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COURT OF APPEALS  
STATE OF NEW YORK

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PEOPLE,

Appellant,

-against-

No. 60

BRYAN HENRY,

Respondent.

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20 Eagle Street  
Albany, New York  
April 25, 2018

Before:

CHIEF JUDGE JANET DIFIORE  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE LESLIE E. STEIN  
ASSOCIATE JUDGE EUGENE M. FAHEY  
ASSOCIATE JUDGE MICHAEL J. GARCIA  
ASSOCIATE JUDGE ROWAN D. WILSON  
ASSOCIATE JUDGE PAUL FEINMAN

Appearances:

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1 CHIEF JUDGE DIFIORE: The next appeal on the  
2 calendar is appeal number 60, the People of the State of  
3 New York v. Bryan Henry.

4 Good afternoon, counsel.

5 MS. CONNELL: Good afternoon, Your Honors. May  
6 it please the court, my name is Cristin Connell, and I  
7 represent the People of the State of New York. Your Honor,  
8 I'd ask for one minute of rebuttal.

9 CHIEF JUDGE DIFIORE: You may. Ms. Connell - - -

10 MS. CONNELL: Yes?

11 CHIEF JUDGE DIFIORE: - - - did the defendant  
12 have the right to counsel on the criminal possession of  
13 stolen property charge?

14 MS. CONNELL: Well, at that point, Your Honor, he  
15 hadn't been charged with criminal possession of stolen  
16 property. He had only been charged officially with  
17 criminal possession of marijuana. That was the charge for  
18 which he had been assigned counsel at arraignment.

19 CHIEF JUDGE DIFIORE: So when he was taken into  
20 custody a couple of days later I think it was on the  
21 possession of stolen property charge, did he have a right  
22 to counsel?

23 MS. CONNELL: Well, at that point, Your Honor, he  
24 was brought in for - - - it's - - - it's a very complicated  
25 set of facts I will allow. He was pulled over because he



1 had been speeding and he had run a number of stop signs.  
2 At that point, the officer who pulled him over made a call  
3 in. There had been a discovery that stolen property had  
4 been discovered during the previous arrest. They said we'd  
5 like to speak with him because there has been stolen  
6 property discovered. That's what they brought him in on.  
7 At that point, the only charge for which that defendant had  
8 counsel was the marijuana charge.

9 CHIEF JUDGE DIFIORE: I understand that.

10 MS. CONNELL: Yes, Judge.

11 CHIEF JUDGE DIFIORE: But was he in custody on  
12 the possession of stolen property some point that day?

13 MS. CONNELL: He was in custody, yes. At that  
14 point - - -

15 CHIEF JUDGE DIFIORE: So did - - - did he have a  
16 right to counsel on the possession of stolen property  
17 charge?

18 MS. CONNELL: He did not invoke his right to  
19 counsel on the possession - - -

20 CHIEF JUDGE DIFIORE: I didn't ask you that  
21 question.

22 MS. CONNELL: Did he have the right to counsel?  
23 If he had invoked his right to counsel I believe - - - if  
24 he - - -

25 JUDGE WILSON: Was he advised - - - was he



1           advised of it?

2                   MS. CONNELL:  Yes, he was immediately - - - when  
3           - - - when the interrogation began he was read his Miranda  
4           rights, he signed a Miranda rights card, and he agreed to  
5           speak with detectives.  That was never a question at the  
6           suppression hearing.

7                   JUDGE FAHEY:  No, but he still had the right to  
8           counsel.  Otherwise, he wouldn't have waived the right to  
9           counsel.

10                  MS. CONNELL:  Of course.  Of course, Judge.

11                  JUDGE FAHEY:  Yeah.

12                  MS. CONNELL:  And every defendant has the right  
13           to counsel.  That's something that we would concede.

14                  CHIEF JUDGE DIFIORE:  Well, under - - -

15                  JUDGE STEIN:  He wasn't represented.  He wasn't  
16           actually - - -

17                  MS. CONNELL:  He wasn't represented, absolutely.  
18           And this is not the kind of case, we would argue, that  
19           Cohen was meant to address.  Cohen was meant to address  
20           cases where there has been an attorney who has actually  
21           entered a case.  In Cohen, the - - - the officers' behavior  
22           was described as flagrant and intentional because the  
23           Thompson Garage case in which the defendant already had  
24           counsel, that attorney spoke with the detectives and said I  
25           am representing this - - - this defendant.  You are not to



1 speak with him about this case.

2 JUDGE STEIN: I want to go back for just a  
3 second.

4 MS. CONNELL: Sure.

5 JUDGE STEIN: Why - - - why wasn't he arraigned  
6 on the - - - on the possession of stolen charges when he  
7 was initially in custody?

8 MS. CONNELL: Well - - -

9 JUDGE STEIN: Do we know that?

10 MS. CONNELL: I believe that he was - - - he  
11 wasn't immediately charged, Judge.

12 JUDGE STEIN: I understand that.

13 MS. CONNELL: Right, so he was brought in, and I  
14 believe that they wanted to speak with him. At that point,  
15 I don't believe that the detectives knew that they had  
16 probable cause necessary to arrest. They wanted - - -

17 JUDGE FAHEY: They hadn't gone - - - I thought  
18 they hadn't gone through the phone yet, the Blackberry, and  
19 they hadn't identified it.

20 MS. CONNELL: Well, at that point I believe they  
21 had looked at the phones.

22 JUDGE FAHEY: Oh, they did?

23 MS. CONNELL: Yes, Judge. They had looked at the  
24 phones.

25 JUDGE WILSON: No, no, wait. We may be at - - -



1 when he was first brought in on the marijuana charge - - -

2 MS. CONNELL: Yes.

3 JUDGE WILSON: - - - did they know that the  
4 Blackberry is stolen from the tattoo parlor?

5 MS. CONNELL: At that point they do not, Judge.

6 JUDGE WILSON: Do they know that it's stolen at  
7 all?

8 MS. CONNELL: At that point, they don't. You  
9 know, when he - - -

10 JUDGE FEINMAN: And he denied ownership of it.

11 MS. CONNELL: He denied ownership, yes. He said  
12 those phones aren't mine. I believe he even said I think  
13 they're broken. You know - - -

14 JUDGE FAHEY: So here's the problem I have.

15 MS. CONNELL: Sure.

16 JUDGE FAHEY: The marijuana charge leads to the  
17 stolen phone. The stolen phone leads to the robbery. And  
18 the robbery has the same car and the same driver as the  
19 murderer, right?

20 MS. CONNELL: Sure, Judge. Oh, however, unless  
21 you're not done - - -

22 JUDGE FAHEY: No, I'm done.

23 MS. CONNELL: Okay. That's good. If we look at  
24 the kind of cases where Cohen has been, if we look at the -  
25 - - if - - - I assume your trouble is the first Cohen



1 analysis, the Townes Vella, if you were, analysis.

2 JUDGE FAHEY: Yeah.

3 MS. CONNELL: There have been plenty of cases in  
4 which there have been far more intertwined sets of facts  
5 than these cases. You know, in this case, there was only  
6 the car. One might argue that the instrumentality of the  
7 crime was the - - - was the glue that holds all of those  
8 different cases - - - the three different crimes together.  
9 Certainly, it's the only thing that holds the murder and  
10 the marijuana charge together. One might argue - - -  
11 indeed the suppression court did argue - - - that the  
12 robbery charge was related. And indeed, the only thing the  
13 suppression court - - -

14 JUDGE RIVERA: But - - - but isn't the point of  
15 the interrogation to get statements from him to connect the  
16 dots and to connect him to these two crimes?

17 MS. CONNELL: Well - - -

18 JUDGE RIVERA: And others who participated in it?

19 MS. CONNELL: Yes, Judge. However, the two  
20 detectives wanted to speak with this defendant. And  
21 indeed, they did want to talk to him. They did the  
22 interrogation together, but they did it in - - - in chunks,  
23 as it were.

24 JUDGE RIVERA: Over seven hours, yeah?

25 MS. CONNELL: Over seven hours, but one detective



1 - - -

2 JUDGE RIVERA: Coming in and out.

3 MS. CONNELL: In and out.

4 JUDGE RIVERA: One asking about robbery, one  
5 asking about the murder.

6 MS. CONNELL: Exactly, they just - - -

7 JUDGE RIVERA: They obviously thought he was, if  
8 nothing else, involved.

9 MS. CONNELL: Well, they wanted to speak with him  
10 about the robbery, and they wanted to speak with him about  
11 the murder. However, there is absolutely nothing in the  
12 suppression record to indicate that they ever asked him  
13 about the marijuana charge which was - - -

14 JUDGE RIVERA: No, no, no. But I'm asking you  
15 about the purpose of the interrogation is to connect him to  
16 this robbery and to the murder, no?

17 MS. CONNELL: Absolutely, Judge.

18 JUDGE RIVERA: Yeah.

19 MS. CONNELL: They wanted information about the  
20 robbery, and they wanted information about the murder. And  
21 indeed, it seems their primary purpose was to find out who  
22 - - - especially because there's no evidence that this  
23 defendant ever did anything but drive the car.

24 JUDGE RIVERA: If he - - - if he had told the - -  
25 - either or both of them simultaneously depending on when -





1 - - when they're in his presence, you know, I got a lawyer  
2 on that marijuana count, should they have done anything at  
3 that point - - - and doesn't say anything else?

4 MS. CONNELL: I have a lawyer on the other - - -  
5 well, I think at that point the detectives might have said  
6 would you like to speak with your lawyer. That's something  
7 they could have said. They might have said would like them  
8 to be - - -

9 JUDGE RIVERA: But they didn't have to stop?

10 MS. CONNELL: They wouldn't have had to stop if -  
11 - - because it wasn't related to the crimes about which  
12 they were asking. It - - - the marijuana - - - you know,  
13 the suppression court, there's nothing we can do at this  
14 point. You know, this case talked about - - - this court  
15 in Concepcion and statutorily there's nothing we can do  
16 about the suppression of the robbery statements. But it's  
17 important I think to look at the - - - the decision that  
18 the suppression court made because it resulted in a  
19 windfall that begat the second windfall in the Appellate  
20 Division.

21 JUDGE STEIN: Well, let me ask you this. If the  
22 relevant comparison - - - and I don't necessarily think it  
23 is for purposes of the suppression court or the Cohen test  
24 is between the robbery and the murder charges, okay, is  
25 that test met?



1 MS. CONNELL: We would argue that it's still not  
2 met.

3 JUDGE FEINMAN: Well, how do you say that when  
4 you in response to the severance motion are arguing that  
5 they're completely related and intertwined?

6 MS. CONNELL: Well, that was - - - that was a  
7 huge problem the Appellate Division had with our argument.  
8 However, they're two entirely different tests, Your Honor.  
9 One analysis is done by two detectives who don't have a  
10 full set of facts in front of them. In fact, you know, if  
11 you look at People's appendix at I believe it's page 128,  
12 Detective Ross testified at the hearing that he didn't even  
13 know if he had enough probable cause to arrest yet when he  
14 was talking to the defendant that day. He knew where he  
15 lived, but he wasn't going out to arrest the guy yet. At  
16 that point, Cohen asks the defendant - - - the detectives  
17 are trying to figure out if - - - if two cases are so woven  
18 together that - - -

19 JUDGE WILSON: I just - - -

20 MS. CONNELL: - - - you know, that talking to a  
21 defendant about one is going to incriminate a defendant on  
22 the other.

23 JUDGE WILSON: I just want to back you up for a  
24 second. So if he actually had retained counsel on the  
25 robbery at the time he was brought in, your position is



1 they could never - - - nevertheless, that doesn't satisfy  
2 Cohen? That they can interrogate him about the murder?

3 MS. CONNELL: We would argue that that argument  
4 can be made, yes, Judge.

5 JUDGE WILSON: And you're making it.

6 MS. CONNELL: Well, I'll make it. If you're  
7 asking me to I'll make it.

8 JUDGE WILSON: No, I'm asking what you think.

9 MS. CONNELL: Our - - -

10 JUDGE WILSON: I'm asking if you think that's a  
11 tenable position.

12 MS. CONNELL: I think that - - - I think it can  
13 be a tenable position because I think that the two crimes  
14 were separate enough that inquiring about one would not  
15 have necessarily incriminated defendant on the other. The  
16 robbery and - - -

17 JUDGE FEINMAN: Facially and temporally separate?

18 MS. CONNELL: Yes, the only thing that really  
19 drew the two crimes together enough - - - which is why the  
20 joinder analysis is - - - is a different analysis. The  
21 joinder analysis requires - - - it asks whether evidence  
22 needs to be put together for a story to make sense in front  
23 of a jury.

24 JUDGE FEINMAN: Well, that's more liberal perhaps  
25 a standard.



1 MS. CONNELL: It's - - - sure, and Cohen is a  
2 much - - -

3 JUDGE RIVERA: What - - - what's the connection?  
4 What's the connection?

5 MS. CONNELL: The connection is the car.

6 JUDGE RIVERA: Right, that he's the getaway  
7 driver.

8 MS. CONNELL: Sure, but the instrument - - -

9 JUDGE RIVERA: And you say that's not enough?

10 MS. CONNELL: Well, in Grant it wasn't  
11 necessarily enough. Judge Titone - - -

12 CHIEF JUDGE DIFIORE: Let me ask you this  
13 question. I'm going to give you a hypothetical.

14 MS. CONNELL: Sure.

15 CHIEF JUDGE DIFIORE: So if the defendant is  
16 riding in a car and he has three discrete bags of proceeds  
17 from a burglary in the car - - -

18 MS. CONNELL: Okay.

19 CHIEF JUDGE DIFIORE: - - - the police tie up one  
20 bag of proceeds to a specific burglary. They arrest him.  
21 He gets arraigned. He gets assigned counsel. He makes  
22 bail. He's released. Two weeks later the police connect  
23 the proceeds from bags two and three to separate  
24 burglaries. They bring him in. Can they question him on  
25 those two burglaries?



1 MS. CONNELL: That's so - - - that's hard to say,  
2 Judge. I mean I think - - -

3 CHIEF JUDGE DIFIORE: It's similar.

4 MS. CONNELL: I think that that - - - I think  
5 that at the end of the day that analysis is closer to the  
6 question of whether or not the robbery and the murder here  
7 were interwoven. I think that what you're asking is a  
8 close call, Judge. But what we are asking this court to  
9 find - - -

10 CHIEF JUDGE DIFIORE: A close call that - - -  
11 that - - - as to whether or not he has a right to - - -

12 MS. CONNELL: Yeah. However, what we are asking  
13 this court to find and where we truly believe the Appellate  
14 Division erred was - - - was entering into that analysis at  
15 all because he did not have actual representation on the  
16 robbery. He only had it on the marijuana charges. And by  
17 extending the right to counsel by proxy - - -

18 JUDGE RIVERA: Because he had not yet been  
19 charged on the robbery?

20 MS. CONNELL: He hadn't been yet charged on the  
21 robbery.

22 JUDGE RIVERA: Even - - - even though there had  
23 been an inventory search of the vehicle - - -

24 MS. CONNELL: Well, there had been - - -

25 JUDGE RIVERA: - - - and they suspected that he



1 was indeed involved in these crimes?

2 MS. CONNELL: There had been a search of the  
3 vehicle because the two occupants of the vehicle were both  
4 arrested and the car was taken in.

5 JUDGE RIVERA: No, I know what's inventoried.

6 MS. CONNELL: Sure, sure.

7 JUDGE RIVERA: Of course.

8 MS. CONNELL: Yeah. Sure, Judge. I mean but  
9 that - - - that is what had happened, but he - - - he still  
10 didn't have an attorney on - - - on the case. So the  
11 analysis that the Appellate Division should have done and  
12 the way that it should have gone under Cohen - - -

13 JUDGE RIVERA: Well, that's - - - that's because  
14 you've delayed - - - right, you've delayed the arraignment  
15 or you delayed the charge?

16 MS. CONNELL: Did - - -

17 JUDGE RIVERA: On the robbery? I mean because  
18 you - - - they're doing this interrogation, right?

19 MS. CONNELL: Well, Detective Ross testified at  
20 the suppression hearing that he wasn't yet ready to arrest  
21 defendant on the robbery. He said this interro - - - you  
22 know, the - - - the investigation - - - I believe it's page  
23 135 he said we just weren't there yet. He knew - - - he  
24 said I knew where the defendant - - -

25 CHIEF JUDGE DIFIORE: But they did bring him in



1 on the possession of stolen property when they radioed in,  
2 right?

3 MS. CONNELL: Well, they - - - at that point,  
4 Judge, they - - -

5 CHIEF JUDGE DIFIORE: They - - - they - - -

6 MS. CONNELL: They had him.

7 CHIEF JUDGE DIFIORE: - - - to bring him in on  
8 the stolen property charge, correct?

9 MS. CONNELL: Yes, Judge. I - - - at that point  
10 they - - - he had already been pulled over. They said all  
11 right, you know, if you've got him pulled over, all right,  
12 bring him in, we'll talk to him. I think at that point the  
13 other detective, Detective Brzeski, might have also wanted  
14 to speak with him. It was no longer just Detective Ross  
15 who was questioning.

16 JUDGE RIVERA: If when they - - - when they  
17 brought him in - - -

18 MS. CONNELL: Yes.

19 JUDGE RIVERA: - - - he said I have nothing to  
20 say and started to walk out, could they keep him?

21 MS. CONNELL: Well, I think at that point they  
22 would have kept him.

23 CHIEF JUDGE DIFIORE: Thank you, counsel.

24 JUDGE RIVERA: On what? On what? I'm sorry.  
25 Keep him on what, on the robbery?

1 MS. CONNELL: On criminal possession of stolen  
2 property at that point.

3 JUDGE RIVERA: Because at that - - - because when  
4 he gets up and says I don't have anything to say, I'm  
5 leaving, now they have probable cause?

6 MS. CONNELL: Well, I think they had probable  
7 cause in the criminal possession of stolen property, not  
8 necessarily on the robbery yet at that point, Judge.

9 CHIEF JUDGE DIFIORE: Thank you, counsel.

10 MS. CONNELL: Thank you, Judge.

11 CHIEF JUDGE DIFIORE: Counsel.

12 MR. MALTZ: Yes, good afternoon, Your Honors;  
13 Judah Maltz for Mr. Bryan Henry. How are you? This - - -  
14 the Cohen case - - - I mean Bryan Henry case is consistent  
15 with the litany of cases decided by this court in the past  
16 five decades. The charges were related with each other.

17 JUDGE STEIN: Counsel, why isn't this - - - why  
18 isn't this like Ruff, okay, where - - -

19 MR. MALTZ: Pardon?

20 JUDGE STEIN: - - - where the defendant was  
21 entitled to counsel but hadn't - - - was not yet  
22 represented. Why isn't the representation here on the  
23 robbery a legal fiction?

24 MR. MALTZ: Well, first of all, the late Judge  
25 Honorof, when he rendered the decision saying his right to





1 counsel attached, indelible right to counsel attached, that  
2 decision had to be upheld on the 470.15 of the Criminal  
3 Procedure Law. The People never challenged that in a court  
4 below to see whether or not LaFontaine and Concepcion  
5 should be overruled or modified. It is a decision  
6 favorable to the defendant. It's not answering your  
7 question directly - - -

8 JUDGE STEIN: No, no, no. I understand that we -  
9 - - we're not discussing whether the - - - whether the  
10 questioning on the robbery should have been - - - or the  
11 statements on the robbery should have been suppressed.

12 MR. MALTZ: Right.

13 JUDGE STEIN: But my point is is that in terms of  
14 and then analyzing what they could question about as far as  
15 the murder was concerned, he wasn't actually represented on  
16 the robbery, right?

17 MR. MALTZ: He wasn't, but - - - he wasn't but  
18 when they found out that the stolen property was related to  
19 a robbery and they found out the - - - almost the next day,  
20 they impounded his car. How many people get - - - how many  
21 people get arrested for marijuana and have their vehicle  
22 impounded by the police, Nassau County Police? They knew  
23 that his vehicle was used in connection to a crime. And it  
24 was not until the second stop of the vehicle did they  
25 realize that the stolen phone - - - the phone was stolen



1 and it was connected to the tattoo robbery where - - -

2 JUDGE GARCIA: Well, let's take this a step  
3 further than from Judge Stein. So now you have in this  
4 fact scenario - - - but let's say in the murder he takes  
5 that gun after the murder and he sells it to somebody.  
6 Assume that's a violation of state law, so that's another  
7 crime they're looking at. And that crime's related to the  
8 murder through the gun, and the murder's related to the  
9 robbery through the car. And the robbery's related to the  
10 marijuana stop through the phone. Do you not - - - are you  
11 not able to ask about the gun sale? I mean how many  
12 degrees of separation do you have to have?

13 MR. MALTZ: I anticipated that question very  
14 well. I anticipated that someone was going to ask me that  
15 question how far do we get. I don't think they would go on  
16 ad finitum to question him for many more hours because they  
17 realize under Ramos case, the right to arraignment, prompt  
18 arraignment within the reasonable - - - within the  
19 reasonable period of time they couldn't have kept him - - -

20 JUDGE GARCIA: It's not a timing issue. I mean  
21 when do you say, as Judge Stein was saying, he's not  
22 represented on the robbery.

23 MR. MALTZ: Right.

24 JUDGE GARCIA: He's not represented on the  
25 murder, and now he's not represented on this hypothetical



1 gun sale.

2 MR. MALTZ: But there is no - - - but for this -  
3 - -

4 JUDGE GARCIA: But we're all tying that back to  
5 representation on a marijuana stop.

6 MR. MALTZ: If you bring another detective to  
7 question him about that gun sale and it's related to - - -  
8 came forward from - - - the from robbery and it came  
9 forward because of the - - - the stolen property, his right  
10 to counsel would be safeguarded, would have to be. Because  
11 they - - - they would have to take a moment of their time  
12 and not - - - and to interrogate him immediately. What we  
13 had was Brzeski and Ross taking times - - - turns. Ross  
14 was connected to the homicide squad. He was a homicide  
15 detective. He testified in the suppression hearing on page  
16 A-92 he was with the Nassau County Homicide.

17 JUDGE RIVERA: So - - - so what should have  
18 happened? Is your position that under the law what should  
19 have happened is that the police officers should have  
20 reached out to the attorney on the marijuana count?

21 MR. MALTZ: Correct. They could have done, and  
22 they could have reached out to the district attorney's  
23 office and say we have a gentleman who's being investigated  
24 for a robbery-homicide.

25 JUDGE FEINMAN: No, so what happens if we - - -



1 MR. MALTZ: What should we do with the marijuana?  
2 Should we dismiss it?

3 JUDGE FEINMAN: Well, hold on - - - they reach  
4 out to that attorney and he says you know what, I'm just  
5 the - - - qualified to do misdemeanors - - -

6 MR. MALTZ: The McLean case.

7 JUDGE FEINMAN: - - - marijuana charges and  
8 things of that - - - I don't know anything about robberies  
9 and murderers?

10 MR. MALTZ: Your Honor, that's the McLean case  
11 when the lawyer said I don't - - - I'm not - - - I'm not  
12 involved with that case. But what about the Johnson case  
13 when the defendant was involved in the negotiation for a  
14 lenient sentence on the burglary case he tells them and he  
15 gives his client to the district attorney to talk to them  
16 about - - -- and enter into a cooperation agreement. And  
17 then they're going to question about a homicide about which  
18 he had information on. Then it turns out that he's the one  
19 who's implicated in that homicide, and this court said in  
20 2014 that his right to counsel attached because his client  
21 was engaged in McLean- - - the client - - - the attorney-  
22 client relationship still existed.

23 McLean case what you're referring to is when the  
24 lawyer said I only represent him on this case. I don't  
25 represent him on any other cases. Johnson - - - this court



1 followed up with Johnson and said the representation  
2 continued. To answer Your Honor, Garcia - - - Judge  
3 Garcia's case, I think if another case was brought up to  
4 him, like a rape charge or something just as serious, the  
5 police officer would be foolish to continue to question him  
6 on the unrelated charge of a rape knowing full well he's  
7 already spent seven hours being examined on a robbery and -  
8 - - and a homicide. And they should say let's stop, let's  
9 pause. He's been in custody seven hours - - -

10 JUDGE STEIN: What if this all happened within  
11 three hours?

12 MR. MALTZ: I would think the amount of time is  
13 important, but I don't think - - - I think it's the  
14 relationship - - - even if another crime would come up I  
15 think they would be foolish not to investigate further from  
16 the district attorney's - - -

17 JUDGE FEINMAN: Yeah, but isn't the - - - the  
18 logical extension of - - - of what you're saying then that  
19 once you give him counsel on this misdemeanor or violation,  
20 depending on the amount of marijuana and whether it's open  
21 or not, aren't you saying then that's it? You can never  
22 separate any of these other investigations and - - -

23 JUDGE GARCIA: We had that rule before.

24 JUDGE FEINMAN: - - - and question them?

25 MR. MALTZ: I think - - -



1 JUDGE GARCIA: We had that rule before. We got -  
2 - - we overruled it in Bing. That used to be the rule.

3 MR. MALTZ: Right - - - the right to counsel - -

4 JUDGE GARCIA: So you understand what Judge  
5 Feinman's saying. Like you want us to go back to pre-Bing.

6 MR. MALTZ: But what about Judge - - - Your  
7 Honor, what about Lopez and the Burdo case where they  
8 mentioned about him being in custody? In those, they knew  
9 he had counsel and when he went to Pennsylvania - - - he  
10 went to Pennsylvania to investigate an unsolved homicide  
11 case. They could have investigated further and contacted  
12 the district attorney to find out the status of that case.  
13 He had his attorney present in Lopez. And yet, this court  
14 seemed to take a back stand against it. You - - - while  
15 you eliminate derivative right to counsel you said that  
16 they should have inquired to see whether he had counsel in  
17 Lopez, and that was - - - Lopez is a very recent case, a  
18 recent pronouncement saying that they should have inquired.  
19 They should have - - - as you mentioned, this court said  
20 presumption of knowledge that he was represented by counsel  
21 - - -

22 JUDGE STEIN: No, we - - - we already - - -  
23 that's not the issue here because we already - - - they  
24 already knew - - -

25 MR. MALTZ: Right.



1 JUDGE STEIN: - - - he - - - he was represented  
2 on the marijuana charge.

3 MR. MALTZ: Right.

4 JUDGE STEIN: And we all know that he wasn't  
5 represented on the - - - on the robbery charge.

6 MR. MALTZ: But, Your Honors, it is closely  
7 connected to other crimes, and if you have another  
8 detective - - - to answer your questions, if I think - - -  
9 if there's another crime being charged against him that - -  
10 - and if he made statements, those statements would have to  
11 be suppressed because there's no pronounced break in their  
12 interrogation. It was continuous. The police were - - -  
13 if they were to spend time and relax their energy to  
14 question him and notify the DA's office to see whether or  
15 not they could continue examining him they could have  
16 charged him, processed the arrest for - - - for the robbery  
17 and the homicide, and maybe put him police lineups for the  
18 rape charges.

19 But to question him continuously, I - - - I don't  
20 think they have the right to do that. What they - - - what  
21 they could have done in my client's case, they - - - when  
22 they - - - he arrested for the marijuana they could have  
23 notified the district attorney. They would have said get  
24 him ACD. Don't - - - don't interrogate him. He was  
25 stopped by the police on December 13th. Then when he got -



1           - - then he found the cell phone, okay. They were  
2           investigating that cell phone because he said only one - -  
3           - one phone he doesn't - - - doesn't belong to him. The  
4           other three belong to him. Another one belongs to the co-  
5           defendant. They immediately knew that that phone was - - -  
6           the serial number they got off of it was a stolen phone  
7           from the tattoo robbery.

8                         JUDGE FAHEY: No, I had thought the sequence was  
9           a little different. I thought the 13th was when the  
10          robbery took place, the 15th - - -

11                        MR. MALTZ: That's right. I'm sorry.

12                        JUDGE FAHEY: Yeah.

13                        MR. MALTZ: The 13th and 15th.

14                        JUDGE GARCIA: The shooting, and then the  
15          marijuana was on the 20th.

16                        MR. MALTZ: That's correct.

17                        JUDGE FAHEY: I thought it was the opposite  
18          sequence.

19                        MR. MALTZ: Correct. I'm sorry.

20                        JUDGE FAHEY: No, it's no problem. Yeah.

21                        MR. MALTZ: And they could have inquired and  
22          known for a while that he may be the person involved in  
23          this getaway crimes, the two robberies, robbery and the  
24          homicide, they could have notified the district attorney  
25          and said let's put us - - - we want to talk to him. They



1           could have then dismissed the ACD. With no - - - with no  
2           open cases against then you have the McLean situation.

3                   JUDGE RIVERA: But all of those - - -

4                   MR. MALTZ: So like I say - - -

5                   JUDGE RIVERA: All the things that you're saying  
6           - - -

7                   MR. MALTZ: Pardon me?

8                   JUDGE RIVERA: - - - certainly could be possible.  
9           The real question is whether or not they're legally  
10          mandated and does it matter here, right?

11                   MR. MALTZ: I'm sorry, ma'am? I don't - - -

12                   JUDGE RIVERA: The only question is whether or  
13          not it's legally mandated and does it matter here. So I  
14          understand your position. You're saying this is what they  
15          could have done.

16                   MR. MALTZ: Right.

17                   JUDGE RIVERA: The question is did they - - -

18                   MR. MALTZ: They didn't do that.

19                   JUDGE RIVERA: By law did they have to do those  
20          things?

21                   MR. MALTZ: They don't. Of course not. They  
22          don't do that all the time. What I'd like to point out is  
23          that detectives worked in tandem. They - - - Ross - - -  
24          Detective Ross was with the homicide squad, and he was also  
25          with the murder investigation. Brzeski said I'll speak to



1 him for a number of hours, got the information he needed.  
2 Then - - - then Ross took over. And Brzeski, whether he  
3 stepped away or not, he came back into the room and Ross  
4 remained there. So they were working to solve these two  
5 crimes. They're related, interrelated with each other, and  
6 there's no - - - there's nothing - - - and as the lower  
7 court noted, there's no separation between the two crimes  
8 and it was necessary to prove the identity of him on both  
9 crimes by interrogating him on these crimes. And I'd also  
10 like to point out the - - - under Cohen's statute - - -  
11 standard, part two, they engaged impermissible examination  
12 of him. They exploited him being there and right to  
13 counsel attached, Your Honors.

14 JUDGE FEINMAN: So - - - so to be clear you want  
15 us to analyze this under the second test of Cohen?

16 MR. MALTZ: Well, they're related and  
17 interrelated with each other. There's no distinction  
18 between the two crimes. There was a getaway car. They - -  
19 - they had a witness who saw the vehicle being used, the  
20 type of vehicle it was. They told him that there was a  
21 witness who saw him with the - - - driving away from the  
22 vehicle - - - from the location. And they - - - and they  
23 asked him who committed this robbery, this homicide? After  
24 he got that information, who committed this robbery? You -  
25 - - we know you're the getaway driver on this. Who



1 committed, are they the same people who committed the  
2 homicide? And he gave that information. They requested  
3 it.

4 JUDGE STEIN: Is that a question - - - I'm just -  
5 - -

6 MR. MALTZ: Sorry, Your Honor. Sorry.

7 JUDGE STEIN: Is that - - - is that a question if  
8 we get to that question and we say that there is - - - we  
9 judge this by the - - - the robbery and - - - and the  
10 murder? The question of whether it was discrete or fairly  
11 separable and - - - and whether the - - - and a question I  
12 think of what the Appellate Division never got to, which  
13 was whether it was purposely exploitive, but whatever. Is  
14 that not a question - - - a mixed question?

15 MR. MALTZ: I believe so. I believe, Your Honor,  
16 I spoke to you on the telephone. I thought I discussed  
17 that. I thought this was a mixed question of law and fact,  
18 and I thought this case was not - - - should not have been  
19 - - -

20 JUDGE STEIN: Well, that's separate from - - -

21 MR. MALTZ: Yeah.

22 JUDGE STEIN: - - - I think the legal question -  
23 - -

24 MR. MALTZ: Right, I think it is a mixed question  
25 - - -



1 JUDGE STEIN: - - - of whether we should be  
2 comparing the robbery to the murder. That - - -

3 MR. MALTZ: I think it is a mixed question of law  
4 and fact which I believe that the court appellate - - -  
5 decision by the Appellate Division was properly decided  
6 based upon the long authority by this court, the case of  
7 Vella, Ermo, and Grant and Carl, Steward all - - - and  
8 Burdo and Lopez is consistent with the decision of Henry.  
9 Thank you very much.

10 CHIEF JUDGE DIFIORE: Thank you, counsel.

11 Counsel. Do both tests - - - do - - - in our  
12 analysis, do we apply both tests of Cohen as counsel  
13 suggested - - - the factually intertwined and the  
14 purposefully exploitive?

15 MS. CONNELL: Should this court apply both tests?  
16 Well, to - - - to which counts, Judge?

17 CHIEF JUDGE DIFIORE: So the - - - the marijuana,  
18 the criminal possession of stolen property, and the robbery  
19 as being factually intertwined and then the purposefully  
20 exploitive test to the robbery/murder?

21 MS. CONNELL: The - - - the interrogation, as it  
22 was here, Judge, was on the - - - so the defendant was  
23 arrested for - - - the charge for which he had counsel was  
24 only on the marijuana. The interrogation was not on  
25 criminal possession of stolen property itself. It was on



1 the robbery and the murder. So what we would ask this  
2 court to do as purely issue of law is - - -

3 CHIEF JUDGE DIFIORE: Is that dispositive that  
4 there were no questions on the - - - the - - -

5 MS. CONNELL: The possession of stolen property?  
6 The - - - it might have come up. I believe the - - - the  
7 real crux of the interrogation itself - - - you - - - you  
8 are correct, Judge. There may have been some question  
9 about that. The record is not entirely clear, so it's not  
10 fair to say what they talked about for however long it was.  
11 As we've discussed, it was a very long interrogation.

12 But what the detectives were truly trying to get  
13 to, the heart of the matter was who were the two men who  
14 were in the car with defendant because as - - - as we've  
15 established, he was just driving the car. What we are  
16 asking this court to do is to truly decide which is more  
17 appropriate - - - to apply Cohen to the marijuana charge  
18 and the murder charge or to apply it to, as defendant is  
19 asking and as the Appellate Division did, to the robbery  
20 and the murder charge together? It's our position that  
21 whichever way it's applied, either way, Cohen would not be  
22 violated.

23 But we - - - it's our argument that it should be  
24 applied the way the hearing court did to the murder and to  
25 the marijuana charge because the - - - the marijuana charge



1 was the only charge for which defendant had an attorney,  
2 and that is - - - that was the crux of Cohen. Those are  
3 the kind of cases with actual representation for which  
4 Cohen was meant to apply. The one reason I got - - - and  
5 this is just a very, very small factual matter, in Nassau  
6 County, unlike in most of the counties in New York City, I  
7 just want to make clear it's very unusual for ACDs, or as  
8 we call them ACODs, on marijuana possession to be handed  
9 out at arraignment, so I just wanted to kind of get that  
10 across. That's not something that would have been typical,  
11 so whether or not that is relevant at all, it's just not  
12 something that's usually done.

13 CHIEF JUDGE DIFIORE: Thank you, counsel.

14 MS. CONNELL: Thanks, Judges.

15 (Court is adjourned)

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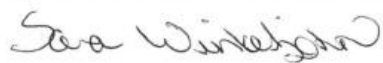
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C E R T I F I C A T I O N

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Bryan Henry, No. 60 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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