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COURT OF APPEALS

STATE OF NEW YORK

PEOPLE,

Respondent, (Papers Sealed)

-against-

No. 47

REGINALD POWELL,

Appellant.

20 Eagle Street
Albany, New York 12207
February 17, 2016

Before:

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

Appearances:

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Sara Winkeljohn
Official Court Transcriber

1 JUDGE PIGOTT: Case number 47, People v.
2 Reginald Powell. Good afternoon.

3 MR. GAETANI: Good afternoon, Your Honor;
4 if I could just have two minutes for a possible
5 rebuttal.

6 JUDGE PIGOTT: Yes, sir.

7 MR. GAETANI: Thank you. The test of
8 probity versus prejudice to determine the admission
9 of evidence of third-party culpability cannot
10 adequately safeguard important constitutional
11 considerations.

12 JUDGE GARCIA: So, counsel, if we don't
13 overrule Primo based on that argument, do you lose
14 under that standard?

15 MR. GAETANI: Not necessarily, Judge,
16 because the trial court decided this on Primo
17 grounds, and the Appellate Division considered it on
18 state evidentiary principles and denied it on that
19 basis, so not necessarily.

20 JUDGE GARCIA: If we apply the Primo
21 standard here, do you lose then?

22 MR. GAETANI: I don't think so.

23 JUDGE GARCIA: We have to overrule Primo?

24 MR. GAETANI: I don't think it's necessary,
25 Judge, but I will say this. I think there's a

1 passage in the record, and this come at the
2 appellant's appendix 521 to 522, where finally, after
3 all the arguments have taken place and further
4 arguments take place and counsel has brought up
5 Chambers and the right to present a defense and
6 reasonable doubt, where the trial court has this
7 epiphany, and this is what the trial court says; the
8 trial court says, listen, I what you're saying; I
9 understand the fact that there's Chambers v.
10 Mississippi; I understand there's a right to present
11 a defense. And the court essentially says, I'm
12 constrained by the rule in Primo because the Court of
13 Appeals has said there has to be this threshold
14 showing, so despite the fact that I understand your
15 argument, I have to reject it.

16 JUDGE GARCIA: It's just a question.

17 MR. GAETANI: Yeah.

18 JUDGE GARCIA: It's not an argument.

19 MR. GAETANI: I think right there - - -

20 JUDGE GARCIA: So if you apply that
21 standard, if you were - - - let's say Primo is - - -
22 passes constitutional muster, aren't you balancing
23 doing that - - - that test based on what the
24 representations of counsel were at the trial as to
25 what he or she wanted to use this evidence for?

1 MR. GAETANI: Well, I think what you have
2 to do is view that in terms of the fact that we - - -
3 when we started the trial, the judge gave a ruling
4 and said, I'm not letting you bring that in, I'm not
5 letting you opening on the policy, I'm not letting
6 you cross-examine Warren Powell on the policy. So
7 right there, defense counsel has to do what any good
8 defense counsel does if there was a suppression
9 motion and it was denied; he'd have to now proceed on
10 a different basis.

11 JUDGE GARCIA: But during the trial - - -

12 MR. GAETANI: That's what he had to do.

13 JUDGE GARCIA: - - - defense counsel raises
14 this again, right?

15 MR. GAETANI: He does raise it again, and
16 instead of running into a brick wall, because the
17 judge said to him on a number of occasions, listen,
18 if you don't put him in the house, this doesn't come
19 in. So instead of running into a brick wall, what he
20 does is he says, Judge, I'm trying to create
21 reasonable doubt, I'm trying - - - this is Chambers
22 v. Mississippi. I am - - - I am trying to present a
23 defense and you're preventing me from presenting my
24 defense.

25 So he prevents the constitutional argument,

1 and I think that's the argument that has been
2 preserved. They've both been preserved, but I think
3 this court really needs to decide this because when
4 the trial court says what it said, it indicated that
5 he felt constrained by Primo because he understood
6 the constitutional arguments. So I think it's an
7 indict - - - indicative of the fact that trial courts
8 need guidance from this court with respect to the
9 constitutional consideration.

10 JUDGE GARCIA: But is it in the record
11 anywhere that his calculation was, I'm not going to
12 push this, Judge, because of the suppression motion,
13 because it's equally an inference, I think, that he
14 didn't want to point the finger directly at his
15 brother.

16 MR. GAETANI: I think, Judge, like I said,
17 he had to proceed with what he had. He had to play
18 the hand he was given. Had the trial court ruled
19 that the evidence of the policy came in, well, now
20 all the elements are there, the opportunity is there,
21 the access is there, there's forensic evidence which
22 points away from the appellant, there's forensic
23 evidence that points towards the presence of more
24 than one male.

25 Had he been able to show motive, then he

1 would have had all of the elements and been able to
2 present a complete defense, but he was deprived of
3 presenting a complete defense. The jury had to be
4 wondering at the end of the case, well, you've shown
5 us opportunity, you've shown us access, you have
6 shown us the forensic evidence - - - there's also
7 other evidence I'd like to review later - - - later
8 on, but what he isn't able to show the jury is why.
9 Why would Warren do this? He wasn't able to show
10 either a jealous motive or a motive - - - a financial
11 motive.

12 JUDGE GARCIA: And that's accusing the
13 brother.

14 MR. GAETANI: Right.

15 JUDGE GARCIA: But he repeatedly says he's
16 not going to use it to do that.

17 MR. GAETANI: Right, Judge, because he
18 knows that the trial court has already indicated, if
19 you can't put him in the house I'm not allowing you
20 to bring it in under that basis. So he's scrambling.
21 He's doing what good trial attorneys do. He's making
22 the best of a bad situation.

23 JUDGE STEIN: But doesn't all the case law
24 require some connection that's more than mere
25 speculation, something to - - - either the scene of

1 the crime or the crime itself and - - - and that's
2 never been found to be unconstitutional - - -

3 MR. GAETANI: Well, Your Honor, I - - -

4 JUDGE STEIN: - - - and - - - and that - -
5 - that prejudice be weighed against probative value
6 and - - - and all of that in - - - in part of the
7 analysis - - -

8 MR. GAETANI: Right.

9 JUDGE STEIN: - - - of whether this evid -
10 - - whether you call it third-party culpability
11 evidence or pointing the finger at or pointing the
12 finger away, it doesn't matter, it's all the same
13 thing, isn't it?

14 MR. GAETANI: Well, the problem here,
15 Judge, with the Primo rule is on the probity side of
16 the equation, it requires this heightened proof from
17 the defendant. And on the prejudice side - - -

18 JUDGE STEIN: What - - - what's heightened
19 about saying it has to be - - - it has to be
20 probative and not prejudicial and it has to - - - and
21 in order to be probative and - - - and not just
22 speculative, then there has to be some connec - - -

23 MR. GAETANI: I would - - -

24 JUDGE STEIN: I mean, anybody - - - I mean,
25 anybody that knows anybody is going to have some

1 motive and opportunity to kill them.

2 MR. GAETANI: Right. I think - - - well -
3 - -

4 JUDGE STEIN: So - - - so I - - - doesn't -
5 - -

6 MR. GAETANI: - - - there was a lot more
7 than that here, Judge.

8 JUDGE STEIN: Well - - -

9 MR. GAETANI: And that - - - that's really
10 a very - - - it would be improper to characterize the
11 evidence that way.

12 JUDGE STEIN: Well, but I - - - but - - - I
13 guess the point that I'm making is is that, as I
14 understand it, our law says that yes, you have the
15 right to present a defense, but there are limitations
16 to that right. We're not just going to allow you to
17 throw things at the wall that are going to confuse
18 the jury or, you know - - -

19 MR. GAETANI: The - - - the argument I'm
20 making, Judge, is this: that's the problem with the
21 Primo rule. There's too much emphasis on how far the
22 defendant can go to show that the third party is
23 culpable, and that's the wrong focus. There's a
24 better rule, and - - - and if I could just read - - -
25 this is from the DC Circuit in the Winfield case, and

1 there's a two - - - it's a two-part test. "There
2 must be proof of facts and circumstances which tend
3 to indicate some reasonable probability that a person
4 other than the defendant committed the charged
5 offense." The focus - - -

6 JUDGE STEIN: But is that constitutionally
7 - - -

8 MR. GAETANI: But - - - but - - -

9 JUDGE STEIN: - - - required?

10 MR. GAETANI: Yes, Judge, I believe it is.
11 The focus - - - and - - - and this is the verbiage
12 that's missing from Primo. "The focus of the
13 standard is not on the third-party's guilt or
14 innocence, but on the effect the evidence has upon
15 the defendant's culpability. And in that regard, it
16 need only tend to create a reasonable doubt that the
17 defendant committed the offense."

18 And that's the problem here. On the one
19 hand, with Primo you have the - - - it can't simply
20 be prejudice versus probative. That's insufficient
21 because prejudice - - - the judge ruled in this case
22 that the - - - the fact is there was motive. The
23 policy could demonstrate motive on Warren's part.
24 There was opportunity. There was access, all
25 demonstrated by evidence the People brought in with

1 respect to the cell phone records and Warren's own
2 testimony where he was on the 28th.

3 The problem is the judge ruled it's going
4 to mislead the jury - - - and he also ruled that it
5 wasn't going to cause delay because he was already
6 under subpoena from the People. It mis - - - could
7 mislead the jury, and it could prejudice the People.
8 But I'm - - - I'm saying the constitutional part of
9 it is this, and the verbiage that's missing from
10 Primo is, it's - - - it's inaccurate to view the
11 prejudice as fifty percent of the equation because if
12 the defendant can create reasonable doubt, then - - -
13 then to - - - to look at it just from prejudice
14 versus probative, the - - - the prejudice to the
15 State must be subordinate to the right to present - -
16 -

17 JUDGE RIVERA: Okay, so let - - - let me
18 ask - - -

19 MR. GAETANI: - - - a complete defense.

20 JUDGE RIVERA: Maybe I'm - - - perhaps I
21 just misunderstood your argument and - - - and
22 perhaps I'm just asking you to again answer, really,
23 Judge Garcia's initial question. Are - - - are you
24 saying there's no way to read Primo or to interpret
25 Primo so that it doesn't require that the defendant

1 actually point to the third party as the actual
2 perpetrator of the crime?

3 MR. GAETANI: I'm saying - - - I'm saying -
4 - -

5 JUDGE RIVERA: You're saying there's no way
6 to read Primo that way?

7 MR. GAETANI: No, I'm not saying that,
8 Judge. No.

9 JUDGE RIVERA: Okay.

10 MR. GAETANI: Because in this court's - - -

11 JUDGE RIVERA: Okay.

12 MR. GAETANI: - - - decision in Negron last
13 year, the - - - Judge Lippman, I believe, wrote the
14 opinion, it - - - it talks about the fact that there
15 wasn't - - - like in Primo, there wasn't a ballistics
16 report and there wasn't a witness who put the - - -

17 JUDGE RIVERA: So then why don't we stay
18 with that. How - - - assuming for one moment that
19 argument is persuasive, that you don't have to point
20 to - - - to the other person and say they did it, how
21 did you meet what otherwise would be this Primo
22 standard without that requirement?

23 MR. GAETANI: Okay, there was - - - as I
24 say, there was evidence of proximity, there was
25 evidence of access. There was an ongoing

1 relationship between Warren and Jennifer. There was
2 the thirteen-minute call that happened the day before
3 the incident. There was a one-minute call, the last
4 phone call that was placed from the victim's phone to
5 Warren's phone, on the 28th. That was 11:41 a.m. At
6 12 a - - - 12 p.m. that day, Warren is parking his
7 truck in the DPW lot. He's two blocks away.

8 JUDGE RIVERA: So by the way, essentially,
9 why - - - why aren't you arguing that this is the
10 person who did it, with that kind of proof, if - - -
11 if your position is that's enough proof under Primo?

12 MR. GAETANI: Your Honor, he couldn't give
13 the jury the motive quotient, and without the motive
14 quotient, the jury had to be wondering - - -

15 JUDGE ABDUS-SALAAM: Assuming - - -
16 assuming, counsel, that we agree with you, and I'm
17 not saying we do, and the - - - the judge erred or
18 erred in not allowing the motive portion in about the
19 insurance policy, why isn't it harmless error here on
20 this record?

21 MR. GAETANI: Judge, I think there might be
22 harmless error with respect to the possession of the
23 vehicle, with the theft of the property, but there's
24 no - - - there isn't a harmless error with respect to
25 the homicide, because there was no admission here. A

1 lot of what the defendant said was con - - - a lot of
2 what happened was consistent with what the defendant
3 told the police. He found the body, who's going to
4 believe me, I'm on parole. I don't think there was
5 harmless error.

6 And one of the cautions with respect to - -
7 - that - - - that's pointed out in Holmes v. South
8 Carolina is that looking at the strength of the
9 People's case to make a determination of whether or
10 not the evidence of third-party culpability comes in
11 the case is wrong. That - - -

12 JUDGE PIGOTT: Thank you, Mr. Gaetani. Let
13 - - - let's hear - - - hear from your opponent. You
14 have three minutes - - - two minutes' rebuttal,
15 right? Yeah.

16 MS. WAGER: Maria Wager for the People of
17 the State of New York as respondent. Good afternoon,
18 Your Honors. All throughout this trial, even when
19 defendant made his post-verdict motion to vacate the
20 conviction and at sentencing, he insisted that he was
21 not and never was offering evidence to support a
22 defense of third-party culpability.

23 JUDGE STEIN: He says he doesn't have to.
24 He says all he has to do is show reasonable doubt.

25 MS. WAGER: Well, Your Honor, he's making a

1 circular argument. In order to show reasonable
2 doubt, he's trying to show he didn't do it, that
3 someone else did. He's trying to point the finger
4 away from himself at someone else. Now, the - - -
5 why he did that was because he wasn't doing what any
6 good defense attorney would do, as my opponent
7 stated. What he was trying to do was to ignore the
8 court's ruling. The court made a ruling that his
9 proffered evidence was not sufficient. So what he
10 was trying to do was to plant a seed in the jury's
11 mind about Warren and about Susan Wesley (ph.)
12 without saying that's what he was doing, because if
13 he wasn't pointing a finger at them, how was the
14 evidence relevant?

15 JUDGE RIVERA: So what if the judge is
16 wrong about not letting him put in that evidence, at
17 least about Warren?

18 MS. WAGER: Well, the Judge - - - our
19 position is the court was not wrong, but harmless
20 error analysis - - -

21 JUDGE RIVERA: Let's say we disagree with
22 you.

23 MR. GAETANI: Sorry, again?

24 JUDGE RIVERA: Let's go to the harmless
25 error analysis. Let's say we disagree with you.

1 He's willing to concede everything expect on the
2 homicide.

3 MS. WAGER: Harmless error analysis does
4 apply. He was referring to in Holmes when the court
5 is making the decision whether to admit evidence and
6 using the conventional balancing test. It - - - it's
7 wrong, it's unconstitutional, to focus on the
8 strength of the People's case. Because in South
9 Carolina what they were doing was saying if the
10 People's case is strong, it doesn't matter how
11 probative defendant's evidence. It doesn't matter
12 that it causes no prejudice or confusion. People's
13 case is strong; your evidence doesn't come in.
14 That's what they said was unconstitutional. And
15 harmless error would apply here and I do submit the
16 evidence of defendant's guilt is truly overwhelming
17 for each of the crimes.

18 JUDGE RIVERA: So - - - so your position is
19 the only way that you can proceed with third-party
20 culpability evidence is if you take the position that
21 the particular person that's relevant to that
22 evidence is indeed the perpetrator of the crime?
23 That's the only way you can pursue that?

24 MS. WAGER: That is what third-party
25 culpability is.

1 JUDGE PIGOTT: Well, I'm - - - I'm - - -

2 JUDGE RIVERA: Well, no, I need - - - let's
3 say I - - - let's say my point is five people - - -

4 MS. WAGER: Sure.

5 JUDGE RIVERA: - - - had the opportunity
6 and the motive, but I'm not necessarily pointing to
7 any particular one of them.

8 MS. WAGER: I - - - I - - -

9 JUDGE RIVERA: I thought your position is
10 you have to point to one of them.

11 MS. WAGER: You can - - -

12 JUDGE RIVERA: That that's the real
13 perpetrator.

14 MS. WAGER: You can have several alternate
15 suspects.

16 JUDGE RIVERA: And then why isn't that just
17 challenging your reasonable doubt, whether or not - -
18 -

19 MS. WAGER: He's - - - he's saying - - -

20 JUDGE RIVERA: - - - you established
21 reasonable doubt.

22 MS. WAGER: That's not what he was doing
23 here, Your Honor. He wasn't saying someone else did
24 it. He was saying Warren did it and Susan Wesley did
25 it and this is the evidence that points to them, but

1 I'm not accusing them, at least not yet.

2 JUDGE PIGOTT: I don't - - - I - - - the
3 judge says "You can say the defendant didn't do it,
4 somebody else did it, and that it is an essential
5 element of third-party culpability, you actually have
6 to accuse somebody."

7 MS. WAGER: Right.

8 JUDGE PIGOTT: Is that your understanding
9 of the law?

10 MS. WAGER: Yes, Your Honor.

11 JUDGE PIGOTT: Well, if he's - - - if the
12 evidence that he wants to put in is that there was a
13 half-a-million dollar life insurance policy payable
14 to Warren, isn't he pointing it? I mean, why - - -

15 MS. WAGER: He - - - he was doing it but to
16 say - - -

17 JUDGE PIGOTT: So why wouldn't it come in?
18 In other words, he's - - - he doesn't want to say it
19 was my brother; I mean, he just wants to lay it out
20 there, and I would think anybody would assume,
21 obviously, Warren may - - - you know, Warren, as - -
22 - as counsel is saying, had everything, you know,
23 access and everything else.

24 MS. WAGER: Well, I disagree that he had
25 all that, Your Honor. I think all he had here was a

1 speculative motive. His proffer was that this policy
2 existed and that Warren was the beneficiary, but he
3 didn't even come forth with that Warren knew about
4 the policy. The only information the court knew was
5 that Warren did not know he was a beneficiary until
6 after Jennifer Katz died.

7 JUDGE PIGOTT: But that's a diff - - -
8 that's a different reason to not let it in, right?

9 MS. WAGER: Well - - - well, Your Honor,
10 what I'm saying is motive alone is never enough, and
11 that's what this court said in People v. Gamble. And
12 that's a good rule because, as Your Honor said, when
13 somebody dies, you can come up with five or ten
14 people that either benefitted from the death or had
15 some animus towards the victim. Motive is not
16 enough. There has to be a connection to the crime -
17 - -

18 JUDGE PIGOTT: So I - - - I guess what - -
19 -

20 MS. WAGER: - - - and then motive can come
21 in.

22 JUDGE PIGOTT: - - - what Judge Rivera and
23 - - - and I were saying is he says you have to - - -
24 you have to point your finger at someone, and it
25 seemed to me that if you were saying there's a motive

1 here or there - - - or there's a reason here that,
2 yeah, a half-a-million dollar life insurance policy,
3 you are pointing the finger even though you're not
4 saying therefore, it's Warren.

5 MS. WAGER: Yes, Your Honor. And I think
6 that's the way the trial court saw - - - saw it. So
7 even though he was saying I'm not doing third-party
8 culpability, the court saw it for what it was and
9 ruled he didn't meet the threshold.

10 JUDGE PIGOTT: So is that - - -

11 MS. WAGER: But the threshold requires
12 something more than just a speculative motive, and
13 he's saying opportunity and access, but Warren was -
14 - -

15 JUDGE RIVERA: Well, I can see the
16 speculative motive if - - - if all he says is oh, he
17 was going to make some money off her death, but he
18 has got - - - there's an actual life insurance policy
19 where - - - where, indeed, the person that - - - is
20 most suggested in this particular scenario, is an
21 actual beneficiary and did actually collect.

22 MS. WAGER: Yes, Your Honor, but - - -

23 JUDGE RIVERA: So what's so speculative?
24 The former lover, right?

25 MS. WAGER: Right.

1 JUDGE RIVERA: The former lover who gets
2 money off the life insurance policy or otherwise has
3 access, understands the woman, could get into this
4 home, I mean, what - - - what's so speculative? Is
5 this really, like, someone who she doesn't know at
6 all? That's speculative.

7 MS. WAGER: But - - - but that - - - but
8 that's not the stand - - - the standard can't be they
9 have a motive, they're going to benefit, and they
10 knew her. Because then that - - - that could be - -
11 -

12 JUDGE RIVERA: So what more do you need?

13 MS. WAGER: - - - thousands of people. You
14 - - -

15 JUDGE RIVERA: Okay, what more do you need?

16 MS. WAGER: What you need is a connection
17 to the crime, and the language that was quoted in - -
18 - in Primo from Greenfield is apt. It's a proof of
19 connection - - -

20 JUDGE RIVERA: But let me ask you this:
21 what if - - - what if his DNA is on the tie?

22 MS. WAGER: Well, if - - -

23 JUDGE RIVERA: They can't get that, right?

24 MS. WAGER: His DNA was not on the tie, and
25 I disagree with my opponent saying there's forensic

1 evidence that points to another person, because
2 that's not accurate. There was some DNA samples that
3 were of low threshold and cannot be identified.
4 Defendant's DNA was all over the place. That - - -
5 that's for certain.

6 JUDGE RIVERA: You mean you couldn't
7 exclude him off the tie, is that what you're saying,
8 because - - -

9 MS. WAGER: Well, defendant was - - -

10 JUDGE RIVERA: - - - you didn't have a
11 sample good enough or - - -

12 MS. WAGER: Defendant was excluded from the
13 tie, and I believe the tie had female DNA on it. She
14 had two teenage daughters, it was a hair tie, a polka
15 dotted hair tie. That still doesn't get you to
16 Warren.

17 There was nothing that connected Warren to
18 the crime. He has a general opportunity.
19 Opportunity doesn't mean that you're in the
20 neighborhood. Countless people are in the
21 neighborhood. Under that theory, I had opportunity,
22 anybody in Westchester County - - -

23 JUDGE RIVERA: You don't have anything
24 else.

25 MS. WAGER: - - - anyone who could knock on

1 her door.

2 JUDGE RIVERA: Yeah, but that - - - that's
3 speculative. I'm - - - I'm not disagreeing with you
4 about that, but he - - - he's not saying that - - -
5 that's it's just the - - - the life insurance policy,
6 right. He's got sort of these other things about - -
7 -

8 MS. WAGER: No, but the other things are -
9 - - are very speculative. He's saying opportunity,
10 opportunity in that he was around. That's not what
11 opportunity means.

12 JUDGE FAHEY: There was some - - - there
13 was some discussion of the - - - the sister, Dana
14 (ph.), I believe her name was. What about her? I -
15 - - I thought that he attempted to prove - - - put
16 proof forward as to her that she would argue that
17 Warren was jealous of the relationship; is that
18 accurate?

19 MS. WAGER: He - - - he - - - defendant had
20 asked Warren on cross-examination, did you tell Dana
21 if I found out Reggie had - - - this is after the
22 death - - - if I found out Reggie had been sleeping
23 with Jennifer, I could never forgive him for that.
24 He then - - - Warren denied saying that. He then
25 wanted to call Dana, introduce extrinsic evidence for

1 impeachment purposes, that's the only ground that was
2 presented to the trial court, and the trial court
3 said well, that's a collateral matter.

4 What he was attempting to show from that
5 was an omission, the fact that Warren didn't say
6 well, I couldn't forgive Reggie if Reggie killed
7 Jennifer. That means Warren knows that Reggie didn't
8 kill Jennifer because Warren did really kill
9 Jennifer. It was this whole speculative asking the
10 jury to jump over, you know, huge gaps in proof. But
11 basically, he just offered to the trial court, I want
12 to call Dana just to impeach Warren that there was
13 some jealousy.

14 JUDGE GARCIA: Counsel, did he - - -

15 MS. WAGER: But again - - -

16 JUDGE GARCIA: - - - ever articulate a
17 third-party culpability theory, either before the
18 trial started or during?

19 MS. WAGER: I'm sorry, Your Honor?

20 MS. WAGER: Did defendant's lawyer ever
21 articulate a third-party culpability theory before or
22 during the trial?

23 MS. WAGER: In the beginning, before the
24 trial actually started, the People brought up the
25 issue because we had made a motion in limine that if

1 - - - if the defendant intended to cross-examine
2 Warren on the life insurance policy, that we asked
3 for an offer of proof because we believe that was not
4 enough - - -

5 JUDGE GARCIA: Right.

6 MS. WAGER: - - - under the case law to go
7 down into the path of third-party culpability. And
8 then defendant answered that and gave a proffer, and
9 when the court said that's enough - - - that's not
10 enough and denied it he then - - -

11 JUDGE GARCIA: But was the proffer I'm
12 going - - -

13 MS. WAGER: - - - denied he was doing that.

14 JUDGE GARCIA: - - - to blame Warren, or
15 was the proffer I'm just going to use it to negate
16 the idea that someone else could have had a - - - no
17 one else could have had a motive to do this? Did he
18 articulate the theory, I am going to use this to
19 blame Warren?

20 MS. WAGER: I don't believe he articulated
21 it that way. He kind of articulated that I just want
22 to point the finger away from myself, show other
23 people could have done it; countless other people
24 could have done it. But he - - - he was making an
25 argument that he was accusing Warren, and if he's not

1 accusing Warren, all these - - - all these questions
2 that he was asking were largely irrelevant, where
3 Warren was at the time, whether he keeps gloves in
4 his car, his lack of reaction to seeing her garbage
5 cans left on the street. All that would be
6 irrelevant if he wasn't accusing Warren.

7 JUDGE GARCIA: Right, so that's my
8 question. Was he accusing - - - did he ever
9 articulate a theory to the court that he was going to
10 use this to accuse Warren?

11 MS. WAGER: He wouldn't admit that. He
12 kept on saying well, I'm just trying to - - -
13 basically, he was saying I want to throw everything
14 out there and, you know, maybe I can confuse the
15 jury. He would never admit that that's what he was
16 doing. And he conceded that he did not have enough
17 under Primo. And he was trying to get through a - -
18 - the backdoor what he couldn't do through the front
19 door.

20 But I - - - I did want to just briefly
21 state that the constitutionality of the Primo
22 standard is not a question of law that this court can
23 decide. He cannot claim that he preserved that
24 issue, whether third-party culpability standard under
25 Primo is constitutional, when he was denying that his

1 proffered evidence had anything to do with third-
2 party culpability or Primo. He not only didn't do
3 it, it would have been impossible to do by disavowing
4 that defense and yet preserving the issue for this
5 court to review.

6 JUDGE PIGOTT: Thank you, Ms. Wager.

7 MS. WAGER: Thank you.

8 JUDGE PIGOTT: Mr. Gaetani.

9 MR. GAETANI: Well, just respect - - - with
10 respect to that last point, it's actually preserved
11 because the trial judge was deciding that,
12 notwithstanding the right to present a defense in
13 Chambers v. Mississippi, that Primo - - - under
14 Primo, it was going to limit what the defendant can
15 do.

16 I just want to clear up something about the
17 DNA. It's - - - it's very clear from the trial
18 record that the defendant's DNA profile was excluded
19 from the red necktie, which is a substantial piece of
20 evidence with respect to the homicide because it was
21 used to bind the victim's hands. With respect to the
22 left fingernail clipping, there was evidence there
23 that showed the presence of more than one male - - -
24 could not be specific with respect to who either one
25 was, but the presence of more than one male, and

1 that's clear from the record.

2 JUDGE GARCIA: And, counsel, could you
3 point me to where in the record your client's - - -
4 the defense lawyer specifically raises accusing the
5 brother of committing this crime?

6 MR. GAETANI: Your Honor, this - - - before
7 the jur - - - before this case went to - - - before
8 jury - - - I think it was during jury selection, the
9 People made this prosp - - - motion for a prospective
10 ruling.

11 JUDGE GARCIA: Right.

12 MS. WAGER: So at that point, it's very
13 early on in the case, there - - - the judge says
14 well, I'll keep an open mind, but I tell you what, if
15 you don't - - - you know, he's not in the house, I'm
16 not going to go for this. The defendant, at that
17 point, he's a trial attorney, he's playing it close
18 to the vest, he's not going to tell what his defense
19 is right from the get-go.

20 JUDGE GARCIA: But at some point when this
21 is going through the trial and these facts line up to
22 show access to the house, does he ever articulate the
23 theory, I'm going to use this to point the finger at
24 Warren?

25 MR. GAETANI: He's already been shut down.

1 The judge has already told him if he's not - - -

2 JUDGE GARCIA: They don't - - -

3 MR. GAETANI: - - - in the house, I can't -
4 - - you're not going to bring in evidence of third-
5 party culpability. Why does he just keep on butting
6 his head against - - -

7 JUDGE GARCIA: But is that on a response to
8 the People's motion where you could have said, in
9 response to that motion, because I want to use this
10 to point the finger at Warren.

11 MR. GAETANI: Judge, that was before the
12 trial started.

13 JUDGE PIGOTT: I had the same question,
14 though. I was wondering is he - - - is he - - - you
15 know, what's the - - - is he just doesn't want to say
16 something that's going to get Warren convicted in the
17 next trial? I mean, I - - - it made no sense - - -

18 MR. GAETANI: Judge - - -

19 JUDGE PIGOTT: - - - to me.

20 MR. GAETANI: - - - I - - - I think very
21 (sic) on when this motion is made, before the
22 selection of the jury is completed, he doesn't want
23 to reveal what his defense is going to be.

24 JUDGE PIGOTT: Well, so what?

25 MR. GAETANI: And I don't think he's

1 required to reveal - - -

2 JUDGE PIGOTT: But - - - but if you're - -

3 -

4 MR. GAETANI: - - - what his defense is

5 going to be.

6 JUDGE PIGOTT: - - - if you're going to

7 bring in a motive like half-a-million dollar life

8 insurance policy, aren't you kind of tipping your

9 cards?

10 JUDGE GARCIA: Right.

11 MR. GAETANI: I mean I - - - I would think

12 he'd be jumping up and down saying it was my brother,

13 it was my brother, it was my brother.

14 MR. GAETANI: Well, Judge, they brought in

15 the policy. They - - - they revealed the fact that

16 that happened. And if I could just finish with one

17 or two points?

18 JUDGE PIGOTT: Certainly.

19 MR. GAETANI: With respect to Dana, it

20 wasn't collateral. The defendant said it wasn't

21 collateral. And there's a case I cite in my brief, a

22 Second Circuit case, and I'd ask the court to take a

23 look at that, Alvarez, and this court's own decision

24 in Carroll. When you're talking about extrinsic

25 evidence to prove motive, it's a different story.

1 But I - - - I don't know, I don't have any time now,
2 but there's other compelling evidence here. And - -
3 - and Judge Lippman used the term in - - - in Negron,
4 when he was talking about the fact that there wasn't
5 anybody who put the witness in that case in the
6 house, he talked - - -

7 JUDGE RIVERA: Did - - - did - - - I'm
8 sorry. Did counsel concede that there wasn't enough
9 evidence to proceed under Primo?

10 MR. GAETANI: I - - - I think - - -

11 JUDGE RIVERA: That's what your adversary
12 says.

13 MR. GAETANI: I think he - - -

14 JUDGE RIVERA: Is that true?

15 MR. GAETANI: I think he said Judge, you -
16 - - you indicated there's not enough evidence. So he
17 - - - he was - - -

18 JUDGE RIVERA: The judge indicated that?

19 MR. GAETANI: Yeah, he was parroting what
20 the - - - what the court said, that there wasn't
21 evidence, but I think there is enough evidence.
22 There is, in addition to the motive, which could - -
23 - if it was proved, there's proximity, there's
24 access, there's this evidence of - - - with the
25 garbage cans and the phone call from the friend and

1 Warren doesn't go over, given the relationship they
2 had. Evidence which - - -

3 JUDGE STEIN: Is there anything - - -
4 anything at all connecting him to the crime or the
5 scene of the crime?

6 MR. GAETANI: There's no witness that puts
7 him in the house, but neither was there a witness in
8 Negron. There was evidence which Judge Lippman
9 characterized "evincing a consciousness of guilt."
10 And I think with respect to the garbage cans, this is
11 somebody who had let themselves into the house during
12 his route to get some drinks for himself and his
13 friend. Passes by one day, doesn't see that the
14 trashcan has been removed - - - and this is a
15 meticulous person; comes back again, doesn't see the
16 recycling is put out, doesn't do anything.

17 The next night when the body's discovered,
18 gets a call from her best friend, hey, Warren, you
19 know, there's sirens, the - - - the police have a big
20 presence at her house. He calls, but he doesn't go
21 over to see what happened. Given the fact that, you
22 know, well, maybe he connects it to the trashcans
23 because he knows the daughters are away. He knows
24 she's home. So there was a lot of other compelling
25 evidence in this case, the forensic evidence. It

1 wasn't just the fact that there was a life insurance
2 policy.

3 JUDGE PIGOTT: Thank you, Mr. Gaetani.

4 MR. GAETANI: There was more. Thank you,
5 Judge.

6 (Court is adjourned)

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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. Reginald Powell, No. 47 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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