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COURT OF APPEALS

STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

No. 153

MICHAEL J. SOLOMON,

Appellant.

20 Eagle Street
Albany, New York 12207
September 4, 2012

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE CARMEN BEAUCHAMP CIPARICK
ASSOCIATE JUDGE VICTORIA A. GRAFFEO
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE ROBERT S. SMITH
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE THEODORE T. JONES

Appearances:

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Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: People v. Solomon.
2 Counsel, wait a second.

3 MR. MAHONEY: Of course, Judge.

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

6 MR. MAHONEY: One minute, if you please,
7 Judge.

8 CHIEF JUDGE LIPPMAN: How much?

9 MR. MAHONEY: One minute.

10 CHIEF JUDGE LIPPMAN: One minute, sure. Go
11 ahead.

12 MR. MAHONEY: When People versus - - - Mark
13 Mahoney for appellant. May it please the Court.
14 When Gomberg was decided in 1975, everybody
15 understood that the court was setting up a
16 prophylactic rule for judges to trap for these
17 attorney conflict of interest cases during trials.
18 And Gomberg not only pointed out that the concern was
19 with actual conflicts of interest, and at that time
20 was two contemporaneously conflicting interests by
21 the defense attorney - - -

22 CHIEF JUDGE LIPPMAN: Is this actual or
23 possible?

24 MR. MAHONEY: This is actual, Judge. This
25 is - - -

1 CHIEF JUDGE LIPPMAN: Why is it actual
2 versus possible?

3 MR. MAHONEY: Because this is a witness for
4 the People in this trial, regarding an issue that is
5 central to the prosecution case and the defense case.

6 JUDGE CIPARICK: So there should be a
7 presumption of prejudice here?

8 MR. MAHONEY: Yes, Judge, there has to be,
9 I think. Because first of all, it's certainly
10 related to the conduct of the defense. This had to
11 do with a statement made by the accused under
12 interrogation - - -

13 CHIEF JUDGE LIPPMAN: Yes. But the
14 representation was something on a case that totally
15 has nothing to do with anything, right?

16 MR. MAHONEY: Well, we don't know. There
17 was no inquiry as to what the - - - maybe it was a -
18 - -

19 JUDGE CIPARICK: If it operates - - -

20 MR. MAHONEY: - - - representation on a
21 civil rights violation by that police officer.

22 JUDGE CIPARICK: If it operates on the
23 defense, isn't that a mixed question?

24 MR. MAHONEY: Well, if that - - - first of
25 all, if that was the issue, I think that there's a -

1 - - I don't agree that it's a mixed question because
2 I think if you see some operation on the defense,
3 then I think that's enough. I don't think it is a
4 question of fact.

5 JUDGE SMITH: What is the question of
6 operation? Is it whether the lawyer did an honest
7 job despite his or her conflict?

8 MR. MAHONEY: Well, I think - - - first of
9 all, I think the question of operation does not come
10 up in this case. Because in this case, where there's
11 been an active conflict of interest and it was not
12 inquired into by the judge in a meaningful way, then
13 as Gomberg suggested, as Macerola suggested, as
14 McDonald indicated, that therefore they're not going
15 to make - - - we're not going to make nice
16 distinctions between the extent to which there's been
17 prejudice.

18 JUDGE SMITH: Can you say - - - I have
19 great trouble reading the cases and making the
20 terminology consistent.

21 MR. MAHONEY: Yes, I agree, Judge.

22 JUDGE SMITH: But you say, first you decide
23 whether there's an actual or a - - - whether there's
24 an actual conflict or only a potential conflict, and
25 if it's an actual conflict, that's the end of the

1 ballgame; you don't worry about operation.

2 MR. MAHONEY: Well, actually, for example,
3 in Recupero, which had done some - - - that decision
4 had confusedly used these different terms - - - one
5 is, does the conflict bear substantial relation to
6 the conduct of the defense, which is a future-looking
7 - - -

8 JUDGE SMITH: And that's not the same
9 question as did it operate upon the defense?

10 MR. MAHONEY: Exactly. Exactly. Which is
11 after - - - it was after - - -

12 JUDGE SMITH: Exactly yes or exactly no?
13 It is the same question or it isn't?

14 MR. MAHONEY: No, it's a different
15 question. And so you see whether it operates on the
16 defense comes up in cases like Alicia (ph.), which is
17 a 440 case and the cases cited by the Appellate
18 Division. There are mostly these - - - that standard
19 comes up in cases which turned out to have been 440
20 cases: Alicia, Ortiz, Abar, by this court, where
21 you're looking backward. The conflict was not
22 brought to the attention of the trial judge. There
23 wasn't that initial inquiry prior to the trial.

24 JUDGE CIPARICK: Well, here the judge was
25 aware of it and just did not perform a sufficient

1 inquiry.

2 MR. MAHONEY: He brushed it to the side,
3 basically, and said we should revisit this at the
4 time of trial and - - -

5 JUDGE SMITH: Aren't there - - -

6 MR. MAHONEY: - - - of course, nobody did.

7 JUDGE SMITH: - - - aren't there some cases
8 - - - I grant you that there are cases that both
9 sides can cite. Aren't there some cases that suggest
10 that the rather brief inquiry that this judge made
11 was adequate? Like Lloyd, for example, wasn't it
12 much the same thing?

13 MR. MAHONEY: It beats me, Judge. I don't
14 think so. I don't think that - - - on this, where
15 you have - - - and what was the inquiry? The inquiry
16 was adopting what defense counsel said. The attorney
17 - - -

18 JUDGE SMITH: What about People against
19 Lloyd? Wasn't it almost exactly the same inquiry and
20 we said it's fine?

21 MR. MAHONEY: I don't know, Judge. I know
22 that in this case - - -

23 JUDGE SMITH: I mean, I grant you, there
24 are plenty of cases where we said there's got to be
25 more searching.

1 MR. MAHONEY: Yes, well, and here, you
2 know, there was nothing to determine - - - the judge
3 didn't do anything to determine the defendant had any
4 idea what his lawyer just said. When a lawyer says,
5 "Michael respects the nature of my representation of
6 Detective Kuebler in the unrelated matter and my
7 client has agreed to waive," not did waive, but "has
8 agreed to waive," which is prospective, "the
9 conflict," the judge says, "Is that correct, Mr.
10 Solomon?" And he says, yes.

11 JUDGE PIGOTT: If this was a situation
12 where the defense lawyer was representing the officer
13 in a house closing, and that inquiry had been made,
14 then an argument would have been made, and presumably
15 the conflict, going back to whether it operated on
16 the defense, would be no. But if at the same time
17 you raised civil - - - if this officer has a series
18 of civil rights complaints against him or even one
19 that arises out of his conduct as an officer, then
20 that would be something that should be brought out in
21 the suppression or could be, conceivably, and that
22 would then operate on the defense, and in your view,
23 would require that the defendant gets a new lawyer?

24 MR. MAHONEY: Sure. The defense attorney's
25 job in this case was to prove that that police

1 officer participated in violating her client's
2 rights. He's a police officer. He doesn't want to
3 that finding.

4 JUDGE JONES: Are you looking for a
5 decision confined to just this case, or are you
6 proposing some bright line rule here?

7 MR. MAHONEY: Well, I think it's already
8 been decided, I think in the cases in - - - that - -
9 - first of all, Gomberg was extended to concurrent
10 representation of a witness and a defendant at a
11 trial. We've got Wendell, Madison, Lombardo, and
12 McDonald. All those cases has had that kind of
13 situation.

14 CHIEF JUDGE LIPPMAN: Is it a - - -

15 MR. MAHONEY: It is a bright line. It is a
16 bright line.

17 CHIEF JUDGE LIPPMAN: - - - do you think
18 this is a slam dunk for actual conflict, or is this
19 case kind of in the middle of some of these other
20 cases?

21 MR. MAHONEY: I don't think it's nearly in
22 the middle, Judge, because again, the only defense in
23 this case was that this was a false confession - - -
24 a confession or false statement.

25 JUDGE SMITH: You're saying it's a - - -

1 the bright line rule you're asking for, if I
2 understand it, is a lawyer, without an adequate
3 Gomberg inquiry, the lawyer can never be permitted to
4 cross-examine her own client.

5 MR. MAHONEY: Where there is - - - cross-
6 examine her own client?

7 JUDGE SMITH: Yes. In other words, that
8 is, she can't - - - if she's - - -

9 CHIEF JUDGE LIPPMAN: In another case.

10 JUDGE SMITH: - - -if she's the lawyer for
11 a witness - - - for a prosecution witness - - -

12 MR. MAHONEY: Oh, I see, I see. Yes. No.

13 JUDGE SMITH: You can't have that?

14 MR. MAHONEY: I think where there is an
15 actual conflict of interest - - - or the cases also
16 say significant possibility of actual conflict of
17 interest.

18 JUDGE SMITH: That line doesn't sound all
19 that bright to me.

20 MR. MAHONEY: I know, yes.

21 JUDGE SMITH: Figuring - - -

22 MR. MAHONEY: But I would say, certainly
23 this case is an actual conflict of interest. And
24 absent the adequate inquiry - - -

25 JUDGE CIPARICK: Here you would apply - - -

1 MR. MAHONEY: - - - there must be a
2 retrial.

3 JUDGE CIPARICK: - - - so you would apply a
4 per se reversal rule here?

5 MR. MAHONEY: Absolutely. And I think this
6 court has done - - -

7 CHIEF JUDGE LIPPMAN: We're not bound - - -

8 MR. MAHONEY: - - - so in other cases.

9 CHIEF JUDGE LIPPMAN: - - - we're not bound
10 by what the Appellate Division characterizes this as?

11 MR. MAHONEY: Well, I think I - - -

12 CHIEF JUDGE LIPPMAN: That it's - - -

13 MR. MAHONEY: - - - the People - - - the
14 Appellate Division apparently recognizes an actual
15 conflict of interest, or close to it. The People
16 don't challenge that.

17 CHIEF JUDGE LIPPMAN: Well, close to it is
18 different than actual.

19 MR. MAHONEY: Yes, I suppose so. But they
20 really didn't go into it either. And I think that -
21 - - and I'm sorry, Judge, I've forgotten the balance
22 of your question.

23 CHIEF JUDGE LIPPMAN: Well, I'm just
24 saying, we're not bound by what they do. Assuming it
25 was possible, can we say it's actual?

1 MR. MAHONEY: I think of course you can,
2 Judge, because I think - - -

3 JUDGE GRAFFEO: Do we have to overrule the
4 statement in Harris that says that it's a mixed
5 question of law and fact?

6 MR. MAHONEY: Well, I don't think it's a -
7 - - I think it's - - - I don't think it's a mixed
8 question here, Judge. I think it's a question of law
9 as to whether or not an attorney who is representing
10 - - -

11 JUDGE GRAFFEO: Well, that's why I'm asking
12 you. Do you disagree with that analysis in Harris -
13 - -

14 MR. MAHONEY: Yeah, I wouldn't say that
15 this is a mixed question.

16 JUDGE GRAFFEO: - - - that said that
17 whether there's a conflict of interest that operates
18 on the defense is a mixed question? You disagree
19 with that statement?

20 MR. MAHONEY: I didn't get the tail of it,
21 the operating on the defense. The Appellate Division
22 made a finding that it didn't. But I think we
23 shouldn't even be there to begin with.

24 JUDGE SMITH: You say we don't reach the
25 question of operation.

1 MR. MAHONEY: Right.

2 JUDGE JONES: What about - - -

3 MR. MAHONEY: But I do think on that
4 question, I think that absolutely this court should
5 rule in favor of the appellant, if you decide to
6 reach that question. And I think it's evident, and
7 that's a major part of our brief.

8 JUDGE JONES: What about the case of a
9 retained counsel where the defendant is absolutely
10 enamored with the lawyer? Same result?

11 MR. MAHONEY: Well, I think no, if there's
12 still no adequate inquiry. Now, it might be that the
13 judge later on, after a full inquiry says that the
14 defense attorney doesn't want - - - the defendant
15 doesn't want to lose that attorney. I can understand
16 that. But - - - and it might be a - - - I don't know
17 what the record would look like in that case, where -
18 - -

19 JUDGE SMITH: Suppose you have a case where
20 there's no Gomberg inquiry, and it later turns out
21 that the lawyer did represent a prosecution witness,
22 but the witness was the telephone company employee
23 who testified to six phone numbers and was not cross-
24 examined. Does that require reversal?

25 MR. MAHONEY: No, for two reasons. Number

1 one, the judge didn't have a chance to look at
2 inquiry into the conflict before the trial.

3 JUDGE SMITH: Didn't have a chance.

4 MR. MAHONEY: This is all about the onus on
5 the trial judge as - - -

6 JUDGE SMITH: All right. So suppose the
7 judge had become aware of it and not made an adequate
8 inquiry? I'm changing my hypothetical. Does that
9 require reversal?

10 MR. MAHONEY: I think that comes back to
11 the question that came up in McDonald, does it bear
12 substantial relationship to the conduct of the
13 defense. If it's a minor witness that has no
14 significance for the prosecution - - -

15 JUDGE SMITH: How - - - okay. So how
16 important was this police officer?

17 MR. MAHONEY: This is central to the case.
18 Even though the admission or confession in this case
19 was not really congruent with the charges, even
20 though it was qualified that he may have been so
21 drunk he didn't remember, and had sex with his
22 daughter once. And it still, it was an entirely
23 damning event.

24 JUDGE SMITH: I mean, I guess what - - -
25 I'm having trouble imagining a highly sophisticated

1 elicit statements in agreement with the police
2 without regard to whether they were true or not, or
3 that these were kinds of techniques that have been
4 used in cases where there have been false confessions
5 found in cases before. Twenty-five percent of the
6 DNA exonerations were false confession cases.

7 And so all the features that you read about
8 in all the literature about false confessions were
9 evident in this case. And in fact, they only came
10 out of the defendant primarily on cross-examination,
11 because his lawyer basically ran away from that issue
12 at the Huntley hearing, at the trial, and when the
13 defendant - - -

14 CHIEF JUDGE LIPPMAN: Because of his
15 conflict, in your view?

16 MR. MAHONEY: There's no other - - - the
17 People don't point to any other possible explanation
18 for it. The People don't point to any possible - - -

19 JUDGE SMITH: Well, but there's never been
20 a trial where another lawyer looking at the cross-
21 examination afterwards can't think of a better one to
22 do.

23 MR. MAHONEY: Well, but they generally can
24 agree on what the topics have to be.

25 JUDGE GRAFFEO: See, that sounds like - - -

1 that sounds like you're asking us to look at, could
2 it have operated on the defen - - - did it operate on
3 the defense. And I thought you just said we don't
4 get there. So I'm trying to figure out the steps or
5 the sequence of what you want our analysis to take.

6 MR. MAHONEY: I think that the trial court,
7 confronted with this question where they are, and
8 that's what would trigger all these prophylactic
9 rules, if the conflict is one which bears a subs - -
10 - this is from McDonald - - - a substantial relation
11 to the conduct of the defense, which is different
12 than looking backward and saying whether it operated
13 on the defense.

14 If that's the case, then it is the kind of
15 conflict which, without that kind of inquiry, there
16 must be a new trial. Because as Gomberg said, and so
17 many other cases, that we won't draw nice
18 distinctions between about what kind of prejudice may
19 have resulted. But where it comes - - -

20 JUDGE SMITH: I'm trying to figure out the
21 variant where the lawyer never discloses the
22 conflict.

23 MR. MAHONEY: Yes?

24 JUDGE SMITH: Does that render the lawyer
25 ineffective, as a matter of law?

1 MR. MAHONEY: Well, there have been cases
2 where the lawyer hasn't disclosed things, like they
3 knew favorable information, and so on. But I think
4 it changes what - - - the per se rule that we're
5 talking about, because - - -

6 JUDGE SMITH: Well, I mean, you're - - - it
7 sounds to me as though you're saying the prosecution
8 would have a better case if the lawyer had kept
9 completely silent. Somehow that's counterintuitive
10 to me.

11 MR. MAHONEY: Well, in this case, both the
12 prosecution and the lawyer should have known about
13 the conflict, and they can bring it up, too. Gomberg
14 was about the prosecution coming forward also. But,
15 no. If it doesn't come up, Gomberg and the
16 subsequent cases are about the role of the trial
17 judge and a prophylactic rule where we trap, for
18 these kinds of conflict of interest problems, up
19 front, at the beginning of the trial. If the judge
20 wasn't aware of it and didn't have the chance to
21 inquire then - - -

22 JUDGE SMITH: Then it's the lawyer's fault.

23 MR. MAHONEY: It may be. But then you'd
24 have - - -

25 JUDGE SMITH: And it seems to me, if you've

1 got a per se rule for the judge, you have to have one
2 for the lawyer too, don't you?

3 MR. MAHONEY: Well, the problem is, the
4 reason why it's a per se rule, is because it's a
5 prophylactic rule. I mean, essentially the point
6 you're making is sort of like Judge Scalia's argument
7 in *Mickens v. Taylor*, which is the Supreme Court.
8 And I'm actually not giving you a compliment in that
9 regard. But - - -

10 JUDGE SMITH: I'll take it as one.

11 MR. MAHONEY: But that say well, what is it
12 - - - why is it any worse of a conflict of interest
13 if the judge knows about it beforehand or knows about
14 it after the trial. But that's why I started out by
15 saying Gomberg was a prophylactic rule to try and
16 trap these problems at the beginning. So what kind
17 of cases - - - so we're only looking at the cases
18 where the judge does know about it, and it's brought
19 to the judge's attention, and that's where the
20 defendant clearly needs help.

21 The lawyer in this case clearly had not
22 done her work. The defendant, how do we know he has
23 any kind of clue of what the - - -

24 JUDGE PIGOTT: Well, that's the law
25 question, right, whether or not there was a hearing

1 here under Gomberg. And as Judge Graffeo has pointed
2 out, if we go beyond that, then we're getting into
3 mixed questions, because you've got to get to that
4 threshold of whether or not there should have been a
5 hearing here, and you say there was.

6 MR. MAHONEY: If you go into the question
7 of whether there was - - - it operated on the
8 defense, I think at some point there has to be - - -
9 where the Appellate Division did not evaluate the
10 facts and so on, I think the court - - - I think it's
11 - - - on this record, where there's no other possible
12 explanation for the way the attorney - - - just to
13 take the best example, I think, as the defendant
14 brought out, finally on cross-examination, all the
15 things that really relate to these psychological
16 interrogation techniques.

17 So Thursday night, the defense attorney
18 said well, I have to redirect my client the next day.
19 The defense attorney would be heavily motivated to
20 get that trial off until Monday. It's the summer
21 time. Don't want to go to the jury on a Friday
22 night. Comes back the next day, no redirect of the
23 client.

24 This was like a shocking and complete
25 abandonment of the client on the only possible

1 defense he has in the case.

2 JUDGE SMITH: Well, no. There's another
3 possibility. There's a possibility he talked to his
4 client over the weekend, decided the client sounded
5 terrible. I mean, isn't that a reasonable surmise?

6 MR. MAHONEY: The client had testified.

7 JUDGE SMITH: Yeah.

8 MR. MAHONEY: And brought - - - and brought
9 out all these elements of a false confession - - -
10 that would point to a false confession. And the
11 prosecution tried to ridicule some of these things.
12 And they got a chance.

13 JUDGE SMITH: Well, there's also, you
14 even - - - no matter what you do to the confession,
15 you've got the problem with the taped phone
16 conversation with the victim.

17 MR. MAHONEY: Well, you call it a problem,
18 Judge. I look at it - - - I think there is a problem
19 with its admission, and that's a whole separate point
20 of the brief. But the - - - and neither the People
21 nor the district attorney at the time, was able to
22 point to anything in that that actually was an
23 admission by the accused of any material fact. It
24 was really more - - -

25 JUDGE SMITH: You're going to ruin my life

1 for something you agreed to and had no problem with,
2 doesn't sound like an admission to you?

3 MR. MAHONEY: Well, the defendant explained
4 that he thought that was about her moving out and
5 living with his wife, with whom there was a bitter
6 divorce that then commenced. So I think that most of
7 that, I think you would have to grant me, of that
8 recorded conversation was a recording of her
9 accusations at the insistence of the police, and for
10 the most part, his silence in response to that, or
11 nonresponsive in response to that.

12 CHIEF JUDGE LIPPMAN: Okay, counsel.
13 Thanks, counsel.

14 MR. MAHONEY: Thank you very much, Judge.

15 CHIEF JUDGE LIPPMAN: Yes. Counsel?

16 MR. BRANDT: Good afternoon, Your Honors.
17 May it please the court, Tom Brandt on behalf of the
18 District Attorney's Office.

19 CHIEF JUDGE LIPPMAN: Counsel, how could
20 this not be an actual conflict?

21 MR. BRANDT: Your Honor, this is not a
22 conflict at all. What you have here - - -

23 CHIEF JUDGE LIPPMAN: It's not a conflict
24 at all? It doesn't raise any questions?

25 MR. BRANDT: There's a potential for a

1 conflict, Your Honor.

2 CHIEF JUDGE LIPPMAN: Okay.

3 MR. BRANDT: But in the situation - - -

4 CHIEF JUDGE LIPPMAN: So why is it
5 potential rather than actual?

6 MR. BRANDT: In the situation you have
7 here, Your Honor, there were two detectives:
8 Detective Smith and Detective Kuebler. Detective
9 Smith was the lead detective. It was her case. She
10 interrogated the defendant alone. Detective Kuebler
11 was not in the room. Detective Kuebler is a
12 detective who the trial attorney represented on an
13 unrelated - - - not a civil rights violation involved
14 in this case - - - but an unrelated civil case.

15 JUDGE SMITH: All we know is that he said
16 it was unrelated. The record doesn't show it wasn't
17 a civil rights violation. You could imagine a civil
18 rights violation that some people think is related
19 and some people think is unrelated.

20 MR. BRANDT: We know it's unrelated, Your
21 Honor. That was the terminology that was used.

22 JUDGE SMITH: All we know is that he said
23 it's unrelated.

24 MR. BRANDT: Yes, Your Honor. And so you
25 have Detective Kuebler, he's outside of the

1 interrogation - - -

2 JUDGE PIGOTT: If he had a civil rights
3 claim going against him from a previous arrest, is
4 that related or unrelated?

5 MR. BRANDT: It would be unrelated to this
6 case, unless - - -

7 JUDGE PIGOTT: That's my point. And if you
8 want to get mysterious about this, we don't know
9 whether that's in fact the case or not. And we also
10 don't know - - - I know you explained that Smith
11 started and Kuebler finished. But that's what they
12 said. And we don't know when Schwendler showed up.
13 She says she showed up a time earlier than when - - -
14 that she was - - - my term - - - cooling her heels
15 out there while they were questioning him.

16 And I would have thought that that would
17 have been an issue to be pressed. Because if she was
18 there and was there as his lawyer, and the police
19 intentionally delayed so that Kuebler could finish
20 his examination, which according to his testimony, is
21 about the time that she arrived, I guess, those are,
22 it would seem to me, things that should be pursued.

23 And you're probably right. Maybe there was
24 nothing there. But we don't have the hearing to take
25 care of that.

1 MR. BRANDT: I'll answer your question,
2 Your Honor. But first I want to agree with your
3 point, we did not have a hearing. Many of the
4 arguments that have been made in the brief to this
5 court and to the court in Rochester are arguments
6 that have never been brought before a trial court
7 before, and are not in the record; they are in the
8 briefs.

9 JUDGE PIGOTT: So what's the - - -

10 MR. BRANDT: They are not in the record on
11 - - -

12 JUDGE PIGOTT: - - - what's the remedy - -
13 - if we were to agree with Mr. Mahoney that there
14 should have been a hearing under Gomberg with respect
15 to this issue, and there wasn't, what's the remedy
16 then?

17 MR. BRANDT: Well, Your Honor, if you agree
18 that there should have been a hearing to delimit the
19 terms of the conflict, then there'd be a hearing,
20 Your Honor. And the court would then have the
21 opportunity to determine, again, the two-step
22 analysis that this court has consistently applied in
23 these cases.

24 JUDGE GRAFFEO: So we would - - -

25 MR. BRANDT: One, is there a conflict,

1 potential conflict or an actual - - -

2 CHIEF JUDGE LIPPMAN: But here we don't
3 have any of that. There's no inquiry.

4 JUDGE GRAFFEO: If we decide that this is a
5 Gomberg violation, what's the remedy that you see?

6 MR. BRANDT: First, the defendant has to
7 show that it operated on the defense, Your Honor.
8 The cases say that the defendant has to show - - -

9 CHIEF JUDGE LIPPMAN: But we don't know - -
10 -

11 JUDGE CIPARICK: We would - - -

12 CHIEF JUDGE LIPPMAN: - - - we don't know
13 whether it's an actual conflict, right, because
14 there's no inquiry.

15 JUDGE CIPARICK: We would have to send - -
16 -

17 MR. BRANDT: I agree with that.

18 JUDGE CIPARICK: - - - we would have to
19 send it back to the trial court to do that. Correct?
20 So it would be a reversal and a remittal back to the
21 trial court.

22 MR. BRANDT: As I look at it, Your Honor,
23 if there's no second prong, there's no need for this
24 court to refer back to lower courts.

25 JUDGE SMITH: Isn't the simultaneous

1 representation of clients with conflicting interests,
2 even in unrelated matters, isn't that always an
3 actual conflict?

4 MR. BRANDT: Your Honor, I think it's a
5 potential conflict. And I think the potential
6 conflict - - -

7 JUDGE SMITH: Suppose this lawyer had
8 represented not the officer, but the victim, the
9 daughter, in an unrelated matter, are you saying
10 that's only a potential conflict?

11 MR. BRANDT: Your Honor, I think that would
12 be an actual conflict in this case.

13 JUDGE SMITH: What's the difference?

14 MR. BRANDT: Your Honor, I think it's
15 the - - - in this case, Your Honor, it is the fact
16 that Kuebler's testimony is confirmatory, it is
17 cumulative. Smith's testimony is primary. She
18 investigated; she interrogated; she received his
19 confession without - - -

20 JUDGE SMITH: But whether - - -

21 MR. BRANDT: - - - Kuebler in the office.

22 JUDGE SMITH: Whether a conflict is
23 potential or actual can turn on whether testimony is
24 primary or secondary?

25 MR. BRANDT: Absolutely, Your Honor.

1 JUDGE SMITH: That doesn't sound right. I
2 mean - - -

3 MR. BRANDT: I think - - -

4 JUDGE SMITH: - - - I can see that it
5 matters how important the conflict is, but conflicts
6 are either - - - they're either real or they're not.

7 MR. BRANDT: Your Honor, but the - - - but
8 then you have the - - - how it operates on the
9 defense. And that's my point. You have to look at
10 how much - - -

11 CHIEF JUDGE LIPPMAN: But how do you reach
12 that if you don't have an inquiry and you don't know
13 whether this is, in your position, an actual
14 conflict? That's your position, right? We don't
15 know. There was no inquiry. So we then just go and
16 look to how it operates on the defense?

17 MR. BRANDT: Well, there was an inquiry,
18 Your Honor. It wasn't a major inquiry, but there was
19 an inquiry on the record between the court, defense
20 counsel and the prosecutor - - -

21 CHIEF JUDGE LIPPMAN: Are you conceding
22 that it was inadequate?

23 MR. BRANDT: No, Your Honor, I'm not.
24 Because as Your Honor points out, there have been
25 very brief inquiries that have been approved by this

1 court before. And in our points to the Fourth
2 Department and in our brief to this court, we
3 maintain that position that it was sufficient, Your
4 Honor.

5 JUDGE SMITH: Let me go back to the
6 question I asked you before. Suppose that all the
7 facts are the same, except that the client was not
8 the officer but the victim, and you say that's an
9 actual conflict. Are you saying that in that case we
10 would still have to consider whether it operated on
11 the representation?

12 MR. BRANDT: Your Honor, as I read the
13 cases, yes. You have to have both prongs.

14 JUDGE SMITH: So you're saying that you - -
15 - that the lawyer for the victim can stand up and
16 cross-examine the victim and if we - - - if the
17 Appellate Division or the Supreme Court in the
18 Appellate Division reading the record afterwards
19 says, well, it looks to me like the lawyer did and
20 honest job; that's a mixed question, the ballgame's
21 over, no harm done, right?

22 MR. BRANDT: Your Honor, I don't think it's
23 an honest job is the test. I think it's whether or
24 not it operated on the defense. In the hypothetical
25 - - -

1 JUDGE SMITH: Okay, we can pose exactly the
2 cross-examination he would have given if he hadn't -
3 - - if he hadn't been cross-examining his client or
4 her client.

5 MR. BRANDT: But in the hypothetical you've
6 given, Your Honor, it's hard to imagine a situation
7 where it would not have operated on the defense.

8 JUDGE SMITH: Well, is it really? People
9 do - - - people sometimes hate their clients. It's -
10 - - to me, it's more - - - it's just not a risk you
11 would take. We would assume conclusively that it's
12 got to affect the representation because of the
13 nature of the relationship. There are such cases,
14 aren't there?

15 MR. BRANDT: Yes, there are, Your Honor.
16 But, Your Honor, as I read People v. Abar, that's a
17 situation where there was a dissent. The dissent
18 said we don't need the second prong in this case.
19 All we need is the first prong. The court rejected
20 that argument and said no, you have to show that
21 there is an operation on the defense - - -

22 JUDGE SMITH: What about McDonald? Didn't
23 we say, as a matter of law, this relationship
24 requires reversal? We didn't inquire as to whether
25 the lawyer did a good job or a bad job.

1 MR. BRANDT: I agree with that, Your Honor.
2 And all I can say is Abar came after McDonald, and it
3 came after - - -

4 JUDGE SMITH: So you think McDonald is no
5 longer good law?

6 MR. BRANDT: As I read the cases, Your
7 Honor, I'm looking at Abar, and that's the latest
8 case where it specifically - - - because, Your Honor,
9 the reason I say it is because the court specifically
10 addressed the issue, because of the nature of the
11 dissent. The dissent said we don't need the second
12 prong. And the main opinion said yes, you do.

13 And if you remember, that was a case
14 where - - - I think it was a case where the district
15 attorney was a prosecutor and then was a defense
16 attorney. And it was sort of all, sort of, related
17 cases - - -

18 JUDGE SMITH: Is that the plea case
19 where - - -

20 MR. BRANDT: Yes, Your Honor. Yes, Your
21 Honor. So I think, as I read Abar, you've rejected
22 that argument specifically and explicitly. And
23 that's the case that I rely on to say that you have
24 to go to the second prong; you have to show that it
25 worked on the defense.

1 Here, the testimony was cumulative. And I
2 need to point out, Your Honor, that the defendant - -
3 - if we look - - - recognize that Smith's testimony -
4 - -

5 JUDGE SMITH: So you're saying, then that
6 no matter how important the witness is, if the
7 defense lawyer is cross-examining his own client or
8 her own client, then it is a mixed question of law or
9 fact whether the conflict affected the cross-
10 examination?

11 MR. BRANDT: Your Honor, I agree that it's
12 a mixed question of law or fact. But I also
13 understand that this court has a prerogative, and has
14 in other mixed questions of law and fact cases, say
15 that there is a minimum, and that this case doesn't
16 not meet the minimum.

17 And I suggest, Your Honor, that the
18 hypothetical you're suggesting would be a situation
19 where it would not meet the minimum. And the
20 court - - -

21 JUDGE JONES: Can you describe that
22 minimum? What's the minimum? In your - - - can you
23 describe that minimum?

24 MR. BRANDT: Your Honor, I don't know if I
25 can describe the minimum, but I know that Your

1 Honor's description of - - -

2 JUDGE JONES: You know it when you see it.

3 MR. BRANDT: - - - cross-examining your own
4 is not - - - I know it when I see it, Your Honor, and
5 that doesn't meet the minimum.

6 But my point is the court has the power to
7 say - - -

8 JUDGE PIGOTT: But doesn't something like -
9 - -

10 MR. BRANDT: - - - you can set a standard.

11 JUDGE PIGOTT: Mr. Brandt, I mean, wouldn't
12 you like to like to know how much Detective Kuebler
13 was paying Ms. Bergevin? I mean, maybe it's the
14 biggest fee ever of the year? I mean, wouldn't you
15 like to know whether it's a divorce, where he - - -
16 she can't bring out things because it'll affect his
17 case going forward; or like I suggested, you know,
18 it's a real estate contract with its closing next
19 Tuesday?

20 MR. BRANDT: It's frustrating, Your Honor,
21 because I do know. And there were off-the-record
22 discussions that are referred to in the record on
23 appeal. And so the judge knew; the parties knew.
24 And it's not put on the record. And so it is
25 frustrating, Your Honor, that it wasn't put on the

1 record.

2 And that's a problem that we have to deal
3 with. But that does not remove our argument that you
4 have to show that it operated on the defense - - -

5 JUDGE PIGOTT: Let's go into that just for
6 a second. Isn't that putting the cart before the
7 horse? Because you have to find out if there's a
8 conflict first, don't you, before you can find out
9 whether it operates on the defense?

10 MR. BRANDT: Well, Your Honor - - -

11 JUDGE PIGOTT: And can - - -

12 MR. BRANDT: - - - the cases don't
13 necessarily go down that way. When you have
14 potential - - - when the cases say there's a
15 potential conflict and then we look at - - -

16 JUDGE PIGOTT: Well, we're talking about
17 the right of the defendant here.

18 MR. BRANDT: Yes, Your Honor.

19 JUDGE PIGOTT: That's the person who's in
20 the - - - who's got the issue. And he's told by his
21 lawyer that this is it, and she says, I've talked to
22 him, it's no problem. And the judge says okay, fine,
23 we'll go forward. Well, no one asked the defendant
24 what did she tell you, and what - - - and where are
25 we on this thing so that we can make sure that

1 sometime in the future there isn't an appeal on this
2 issue.

3 MR. BRANDT: A better inquiry would have
4 been helpful, Your Honor. No question about that.
5 But again, under Abar, you come back to the fact that
6 you need an - - - it has to impact on the operation
7 of the defense. And I'm suggesting, Your Honor, that
8 there is no operation here, because of the cumulative
9 nature. There was no conflict between - - -

10 JUDGE PIGOTT: Well, what about what I
11 asked Mr. Mahoney about when Attorney Schwendler
12 showed up? Because there's a conflict there.
13 Schwendler says she showed up at like 8:05. They say
14 she didn't show up until 8:45 or something, as - - -
15 and when she showed up, they stopped.

16 But if that's true, and upon pressed, the
17 officer says well, I wasn't there, you know, I was
18 just told later that that's when she came, and she
19 actually came sooner, and therefore, all of his
20 testimony with respect to the purported confession
21 would have been stricken.

22 MR. BRANDT: Well, Your Honor, as I recall
23 the testimony, there was some confusion that Ms.
24 Schwendler had about the time she got there as well.
25 And, Your Honor, you have to remember that there is

1 no conflict between the defense counsel and Detective
2 White. There's no - - - or Smith. There's no
3 conflict there.

4 JUDGE PIGOTT: We don't know that. I mean,
5 maybe Kuebler and Smith had an issue. I mean, you
6 don't know what was going - - - what the issue that
7 Kuebler had that he needed a lawyer that was going
8 on, that may or may not have affected this.

9 MR. BRANDT: Well, I'm not sure that I
10 understand Your Honor's question.

11 JUDGE PIGOTT: Let's make something up.
12 Let's pretend that the other officer - - - not
13 Detective Smith, but somebody else, had a sexual
14 harassment claim against Kuebler, and she's defending
15 Kuebler. And that officer, who has a sexual
16 complaint is the interrogating officer here. That
17 would be a serious problem.

18 MR. BRANDT: Well, Your Honor, in that
19 situation, that goes exactly counter to what the
20 defendant's arguing. Defendant's arguing that
21 defense counsel here didn't cross-examine Smith
22 because she didn't want to show up Kuebler, who she
23 liked being hard-pressed on Smith - - -

24 JUDGE PIGOTT: Another example, is my
25 point. It's just another example of what we don't

1 know.

2 MR. BRANDT: I'll agree, what we don't
3 know, but - - -

4 JUDGE SMITH: While we're making things up,
5 you could - - - it's not impossible that the defense
6 lawyer might have tried to prove that Smith and
7 Kuebler conspired together to extort a false
8 confession. I had no indication of it in the record,
9 but you never know. And if you're Kuebler's lawyer,
10 you might want to take it easy on Smith.

11 MR. BRANDT: Judge, there's no evidence
12 that the detectives, either one of them, were lying
13 about what they said the defendant admitted to.
14 Rather this is a false confession - - -

15 JUDGE SMITH: No, there is no evidence.
16 But the problem is, theoretically, you don't know
17 what evidence there would have been if a
18 nonconflicted lawyer had tried the case.

19 MR. BRANDT: Defendant took the stand, Your
20 Honor. He did not say the police are lying when they
21 said that this is what I said. He had an explanation
22 for why he said what he said. I had to get home and
23 take care of some kids; not these two detectives are
24 lying about what I said. So it's not that type of
25 false confession case, where the police are lying,

1 Your Honor. It's the type of false confession case
2 where the interrogation techniques, which Your Honors
3 had made the point, the criticism of those techniques
4 rely on matters not in the record on appeal, only in
5 defendant's brief.

6 There's never been a hearing on that, Your
7 Honor, in front of a judge - - - trial judge, to make
8 that determination. And so it's - - -

9 CHIEF JUDGE LIPPMAN: Counselor you - - -

10 MR. BRANDT: - - - a situation where it
11 involves the techniques.

12 CHIEF JUDGE LIPPMAN: Counselor, you agree
13 that the attorney really didn't explore Kuebler's
14 part in the interrogation? He really asked him about
15 Smith. He really in no way appeared to go after
16 Kuebler.

17 MR. BRANDT: For the very reason that Smith
18 is the one who took the confession, Your Honor.

19 CHIEF JUDGE LIPPMAN: Yes, but he's also
20 the attorney for Kuebler in another case.

21 MR. BRANDT: I under - - -

22 CHIEF JUDGE LIPPMAN: Maybe that's the
23 reason.

24 MR. BRANDT: Yes, Your Honor. But Smith
25 took the confession. She received the confession

1 without Kuebler even being in the room. And there's
2 no conflict between the attorney and Smith.

3 JUDGE GRAFFEO: Couldn't the prosecutor in
4 this case have brought to the court's attention the
5 need for the Gomberg hearing so that we could have
6 determined if this was actual or potential?

7 MR. BRANDT: Well, Judge, I don't think
8 anyone was trying to hide the fact of the conflict.
9 Whether the court conducted a sufficient inquiry, you
10 know, as a prosecutor, you're always sort of leery
11 about telling the judge what to do and how to do it.
12 I agree that some more facts and explication would
13 have helped. Absolutely.

14 But I don't think you can criticize the
15 prosecutor. There was no - - - this was an on-the-
16 record inquiry, as limited as it was, and discussion.

17 JUDGE PIGOTT: No, you said that there was
18 off-the-record conversations that obviously the judge
19 was part of, I think, right?

20 MR. BRANDT: Yes.

21 JUDGE PIGOTT: That could have been put on
22 the record if - - -

23 MR. BRANDT: Yes, Your Honor. Again, and
24 that - - - unfortunately that happens in the mix,
25 when you get in a courtroom, and this is what the

1 judge says. And I agree that maybe it should have
2 been explicated, but we have what we have.

3 But again, Your Honor, there's no proof
4 that it operated on the defense - - -

5 CHIEF JUDGE LIPPMAN: Okay, counsel.

6 MR. BRANDT: - - - and that's necessary.

7 CHIEF JUDGE LIPPMAN: Thanks, counselor.

8 MR. BRANDT: Thank you, Your Honors.

9 CHIEF JUDGE LIPPMAN: Counselor?

10 MR. MAHONEY: Yes. First of all, I think
11 that, does it really matter whether Kuebler's matter
12 that he hired Bergevin for was related to this case
13 or not? It's that he's her client also, and he has
14 certainly no - - - he's not disinterested in whether
15 she establishes that he violated her other client's
16 rights.

17 So his conflict of interest - - - the
18 conflict of interest is established by the fact that
19 her obligation is to prove that he violated her other
20 client's rights. So it doesn't really matter whether
21 the other case was related to - - - related or not.
22 What is important is it was her client.

23 And Kuebler could be the most effective if
24 she was really going after the interrogation
25 techniques, because Kuebler had maybe the least stake

1 in it. He wasn't the main investigator. He's the
2 one who could be - - - he's the one who gave up the
3 fact that she lied about DNA evidence, which hadn't
4 even come up until that time of the trial.

5 JUDGE GRAFFEO: If we agree with you,
6 what's the remedy? Does it go back for a hearing, or
7 is there a dismissal? What are you asking for?

8 MR. MAHONEY: A personal injury trial.

9 JUDGE PIGOTT: Why can't - - -

10 MR. MAHONEY: And the reason why Abar is
11 irrelevant here, that was a 440 case that involved
12 sequential - - - a former DA now is a defense
13 attorney. It wasn't concurrent conflicting interests
14 by the attorney.

15 JUDGE PIGOTT: But why couldn't this be
16 treated in the nature of a 440 in the sense that you
17 could have the hearing and determine now whether or
18 not that was in fact - - - had an impact on the
19 trial, without vacating the conviction at this time?

20 MR. MAHONEY: Well, technically a 440
21 wouldn't lie, if it's a matter that could be reviewed
22 on appeal. So 440 itself really is collateral
23 attack, and this is something - - -

24 JUDGE PIGOTT: That's what I mean. Here
25 you are - - -

1 MR. MAHONEY: Yeah, here I am.

2 JUDGE PIGOTT: - - - so you could have it
3 as if it were.

4 MR. MAHONEY: Well, had the Appellate
5 Division analyzed it and give some reasons why these
6 failures of the defense attorney to go after these
7 cops to attack the - - - bring up the false
8 confession issues, which is the only hope this
9 defendant had, it's - - - he has no case. He
10 shouldn't be at trial if he can't undercut the
11 validity of that interrogation. That's the only
12 defense.

13 CHIEF JUDGE LIPPMAN: Okay. Thanks,
14 counsel. Thank you both. Appreciate it.

15 (Court is adjourned)

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

I, Penina Wolicki, certify that the foregoing transcript of proceedings in the Court of Appeals of People, etc. v. Michael J. Solomon, No. 153 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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