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COURT OF APPEALS
STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

NO. 122

EDWARD MERO,

Appellant.

20 Eagle Street
Albany, New York
November 21, 2024

Before:

CHIEF JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE MADELINE SINGAS
ASSOCIATE JUDGE ANTHONY CANNATARO
ASSOCIATE JUDGE SHIRLEY TROUTMAN
ASSOCIATE JUDGE CAITLIN J. HALLIGAN

Appearances:

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1 CHIEF JUDGE WILSON: Good afternoon. The first
2 case on today's calendar is People v. Edward Mero.

3 Counsel?

4 MR. HUG: Thank you, Your Honors. Matthew Hug
5 for Mr. Mero. May I reserve three minutes for rebuttal?

6 CHIEF JUDGE WILSON: Yes.

7 MR. HUG: Your Honors, I think we can agree that
8 the - - - these two separate cases are stronger together
9 than they would have been apart. So it begs the question,
10 why? The reason why is that it leverages this inherent
11 psychological bias that the prosecutor sought to exploit,
12 that there is no way that it could be so coincidental that
13 one individual would be in the orbit of two people that
14 died under circumstances such as these.

15 JUDGE SINGAS: But to believe that do we have to
16 assume that the jury ignored the judge's instruction to
17 keep the evidence separate in their minds as they went
18 through the charges?

19 MR. HUG: I don't think you have to go so far as
20 to say that they intentionally ignored an instruction, but
21 I think that you should look at this as an instruction from
22 a judge is not going to overpower basic, you know, human
23 psychology. And I think that the cases that this court has
24 - - - have held, as well as the lower courts have held,
25 that you look beyond simply, you know, the weight of one

1 case is stronger than the other. It looks to see whether
2 or not there is a danger of undue prejudice - - -

3 JUDGE RIVERA: So what's your strongest - - - I'm
4 sorry. Over here. What's your strongest case for the
5 proposition you're asserting now?

6 MR. HUG: I think it's self-evident that they
7 have a case - - - they have two cases that have almost no
8 evidence establishing the defendant's guilt. They lop them
9 together in an effort to create that very prejudice. And
10 if you look at the people's - - -

11 JUDGE TROUTMAN: And statutorily, are they
12 permitted to join them together.

13 MR. HUG: Statutorily, they're permitted. It
14 invokes the court's discretion to sever them. So because
15 they're both murder cases and tampering charges, then yes,
16 they are - - - they fall up under the same statutory
17 umbrella, so subsection C is appropriate. However, in this
18 case, the court abused its discretion by not severing it as
19 a result of the clear prejudice that was attendant here.
20 And I would like you to really - - -

21 JUDGE HALLIGAN: So can I ask you, counsel, what
22 exactly is your theory? Is it that there were two cases
23 with - - - each with weak proof, in your view, or is it
24 that there was differential proof, or something different?

25 MR. HUG: It's both. Not only is it - - -

1 JUDGE HALLIGAN: But those are - - - those are
2 intention, it seems to me, right? One is that both cases
3 had roughly equivalent and, in your view, weak proof. And
4 the second is that there was a real imbalance in proof. So
5 that's why I'm asking you which one of those theories are
6 you really relying on?

7 MR. HUG: I think that you can look at it both
8 ways, Judge. Both are weak. One has more qual - - - a
9 greater quantity of proof. The Countermine side of the
10 case, the people put forth more witnesses and more
11 evidence. So in that regard, is the weight of the evidence
12 greater on one side than the other? The Cunningham case is
13 a clear accident. I think that there can be no question
14 that had they brought that case, People v. Mero, on the
15 Cunningham death only, it's an acquittal within moments.

16 I really - - - I think that the veil slips on the
17 people's position here at page 13 of their brief, when
18 they're speaking about Mr. Mero's interrogation. And what
19 they say is the chilling revelation that another young
20 woman with ties to defendant had died an untimely and
21 violent death prompted investigators to take a closer look.
22 Even the prosecutor in the brief, all the way at this level
23 of the court, is still unable to rinse that psychological
24 bias that he was associated with Cunningham, he's
25 associated with Countermine. We don't know how either one

1 of these two individuals died, but it's so unlikely that
2 one person would be in such a circumstance twice that,
3 well, you know, we'll get a jury to buy it.

4 CHIEF JUDGE WILSON: So let me ask you some
5 things that I find curious about the statute that maybe you
6 can help me with. So the provision we're talking about is
7 sub C, which the requirement is that the two crimes be the
8 same to join them, right?

9 MR. HUG: Yes.

10 CHIEF JUDGE WILSON: But why isn't it the case
11 that that would be more likely to cause prejudice than if
12 they were wildly different?

13 MR. HUG: I agree wholeheartedly.

14 CHIEF JUDGE WILSON: But the statute allows that.

15 MR. HUG: It does. But the case - - - but if you
16 look at subsection 3, because it's such a wide - - - a
17 broad power to consolidate, almost anything can be
18 consolidated under subsection C, that there are strict
19 limits, and that the courts are bound to enforce those
20 limits, and propensity - - - prevention of propensity is
21 one of those.

22 CHIEF JUDGE WILSON: So one of the - - - and
23 that's, I guess, sub A in section 3, right?

24 MR. HUG: Yes.

25 CHIEF JUDGE WILSON: Which also I'm curious about

1 because it requires two things conjunctively, substantially
2 more proof on one or more, right, than on the others, which
3 I want to pause on. I'll get back to it for a second. And
4 it also requires a substantial likelihood that the jury
5 would be unable to consider the proof separately.

6 So I wonder why the second element shouldn't be
7 enough. That is, if the jury couldn't consider them
8 separately, why isn't that reason in and of itself? But
9 the statute doesn't set that out as independent. You also
10 have to show substantially more proof, which I find
11 curious, and - - -

12 MR. HUG: But it all - - -

13 CHIEF JUDGE WILSON: - - - I don't know if
14 substantially more proof - - - going to Judge Halligan's
15 question - - - means volume or means force.

16 MR. HUG: I look at it as volume because you're
17 asking a jury to sit through a trial, and if there's a
18 substantially more voluminous proof with respect to one,
19 it's going to overcome or absorb the other. But I take
20 your point. It could - - - you could look at it either
21 way.

22 I would also note that the statute states that
23 that is one of a non-exhaustive list, and that if you look
24 at this court's decision in Shapiro and the cases that
25 follow it from the Second - - - from the First and Third

1 Department, it clearly states that propensity is a - - - is
2 an enormous concern, even though it's not laid out in the
3 statute, one that is probably subsumes all others because,
4 as you correctly pointed out, you're putting together cases
5 on charges that are the same.

6 And in this case - - -

7 JUDGE HALLIGAN: But the statute expressly
8 contemplates that, right?

9 MR. HUG: Yes, it does. It's strange because it
10 also says - - - it also includes a Molineux-type joinder.
11 And in this case, the prosecutor objected to the court's
12 use of Molineux joinder and saying, whoa, whoa, whoa,
13 there's no way that this is going to withstand appellate
14 review if we - - - because the prejudice would be so
15 overwhelming that we couldn't use Molineux Joinder.

16 So the court and the prosecution are all seeing
17 exactly what's happening here. They're - - - it's a
18 cynical play, because if you look at the letter from the
19 prosecutor, he tells the judge, listen, just do it under
20 sub C. You got - - - that's an abuse of discretion
21 standard. There's no way the courts are going to overturn
22 you.

23 CHIEF JUDGE WILSON: Well, so is it your view
24 that if you couldn't justify a Molineux joinder, you
25 nevertheless could under the CPL?

1 MR. HUG: It makes no sense to me that you could.

2 CHIEF JUDGE WILSON: Okay.

3 MR. HUG: I can't - - - I've thought about it and
4 thought about it, and I cannot square how you can't join it
5 under Molineux because it would be so preju - - - the
6 prejudicial effect would outweigh any probative value. But
7 that, you can say, the desire to preserve the resources of
8 the judicial branch overwhelm the defendant's right to a
9 fair trial, because that's really what subsection C is
10 about. Right. I mean, it's about preserving judicial
11 resources. I doubt that the District Attorney's Office
12 contacted the court clerk's office and said, you know, we
13 got a couple of murder charges here. Would it be - - - you
14 guys got the resources for two or one? They didn't do
15 that.

16 CHIEF JUDGE WILSON: Well, why do you say that
17 subsection C was based in efficiency?

18 MR. HUG: Because if you look at the cases that -
19 - - that - - -

20 CHIEF JUDGE WILSON: Well, did you look at - - -

21 MR. HUG: I'm sorry. B - - - B(3). I meant B(3).

22 CHIEF JUDGE WILSON: Oh, B.

23 MR. HUG: Right. The consolidation that's at
24 issue here, which is cases that are of the same type - - -
25 charges that are of the same type. The basis really

1 underlining it - - -

2 CHIEF JUDGE WILSON: That's C. Defined by the
3 same or similar statutory provisions. That's C.

4 MR. HUG: Yes. I misspoke. What I'm - - - but
5 the purpose of that is judicial economy, yes - - -

6 CHIEF JUDGE WILSON: Well, did you look to see
7 where that provision came from, what its genesis was?

8 MR. HUG: What the genesis of the - - -

9 CHIEF JUDGE WILSON: Yeah. Why - - - why it
10 originally wound up first in the Code of Civil Proced - - -
11 sorry - - - Code of Criminal Procedure?

12 MR. HUG: I didn't do a history on that.

13 CHIEF JUDGE WILSON: Okay.

14 MR. HUG: But clearly, when you read the stat - -
15 - when you read the cases that interpret it - - -

16 CHIEF JUDGE WILSON: Uh-huh.

17 MR. HUG: - - - judicial economy is prime amongst
18 the reasons for it. And this court in Shapiro warned
19 against diminishing the due-process rights of the
20 defendant, that it should not be a quid pro quo of the
21 defendant is going to have to sacrifice here because the
22 resources of the judiciary are being taxed right now.

23 JUDGE SINGAS: Does the fact that the jurors,
24 when - - - in their read backs during their deliberations,
25 were able to separate out the cases? I don't think you can

1 point to anything in their questioning where they melded
2 those two cases.

3 So the fact that they could say on one day, I
4 want to hear from the medical examiner regarding victim A,
5 and then a day or two days later, they say, now we want to
6 hear from the medical examiner about victim B. Does that
7 undermine your argument at all?

8 MR. HUG: No. I think anybody that tries to read
9 the tea leaves of juror notes is making a big mistake.

10 JUDGE SINGAS: Well, but your argument is that
11 the jury can't separate out because they're overwhelmed by
12 either the volume of the evidence so that they can't
13 distinguish between each case, and I'm asking, is there any
14 evidence that you can point to, to demonstrate that?

15 MR. HUG: Well, the decision here takes place
16 before the trial for good reason, so that we aren't locked
17 into a position of trying to guess as to what the jury may
18 or may not have been deliberating about. I think that this
19 case is vexing enough, without trying to examine the inner
20 workings of what the - - - this particular jury would have
21 been doing, or why they asked for these - these read backs
22 in the order that they did. What I can say is that it is
23 self-evident on this record that you have two weak cases
24 that are joined together for the sole purpose of making
25 them stronger.

1 JUDGE HALLIGAN: Can I ask in your - - - over
2 here - - - in your brief, you just addressed the severance
3 issue, I think, in a couple of pages, and I see some sights
4 to some Appellate Division cases. Are there any cases from
5 this court on the severance point that you would direct us
6 to?

7 MR. HUG: Yes. Shapiro, I would direct you to.

8 JUDGE HALLIGAN: Okay.

9 MR. HUG: Chiefly. Daniels is a Third Department
10 case.

11 JUDGE HALLIGAN: Right.

12 MR. HUG: But yes.

13 JUDGE HALLIGAN: Shapiro. Okay. Thank you.

14 MR. HUG: Yes. The court went into it in great
15 length. I think it's from 1980 or so.

16 JUDGE HALLIGAN: Uh-huh.

17 MR. HUG: With respect to the conflict of
18 interest issue - - - I see that I'm running low on time.
19 It's a very complex issue as well. I think that there's no
20 question here that Shinkle drives this analysis, that
21 Shinkle is directly on point in every way and should be
22 followed here because there is almost no difference between
23 this matter and the Shinkle case.

24 And Shinkle - - - should I - - -

25 CHIEF JUDGE WILSON: Go ahead and finish your

1 thought.

2 MR. HUG: In Shinkle, the conflict of interest
3 was - - - it didn't matter that the - - - that the attorney
4 had been walled off and prevented from sharing any kind of
5 confidences. The court looked at this from two angles.
6 One was, is there an appearance of impropriety? And as a
7 secondary basis, was there a potential for the sharing of
8 confidences?

9 The District Attorney's Office in this case wants
10 to read Shinkle for much more cramped than it is, and they
11 want to eliminate "and" from the sentence, "appearance of
12 impropriety and the potential for shared confidences."

13 CHIEF JUDGE WILSON: Thank you.

14 MS. SCHULTZ: May it please the court. Emily
15 Schultz, on behalf of the people.

16 I believe this case highlights the importance of
17 why we try criminal cases in a court of law, not one of
18 public opinion. We deal with facts, not surmise or
19 assumption. We don't rush to knee-jerk conclusions. When
20 you apply the proven facts of this record, those proven at
21 the 440 hearing, those proven at trial, to the law, it's
22 clear that the Appellate Division majority got it right.
23 The trial court got it right. The jury got it right.

24 JUDGE TROUTMAN: What about the argument that the
25 people - - - the cases were joined together because of a

1 desire of the people to get a conviction in both, because
2 they weren't necessarily the strongest of cases separately.

3 MS. SCHULTZ: I hope the court does not adopt the
4 same pessimistic view that Mr. Hug has. There are a number
5 of considerations to keep in mind when you decide whether
6 or not joinder is appropriate. I would point to the fact
7 that the statute allows for it. Clearly, there's no
8 question about that. And ultimately the statute guides our
9 charting decision - - -

10 JUDGE TROUTMAN: So the statute allows for it.
11 When is it appropriate for the court to grant such a motion
12 made by the defense?

13 MS. SCHULTZ: Sure. I would point out that under
14 this particular subdivision, 2-C, that is the subdivision
15 that allows for discretionary senten - - - or severance.
16 Excuse me. And so it falls within the purview of the trial
17 court. And we grant trial courts wide latitude in making
18 these determinations - - -

19 JUDGE TROUTMAN: And what are the considerations?

20 MS. SCHULTZ: One of them is the judicial economy
21 and court congestion. And I think the root of that is
22 because, you know - - -

23 JUDGE TROUTMAN: Well, not - - - no - - -

24 CHIEF JUDGE WILSON: No, I think Judge Troutman
25 is trying to ask you the opposite of that, that is - - -

1 can you give us an example of when we should reverse a
2 trial court's decision to join cases? In what
3 circumstances could we do that? Efficiency is not a
4 circumstance like that. That's the other way.

5 MS. SCHULTZ: Sure.

6 CHIEF JUDGE WILSON: And it's never going to be
7 inefficient. It's always better to put more people in and
8 try them altogether.

9 MS. SCHULTZ: Sure. I think Shapiro is one of
10 those examples of when it should have been severed. I
11 would point out the fact that Shapiro highlighted the
12 unique circumstances of those cases. And any time you're
13 anal - - - you know, analyzing severance, it's always a
14 fact specific inquiry, so - - -

15 JUDGE RIVERA: Okay. So what's unique about
16 Shapiro?

17 JUDGE TROUTMAN: Right.

18 JUDGE RIVERA: Let's try and get direct to the
19 question.

20 MS. SCHULTZ: So there was a substantial period
21 of time, I think more than two years apart from the crimes,
22 and Shapiro focused - - -

23 JUDGE RIVERA: That was the case here, no?

24 MS. SCHULTZ: No, it was actually less than two
25 years between the two murders.

1 JUDGE RIVERA: But it wasn't around the same
2 time, correct?

3 MS. SCHULTZ: I think the dis - - - so the gap in
4 time, I think, actually helps - - - rules in favor of the
5 people and denied severance - - -

6 JUDGE RIVERA: Okay. But you agree there's a gap
7 in time?

8 MS. SCHULTZ: There is a gap in time.

9 JUDGE RIVERA: Okay. What were the other factors
10 you wanted to point to in Shapiro?

11 MS. SCHULTZ: So Shapiro - - - the first set of
12 charges, there's numerous - - - I believe it's three
13 indictments total. The first indictment has, I think,
14 sixty-four counts charged, and they all relate to sodomy.
15 Then the later counts relate to promotion. And the court
16 highlights the fact that, wow, we're now seeing an
17 escalation in criminal behavior. And that is the
18 distinction here. These are the exact same crimes that are
19 charged in both. And the reason the gap in time, the fact
20 that there is some separation in time, helps the People is
21 because you want to make sure that the jury - - -

22 CHIEF JUDGE WILSON: Why does the escalation make
23 the joinder improper?

24 MS. SCHULTZ: I think that's when you start to -
25 - - to inch into the propensity territory, which is not

1 present - - -

2 JUDGE HALLIGAN: Why would that be true with
3 escalation as opposed to simply aggregation?

4 MS. SCHULTZ: I think escalation shows a
5 different mentality. It shows, well, geez, if we don't
6 convict this guy on everything, then what's he going to do
7 next?

8 JUDGE HALLIGAN: But wouldn't you agree that
9 aggregation can also leave a jury vulnerable to thinking
10 about propensity?

11 MS. SCHULTZ: I believe that's certainly
12 possible. I don't think it's what happened in the facts of
13 this case.

14 JUDGE HALLIGAN: Why not?

15 MS. SCHULTZ: If you have to balance the case - -
16 - the quantum of proof of each of these cases. I believe
17 Shelby's case is more obvious. I think Megan's case is not
18 as obvious. I'm going to borrow an analogy from - - -

19 CHIEF JUDGE WILSON: And when you say quantum, do
20 you mean volume, or do you mean strength?

21 MS. SCHULTZ: Strength.

22 CHIEF JUDGE WILSON: Okay.

23 MS. SCHULTZ: I think that's ultimately that - -
24 - what matters. We're not counting - - -

25 CHIEF JUDGE WILSON: And so when you're - - -

1 right - - - and so when you're - - - when you're looking at
2 - - - I asked Mr. Hug this question - - - when you're
3 looking at four - - - I'm sorry 3 subdivision A, and it
4 says substantially more proof, you're reading that as
5 weight of the proof, not volume of the proof?

6 MS. SCHULTZ: Yes.

7 CHIEF JUDGE WILSON: Okay.

8 MS. SCHULTZ: Because, you know, there are - - -

9 JUDGE RIVERA: You think it means stronger?

10 MS. SCHULTZ: I do.

11 JUDGE RIVERA: Okay.

12 MS. SCHULTZ: I believe it's that - - - that
13 persuasive value of the evidence.

14 JUDGE RIVERA: They would have said stronger if
15 that's what they meant, though, no?

16 MS. SCHULTZ: Well, certainly we - - - we
17 interpret what the language of the statute means, and
18 sometimes it's not always the plain - - -

19 JUDGE RIVERA: Or we - - - was there some other
20 factor? I don't want to - - -

21 MS. SCHULTZ: Sure.

22 JUDGE RIVERA: - - - because your time is short.

23 MS. SCHULTZ: Yes.

24 JUDGE RIVERA: What are the other factors?

25 MS. SCHULTZ: There is some overlapping proof

1 which weighs in favor of trying the cases together. And at
2 the same time, the proof was largely separately presented,
3 uncomplicated, and easily distinguishable - - -

4 JUDGE RIVERA: No. No. No. I'm sorry. You
5 said in Shapiro there were particular facts that showed why
6 severance - - - the - - - we're still on that point.

7 MS. SCHULTZ: I apologize.

8 JUDGE RIVERA: What would be the basis for a
9 severance motion, where if it was not granted, that would
10 be an abuse of discretion?

11 MS. SCHULTZ: Under 202(c) - - - (b) - - -

12 JUDGE RIVERA: You said it - - - you said we can
13 look to Shapiro, and you were going through the factors
14 there.

15 MS. SCHULTZ: Sure.

16 JUDGE RIVERA: So I was asking if there were any
17 more. You gave us a couple, and we've had questions, so I
18 wanted to make sure that we didn't interrupt you and you
19 didn't have an opportunity to finish your thought.

20 MS. SCHULTZ: I appreciate that. I believe I was
21 done with Shapiro - - - Shapiro doesn't support my
22 position. I would point the court to People v. Ford, which
23 came out in 2008 - - -

24 JUDGE RIVERA: So I just want to be clear. You
25 view it as gap in time, numerosity of the counts, and

1 escalation of criminal behavior. Did I miss anything?

2 MS. SCHULTZ: Chiefly, the escalation of
3 behavior. I believe that was the focus of the decision is
4 that these weren't the same subdivisions. These are two
5 different types of crimes, and although they're similar in
6 nature, there is an important distinguishment.

7 And again, Shapiro didn't highlight the unique
8 circumstances because again, severance is always going to
9 be fact specific.

10 CHIEF JUDGE WILSON: Would you agree that as a
11 general matter - - - there's a greater risk of prejudice if
12 the two charges are the same legal - - - you know, section
13 of the penal code as opposed to different crimes?

14 MS. SCHULTZ: I believe - - -

15 CHIEF JUDGE WILSON: As a general matter.

16 MS. SCHULTZ: Prejudice is inherent in any joint
17 trial. This court has recognized that. And I think the
18 CPL obviously acknowledges that and acknowledges that
19 despite that there may be some prejudice, that doesn't make
20 it inherently unduly prejudicial.

21 CHIEF JUDGE WILSON: Right. Not my question,
22 though.

23 MS. SCHULTZ: I guess, could you ask it again?

24 CHIEF JUDGE WILSON: Sure. Would you agree that
25 when the two charges are the same section of the penal code

1 or the same crime, the - - - as a general matter, the
2 potential for prejudice is greater than for example - - -
3 here we have murder and murder. Right. But you could have
4 murder and bank robbery or unrelated events.

5 MS. SCHULTZ: Sure.

6 CHIEF JUDGE WILSON: Right. Would you agree that
7 when the charges are the same, there's a greater danger of
8 prejudice as a general matter?

9 MS. SCHULTZ: Yes, I do agree with that, but I do
10 believe the CPL takes that into consideration.

11 CHIEF JUDGE WILSON: It does. And then it has
12 some escape valves, I think, right?

13 MS. SCHULTZ: Yep. And we trust trial court's
14 discretion in assessing those.

15 CHIEF JUDGE WILSON: Right. So do you - - - I'm
16 going to ask you the same question I asked Mr. Hug. Do you
17 have any idea where subsection 2-C came from, what its
18 purpose was originally?

19 MS. SCHULTZ: I do not, but I think that there's
20 some - - - some logical arguments that I could bring to the
21 court's attention - - -

22 CHIEF JUDGE WILSON: No, that's okay. I mean, if
23 you want to, but that's not my question.

24 MS. SCHULTZ: I guess I'll go back - - -

25 CHIEF JUDGE WILSON: You've answered my question.

1 MS. SCHULTZ: Thank you. I'll go back to that
2 quantum of proof analysis, which I think is what the
3 dissenting justices of the Third Department got a little
4 hung up on. Megan's case is not as obvious as Shelby's.
5 Shelby is found in a remote area. She's found in a shallow
6 grave, and her face is brutally beaten. Megan takes a
7 little bit more work. It takes a little bit more time to
8 put that case together.

9 I'm going to borrow an analogy from the trial
10 court - - -

11 JUDGE HALLIGAN: Well, it takes time to even
12 conclude that it's a homicide, right? Isn't the fire
13 initially ruled an accident?

14 MS. SCHULTZ: Yes, but that's certainly one of
15 the elements of the crime that we have to prove. And to
16 borrow the analogy from the trial attorney, you know - - -

17 JUDGE RIVERA: But isn't this his point? Isn't
18 this his point? The difference of the way these deaths
19 occur, right - - -

20 MS. SCHULTZ: Uh-huh.

21 JUDGE RIVERA: You're - - - you made your
22 argument and were successful before the jury that they're
23 murders, right. The difference in how these events occur
24 and that they're primarily circumstantial cases.

25 MS. SCHULTZ: Yes.

1 JUDGE RIVERA: You agree with that, right?

2 MS. SCHULTZ: Right.

3 JUDGE RIVERA: Okay. And so in that way, it
4 becomes very difficult - - - his argument, as I understand
5 it - - - becomes very difficult and perhaps to the level of
6 prejudicial with respect to his client, for the jury to be
7 able to look at these cases independently of one another
8 without saying, well, the likelihood of this defendant
9 having a connection to both of these people who die - - -
10 right - - - in these particular suspect circumstances - - -
11 that's going to be your argument - - - is almost nil. And
12 that bolsters the case. Each case bolsters one another,
13 right?

14 MS. SCHULTZ: I think that's inevitable in any
15 joint trial that's allowed under that subdivision. I think
16 - - -

17 JUDGE RIVERA: Well, no, I don't agree with that.

18 MS. SCHULTZ: But - - -

19 JUDGE RIVERA: I don't think that's always the
20 case.

21 MS. SCHULTZ: Well, I - - -

22 JUDGE RIVERA: You think that's always the case?

23 MS. SCHULTZ: I mean, if you're trying two
24 different criminal transactions together, I think there's -
25 - - you know, and you're relying on that human tendency to

1 group them together, then sure, I think that, you know, if
2 you're talking about the subconscious, yes, that would
3 always be present. The legislature contemplated that when
4 they allowed for joinder under these circumstances.

5 And I think that that argument actually, again,
6 weighs in favor of the people because it shows that the
7 proof was separately presented, uncomplicated, and easily
8 distinguishable. And we know that the jury followed the
9 instructions. There were instructions at the outset of the
10 trial, and - - -

11 JUDGE RIVERA: But easily distinguishable - - -
12 you make a good point on that - - - doesn't, though, deal
13 with the potential for the spillover effect and the
14 prejudice. The fact that a juror can say, okay, I
15 understand the evidence related to the person who they
16 conclude was killed, and then a fire was started to cover
17 it up.

18 MS. SCHULTZ: Yep.

19 JUDGE RIVERA: And now I understand the proof to
20 someone who's got blunt-force trauma to the face and then
21 is buried in this particular grave in this location. They
22 can understand that. But that doesn't address the impact
23 on the fact that your argument is, it is the same person
24 who did this, given their particular connection to each of
25 them.

1 MS. SCHULTZ: That is true.

2 JUDGE RIVERA: I mean, as I recall - - - you can
3 correct me if I'm wrong - - - the prosecutor suggested a
4 motive that applied across both these murders. Yes? That
5 - - -

6 MS. SCHULTZ: I don't recall that particular - -
7 -

8 JUDGE RIVERA: I thought the argument was that
9 the defendant killed them because he was angry with them,
10 because they only wanted to be close to him for his money.

11 MS. SCHULTZ: That wasn't so much our theory.
12 It's what he told one of his jailhouse friends. He
13 informed them that he did that - - - he committed both
14 crimes - - - when he confessed to both of the crimes to his
15 friend - - - that he did it because he didn't think that
16 they liked them, and that he was only with them for his
17 money. I guess I'll take a step - - -

18 JUDGE RIVERA: But that provides a motive that
19 connects both. So again, if a jury feels that one perhaps
20 not so close to reason - - - or has reasonable doubt,
21 again, the likelihood of this person not being the
22 individual who killed this victim, if they're persuaded on
23 the other one, it's - - - it is a compelling argument on
24 his side.

25 MS. SCHULTZ: Perhaps - - -

1 JUDGE RIVERA: Especially since it is a murder.
2 Brutal murders.

3 MS. SCHULTZ: I think it - - - I think it's a
4 speculative belief. When we look at the record - - -

5 JUDGE HALLIGAN: But isn't that always the case?
6 I mean - - -

7 MS. SCHULTZ: Sure.

8 JUDGE HALLIGAN: - - - you're - - - we're - - -
9 we're here, I think, inevitably making judgments where we
10 don't know for sure what's in a juror's mind, but we're
11 making some best assumption about the way in which the
12 joinder affects their ability to separately evaluate the
13 proof in each case.

14 MS. SCHULTZ: I think, yes, I would agree. We
15 can certainly speculate about a lot of things, but I think
16 we can glean a lot from the record, and that gives us a
17 much more concrete confidence - - -

18 JUDGE HALLIGAN: And what about the record here,
19 though, does that in your view?

20 MS. SCHULTZ: So one, the jury instructions that
21 Judge Singas pointed out. They were instructed at the
22 outset of the trial and again, at the end. Both the
23 attorneys belabor the point. Defense counsel got ahead of
24 that in her opening. She said, please keep these separate
25 and apart. It was again brought up by the attorneys, both

1 of them, in their summations. And we trust jurors to
2 follow the instructions they're given. And then the jury
3 notes. Right. They're - - - they are asking very
4 pinpointed questions, and they are parsing out each victim.
5 And one victim - - - I believe they ask for testimony
6 related to Shelby's murder on a Friday. A whole weekend
7 goes by, and then the next week they ask questions about
8 Megan, about the fire investigators' readback. So I think
9 you can glean from the record and have confidence that not
10 only they were told to do the right thing, that they did do
11 the right thing.

12 JUDGE HALLIGAN: Can I - - - can I - - -

13 JUDGE RIVERA: But it would be the only way to
14 ask for that evidence, would it not? How else would one
15 ask for that, rather - - - other than to connect them to
16 the actual victim?

17 MS. SCHULTZ: I guess it - - -

18 JUDGE RIVERA: How else would a juror who wants
19 to hear particular testimony request it other than by
20 putting it in a particular category of count, right, that
21 it has to do with this murder?

22 MS. SCHULTZ: Well - - -

23 JUDGE RIVERA: So I'm not - - - perhaps I'm
24 misunderstanding your point. It sounds like you're saying,
25 well, they asked for a particular - - - for evidence

1 related to a particular victim, but there is only one way
2 to ask for such evidence by association with the victim,
3 given the way you've tried the case.

4 MS. SCHULTZ: I would point to the actual witness
5 they asked for. I see that I'm out of time. If I may?

6 CHIEF JUDGE WILSON: Just go ahead. Yeah.

7 MS. SCHULTZ: Thank you. They asked for the
8 medical examiner as it relates to Megan. And then they
9 asked for the medical examiner as it relates to Shelby - -
10 - or excuse me - - - the inverse.

11 JUDGE RIVERA: Uh-huh.

12 MS. SCHULTZ: So they're asking for the exact
13 same witness, but they are focused. They are focused only
14 on one victim, and then they are focused on the other
15 victim. And that tells us everything we need to know to
16 have confidence that they kept these cases separate and
17 that they distinguish between the two. They only decided
18 each case on the merits of each case. And I - - -

19 JUDGE HALLIGAN: May I, Chief, ask - - -

20 CHIEF JUDGE WILSON: Of course.

21 JUDGE HALLIGAN: - - - one final question?

22 MS. SCHULTZ: Yes.

23 JUDGE HALLIGAN: With respect to the conflict
24 question for a moment. My understanding was at the time
25 the testimony was that there was not a written policy in

1 effect regarding an arrangement like that. Is that right?
2 And do you know whether there is now a written policy in
3 effect that would preclude an arrangement like this?

4 MS. SCHULTZ: I don't have that information. It
5 certainly doesn't exist in the record as we have today.

6 JUDGE HALLIGAN: Uh-huh.

7 MS. SCHULTZ: I think, you know, it's sort of, of
8 no consequence what happens after the fact when we're
9 analyzing what happened.

10 JUDGE HALLIGAN: But - - - but you don't know?

11 MS. SCHULTZ: I am - - - I'm unaware of one.

12 JUDGE HALLIGAN: Okay.

13 MS. SCHULTZ: If I may briefly?

14 CHIEF JUDGE WILSON: Of course.

15 MS. SCHULTZ: Thank you. I'm asking this court
16 to please focus on the proof of this case. The proven
17 facts from the 440 hearing, from the trial, not the
18 inflammatory rhetoric that appears in the brief.
19 Accusations without more can never meet the burden as it
20 relates to a conflict of issue - - - issue - - -

21 JUDGE RIVERA: I may ask - - -

22 MS. SCHULTZ: Yes.

23 JUDGE RIVERA: - - - if I may ask, is there any
24 obstacle to separate trials? Is there anything that would
25 have put the prosecution in a worse position?

1 MS. SCHULTZ: Well, we'd have to recall some
2 witnesses. It's not always easy to get witnesses in to
3 testify. It - - - trials are very laborious. It's more
4 than just the few weeks that it takes to go into court and
5 - - - and put your case in. It is draining. It's
6 exhaustive. And - - -

7 JUDGE RIVERA: That's about the efficiency and
8 the preservation of resources. You're absolutely right.
9 I'm not going to disagree with you on that. But I mean, in
10 terms of the ability for you to establish the elements of
11 the crime and to convince the jury that this is indeed the
12 person who committed these crimes.

13 MS. SCHULTZ: In a hypothetical sense, if we went
14 back in time - - -

15 JUDGE RIVERA: Yeah. Yeah.

16 MS. SCHULTZ: - - - I'm not sure, to - - - to be
17 honest. Nothing jumps out at - - - to my mind, but I don't
18 think we should be engaging in the hypotheticals. We
19 should be looking at exactly what happened.

20 And one last aside, People v. Ford, I believe,
21 supports the People's position that severance should have
22 been denied.

23 I appreciate the court's time. Thank you.

24 CHIEF JUDGE WILSON: Thank you.

25 MR. HUG: Thank you, Your Honors. During the



1 prosecutor's remarks, it struck me that she admitted that
2 the proof with respect to one side of the case was
3 substantially more voluminous and stronger than the other.
4 And that's a concession that consolidation should not have
5 been permitted and severance should have been made, and
6 that it was an abuse of discretion not to sever.

7 With respect to escalation versus aggregation,
8 Your Honor, how can you escalate from murder? You know,
9 escalate - - - aggregation is more prejudicial than
10 escalation.

11 With respect to the conflict of interest issue.
12 It strikes me that this would have even happened. It
13 strikes me that it would be tolerated. People wonder why -
14 - - why is the general public - - -

15 JUDGE GARCIA: Counsel, did you report this to
16 the court when you first learned of the conflict?

17 MR. HUG: I cer - - - I certainly did.

18 JUDGE GARCIA: That was the first thing you did?

19 MR. HUG: It certainly was.

20 JUDGE GARCIA: You didn't go to the parties
21 first. You went directly to the court.

22 MR. HUG: I'll - - - if you would like me to
23 explain exactly how it happened, even though it's outside
24 the record, I'd be more than happy to indulge.

25 JUDGE GARCIA: No, I just - - - if you could

1 answer my question, that would be what I would be looking
2 for.

3 MR. HUG: Yes, I - - -

4 JUDGE GARCIA: Did you go to the parties first,
5 or did you go to the court?

6 MR. HUG: The parties being the two attorneys? I
7 went to Attorney Coleman first because she asked to speak
8 to me. I had no idea that this was true. She disclosed
9 it. And then I got a call from Mr. Sharp.

10 JUDGE GARCIA: Thank you.

11 MR. HUG: During those conversations, I explained
12 to them that you're putting me in a terrible position. I
13 don't know how I could possibly prove this. I encourage
14 you to come clean. I sent a letter to the judge. I sent a
15 letter to the district attorney. Nobody cared. They
16 covered up - - -

17 JUDGE TROUTMAN: Accepting that what occurred may
18 be untoward, how did it operate adversely on the defense?

19 MR. HUG: Okay. If you're going to the potential
20 conflict of interest, I think that we've already missed the
21 actual, because Shinkle says an appearance of impropriety
22 alone - - - standing alone is enough to determine that
23 there was an actual conflict of interest. That's present
24 here clear as - - -

25 JUDGE SINGAS: Shinkle is different, isn't it, in

1 the sense that in that case, the attorney actually
2 represented the person. So clearly, from a layperson or
3 the public looking at it saying, wait a minute, this guy
4 represented this defendant, so he has a lot of information
5 about him and about this particular case that he could
6 share with now his new employer, who just happens to be the
7 people that they're prosecuting him.

8 MR. HUG: Isn't that exactly what's happening
9 here? Ms. Coleman is representing the defendant.

10 JUDGE SINGAS: No, it's not.

11 MR. HUG: She's working with the prosecutor.
12 There is the same concern that there could be shared
13 confidences - - -

14 JUDGE RIVERA: But he - - -

15 MR. HUG: - - - more so because they're involved
16 in essentially not only an unethical - - -

17 JUDGE RIVERA: But he's a - - - he's a
18 ghostwriter in cases, but not in the defendant's case. He
19 doesn't have access, otherwise. I mean, was there any
20 evidence on the 440 that he had access to confidences
21 related to the defendant's defense?

22 MR. HUG: It was unknown. And in Shinkle, it was
23 disproven. So Shinkle is even more - - - is even more
24 prosecution favorable in that regard because in Shinkle we
25 know that he - - - that the attorney - - - the toxic

1 attorney was isolated. In this, we - - -

2 JUDGE TROUTMAN: No, but - - - but that is
3 different. When you're talking about the exact same
4 prosecutor - - - and wasn't he a supervisor? ADAs
5 subordinates go to the supervisors for guidance. That's
6 different than this situation. Not that it's the - - - a
7 good situation, but it is distinctly different from this
8 case.

9 MR. HUG: I disagree. I think that in Shinkle,
10 there was an attempt, and it was established that the
11 attorney that had the conflict - - -

12 JUDGE TROUTMAN: This case isn't different from
13 Shinkle?

14 MR. HUG: No, I think this case is worse - - -

15 JUDGE TROUTMAN: It's the exact same parties
16 involved representing - - - it's the - - - you're saying
17 this case and that case are exactly the same?

18 MR. HUG: No, this case is worse because at least
19 in Shinkle, there was an attempt at ethical conduct. In
20 both cases - - - in Shinkle, oddly enough, the conflicted
21 attorney assisted the prosecution in the 440 motion. It
22 happened here too, amazingly enough. No, this is worse
23 than Shinkle because you're - - - this court's concerns in
24 Shinkle were that there was an appearance of impropriety
25 and a potential for the sharing of confidences. This - - -

1 and how is that different from this?

2 JUDGE TROUTMAN: Because it's the exact same DA's
3 office prosecuting him at the time.

4 MR. HUG: And it's - - - and it's - - -

5 JUDGE TROUTMAN: And the protection of the right
6 of the defendant to think that he - - - and to know that it
7 is a process that he's being protected the same
8 constitutional rights. It's quite different when they're
9 the same entity prosecuting the defendant, even though
10 there's claim to be the walling off of. But in that
11 appearance, that is a much different appearance than an
12 appearance where you have a ghostwriter. Not a good thing,
13 but it is distinctly different.

14 MR. HUG: Well, I suppose that we must agree to
15 disagree, because I think that the potential for the
16 sharing of confidences becomes a lot easier when you've
17 crossed the Rubicon and you have done what these two did.

18 JUDGE TROUTMAN: Because of their work - - -
19 their business relationship - - -

20 MR. HUG: Yeah.

21 JUDGE TROUTMAN: - - - they were likely to share
22 his case information?

23 MR. HUG: Of course. And had - - - had the
24 district attorney - - -

25 JUDGE RIVERA: Yeah. But it different. I mean,

1 the - - - there, the defense attorney went to the
2 prosecutor, so of course, there would be concern that now
3 being on the adversarial side, that individual would share
4 confidences or perhaps, not intending to, nevertheless,
5 reveal some information and strategy or design or assist
6 with strategy in a way that's problematic.

7 But here, frankly, if anything, how doesn't your
8 client benefit from this relationship?

9 MR. HUG: How does he - - - how doesn't he ben -
10 - -

11 JUDGE RIVERA: How doesn't he benefit from the
12 relationship?

13 MR. HUG: Well, I mean, the - - - I mean - - -

14 JUDGE RIVERA: I mean, the prosecutor worked for
15 the defense counsel.

16 MR. HUG: Yeah - - -

17 JUDGE RIVERA: Not in defendant's case.

18 MR. HUG: I laid it out - - - the list of
19 potential - - - if we get into the potential conflict of
20 interest, I lay it out. You've got the disclosure of the
21 weather report before the - - - before it was needed to be
22 disclosed. You have ten unexplained cell phone calls
23 between Ms. Coleman and Mr. Sharp during the course of the
24 trial, where the supervising attorney doesn't know about
25 them. You've got Ms. Coleman causing the ejection and

1 dismissal of a sitting juror. You have the failure to
2 bring up - - -

3 JUDGE RIVERA: Well, I don't know how that's
4 related to the business relationship.

5 MR. HUG: Because the - - - because look at the
6 trial court's decision. If you read the trial court's
7 decision - - - if you read through it, you're shocked at
8 the end that he didn't - - - that he didn't vacate because
9 he says repeatedly that there was a conflict of interest
10 that was impinging on the defendant's attorney's single-
11 minded devotion to her client. The second the trial judge
12 said that; that's game over. I don't know how you can put
13 it back in the tube where, on six different occasions
14 through the record, it looked - - - focus on pages - - -
15 appendix pages 31 through 33. I think that Judge Lynch
16 states that Ms. Coleman had a conflict of interest that
17 impacted her ability and leads to questions of her single-
18 minded devotion to her client at least five times.

19 CHIEF JUDGE WILSON: Thank you.

20 MR. HUG: Thank you.

21 (Court is adjourned)

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

I, Christian C. Amis, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Edward Mero, No. 122 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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