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COURT OF APPEALS

STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

No. 218

RAUL JOHNSON,

Appellant.

20 Eagle Street
Albany, New York 12207
November 17, 2014

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE ROBERT S. SMITH
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM

Appearances:

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Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: People v. Johnson,
2 218.

3 Counsel, would you like any rebuttal time?

4 MS. O'HARA WOODS: Yes, one minute, please,
5 Your Honor.

6 CHIEF JUDGE LIPPMAN: One minute, go ahead.
7 You're on.

8 MS. O'HARA WOODS: Thank you, Your Honor.
9 May it please the court, I'm Ellen O'Hara Woods from
10 the Office of the Public Defender, Rockland County,
11 for Mr. Johnson.

12 Your Honors, Raul Johnson was represented
13 by John Schwarz in this matter. He was represented
14 by John Schwarz at the critical times in this matter.
15 And as my cli - - - my adversary candidly concedes,
16 he was represented by John Schwarz at the time of the
17 discussion about a global disposition on the original
18 burglary charge and the stabbing, when Richard Moran,
19 the assistant district attorney, contacted Schwarz
20 about a global disposition.

21 JUDGE READ: So what should have happened
22 here, because he - - - he sort of just spontaneously
23 volunteered, didn't he, when he was meeting with the
24 police that - - -

25 MS. O'HARA WOODS: I - - - I'm sorry, Your

1 Honor, who - - -

2 JUDGE READ: What - - - so what should have
3 happened here? Because he - - - didn't your client
4 sort of just spontaneously volunteer that he didn't
5 need to wear the wire because he'd been the one who'd
6 been the stabber? So what - - -

7 MS. O'HARA WOODS: Well - - -

8 JUDGE READ: - - - what should the police
9 do?

10 MS. O'HARA WOODS: What the police should
11 have done, the - - - was the police should have
12 followed the mandate that this court put forth in
13 McLean last month, which is, if there's an ambiguity
14 or any reason to believe that there's an attorney
15 involved, they have to - - - they have to make the
16 inquiry, as in West and - - -

17 JUDGE SMITH: I mean the - - - the - - -
18 the lawyer knew that he was - - - that he was meeting
19 with them.

20 MS. O'HARA WOODS: Absolutely, Judge, and
21 the - - -

22 JUDGE SMITH: And did you - - - could he
23 really have thought that they were going to meet in
24 silence, and all he was going to do was hand him a
25 recording device?

1 MS. O'HARA WOODS: Not at all, Judge,
2 because what was supposed to happen was a wiring-up
3 session, because when they left the proffer after - -
4 - at the end of the - - - at the end of the proffer
5 session - - -

6 JUDGE SMITH: But - - - but - - - but in
7 common sense, you say - - - you're - - - you're - - -
8 you're a police officer.

9 MS. O'HARA WOODS: Yes, Judge.

10 JUDGE SMITH: You're sending a cooperating
11 witness - - -

12 MS. O'HARA WOODS: Yes, Judge.

13 JUDGE SMITH: - - - wearing a wire to talk
14 to - - - to suspects. You're not going to talk - - -
15 you're not going to discuss what he's going to talk
16 about - - -

17 MS. O'HARA WOODS: Oh.

18 JUDGE SMITH: - - - what's he's going to
19 ask him?

20 MS. O'HARA WOODS: Absolutely, Judge. But
21 this was not a "let's find out who you're talking to;
22 let's find out the parameters of what we're going to
23 ask him". This was a two-and-a-half hour in - - -
24 investigatory interrogation, Judge.

25 JUDGE PIGOTT: I got - - - I got the

1 impression - - - I obviously don't know the lawyers
2 involved here, but if - - - if - - - if Mr. Schwarz
3 was the lawyer that he appears to be - - -

4 MS. O'HARA WOODS: Yes, Judge.

5 JUDGE PIGOTT: - - - why wouldn't it be a
6 mixed question of law and fact with respect to he - -
7 - he walked away. I mean he - - - he - - - he made
8 the little deal, and then it - - - it - - - he acted
9 as if he did not represent him on anything other than
10 the burglary because he says if you want to get wired
11 on the - - - on the assault, you know, go ahead. I'm
12 - - - you know, I don't - - - I can't imagine a
13 lawyer would - - - would let their defendant walk
14 into a police station and not be with him.

15 MS. O'HARA WOODS: I - - - I understand,
16 Judge. But what I think - - - and, again, you're ask
17 - - - I'm - - - I'm going to speculate as to what
18 John Schwarz was thinking to a certain extent, but I
19 can tell you I practice in that county, and I
20 practice in - - - in this area. I think that Schwarz
21 left the proffer session thinking his client was
22 protected by his representation. So when Mor - - -

23 JUDGE PIGOTT: Was that - - - doesn't that
24 get - - - that's why I'm asking if it's a mixed - - -

25 MS. O'HARA WOODS: Right.

1 JUDGE PIGOTT: - - - question of law and
2 fact, because - - -

3 MS. O'HARA WOODS: So I - - - I - - - I
4 think it - - - I think it might be, Judge. But what
5 I'm - - - what I'm saying is - - - what I'm saying is
6 when Schwarz and Moran had that conversation, Schwarz
7 is thinking you're going to wire my guy up. I - - -
8 Moran calls you and says, you want to - - - we're
9 going to wire him up. We want him to follow through
10 on that part of the agreement we had. But he only
11 agreed to be a confidential informant. So he's going
12 to meet with the - - - with the - - - the cour - - -
13 with the police officers, and they're going to
14 discuss whatever needs to be discussed in order to
15 further him being a CI. But it wasn't going to turn
16 into a - - -

17 CHIEF JUDGE LIPPMAN: But the - - - but the
18 - - -

19 MS. O'HARA WOODS: - - - an interrogation
20 of him.

21 JUDGE READ: But then he volunteers this -
22 - - but then he volunteers this information.

23 MS. O'HARA WOODS: Well, Mor - - - Roman -
24 - - if we look at Romano's notes prior to the wire-up
25 session, which never was a wire-up session, because

1 there was never any wire that was actually attached
2 to the man, Mor - - - Mor - - - Romano - - - Romano's
3 note said his plan is to obtain all the information
4 possible that my client might have.

5 CHIEF JUDGE LIPPMAN: Do you think they - -
6 -

7 JUDGE SMITH: Well, didn't the - - -

8 CHIEF JUDGE LIPPMAN: Do you think they
9 didn't trust him to begin with, and this was the
10 whole design?

11 MS. O'HARA WOODS: I don't know what the -
12 - - I'm - - - I'm trying not to ascribe - - -

13 CHIEF JUDGE LIPPMAN: To come in and - - -
14 and - - - and - - - and - - - and ask about it, at
15 least, there was a level of - - - of distrust.

16 MS. O'HARA WOODS: There might have been.

17 CHIEF JUDGE LIPPMAN: And if - - - and if
18 so, how does that cut along the lines of the
19 questioning that you've been getting as to whether
20 Schwarz should have been there? Did everyone know
21 that they were kind of somewhat cynical?

22 MS. O'HARA WOODS: Dubious? I don't know,
23 Judge, because this is what I know about the proffer.
24 At the proffer, Raul Johnson makes - - - one
25 particular statement that stuck in everybody's head

1 was that he said he was in jail at the time of the
2 stabbing.

3 CHIEF JUDGE LIPPMAN: Right.

4 MS. O'HARA WOODS: So the cops and Moran
5 heard that and said well, this is something we can
6 verify. They walk out of the room, and they verify
7 it. And they find out, lo and behold, he wasn't in
8 jail. They walk back into that room; they could have
9 done a number of things. They could have said Mr.
10 Schw - - - Mr. Johnson, you're a liar. You're - - -
11 you're not being honest with us. We're not dealing
12 with you. Good luck on your burglary. Have a nice
13 night.

14 CHIEF JUDGE LIPPMAN: Yeah, but that's what
15 I'm asking you. Was this a trap for your - - - for -
16 - -

17 MS. O'HARA WOODS: It - - - it certainly -
18 - -

19 CHIEF JUDGE LIPPMAN: - - - for the
20 defendant?

21 MS. O'HARA WOODS: - - - looks like it was,
22 Judge, because when Moran called Schwarz and said we
23 want to wire up your guy, he - - - there was no
24 conversation there - - -

25 CHIEF JUDGE LIPPMAN: But there are two - -

1 - there are two ways to look at it, you know.

2 MS. O'HARA WOODS: Yes, Judge.

3 CHIEF JUDGE LIPPMAN: One is that, if it's
4 a trap and everyone knows it, why isn't Schwarz
5 there.

6 MS. O'HARA WOODS: Right.

7 CHIEF JUDGE LIPPMAN: And then on the other
8 hand, if the police are - - - know that they're going
9 to get this guy in and try to get him to
10 spontaneously say I did it - - -

11 MS. O'HARA WOODS: Right.

12 CHIEF JUDGE LIPPMAN: - - - why don't they
13 call his attorney since - - - since they're
14 connected.

15 MS. O'HARA WOODS: Exactly, well - - -

16 CHIEF JUDGE LIPPMAN: The - - - so what I'm
17 saying is it - - - it cuts both ways.

18 MS. O'HARA WOODS: It does, Judge, and - -
19 - and what I would submit is that there's nothing in
20 the - - - in the hearing testimony or in anything
21 that I read in all of the transcripts that indicates
22 that Schwarz thought this was a trap. I think
23 Schwarz - - -

24 JUDGE SMITH: Well, but - - - but - - - but
25 - - - but isn't there - - - isn't there a law in

1 between the - - - the police must have coop - - - the
2 people who cooperate with the police are often not
3 saints. That's fair to say?

4 MS. O'HARA WOODS: That's true, Judge.

5 JUDGE SMITH: And - - - and the police
6 probably don't trust any of them.

7 MS. O'HARA WOODS: I think that's very fair
8 to say.

9 JUDGE SMITH: And a lot of them - - - a lot
10 of them probably tell lies during the course of that
11 - - - of that process. That doesn't mean that the
12 police are never - - - are - - - are - - - are trying
13 to trap them.

14 MS. O'HARA WOODS: Absolutely, Judge, but -
15 - - but what I'm saying is - - -

16 JUDGE SMITH: And in - - - in - - - in this
17 one, isn't there an internal document even after - -
18 - after your guy had confessed, isn't there a
19 document where the police officer's saying gee, maybe
20 we can still use this guy?

21 MS. O'HARA WOODS: Absolutely, Judge. The
22 - - - Officer Romano lets my client leave.

23 JUDGE SMITH: Okay, yeah.

24 MS. O'HARA WOODS: And then calls Moran and
25 says - - - in fact, there was three conversations.

1 JUDGE SMITH: Well, does - - - doesn't that
2 suggest the police were in good faith and really - -
3 - really thought, despite their significant mistrust
4 of your guy, that he - - - that he could be more
5 useful to them as a - - - as on the - - - on their
6 side then on - - - as an adversary?

7 MS. O'HARA WOODS: I - - - I thin - - - I -
8 - - I can't speculate as to what the officers were
9 thinking, Judge, but they certainly were considering
10 still working with him from the original proffer to
11 the CI and then - - -

12 JUDGE SMITH: But let me - - -

13 MS. O'HARA WOODS: - - - possibly a new CI
14 agreement.

15 JUDGE SMITH: Let - - - let me ask you a
16 general question.

17 MS. O'HARA WOODS: Yes, Judge.

18 JUDGE SMITH: What are the police supposed
19 to do when they have a cooperating witness who is
20 under indictment in another case? Can they just - -
21 - can they talk to him about the substance of the
22 other case without his lawyer there?

23 MS. O'HARA WOODS: No, Judge, they can't.

24 JUDGE SMITH: So the lawyer has to be the -
25 - - so if a witness is cooperating, the lawyer has to

1 be there every minute he's talking - - - he's - - -

2 MS. O'HARA WOODS: Well, to the extent that
3 he's in jeopardy, Judge, I think that's what the - -
4 -

5 JUDGE SMITH: Well, yeah - - - well, he's a
6 - - - well, they're always in jeopardy. These guys
7 are always in jeopardy.

8 MS. O'HARA WOODS: Well, I think that
9 that's what the Constitution demands. Once - - -
10 once - - - if we're saying that - - - that Schwarz -
11 - -

12 JUDGE SMITH: Aren't - - -

13 MS. O'HARA WOODS: - - - entered the
14 proceeding as his counsel, I think he needs to be
15 there, at least to have him waive.

16 JUDGE SMITH: Is - - - isn't - - - isn't
17 that going to be a problem - - - I mean for
18 everybody? I mean you - - - you're saying that you
19 can't talk to a - - - a - - - a defendant. We see
20 this sort of - - - can happen all the time. Okay,
21 I'll give you a deal in this case if you help me in
22 that case. The lawyer, obviously, has to be
23 involved. But you're saying that one - - - even once
24 that deal, in principle, has been made, they can't
25 sit down and talk to the cooperator without the

1 lawyer there?

2 MS. O'HARA WOODS: I'm not sure that that's
3 exactly what happened here. I think, Judge, when - -
4 - I think Rom - - - I think Romano's intention when
5 he went to speak to - - - when he had picked up Raul
6 Johnson 9 o'clock that morning was to get as much
7 information as he could, because if you read the
8 transcript - - -

9 JUDGE SMITH: Is that - - - well - - - well
10 wouldn't you - - - wouldn't any decent investigator
11 always want as much information as he could?

12 MS. O'HARA WOODS: Of course, Judge, but
13 when you're - - - when you're leading someone down
14 the garden path the way he did in his testimony, the
15 questioning that he did of - - - of my client, well,
16 you really were there.

17 JUDGE SMITH: Well, he wanted - - - he
18 wanted - - - if he wanted to lead him down the garden
19 path to the truth, wasn't he? I mean you - - - you -
20 - - you want your cooperator to tell you the truth.

21 MS. O'HARA WOODS: And - - -

22 JUDGE SMITH: And you realize sometimes he
23 - - - he made need a little - - - he - - - you may
24 have to correct him now and then.

25 MS. O'HARA WOODS: Right.

1 JUDGE SMITH: He might stray from the
2 truth.

3 MS. O'HARA WOODS: And you certainly would
4 have an easier time correcting him if you're asking
5 him these questions without his attorney there.

6 JUDGE SMITH: So you can't - - - I mean I
7 guess what I'm saying - - - it seems to me, you've -
8 - - a normal dialogue between the cops and a
9 cooperating witness, would it - - - would be - - -
10 well, it would be a lot - - - somewhat like this. So
11 this is what happened. Oh, come on, Fred, no one's
12 ever going to believe that's what happened. Tell - -
13 - yeah - - - yeah, try again. You're saying that
14 kind of conversation cannot happen without a lawyer
15 present. It seems to me that's going to make it hard
16 - - -

17 MS. O'HARA WOODS: Well - - -

18 JUDGE SMITH: - - - for - - - for - - - for
19 the police to - - - to work with these people.

20 MS. O'HARA WOODS: It might make it hard,
21 Your Honor, but if there's - - - if the value of the
22 limited use immunity agreement has any value
23 whatsoever, it's to protect him from - - - from
24 incriminating himself outside the presence of his - -
25 - of his counsel. What was the role of having

1 Schwarz as his attorney - - - which - - - we
2 understand he was the attorney at the end. He's been
3 the attorney throughout. What's his role - - -

4 JUDGE PIGOTT: But didn't it - - - didn't
5 it say that - - -

6 MS. O'HARA WOODS: - - - if he's not there
7 to protect - - -

8 JUDGE PIGOTT: - - - that they couldn't
9 prosecute him for perjury or ob - - - obstruction? I
10 mean it - - - there was nothing in the agreement that
11 said that, you know, if he's ultimately implicated in
12 the - - - in the stabbing that they couldn't
13 prosecute him, right?

14 MS. O'HARA WOODS: Right, but he was rep -
15 - - but - - - but the point is that his - - - his
16 right to - - - if his right to counsel attached, then
17 what's the value of his right to counsel if he can be
18 questioned outside his counsel's presence under - - -

19 JUDGE PIGOTT: I got the impression Schwarz
20 thought he's going to give a statement today, and as
21 long as it's a truthful statement, we got a deal on
22 the - - - on the burglaries, and so everybody folded
23 up their files and went home.

24 MS. O'HARA WOODS: Right.

25 JUDGE PIGOTT: Because he told the truth,

1 as far as Schwarz was concerned. He's getting his
2 deal on the burglaries, and they're getting their
3 wire six months later.

4 MS. O'HARA WOODS: But Schwarz also
5 testified that his understanding was that he
6 represented - - -

7 Can I finish the statement?

8 CHIEF JUDGE LIPPMAN: Yes, of course. Go
9 ahead.

10 MS. O'HARA WOODS: Thank you. That he - -
11 - he was planning on - - - on representing him at the
12 proffer and whatever came out of the proffer, because
13 if he was - - - if Schwarz was a retained attorney,
14 that wouldn't be a question, because he would have
15 represented him throughout. Because he was an 18B
16 attorney, there's a gap there.

17 JUDGE PIGOTT: Could that be taken that in
18 - - - in the event they - - - they indicted him for
19 perjury, he would represent him because he was
20 present at the time of the - - - of the - - - of the
21 - - -

22 MS. O'HARA WOODS: That's not - - - I - - -
23 it's - - - it - - - that may be what he was thinking,
24 Judge, but that isn't what he said. That - - - he
25 said that he anticipated representing him throughout

1 time that the - - -

2 CHIEF JUDGE LIPPMAN: You made the deal
3 with them, no?

4 MR. YEGER: At the time the defendant was
5 arrested for the burglary, the prosecution had
6 absolutely no idea that the defendant - - -

7 CHIEF JUDGE LIPPMAN: Then the guy comes in
8 and says, I have information on the stabbing.

9 MR. YEGER: Correct.

10 CHIEF JUDGE LIPPMAN: You talk with him and
11 the attorney, and you get the agreement - - -
12 limited-immunity agreement.

13 MR. YEGER: That's correct.

14 CHIEF JUDGE LIPPMAN: And so you're - - -
15 you're putting this together. You're with them.
16 Obviously, he's volunteering it, but you agree. How
17 could you then turn around and say oh, but they're
18 two separate things now. I'm just going to ask him
19 whatever I want on - - - on the - - - the stabbing,
20 and the attorney is - - - he's finished. He only
21 represents him in the other case. That's the way you
22 viewed it?

23 MR. YEGER: Well, that's the way the
24 attorney viewed it, the attorney for the defendant,
25 until afterwards.

1 CHIEF JUDGE LIPPMAN: Mightn't you ask him
2 if he represents him on the stabbing?

3 MR. YEGER: Well - - -

4 CHIEF JUDGE LIPPMAN: Isn't it your
5 responsibility under our cases?

6 MR. YEGER: The answer is no to whether a -
7 - - a prosecutor has to ask ab initio whether the
8 defendant is represented by anybody, and - - - and
9 the - - -

10 CHIEF JUDGE LIPPMAN: Yeah, but if he's
11 already entered.

12 MR. YEGER: Well, Pacquette answers that
13 question. This court decided - - - I believe Your
14 Honor dissented in that case. Nevertheless, it's law
15 - - - it's the law of New York State that in a case
16 where the attorney - - -

17 CHIEF JUDGE LIPPMAN: What - - - what - - -
18 what's the law of New York State?

19 MR. YEGER: - - - the attorney told - - -
20 the attorney told the detectives that he - - - that
21 the defendant was represented by counsel and that
22 they could not talk to him, even though he told the
23 defendant that he wasn't representing him.

24 JUDGE PIGOTT: What case are you citing,
25 that you're talking about?

1 MR. YEGER: I'm sorry, Your Honor?

2 JUDGE PIGOTT: What case are you citing?

3 MR. YEGER: Pacquette, 17 N.Y.2nd. It's a
4 2011 case, Your Honor. In that case the de - - - the
5 - - - the defendant was a suspect in a Brooklyn case,
6 and he was arrested in Manhattan. And the Brooklyn
7 detectives went to Manhattan to get him, and got him.
8 And he put him in a lineup, and then they brought him
9 back to Manhattan. And the Manhattan attorney told
10 the defendant I'm not going back to Brooklyn,
11 according to the detectives. And - - - but told the
12 detectives he is represented by counsel.

13 Nevertheless, this court said that we don't
14 allow attorneys to essentially make up who represents
15 the defendant and when they do. In this case, there
16 is no evidence in this record, none, that the - - -

17 JUDGE SMITH: Let - - - let - - - let - - -
18 let me come back to this - - - this case. What - - -
19 suppose - - - to simplify, suppose the lawyer had
20 said by the way, in case you're wondering, I'm
21 representing him in both cases? What - - - what - -
22 - what - - - what would the police have done? What
23 should they have done?

24 MR. YEGER: Well, that may be a different
25 result, although I don't think - - - I - - - I don't

1 think the result - - -

2 JUDGE SMITH: Well - - - well, what if - -
3 -

4 MR. YEGER: I don't think the result here
5 is different because, frankly, at the proffer
6 session, everybody sitting there agreed that he was
7 going to show up, and the attorney plainly was not go
8 - - - did not want to be there.

9 JUDGE SMITH: You - - - you're saying that
10 the lawyer - - - that the lawyer consented to the
11 proffer session?

12 MR. YEGER: Oh, absolutely he consented.

13 JUDGE SMITH: And does that - - - does that
14 do it? That is, if the lawyer says go ahead and talk
15 to him without me there, then he - - - he's - - -
16 you're taking a chance - - -

17 MR. YEGER: But - - -

18 JUDGE SMITH: - - - then he's taking his
19 chances?

20 MR. YEGER: But with the defendant in the
21 room, and then the defendant shows up by himself? I
22 would argue that that effects a waiver, yes, Your
23 Honor.

24 JUDGE SMITH: What about - - - what - - -
25 yeah, but what about - - - didn't there come a point

1 in this - - - in this session when your - - - your
2 guys - - - when - - - when Johnson spilled out the
3 whole story, and your guy said we got to huddle; and
4 they came back and gave the Miranda warnings?
5 Wouldn't it have been appropriate to give the lawyer
6 a phone call at that point, say hey, you've got a
7 different situation here?

8 MR. YEGER: Well, that goes back to the
9 next question which is, did the lawyer represent him
10 in the first place?

11 JUDGE SMITH: Okay.

12 MR. YEGER: And it's our position that he -
13 - -

14 JUDGE SMITH: But suppose he did.

15 MR. YEGER: I'm sorry?

16 JUDGE SMITH: If he - - - if he did.

17 MR. YEGER: Assuming that - - -

18 JUDGE SMITH: Let's take - - - take my
19 hypothetical, where he is rep - - - the lawyer is
20 representing him but consent - - - but consented to
21 the conversation. Then the conversation all of a
22 sudden turns into something quite unanticipated.
23 Don't you have to call the lawyer up?

24 MR. YEGER: Not if the lawyer consented to
25 the - - - to the - - - to the - - - to the - - - to

1 the whole thing. Absolutely not.

2 CHIEF JUDGE LIPPMAN: Because - - - go
3 ahead.

4 JUDGE SMITH: I mean are you really saying
5 - - - we're - - - we're - - - we're talking about
6 interpreting the lawyer's acquiescence in this
7 meeting. And you're suggesting that he did acquiesce
8 in a substantive conversation, and I'm - - - let's -
9 - - so let - - - let's go along with that. Did he
10 really acquiesce in a conversation in which the guy,
11 having confessed the - - - that he - - - the - - -
12 the - - - the - - - the police changed the whole
13 nature of the questioning; they Mirandized him?
14 They're now talking - - - interviewing about his
15 involvement. Did the lawyer consent to that?

16 MR. YEGER: I believe that there's nobody
17 in this room who's aware of this case, who would say
18 that the lawyer thought that his client actually
19 committed the stabbing.

20 JUDGE PIGOTT: Well, what's - - - that's a
21 - - - you raise the - - - the - - - what I thought
22 was another interesting point, which - - - which - -
23 - which is the Rosario issue because what was said at
24 the Huntley was limited by the fact that some
25 documents were not turned over; and the - - - and the

1 People's argument is that they were unrelated, right?

2 MR. YEGER: Well, yes, I mean the - - -
3 certainly the doc - - - I'm sorry, Your Honor.

4 JUDGE PIGOTT: Well, they're certainly
5 related to the whole issue we're talking about this
6 morn - - - this afternoon, which is, you know, what
7 Romano knew and when he knew it, et cetera.

8 MR. YEGER: Well, the - - - the majority of
9 the documents that weren't turned over dealt with
10 after the - - - the supposed wiring session. Those
11 would never be Rosario for the defen - - -

12 JUDGE PIGOTT: Well, I thought in terms of
13 the cross-examination - - - because I - - - I get the
14 point. You say well, it's after the - - - after
15 everything, so - - - so it's not Rosario. But it's -
16 - - it's statements made by the police with respect
17 to the issue that is before the court, and - - - and
18 it would - - - it would seem to me may - - - you
19 know, that it - - - it wouldn't have been bad fodder
20 for cross-examination.

21 MR. YEGER: Well, if it's not a subject
22 matter of the - - - of the Huntley hearing that - - -

23 JUDGE PIGOTT: But if Romano in his notes
24 is saying - - - or she's saying, you know, certain
25 things that the defense wants to say well, why did

1 you say - - - why were you thinking this afterwards
2 and - - - and you're now saying that, as far as
3 you're concerned, he never had counsel? And yet you
4 had - - - you had serious doubts, did you not?

5 MR. YEGER: Again, whether the det - - - I
6 mean the real question is whether what the detective
7 thought made any difference a couple of months after
8 versus at the time of the proffer session. And
9 ultimately, it's a - - - it's a mixed question of
10 fact that the - - -

11 JUDGE PIGOTT: Yeah.

12 MR. YEGER: - - - courts below found - - -

13 JUDGE PIGOTT: But what troubled me is that
14 you got to make that decision, and I - - - I got - -
15 - the courts, of course, have agreed with you so far,
16 but on - - - on Rosario, it just seemed to me that
17 this would have been an easy thing to toss in and
18 find out where you're going. I didn't see the - - -
19 I didn't see a downside to the People, and I saw a
20 possible downside to the defense. Am I - - - am I
21 misreading it - - - paranoid?

22 MR. YEGER: I would only - - - well, I
23 would - - - I would only say - - - I would only say
24 this with regard to the Rosario. The - - - the
25 courts below and the People at the time that they

1 were preparing the Rosario prepared it with the eye
2 towards this is the Rosario for the Huntley, this is
3 the Rosario for the trial. The People turned it over
4 during the trial, and defense tried to make use of
5 it. Ultimately, he decided to defer the entire
6 question until after the trial. Frankly, as we argue
7 in our brief extensively, it renders the Rosario
8 claim unreserved because that's - - -

9 JUDGE PIGOTT: Why does it do that because
10 it's - - - it would seem to me that any good defense
11 lawyer would say, well - - - as the - - - this - - -
12 this one did; you know, maybe it's moot, Judge,
13 because if he gets acquitted you don't have an issue.
14 But if it - - - if he doesn't get acquitted, you
15 know, this is an issue that ought to be raised. And
16 I didn't see the People jumping up and down objecting
17 and saying make the decision now.

18 MR. YEGER: Well - - - well this court
19 would - - - would set a dangerous precedent in all
20 cases if it allowed parties to say - - - to all - - -
21 to basically second-guess the ultimate determination
22 like this.

23 JUDGE PIGOTT: Well, I agree. That's why -
24 - - I mean the court could have said I'm not doing
25 that. If you - - - if you've got a Huntley issue,

1 raise it now. I'm not going to wait until the jury -
2 - - you know, you can't have half a loaf, but he - -
3 - but the judge didn't do that. The People didn't
4 object to the idea of - - - of reserving decision
5 until after the - - - the - - - the thing. And now
6 we want to say well, you defend it. You - - - you
7 were willing to wait, and therefore, it's - - - it's
8 to your detriment.

9 MR. YEGER: Well, the People said that
10 there was no Rosario violation at all. So they - - -

11 JUDGE PIGOTT: But they wanted a ruling.

12 MR. YEGER: - - - made their argument.
13 They made this - - -

14 JUDGE PIGOTT: Didn't they want a ruling?

15 MR. YEGER: Well, they made their
16 substantive ruling. There's nothing - - - I mean
17 there's nothing wrong with the People's abiding by -
18 - - by whatever it is. It's the defendant's job - -
19 -

20 JUDGE SMITH: If we could just come back to
21 the question - - -

22 MR. YEGER: Sorry.

23 JUDGE SMITH: - - - of whether - - - of - -
24 - of whether the lawyer was representing him in both
25 cases. You represent - - - a lawyer is representing

1 a defendant in - - - in case one, and in order to get
2 a better deal in case one, the defendant's
3 cooperating in case two. The lawyer, obviously,
4 cares what happens in the cooperation, doesn't he?

5 MR. YEGER: Yes, but that doesn't - - -

6 JUDGE SMITH: And in - - - including - - -
7 including he - - - he - - - he is - - - he has a
8 duty, surely, to tell his client look, don't be so
9 eager to get yourself off in case one that you're
10 going to immolate yourself in case two. Wouldn't any
11 conscientious lawyer worry about that?

12 MR. YEGER: Yes, but there's nothing about
13 that in the record, and it's the defendant's
14 responsibility to create the record in this case.

15 CHIEF JUDGE LIPPMAN: Counsel, but - - -
16 but on the same vein that Judge Smith was asking you
17 on the question he asked you before about once you
18 got to the point where you Mirandized him, even
19 before that, even the attorney says - - - you're
20 interpreting what the attorney did as saying listen,
21 I know when he goes in to get a wire that they may be
22 interrogating him, but that's okay with me. I don't
23 care, even though I'm involved in this - - - this - -
24 - again, bringing together the two charges to make
25 this - - - this agreement.

1 You mean that - - - is that possible that
2 the attorney says I don't care; go interrogate the
3 hell out of him when it's supposed to be a wiring
4 situation? Is that possible? Even before the point
5 where it gets to Mirandizing, well, he certainly
6 should understand that gee, maybe I better call this
7 attorney?

8 MR. YEGER: I can't answer that question
9 because nothing - - - may I answer the question?

10 CHIEF JUDGE LIPPMAN: Yeah, of course.

11 MR. YEGER: Because nothing appears in this
12 record with regard to what the attorney was thinking.
13 But - - -

14 CHIEF JUDGE LIPPMAN: But doesn't common
15 sense tell you that? He's involved with you in
16 negotiating this arrangement. It's really similar to
17 what Judge Smith was just asking you. He just
18 doesn't care anymore about this? If you get him on
19 the stabbing, great, ask him whatever you want, you
20 know, I have nothing to do with that case. I made
21 this deal regarding the burglary. Is that possible?

22 MR. YEGER: The question that this court
23 has to answer in this case is whether the attorney
24 represented the defendant - - -

25 CHIEF JUDGE LIPPMAN: I know, I know.

1 MR. YEGER: - - - on the other case.

2 JUDGE SMITH: Well, if he had a - - - if he
3 had an - - -

4 MR. YEGER: He didn't - - -

5 JUDGE SMITH: If he had an obligation to
6 protect the defendant from injuring himself in that
7 case, which obviously he did, then - - - then what -
8 - - what does it mean to say he doesn't represent
9 him?

10 MR. YEGER: Well, it might mean - - - it
11 might mean another trip through the court system, but
12 it doesn't mean a reversal in this case. In other
13 words, maybe the attorney might have been
14 ineffective. That I can't answer, because there's
15 nothing in this record that shows that he is.

16 JUDGE SMITH: Well, I mean if - - - if - -
17 - I mean even if - - - let's suppose he's very
18 effective. Let's supp - - - suppose he's a great
19 lawyer and did everything he could possibly have
20 done. That - - - yeah, it still could have happened
21 that - - - yeah, that - - - that through - - - yeah,
22 that unforeseeably - - - and maybe that is what
23 happened, unforeseeably, Johnson disclosed to the
24 cops that he had a much, much bigger role in this - -
25 - in - - - in the stabbing than anyone had ever

1 dreamed.

2 That doesn't mean that the lawyer - - -
3 yeah, that - - - that - - - that the lawyer never
4 represented him in the stabbing. The law - - - the -
5 - - it was part - - - we - - - we - - - I think we
6 agree. It was part of the lawyer's obligation to - -
7 - to do his best to keep Johnson from destroying
8 himself in the stabbing case.

9 MR. YEGER: The attorney in - - - in this
10 matter, Mr. Schwarz, had no idea the defendant
11 required representation in that case.

12 JUDGE PIGOTT: We - - - we don't know that.

13 MR. YEGER: The defendant never told him -
14 - -

15 JUDGE PIGOTT: That's right. I - - - I was
16 just going say, at the time of the proffer, at the
17 time of the - - - of the deal, I would have thought
18 Mr. Schwarz would say now if you're going to - - - if
19 you're going to do this make sure you tell them the
20 damn truth because if you don't, you got a - - - you
21 got a perjury charge, possibly. So did you or did
22 you not participate in the - - - in the stabbing? I
23 would assume he told Schwarz no, I didn't, and then
24 Schwarz felt - - - felt it's okay. But we don't know
25 any of that.

1 MR. YEGER: Right, we don't know any of
2 that, because it's not in the record. So either - -
3 - either the People - - - either this court should
4 affirm because of Pacquette, or it should affirm
5 because of McLean, and there's not enough in the
6 record.

7 CHIEF JUDGE LIPPMAN: Okay, counsel,
8 thanks.

9 MR. YEGER: Thank you, Your Honors.

10 CHIEF JUDGE LIPPMAN: Rebuttal?

11 MS. O'HARA WOODS: Yes, Judge, very
12 quickly. Just to go back to what Judge Smith was
13 asking about the representation and - - - and when -
14 - - whether the representation actually was taking
15 place. Just want to point out in my adversary's
16 brief, he concedes that at the time of the discussion
17 between Moran and Schwarz on a global disposition in
18 July, there's - - - there was representation by
19 Schwarz at that time. It's conc - - - it's in
20 respondent's brief that at that moment - - -

21 CHIEF JUDGE LIPPMAN: Well, in order to get
22 a global disposition you would need a representative,
23 wouldn't you?

24 MS. O'HARA WOODS: Why would - - - why
25 would Moran be calling him if he wasn't the attorney?

1 So what was the magic moment - - -

2 JUDGE PIGOTT: Why would Moran call him if
3 he wasn't - - -

4 MS. O'HARA WOODS: - - - where the
5 representation happened?

6 JUDGE PIGOTT: He - - - he was the attorney
7 on the burglary. You're talking about a global
8 between the burglary and the stabbing.

9 MS. O'HARA WOODS: The burglary and the
10 stabbing.

11 JUDGE PIGOTT: But obviously he needed him
12 because he's the lawyer on the burglary.

13 MS. O'HARA WOODS: Right, but he had - - -
14 but in order to have a global disposition, Schwarz
15 has to have the power to make a recommendation to his
16 client on the stabbing, and - - -

17 JUDGE PIGOTT: Only - - - only if later on
18 - - - you - - - you know, if you're the defense
19 lawyer, and - - - and the DA calls you and says by
20 the way, we can work something out but - - - as long
21 as you understand that we just arrested your client
22 on another one. You don't represent him until that
23 point; now you do.

24 MS. O'HARA WOODS: But - - -

25 JUDGE PIGOTT: I mean, it doesn't - - -

1 doesn't mean because you were going to make a deal
2 that - - - that the representation began way back in
3 April.

4 MS. O'HARA WOODS: Right, but what I'm
5 saying is that - - - that the conversation between
6 Moran and Schwarz doesn't create that representation.
7 So for my adversary to say that the representation
8 existed at that point, it must have existed at
9 another - - - at a point prior. Thank you.

10 CHIEF JUDGE LIPPMAN: Okay, thanks.

11 Thank you both.

12 (Court is adjourned)

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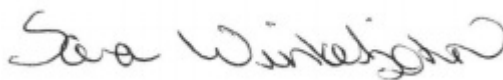
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C E R T I F I C A T I O N

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Raul Johnson, No. 218 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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