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COURT OF APPEALS

STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

No. 88

GARY WRIGHT,

Appellant.

20 Eagle Street
Albany, New York 12207
May 04, 2016

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA

Appearances:

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1 CHIEF JUDGE DIFIORE: First matter on this
2 afternoon's calendar is People v. Gary Wright, it's
3 number 88.

4 Counsel, your appearance.

5 MR. KATZER: Thank you, Your Honor.

6 May I begin by asking to reserve two minutes,
7 please?

8 CHIEF JUDGE DIFIORE: Yes, you may.

9 MR. KATZER: Thank you. Good afternoon,
10 Your Honors. May it please the court. My name is
11 Michael Katzer, and on behalf of my client, Gary
12 Wright, I thank you for the opportunity to bring this
13 matter before you.

14 The issues here go beyond those affecting Gary
15 Wright; they go beyond affecting any one individual. The
16 issues here are about the right of the public to fairness
17 in the criminal justice system.

18 CHIEF JUDGE DIFIORE: Counsel, in your 440
19 application, that was based on an actual conflict of
20 interest due to simultaneous representation, correct?

21 MR. KATZER: Yes and no, Judge. It was
22 based upon an actual and inherent conflict of
23 interest.

24 CHIEF JUDGE DIFIORE: Stay with me, for a
25 second.

1 MR. KATZER: Yes, I will.

2 CHIEF JUDGE DIFIORE: The 440 practice is
3 fairly clear as set out in the statute, and it is the
4 defendant's burden to make the proper sworn
5 allegations. Do you do that there?

6 MR. KATZER: Did we do that there?

7 CHIEF JUDGE DIFIORE: Yes.

8 MR. KATZER: Yes, I think we did, Your Hon

9 - - -

10 CHIEF JUDGE DIFIORE: Explain to me how you
11 did that.

12 MR. KATZER: Excuse me.

13 JUDGE PIGOTT: Explain how you did that.

14 MR. KATZER: Well, we set forth facts that
15 Mr. Long represented the District Attorney Soares in
16 October of 2008 in an election matter.

17 CHIEF JUDGE DIFIORE: Um-hum.

18 MR. KATZER: And then Mr. Long was retained
19 by Gary Wright in around January of 2009 without any
20 disclosure by Mr. Long of his conflict of interest.
21 And I submit that the failure to disclose in this
22 case is as serious and pernicious as the conflict
23 itself.

24 JUDGE ABDUS-SALAAM: Was the election law
25 matter still going on in 2009, counsel, when your

1 client engaged Mr. Long?

2 MR. KATZER: Was the what matter?

3 JUDGE ABDUS-SALAAM: Was the election law
4 matter that you first referenced, in 2008, was that
5 still going on?

6 MR. KATZER: Judge, I have to answer you in
7 the words of your predecessor court, People v.
8 Shinkle, that information is out of my reach and is
9 out of my client's reach.

10 CHIEF JUDGE DIFIORE: Did you ask Attorney
11 Long for an affidavit?

12 MR. KATZER: No, Judge, I did not. I - - -
13 as a tactical matter, I believe that Mr. Long was in
14 an adversarial position with my client, and while I
15 thought of it, I made a conscious decision not to.
16 Mister - - - no, Mr. Long was the defendant - - -
17 that's the whole point, Mr. Long was the District
18 Attorney - - -

19 CHIEF JUDGE DIFIORE: I understand.

20 MR. KATZER: - - - District Attorney's
21 attorney.

22 CHIEF JUDGE DIFIORE: I understand.

23 MR. KATZER: What's he going to tell me?
24 What he wants to tell me.

25 JUDGE PIGOTT: Well, that's your - - -

1 you're assuming he's not going to tell you the truth.

2 MR. KATZER: I'm assuming he's not going to
3 be helpful. Let me respond by saying this.

4 JUDGE PIGOTT: My point is, suppose you're
5 wrong, suppose as Judge Abdus-Salaam is asking you,
6 if in fact that - - - that retainer, or whatever you
7 want to call it was over, that the election law thing
8 was over, you know, election is over, everything is
9 over, and now he has another new client. And - - -

10 MR. KATZER: Okay.

11 JUDGE PIGOTT: - - - and he goes forward,
12 and apparently represents with pretty good alacrity,
13 the reasonable offer of a plea, and this didn't come
14 up until later.

15 MR. KATZER: Judge, I would dispute the
16 fact that he represented Mr. Wright well. I think
17 you know in the record, he submitted a motion, an
18 omnibus motion seeking to dismiss the indictment on
19 the ground of lack of forcible compulsion.

20 JUDGE PIGOTT: Let's - - - let's take - - -
21 let's take that away for a minute.

22 MR. KATZER: Okay.

23 JUDGE PIGOTT: I got too far ahead of you.
24 But if - - - if the election law thing was over - - -

25 MR. KATZER: Yes.

1 JUDGE PIGOTT: - - - and then a month later
2 he gets retained by - - - by now your client, there
3 is no conflict, right?

4 MR. KATZER: I disagree with that, Judge,
5 for several reasons. One, there's the failure to
6 disclose. When Gary Wright sought to retain Mr.
7 Long, didn't Mr. Wright have the constitutional right
8 to be advised by Mr. Long, by the way, I represented
9 the District Attorney, the guy who is trying to put
10 you in jail just two months ago.

11 JUDGE ABDUS-SALAAM: Was Mr. Long's
12 representation of the District Attorney in 2008, was
13 that a matter of public record?

14 MR. KATZER: I discovered it through an
15 Internet search, and it was either in the Times - - -
16 Albany Times Union Paper, or some other blog. And it
17 so happens that I - - - when I saw that, it struck a
18 nerve with me, because I had been involved in another
19 case involving this conflict.

20 But there's another way I'd like to answer
21 both Judge Pigott and Judge Abdus-Salaam. In
22 judicial matters, if an attorney is a campaign
23 manager or otherwise has an active role in the
24 campaign of a judge, that attorney cannot appear for
25 the judge for two years. Two years. Now, why should

1 Mr. Long or any other attorney be under less of a
2 rule than Your Honors. Why should Mr. Long - - -

3 JUDGE PIGOTT: Is it the rule? I honestly
4 don't know. If you represent a District Attorney,
5 you cannot practice criminal law in that county for
6 two years?

7 MR. KATZER: No, Judge. I am saying that
8 the - - - the rule is that if you're a campaign
9 manager, let's say, for a judge, you cannot appear
10 before that judge for two years. All I'm saying is -
11 - -

12 JUDGE ABDUS-SALAAM: Was Mr. Long the
13 campaign manager for - - -

14 MR. KATZER: No, but he was the attorney
15 for the campaign which kept him on the ballot. And I
16 don't want to jump too far ahead of myself, we - - -
17 not only was that an important matter, but there's
18 another rule here that the spouse of a District
19 Attorney cannot handle a criminal case as
20 representing a defendant. The reason for that is,
21 it's recognized that spouses have, you know,
22 interconnected - - - what's good for one - - -

23 JUDGE PIGOTT: Financial.

24 CHIEF JUDGE DIFIORE: Financial.

25 MR. KATZER: Excuse me.

1 MR. KATZER: Yeah, financial, right,
2 financial and personal.

3 JUDGE STEIN: So that's assuming
4 simultaneously being married, doesn't it? I mean, if
5 - - - the ques - - - you seem to be suggesting, and I
6 just want to make sure I understand your argument,
7 that even if, as a matter of fact, Mr. Long's
8 representation of the def - - - of the DA was
9 completely terminated by the time he took on
10 representation of the defendant here, he still had to
11 disclose or it was ineffective assistance of counsel?

12 MR. KATZER: Judge, I - - -

13 JUDGE STEIN: Is that your position?

14 MR. KATZER: Yes, Judge. I think the
15 failure to disclose - - -

16 JUDGE STEIN: Even if he is no longer
17 representing - - - how - - - how long would he have
18 to disclose for? Let's say he never represented Mr.
19 Soares again. How many defendants, and for how long,
20 does he have to disclose that prior representation
21 under your position?

22 MR. KATZER: A good - - - not under mine,
23 on the good benchmark would be the judicial - - - the
24 opinion of the bar association of two years. Maybe
25 it to be less, maybe this court will set another.

1 JUDGE FAHEY: The problem with a two-year
2 rule is that if Soares was the judge in the case, I
3 could understand the two year rules. But he's not
4 the judge of case; he would be an opponent. If you
5 work on the sa - - - on an issue together and then -
6 - - and the next time you and another attorney are in
7 - - - on opposite sides, there is no two-year rule.

8 MR. KATZER: I'm sorry, I didn't quite
9 understand that, Judge, it's my - - - my fault.

10 JUDGE FAHEY: When the two-year rule
11 applies to attorneys appearing in front of me, if I'm
12 a trial court judge - - -

13 MR. KATZER: Yes.

14 JUDGE FAHEY: - - - if they worked on my
15 campaign in front of me, because I can make a
16 decision on the case, so if Soares, the DA, was a
17 judge, then the two-year rule would apply. But he
18 wasn't, he was opposing counsel.

19 MR. KATZER: Why should any less of a rule
20 apply when a man's liberty is at stake?

21 JUDGE FAHEY: Wait a minute, wait a minute,
22 the judge is making that decision. The attorney - -
23 - the District Attorney is going to advocate for the
24 DA - - - for the People, and then Long advocates for
25 the defendant. But the two-year rule, the purpose of

1 that, you see what I'm saying, is that the
2 adjudicator, the trier of fact sometimes, the person
3 who makes the decision about the law can't have that
4 conflict. But here, Soares isn't in that opposition.

5 MR. KATZER: Judge, I disagree with you
6 because we have to look at the big picture. Mr.
7 Soares was charged by the Third Department with the
8 most serious ethical violations that an attorney
9 could commit. And who did he go to for that? Jim
10 Long. Later, Mr. Soares was going through personal
11 matters and he went through a divorce. Who did he
12 retain, Jim Long.

13 As we just discussed with you, Judge DiFiore, in
14 matrimonial situations, spouses can't be on the other end,
15 because presumably a spouse is the most important person
16 to the other spouse. In this case, I submit to you that
17 the most important person to David Soares in his life
18 during this time period was not his wife, but was Jim
19 Long.

20 JUDGE FAHEY: Well, that - - -

21 JUDGE PIGOTT: If that was true, that would
22 help your client, it would seem to me.

23 MR. KATZER: No, not necessarily.

24 JUDGE PIGOTT: Because you're saying to the
25 victim of this - - - of this attempted rape, you

1 you can understand as a strategic decision why I did
2 not seek an affidavit for Mr. Long.

3 JUDGE ABDUS-SALAAM: Okay, counsel, but you
4 have an assistant district attorney who has submitted
5 an affidavit saying that there was no representation
6 at the time that Mr. Long represented your client.
7 And the assistant district attorney represents the
8 District Attorney, yes?

9 MR. KATZER: Judge, did - - - that
10 affirmation was made upon information and belief;
11 worthless under the law of evidence. Personal
12 knowledge is necessary, and only Mr. Soares - - -

13 JUDGE PIGOTT: Wait a minute. Let's back
14 that up. I mean, you say I don't know what Mr. Long
15 did, you know, I didn't - - - I made a tactical
16 decision not to know, not to find out.

17 MR. KATZER: No, no, I didn't say that,
18 Judge.

19 JUDGE PIGOTT: You said you made a tactical
20 decision not to talk to him. Because - - -

21 MR. KATZER: Yes.

22 JUDGE PIGOTT: All right. Now, now you're
23 saying well, somebody says something on information
24 and belief, well, that's worthless. Well, how
25 worthful is - - - is your affidavit, if you're

1 saying, by the way, I didn't talk to anybody? I'm
2 just saying, look at the way this looks.

3 MR. KATZER: Okay. I'm going to ask a
4 question that I believe will answer that, if I could
5 with, I believe Judge Abdus-Salaam and Judge DiFiore
6 asked me; what facts did I provide. I provided an
7 affidavit of Gary Wright. And he said among other -
8 - - I was sitting with him across the table at
9 Woodbourne Correctional Facility on March 5, 2014.

10 Yes, I prepared his affidavit. That's A80
11 through 83. But when I told him that Mr. Soares had
12 been represented by Jim Long just a few months before
13 Mr. Long came to represent him, his jaw dropped.
14 Now, I was sitting across from him, in a grim
15 visiting room of Woodbourne Correctional Facility,
16 and he was shocked.

17 And even though he was wearing a jumpsuit,
18 he had a right to be shocked. I mean, here he hires
19 the attorney who thinks he's going to get a vigorous
20 defense from that attorney, and lo and behold, the
21 attorney, three and a half months ago, just
22 represented the District Attorney.

23 JUDGE FAHEY: Let me ask you this. If you
24 had - - - because your red light is on. If you had
25 had - - - if you have a hearing, are you going to

1 call Long? Are you going to call Long? Are you
2 going to call the DA?

3 MR. KATZER: I thought about what would
4 happen, and I think I would have to, and I also think
5 what the result for that would be.

6 CHIEF JUDGE DIFIORE: Thank you, Mr.
7 Katzer.

8 Counsel.

9 MR. HORN: May it please the court, I'm
10 Chris Horn on behalf of the People of the State of
11 New York.

12 The allegation here is that there was an
13 undisclosed actual conflict in the court below. It is the
14 People's position that there was no actual conflict, and
15 that - - -

16 JUDGE STEIN: How do we know that? Why - -
17 - why - - - why isn't he entitled to a hearing? I
18 mean, there - - - it seems to me there are two people
19 that would know that, Mr. Soares and Mr. Long. We
20 don't have an affidavit from either one of them. And
21 - - -

22 MR. HORN: It is - - - respectfully, it is
23 his burden to establish those facts. I don't have
24 any burden to prove or disprove his speculative - - -

25 JUDGE STEIN: Well, let's say, for example,

1 just for example, Mr. Long represented Mr. Soares in
2 his matrimonial. Those are sealed records. How
3 would this defendant ever obtain that information?
4 He makes - - - he makes a motion, he says, Judge,
5 this is what I can show you. I can show you that Mr.
6 Long represented the DA leading up to his
7 representation of me, and after his representation of
8 me. I think that there's a fair inference that he
9 represented him in between as well.

10 MR. HORN: Well, as far - - -

11 JUDGE STEIN: And he makes - - - and he
12 makes a motion, and the only thing in that position
13 is an affidavit of an ADA, who doesn't say on
14 personal knowledge, it doesn't even say, I had a
15 conversation with the DA, not - - - just - - - you
16 know, based upon my review of the records of the DA's
17 office, which of course I wouldn't expect there would
18 be any if he represented him in a matrimonial - - -

19 MR. HORN: Right.

20 JUDGE STEIN: - - - he - - - he - - -
21 there was no simultaneous representation. How is
22 that enough to get a hearing?

23 MR. HORN: I am only required under the
24 statute to deny. I am allowed to simply deny or not
25 respond at all, because I don't have the burden; he

1 has a burden. He is speculating, speculating is not
2 enough. The statute is very clear on that. And if
3 he does not come forward with sworn allegations
4 supported by facts to make his papers legally
5 sufficient, there is no reason why I should take a
6 burden upon myself to disprove his speculation.

7 JUDGE GARCIA: Counsel, let me ask you on
8 that point then, if this - - - if he had been
9 representing the District Attorney during this trial,
10 would the office have an obligation to disclose that?

11 MR. HORN: There is an obligation on both
12 sides, if you're aware of a conflict or a possible
13 conflict, to come forward.

14 JUDGE GARCIA: But your District Attorney
15 would certainly be aware of it. Right?

16 MR. HORN: Sure.

17 JUDGE GARCIA: So I'm assuming, if your
18 District Attorney is aware of it, your office is
19 aware of it.

20 MR. HORN: Yes. And when we were aware of
21 it, we applied for a special prosecutor.

22 JUDGE GARCIA: So can we assume then that
23 because you didn't, you would have had an ethical
24 obligation to disclose that; if you didn't, it would
25 be a violation in this case.

1 MR. HORN: It would be a violation, however
2 this court has found that even when - - - even when
3 both - - - either side fails to meet their obligation
4 of coming forward and letting the court know that
5 there is a potential conflict, that that, in and of
6 itself, is not enough to reverse or warrant a
7 hearing. People v. Abar specifically, the court said
8 - - -

9 JUDGE GARCIA: Where a District Attorney is
10 represented in another matter by the defense lawyer.

11 MR. HORN: No, it was not the District
12 Attorney himself - - -

13 JUDGE GARCIA: Right.

14 MR. HORN: - - - but it was a conflict.
15 And the conflict was not disclosed. And so the rules
16 of professional conduct are not read into the
17 Constitution so that that is a - - - so that you go
18 through the Constitutional analysis of whether or not
19 he received a fair trial, based on that.

20 JUDGE GARCIA: But we - - - would we agree
21 that if there was simultaneous representation, it
22 would be an ethical violation not to disclose it?

23 MR. HORN: It would be in violation of the
24 professional conduct rules.

25 CHIEF JUDGE DIFIORE: Not only that, would

1 it be an actual conflict that cannot be waived?

2 MR. HORN: No, Your Honor, absolutely not.
3 Actual conflicts, number one, can be waived, unless
4 of course, the attorney is implicated in the crime
5 that he is representing the defendant on, in that
6 case; that's per se reversible. But for - - - for an
7 actual conflict to exist, you need three things, none
8 of which are met here.

9 There has to be concurrent representation.
10 The - - - it has to be current representation of a
11 key witness. Mr. Soares is not a witness in this
12 case; he is not going to be testifying to anything.
13 He is not a key witness, he is not a codefendant, he
14 is not a victim. So the duty that Mr. Long might
15 have, and I would point the court to People v.
16 Solomon, the duty that Mr. Long would have to his
17 defendant never comes into conflict with any duty he
18 has with regard to Mr. Soares, because Mr. Soares is
19 not on the stand.

20 So it's not like he is - - -

21 JUDGE STEIN: But are you talking about
22 disqualification of the DA, or are you talking about
23 conflict of counsel?

24 MR. HORN: I'm talking about actual
25 conflicts, as talked about in People v. Solomon, and

1 that was the standard that was set forth. The first
2 thing you have to consider is the nature of the
3 conflict and the nature of the parties.

4 JUDGE GARCIA: But couldn't you have a
5 conflict here that he represents the DA, right, and
6 there - - - something comes up in this trial where
7 there is misconduct by the District Attorney's
8 office. Would not he have an incentive, since that's
9 his client on another matter, not to raise that
10 issue?

11 MR. HORN: Well, that's not going to
12 pertain to David Soares. I mean, that would be the
13 DA's Office. He - - - we're also sort of getting
14 into the idea that - - - that he actually represented
15 David Soares in that whole election thing.

16 JUDGE PIGOTT: Well, why don't - - - why
17 don't - - -

18 MR. HORN: - - - he represented the
19 campaign, if at all, and it was just a letter saying
20 - - -

21 JUDGE FAHEY: But you can't - - - you can't
22 draw that distinction. I mean, it does - - - listen,
23 there is a broader reality here which is that, by my
24 count, Mr. Long represented him on five different
25 occasions, five different items, you know, divorce, a

1 grievance, election law matter, an article about
2 extramarital affair, and in every instance, mister -
3 - - the DA seemed to have used some sense, and said
4 in Long cases, there is a conflict, I have got to
5 recuse.

6 And I'm assuming that they were more on
7 spot, but certainly if there's not an actual
8 conflict, doesn't there - - - isn't this enough for
9 an inference?

10 MR. HORN: No, I don't believe so, sir.
11 Again, it's because you need concurrency, you have to
12 prove the concurrency, there is no concurrency here.
13 The election issue on his - - -

14 JUDGE FAHEY: Well, how - - - how do we
15 know that without - - - now, you're sitting as a
16 judge, how do you know that without a hearing?

17 MR. HORN: Because the record isn't very
18 clear - - -

19 JUDGE FAHEY: If you are - - - or are you
20 just saying simply they just simply haven't met their
21 burden for the hearing, and that's it?

22 MR. HORN: They haven't met their burden
23 for the hearing, and ultimately, you got to look at
24 the timing of everything.

25 That letter was sent out in October of 2008.

1 JUDGE FAHEY: Um-hum.

2 MR. HORN: It was about the DA's name
3 appearing on mail-in ballots; it was just a letter.

4 JUDGE PIGOTT: Some of this struck me - - -
5 pardon me, struck me on this is that you didn't resp
6 - - - there was no response to their, you know, to
7 their 440. And a lot of the arguments you're making
8 here might have been really good and very helpful,
9 you know, in that early stage. And you say we don't
10 have to respond. And I think that, you know, in a
11 certain circumstance that's true, but we do have
12 motions to dismiss, we have - - - we have things like
13 that, none of which was done here.

14 And so now all of a sudden, you know, we're
15 hearing from you, and we saw your brief, and saying
16 all of these things, but - - -

17 MR. HORN: Well, and I certainly did
18 respond to the 440.

19 JUDGE PIGOTT: Um-hum.

20 MR. HORN: I definitely did. And I denied
21 that it was true. But the - - - again, the election
22 law thing ended when the election ended; there were
23 no issues there. It was one letter saying, you left
24 his name off, please put his name on, they put the
25 name on. There was no litigation, there was nothing

1 ongoing, it was over with. Then, we're talking about
2 the misconduct thing, the event that spurred the
3 misconduct investigation didn't occur till a year
4 after Mr. Long was fired. So - - -

5 JUDGE STEIN: But the - - - I think the
6 inference that I think Judge Fahey was referring to
7 is that it appears that in every instance in which we
8 know that Mr. Soares consulted with, or sought the
9 assistance of an attorney in some matter or other, it
10 appears to have been Mr. Long. So if there was
11 something that we don't know about in between, it's
12 likely that it was again, Mr. Long.

13 But if it's something that never became public,
14 there would be no way for defendant to know that. So - -
15 - so he shows the - - - he shows the sequence of events,
16 and he says there's an inference here, and he sort of - -
17 - that's his burden, and then he ships the burden to you
18 to say, no, no, no, and, you know, maybe - - - maybe there
19 should be a hearing, and - - - but again, the opposition
20 here, it's not the personal knowledge.

21 MR. HORN: Correct. But it's - - - but
22 it's also he is relying entirely on speculation. I
23 know we're calling it an inference, but - - -

24 JUDGE RIVERA: So what - - - what - - -
25 what should he have done; what would he have had to

1 do to meet his burden?

2 MR. HORN: Well, the number one thing he
3 should have done is gone to Mr. Long and ask for an
4 affidavit. And there's plenty of case law out of the
5 First Department that says if you don't go to that
6 defense attorney and ask for an affidavit, summary
7 denial lies. And he could have done that, and he
8 chose not to do it for tactical reasons; I don't
9 really understand why that would be a tactical
10 reason. Because you're then allowed to explain, if
11 he doesn't cooperate, you're allowed to say, hey, I
12 went to him for an affidavit, he didn't want to give
13 me an affidavit, so there is your explanation, and
14 now you've done your due diligence in - - - in - - -

15 JUDGE RIVERA: Would the attorney have
16 breached any ethical violation by giving him an
17 affidavit?

18 MR. HORN: Not unless he was asking about
19 it.

20 JUDGE RIVERA: Because - - - explaining
21 what if any relationship he had with the DA?

22 MR. HORN: I don't think representing him
23 is confidential. I mean, I don't think that violates
24 anything. And it's certainly relevant to - - - to
25 the cases before the court, so, no, I don't think

1 that would have been anything. And it - - -

2 JUDGE RIVERA: He would have been able to
3 answer his question, is what you're saying.

4 MR. HORN: Yes, Your Honor.

5 And - - -

6 JUDGE RIVERA: He could have answered your
7 question too, correct?

8 MR. HORN: Correct.

9 JUDGE RIVERA: So why didn't you put in the
10 affidavit?

11 MR. HORN: Because - - -

12 JUDGE RIVERA: Only because you say it's
13 his burden; I never had a burden?

14 MR. HORN: That's - - - that's what I'm
15 relying on - - -

16 JUDGE RIVERA: (indiscernible).

17 MR. HORN: - - - and that's what I relied
18 on the whole way through - - -

19 JUDGE RIVERA: I understand.

20 MR. HORN: - - - because there was
21 literally nothing in that affidavit. He didn't - - -
22 he doesn't have any facts to say. I know it's being
23 suggested that there is an inference, but there is
24 not even an inference - - - there's no reference to
25 other legal proceedings that he was ever involved

1 with. We're just speculating that maybe that was the
2 case, and maybe he hired Jim Long in that regard.

3 That's not enough to sustain his burden in - - -
4 as far as I'm concerned.

5 JUDGE STEIN: How do you - - -

6 JUDGE ABDUS-SALAAM: So theoretical - - -

7 JUDGE STEIN: No, go ahead.

8 JUDGE ABDUS-SALAAM: Just as a theoretical
9 matter, what if Mr. Long were unavailable for
10 example, he couldn't submit anything even if counsel
11 had gone to him and asked for an affidavit; he was
12 dead or too ill, or, you know, now non compos mentis,
13 what - - - what would the burden - - -

14 MR. HORN: I think again, that's what you
15 would put in as your explanation for why I did not
16 come to the court with an affidavit, and I think that
17 would be a valid explanation. But he - - - but he
18 did not go that far, and that was his burden to do.

19 JUDGE RIVERA: Did he have to go to DA
20 Soares? Since the other person knows.

21 MR. HORN: I haven't read anything that
22 suggests that particular one, but, you know,
23 certainly it would have showed more due diligence
24 than what we have here, which is really just guessing
25 and innuendo; it's not proof, which is - - - which is

1 what you're supposed to do. You have to have
2 sufficient factual allegations to raise a question of
3 fact, and he hasn't done it.

4 And, on top of it all, since I only have one
5 minute left, even if you assume that there was a conflict
6 here, there is no reason to send it back for a hearing,
7 there is no reason to reverse, because the error was
8 cured.

9 His remedy here is to send it back for a new
10 trial with an attorney who doesn't have any conflicts.
11 His trial had an attorney with no conflicts. He was
12 represented by Terry Kindlon at trial. So it would be
13 redundant and meaningless to either send it back for a
14 hearing, or send it back for a trial, because he had
15 counsel with no conflict.

16 JUDGE PIGOTT: Wasn't it part - - - isn't
17 part of the argument here about the pretrial motions,
18 and all of that, you know - - -

19 MR. HORN: You can't show anywhere in there
20 where anything possibly could have operated in that
21 regard. I mean, the whole speculation about royalty
22 to the DA, because I represented him on some prior
23 matter, that's been rejected in People v.
24 Konstantinides, People v. Abar. You can't just
25 speculate about, you know, some perceived loyalty to

1 somebody, and that means you're going to tank the
2 case.

3 JUDGE GARCIA: Are those prior
4 representation cases? Are those prior or concurrent
5 representation cases you just cited?

6 MR. HORN: Konstantinides, the DA was
7 accusing the defense attorney, who was representing
8 him on that trial, of wrongdoing in the middle of the
9 trial, of suborning perjury and bribing a witness.
10 And People v. Abar, it was an ADA who indicted the
11 defendant, left the DA's Office, and then represented
12 that same defendant. So - - -

13 JUDGE PIGOTT: My - - - my point was that
14 you said the trial would have cured that because it
15 was a non - - - non-conflicting. But his argument is
16 it was even before that. That it may have impacted
17 on the pretrial proceedings; the omnibus motion, et
18 cetera.

19 MR. HORN: I don't see how it could be,
20 again, because Soares is not a witness, he is not a
21 victim, he is not a codefendant. The alleged
22 conflicts bore no relation whatsoever to the conduct
23 of the defense.

24 JUDGE PIGOTT: Well, I understand that, I
25 apologize. I was just trying to clear up the fact

1 that you say there is a trial, therefore no harm no
2 foul. And I'm saying, he is saying there is a foul
3 because of pretrial stuff too.

4 MR. HORN: He would - - - he would still
5 have to show some sort of operation on that, and I
6 don't believe he can, particularly with the very
7 favorable plea bargains he was able to procure for -
8 - - for the defendant.

9 CHIEF JUDGE DIFIORE: Thank you, sir.

10 MR. HORN: Thank you.

11 CHIEF JUDGE DIFIORE: Counsel.

12 MR. KATZER: Thank you, Your Honor.

13 CHIEF JUDGE DIFIORE: Counsel, if there is
14 no simultaneous representation here, what is the
15 prejudicial effect of Mr. Long's representation of DA
16 Soares before and after your client's case? Talk me
17 through that.

18 MR. KATZER: Okay. For the reasons that
19 Judge Stein expressed, and also that the Court of
20 Appeals previously has expressed is, we don't know
21 what other representation there was between these two
22 ends.

23 CHIEF JUDGE DIFIORE: No, I'm asking you,
24 what is the prejudicial effect on the stage of - - -
25 on the services that Mr. Long provided during the

1 preliminary proceedings of his case to your client?

2 MR. KATZER: Okay. Well, among other
3 things, he did no preparation, no investigation, and
4 Mr. Kindlon stated that, in an affidavit to the
5 court, I think he said the file was bereft of any
6 preparation.

7 JUDGE PIGOTT: He said that about Spargo
8 too, didn't he?

9 MR. KATZER: Judge, that's - - - I think he
10 did both and that's a factor which I didn't bring up
11 gener - - - initially, but mister - - -

12 CHIEF JUDGE DIFIORE: Did he work to
13 negotiate a reduced plea resolution in the case?

14 MR. KATZER: Did he what?

15 CHIEF JUDGE DIFIORE: Work to negotiate a
16 plea in the case?

17 MR. KATZER: Well, two - - - two plea
18 offers were made, and they were for, I believe
19 straight probation. And Mr. Wright rejected it. And
20 Mr. Wright rejected it because he's innocent. And he
21 - - -

22 JUDGE STEIN: Did Mr. Kindlon indicate that
23 his - - - his effectiveness at trial was in any way
24 hampered by anything that Mr. Long did or did not do?

25 MR. KATZER: Yes, I believe he did in his

1 affidavit, yes.

2 With respect to the plea, I've got to talk
3 really quick. There's an exhibit, I think at A68 or
4 something, where after the plea was offered, Mr. Long said
5 to the assistant district attorney, I'm going to work on
6 the defendant to take the plea. That's in - - - that's in
7 there, in the DA file. Now, is that consistent with a
8 defense attorney who is going to fight tooth and nail for
9 his client?

10 JUDGE PIGOTT: Yes. Yes, it is.

11 MR. KATZER: Maybe so.

12 JUDGE FAHEY: You know, a lot of times,
13 that's the best advice anybody can get.

14 MR. KATZER: But this is - - - yes, but it
15 wasn't the advice that this client wanted to - - - he
16 wanted a client - - - okay.

17 JUDGE PIGOTT: But how did that work a for
18 him, I mean - - -

19 MR. KATZER: Not well. But let me - - -
20 let me end by saying this, Judge. You brought it up,
21 Judge Pigott, and it's been discussed by all of you.

22 I did not make a haphazard decision not to speak
23 to Mr. Long; it was a - - - we try cases all the time, we
24 have to make decisions, we have to - - - which have - - -
25 sometimes have consequences which we don't anticipate, but

1 I knew that the ultimate affidavit here to be from David
2 Soares; not from Mr. Long.

3 In any event, if I was at fault for not doing
4 that, then if there is any way to take it out on me and
5 not my client - - - my client, I welcome that.

6 JUDGE RIVERA: Well, I'm confused, why - -
7 - why do you say that the affidavit needed to come
8 from Soares, from the DA Soares, not from Long?

9 MR. KATZER: Because he's the add - - - he
10 is the other side. Mr. Long keeps saying, it's just
11 my burden; I disagree.

12 JUDGE RIVERA: Could it be because only the
13 client may reveal whether or not Long was
14 representing him concurrently?

15 MR. KATZER: No, I think they both could,
16 but my position - - - Mr. Long isn't going to be a
17 friend of mine, and Mr. Soares already had some
18 conclusions reached by the Fourth Department about
19 his conduct in judicial matters, so he certainly
20 wasn't going to be a friend of mine or my client
21 either.

22 CHIEF JUDGE DIFIORE: Thank you, Mr.
23 Katzer.

24 MR. KATZER: Thank you, Your Honors.

25 CHIEF JUDGE DIFIORE: Thank you.

(Court is adjourned)

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

I, Meir Sabbah, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Gary Wright, No. 88 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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