHEY: Go ahead.

16 MR. ZENO: - - - two quick reactions to
17 that, Your Honor. One, I think you have to look at
18 the fact that the witness identified the perpetrator
19 in their description, one eye that's kind of off.

20 JUDGE FAHEY: Um-hum.

21 MR. ZENO: So there were five people who
22 unquestionably - - - unquestionably in the array did
23 not have one eye that's kind of off.

24 CHIEF JUDGE DIFIORE: So what efforts do
25 the police or prosecutor have to make under those

1 circumstances?

2 MR. ZENO: Well, it's a photo - - - it's a
3 photo array, Your - - -

4 CHIEF JUDGE DIFIORE: Everyone has to have
5 an off eye?

6 MR. ZENO: Not at all. It's a photo array,
7 Your Honor. They could have just put a piece of
8 paper over the - - - over the offending eye in each
9 of the - - - on each of the photos in the array, and
10 that would have eliminated the suggestiveness, very
11 simple.

12 CHIEF JUDGE DIFIORE: Thank you, counsel.

13 MR. ZENO: Thanks.

14 MS. WERTHEIMER: Good afternoon, Your
15 Honors; my name is Sylvia Wertheimer. I represent
16 the People. I'd like to focus on the fact that the -
17 - - the proffer here was really very general. The
18 problem in this case - - -

19 JUDGE GARCIA: Counsel, just to go to the
20 proffer, and we've been talking a lot about what
21 specific proffers were made. And I think this case
22 is somewhat different in that defense counsel here
23 showed a good faith basis for why they wanted to ask
24 this, the lawsuits, but then pointed to specific acts
25 lthey wanted to ask about in saying, look, I

1 understand the suit itself would be irrelevant, but
2 that gives me good faith basis to ask if he
3 participated in some of the acts that allegedly would
4 fall under the bad and malicious acts. Why doesn't
5 that get to you these bad acts which then there is
6 some proffer as to what they would be?

7 MS. WERTHEIMER: Well, I would submit that
8 there is no proffer as to what the bad acts would be.
9 I think a key point is that - - - that the federal
10 lawsuits alleged group misconduct, and the rationale
11 behind bad act impeachment is that the bad act has to
12 be probative, intend to show that the witness with -
13 - - is untrustworthy or willing to put his own
14 interests above the interests of others. It's not
15 enough to just say it's a bad act.

16 JUDGE GARCIA: He says it's false arrest,
17 didn't he?

18 MS. WERTHEIMER: Well, a false arrest is
19 not nec - - - first of all, the question didn't
20 necessarily - - - in terms he said did you want to
21 arrest people who committed - - - were you involved
22 in the arrest of people who committed no crimes.
23 That doesn't necessarily even mean there wasn't
24 probable cause. But even if there was - - - or
25 contemplating an arrest without probable cause, being

1 involved, what does that mean? As Justice Rivera
2 said, what if he just was watching somebody else
3 arrest? It matters what this particular police
4 officer - - -

5 JUDGE GARCIA: But he could say that. I
6 mean the questions he wants to ask are, "So I was
7 going to ask him if he's aware of being involved in
8 the arrest of" so-and-so, this plaintiff. "If such
9 an arrest took place on the dates that were alleged,
10 and is it, in fact, that those plaintiffs committed
11 no crimes and he participated in a false arrest?"
12 Why doesn't that give you the basis to ask that
13 question?

14 MS. WERTHEIMER: That - - - because that
15 doesn't show that this particular detective, the
16 witness on the stand, did anything wrong. It
17 involved an allegation of a group of officers - - -

18 JUDGE GARCIA: Who made a false arrest.

19 MS. WERTHEIMER: A group of officer - - -
20 who arrested somebody who didn't commit a crime. Now
21 if you arrest somebody without probable cause, first
22 of all, you don't know what this particular def - - -
23 detective's role was. The - - - the lawsuits were
24 not made part of the record, but I believe in one of
25 the case, for example, one of the officers just swore

1 out a complaint based on what the other officers who
2 were on the scene said to him. Would that be a bad
3 act by this officer? We submit it wouldn't be.
4 Probable cause is a very complicated concept. Police
5 officers can make mistakes. Simply arresting
6 somebody without probable cause does not mean - - -
7 is not - - - does not tend to show that - - -

8 JUDGE ABDUS-SALAAM: Counsel - - - counsel,
9 are we - - - are we - - -

10 MS. WERTHEIMER: - - - the detective is
11 untrustworthy.

12 JUDGE ABDUS-SALAAM: Excuse me, counsel.
13 Are we slicing this issue of bad acts and - - - and
14 moral conduct or are these very thin because these
15 are police officers, or wouldn't this be the case
16 with any other witness that people make mistakes and
17 they do things that they can explain - - -

18 MS. WERTHEIMER: If - - -

19 JUDGE ABDUS-SALAAM: - - - if they're asked
20 about?

21 MS. WERTHEIMER: Okay. But - - - but we
22 submit that it's not a different rule for police
23 officers, because you couldn't ask a witness about
24 something that they did as a group. I mean would you
25 be able to ask a witness, a defendant or any other

1 witness, were you present at a club when the group of
2 people you were with fired shots at somebody else?
3 Wouldn't you have to first have a basis that this
4 particular witness fired some shots and was involved?
5 The fact that he was just part of the group, that
6 wouldn't indicate - - - wouldn't be a proper basis
7 for this particular witness having committed a bad
8 act. In addition, it certainly goes - - -

9 JUDGE RIVERA: But - - - but that might be
10 the first question leading to the questions that are
11 connected to that bad act. Is - - - is defense
12 counsel not able to do that?

13 MS. WERTHEIMER: Well, the defense counsel
14 could have made a proffer as to what this particular
15 officer did. He chose not to do so. I submit it
16 seems - - -

17 CHIEF JUDGE DIFIORE: Counsel, the
18 underlying cases - - - if the criminal case is
19 dismissed that's forming the basis of these
20 allegations?

21 MS. WERTHEIMER: Yes. They - - - they were
22 dismissed. They were - - - I think they were quickly
23 dismissed. None of this is in the record, by the
24 way.

25 CHIEF JUDGE DIFIORE: So let me ask you a

1 question. How would defense counsel get to any
2 possible specific acts? Would they have access to
3 the case file from the underlying criminal case?
4 Would they access to the personnel file of the police
5 officer who may have been involved in the false
6 arrests?

7 MS. WERTHEIMER: No, I - - - I believe what
8 they would have access to is documents relating to
9 the federal lawsuit. They could call up the defense
10 - - - the attorney who represents the plaintiff in
11 the federal lawsuit and say get more information.

12 CHIEF JUDGE DIFIORE: How about the case
13 file, the criminal case file?

14 MS. WERTHEIMER: No, I don't think you
15 would have access to the criminal case file, but this
16 is based on the allegations from the federal lawsuit.
17 So you could call up the lawyer who is representing
18 the plaintiff in a federal lawsuit and say what did
19 this particular witness supposedly do. And - - -

20 JUDGE RIVERA: But if he knew, he would
21 have put it in the lawsuit, right?

22 MS. WERTHEIMER: Excuse me?

23 JUDGE RIVERA: Well - - - well, if he knew,
24 he would have put it in the complaint?

25 MS. WERTHEIMER: Well, not necessarily, and

1 we don't even know in - - -

2 JUDGE RIVERA: So he might not be as

3 generous - - -

4 MS. WERTHEIMER: We don't even know in this

5 case - - - I - - - I believe that, you know, the

6 defense counsel here could have been particularly

7 vague and - - -

8 JUDGE STEIN: Well, wouldn't you be

9 arguing, too, that it wasn't a good faith basis, so -

10 - - so counsel for the plaintiff told you that this

11 is it? I mean it's not in a pleading it's a proffer.

12 MS. WERTHEIMER: Not if - - -

13 JUDGE STEIN: How - - - how would that - -

14 -

15 MS. WERTHEIMER: I don't think so. We

16 would - - - if it was based on the counsel, these are

17 the allegations underlying federal false arrest

18 allegations in a - - - in a lawsuit. But certainly,

19 also it goes to the exercise - - -

20 JUDGE RIVERA: I don't want to stay on that

21 argument. Look, I - - - I'm an attorney; I represent

22 someone who claims that an officer committed a bad

23 act that violated my civil rights. The attorney does

24 research, decides yes, there's a callable claim,

25 files it, sets up the allegations to survive the

1 motion to dismiss or not. Why isn't that enough?
2 I've set out in this thing that this group or this
3 individual did not follow the - - - the duties of an
4 officer.

5 MS. WERTHEIMER: So we submit - - - we
6 submit that the key point is whether there's a
7 showing of specific factual wrongdoing by this
8 particular officer. And just to say were you
9 involved in a false arrest is not necessarily
10 relevant of credibility.

11 JUDGE GARCIA: But that's not what the
12 judge ruled. I mean that would be an interesting
13 ruling, but the court ruled, I - - - "I know you say
14 as part of your defense, I suppose, that he was
15 falsely arrested. But how is the relevance of
16 another case claiming false arrest after against this
17 police officer a viable question, really? Nothing
18 has been proven that he indeed falsely arrested
19 someone." That seems like the wrong standard for
20 evaluating whether or not you can ask the question.

21 MS. WERTHEIMER: Well, I don't - - - number
22 one, I don't think the nothing has been proven is the
23 sole basis of - - - that was one of the things that
24 the court said. The court is thinking, you know - -
25 - in response. I think the first part is that how it

1 is it - - -

2 JUDGE GARCIA: The courts were bound by the
3 proffer. Aren't we bound by the ruling?

4 MS. WERTHEIMER: Well, the - - - the
5 proffer is - - - is how - - - yeah, and the ruling
6 was how is it relevant. And it's not relevant unless
7 you show that there's something that indicates that
8 this - - - that the conduct that this particular
9 officer committed in this situation tends to show he
10 was untrustworthy. What if he was just standing
11 there? This is - - -

12 JUDGE RIVERA: So - - - so, counsel, let's
13 say we don't agree with your interpretation of this
14 record and Judge Garcia wins the day in his
15 interpretation of the record. Is it enough then?
16 Did the judge make an error? If that's - - - if
17 that's the correct interpretation, that the judge
18 based this on - - -

19 MS. WERTHEIMER: No, because of the - - -

20 JUDGE RIVERA: - - - mere allegations and a
21 civil rights lawsuit is not enough?

22 MS. WERTHEIMER: No. The judge - - - the
23 judge went further and exercised the discretion. The
24 - - - the colloquy continued after the judge made the
25 comment how is it relevant, and the - - - the

1 prosecutor specifically invoked the exercise of
2 discretion, specifically mentioned that there would
3 be prejudice from this line of questioning. And I
4 think that's something that we're a little bit
5 ignoring is that there is some aura of prejudice
6 trying to be - - - there's a potential for confusing
7 the issues and this whole idea of police conduct,
8 misconduct, being a - - - a hot topic nowadays,
9 trying to inject that specter into a lawsuit. That -
10 - -

11 JUDGE RIVERA: Is that the prejudice that
12 you're referring to?

13 MS. WERTHEIMER: Well, that's part of the
14 prejudice, and I think that's part of what the courts
15 are - - -

16 JUDGE PIGOTT: You're saying because
17 there's allegations among police officers that they
18 commit bad acts that we should not be allowed to ask
19 about bad acts?

20 MS. WERTHEIMER: No, I'm saying - - - I'm
21 saying not never. I'm saying that that's something
22 that should be taken into account when you have
23 minimal probative value, and here there was minimal
24 probative value, that you didn't even show - - -

25 JUDGE PIGOTT: You - - - you say that but -

1 - - but the judge didn't say that. He said it's
2 irrelevant.

3 MS. WERTHEIMER: No, the - - -

4 JUDGE PIGOTT: It could be - - - it could
5 be probative as heck - - -

6 MS. WERTHEIMER: The judge in the end - - -
7 the judge in the - - -

8 JUDGE PIGOTT: I was almost done. But
9 that's okay. Go ahead.

10 MS. WERTHEIMER: I'm sorry.

11 JUDGE PIGOTT: That's all right.

12 MS. WERTHEIMER: The judge in the end said
13 that she was basing her ruling based on everything
14 that has been stated. Everything that has been
15 stated included the prosecutor specifically referring
16 to discretion, specifically referring to prejudice,
17 and specifically referring to the fact that the
18 allegations were vague and didn't allege wrongdoing
19 by this particular - - -

20 JUDGE GARCIA: It was a valiant effort, I
21 think, by the prosecutor. But I take that statement
22 as I am not going to allow it based on what has
23 already been stated to mean what I have already
24 stated. Which is this is not relevant.

25 MS. WERTHEIMER: Well, I submit - - - I

1 would disagree that it should read - - - I - - - I
2 think if that's what the judge meant she would have
3 just said based on what I have already stated.

4 JUDGE PIGOTT: Well, she said, "I mean you
5 have a good faith basis but it still seems to be
6 irrelevant."

7 MS. WERTHEIMER: But she said that before
8 she said I'm ruling based on what already been
9 stated. That was - - - that was way before. Then
10 the judge said how is it relevant and there was a
11 whole other colloquy. In any event, as certainly any
12 error would be harmless, as - - - it gets back to if
13 there was an - - - and again, this is an exercise of
14 discretion. I don't think you could really under
15 discount the - - - the prejudice here when there's no
16 showing of specific misconduct by the police officer.

17 JUDGE RIVERA: Can you just, and your light
18 has gone off, but just in a couple of sentences
19 address the photo array?

20 MS. WERTHEIMER: The photo array? The
21 photo array, it was a mixed question of law and fact.
22 The - - - the - - - if you look at the photo array,
23 as the judge said below, and as the Appellate
24 Division affirmed, the eye condition was not all that
25 noticeable. If you look at the picture, it - - - it

1 almost looks like all that's happening is that this
2 defendant is looking off to the side, not necessarily
3 that he has an eye condition. So, certainly, in
4 terms of the standard of whether this called for the
5 sugg - - - was suggestive and - - - and attracted
6 attention to this individual, we would submit not.
7 We submit also, you know, this is - - - there
8 certainly - - - it was appropriate to have a hearing,
9 but this was not just a civilian witness. This was a
10 - - - a trained police officer who - - - and who
11 looked at it carefully, who looked at it for a
12 minute, and certainly, was careful with respect to
13 that. I don't know if you want me to say anything
14 about the sentence.

15 JUDGE ABDUS-SALAAM: Could you just a
16 couple of words about that?

17 MS. WERTHEIMER: Okay. With respect to the
18 sentence, the key point we - - - we submit is that
19 the conduct that constituted the prior crime was and
20 continued to be a violent felony at all times. It
21 used to - - -

22 JUDGE STEIN: What about notice? Is - - -
23 is a person contemplating a criminal act supposed to
24 go to the Penal Law and look at all the different
25 crimes that - - - that the acts might constitute or -

1 - -

2 MS. WERTHEIMER: Well, I - - - I don't know
3 that a person contemplating an act is going to go and
4 - - - and think in terms of the particular section
5 number as opposed to the conduct. The conduct was
6 the same. The conduct is possessing a loaded firearm
7 outside the home or place of business.

8 JUDGE STEIN: But how would a defendant
9 know that that conduct was - - -

10 MS. WERTHEIMER: Because if - - - if you
11 look and you - - - and you look and you see
12 possession of a - - - that - - - that is now CPW 2,
13 and that is listed as a violent felony. And in
14 Morse, this court said that, "Fair notice is provided
15 so long as the elements of the crime when committed
16 were the same as the elements of an offense defined
17 as a violent felony at the time the enhanced sentence
18 is imposed." So this continued to be a violent
19 felony, possession of a loaded firearm outside the
20 home or place of business was always a - - - it was
21 always a violent felony. In addition, the language
22 of the statute, the plain statutory language, says it
23 was a violent felony. This defendant had notice at
24 the time that he was convicted. That's - - - when he
25 was convicted, it was a violent felony. So that also

1 gave him notice that he was subjected to enhanced
2 sentencing on the basis that that was a violent
3 felony.

4 CHIEF JUDGE DIFIORE: Thank you, counsel.

5 MS. WERTHEIMER: We ask that the judgment
6 be affirmed. Thank you.

7 CHIEF JUDGE DIFIORE: Does the use of the
8 word was a violent felony, was, affect your argument?

9 MR. ZENO: It's relevant to the argument,
10 Your Honor. I would point to different precise
11 language. 70.70(1)(b) (sic) says, "Violent felony
12 shall have the same meaning as that term is defined
13 in" - - - as that term is defined, is defined in
14 Section 70.02(1). And then you turn to 70.02(1), and
15 you do not find this violent felony listed there.
16 The way the legislature set up the violent felony
17 offender sentencing statute is they provided a list
18 of B violent felonies, C violent felonies, D violent
19 felonies, and 265.02(4) is not listed there.

20 JUDGE STEIN: You - - - you wouldn't argue
21 that the legislature didn't intend for this to be a
22 felony?

23 MR. ZENO: I think it was - - - as I - - -
24 as we say in our brief it was a drafting error.
25 There's no question it was a drafting error. That

1 when they made the change to the law and elevated
2 this crime, they didn't realize what they were doing,
3 that they were taking this crime off this list. But
4 they did take this crime off the list, and the
5 defendant would not have fair notice.

6 JUDGE STEIN: But they didn't take the
7 underlying acts as a crime off the list.

8 MR. ZENO: The - - - the definition - - -
9 the section number and the name of the crime was
10 taken off the list. It's no longer part of the list.
11 If you were to go to the statute today, you would not
12 find this crime, 265.02(4), listed as a violent
13 felony.

14 JUDGE STEIN: How does Morse affect the
15 analysis?

16 MR. ZENO: I'm sorry?

17 JUDGE STEIN: Morse, how does Morse affect
18 the analysis?

19 MR. ZENO: Well, Morse was - - - Morse used
20 different language. It - - - it said - - - it had
21 backward looking language. It talked in terms of
22 what was a felony, a second - - - and it was a second
23 felony offender statute. It's a different language
24 than this crime, and this crime says - - - you know,
25 this statute, 70.70, again, I keep going back to

1 this, 70.70(1)(b) says, "Violent felony shall have
2 the same meaning as that term is defined" in 70.02.
3 You go to 70.02, and it's not there. So - - - and
4 just if I could just have one more moment - - -

5 CHIEF JUDGE DIFIORE: Please.

6 MR. ZENO: - - - to - - - to address the
7 cross-examination point. I think that this court has
8 never required before if a defendant wants to ask a
9 witness, an adverse witness, about prior bad acts, a
10 proffer to prove relevance before asking the
11 question. And that's what the prosecutor is asking
12 for here, that the defendant - - - that the defendant
13 has to prove relevance before they can even ask the
14 question, that the defendant has to prove that the
15 officer was involved in the underlying conduct in a
16 specific identifiable way before you can even ask the
17 officer about - - -

18 JUDGE GARCIA: Counsel - - -

19 MR. ZENO: - - - about it.

20 JUDGE GARCIA: And I think this case is - -
21 - is somewhat different, but wouldn't you agree you
22 have to do something more than proffer there is a
23 lawsuit and this person is named, or there is a
24 lawsuit and it was settled for a million dollars? I
25 mean does that get you the right to ask anything you

1 want about the underlying lawsuit?

2 MR. ZENO: If you ask a question that - - -
3 if you ask a question about the underlying conduct
4 and the prosecutor objects saying what's your good
5 faith basis for asking that question, then you may
6 need to - - - to provide a more specific answer. I
7 have a lawsuit here. It says that Officer Rivera did
8 these acts.

9 JUDGE GARCIA: So what if you just went in
10 and you're cross-examining your witness and you say
11 did you arrest so-and-so? There's an objection.
12 Wouldn't - - - didn't this come up in a lot of these
13 cases because the first question out of the box is
14 are you being sued in - - - in a civil rights lawsuit
15 or, you know, didn't - - - you know, that's the
16 question that sparks the objection. And isn't that
17 an objectionable question?

18 MR. ZENO: Which question, were you sued or
19 - - -

20 JUDGE GARCIA: Yeah - - -

21 MR. ZENO: - - - did you arrest so-and-so?

22 JUDGE GARCIA: - - - is there a civil
23 rights lawsuit pending against you, or were you sued,
24 or did this case get dismissed. I mean aren't those
25 the questions that spark this? So if you ask the

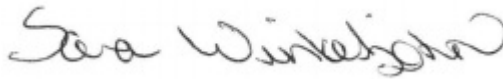
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MR. ZENO: Thank you.

(Court is adjourned)

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

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