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COURT OF APPEALS

STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

No. 154

SAMUEL McLEAN,

Appellant.

20 Eagle Street
Albany, New York 12207
September 10, 2014

Before:

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

Appearances:

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Official Court Transcriber

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CHIEF JUDGE LIPPMAN: 154, People v.
McLean.

Hold for one second, counselor.

Okay, counselor.

MS. REILLY: Thank you, Your Honor.

CHIEF JUDGE LIPPMAN: You want some
rebuttal time, counselor?

MS. REILLY: Sure, two minutes, please.
Thank you.

CHIEF JUDGE LIPPMAN: Two minutes. You
have it.

MS. REILLY: Good afternoon.

CHIEF JUDGE LIPPMAN: Go ahead.

MS. REILLY: I'm Danielle Neroni Reilly. I
represent the appellant in this matter, Samuel
McLean.

In this case, Your Honors, in 2003 Mr.
McLean's indelible right to counsel attached when - -
-

CHIEF JUDGE LIPPMAN: What did the police
have to do in this situation? Going now to treat him
as a suspect in the murder case, what did they have
to do with the - - - the old attorney?

MS. REILLY: With the old attorney? Well,

1 they went down to speak, supposedly, to Mr. - - - Mr.
2 Kouray. However, they never - - - and I - - - I
3 credit what the defense - - - or what the dissenter
4 said in the Appellate Division is that they played
5 fast and loose with it. They didn't ask him do you
6 still represent Sam.

7 CHIEF JUDGE LIPPMAN: What was their
8 burden? What did they have to do?

9 MS. REILLY: They just have to see if the
10 representation had ceased, as it pertained to that
11 investigation, and they didn't do that.

12 JUDGE SMITH: Isn't that - - - isn't that
13 the question that they asked the - - - the defense
14 attorney?

15 MS. REILLY: I think what they said is hey,
16 do you still represent Sam McLean. And then he said
17 - - - I think he said no, the robbery case is over.

18 JUDGE GRAFFEO: Why isn't - - - why isn't
19 that sufficient? Do we have to require a particular
20 litany, now, that the police have to ask?

21 MS. REILLY: I don't think it's a litany.
22 I think that it's a - - - it's just basic common
23 sense to alert that person. Hey, we're not just
24 talking to him about the robbery case. We get that's
25 closed. It's we want to talk to him about the same

1 case that you entered into that you represented him
2 before.

3 JUDGE ABDUS-SALAAM: Would it - - -

4 JUDGE GRAFFEO: In the Booker case in the
5 Third Department, why can't we just accept that
6 rationale?

7 MS. REILLY: It - - - it - - -

8 JUDGE GRAFFEO: That would be - - -

9 MS. REILLY: It's - - - it's not similar to
10 this case. In this case, these are the same
11 investigators. These are the same investigators who
12 spent hours with Kouray and McLean together.

13 CHIEF JUDGE LIPPMAN: What should he have
14 said? That's what I'm trying to focus on. What - -
15 - what should the police have said to - - - Kouray?

16 MS. REILLY: Yes.

17 CHIEF JUDGE LIPPMAN: Or to the defendant?
18 What's - - - what's the - - - what's the
19 responsibility under the cases?

20 MS. REILLY: Well, it - - - I'm going to
21 first go to, I guess, what he should have said to
22 Kouray is that the - - - new information has come to
23 light. We're going to reopen the case with respect
24 to the investigation, the homicide investigation.

25 CHIEF JUDGE LIPPMAN: And mentioning

1 Goodwin or whatever the name of the case was, didn't
2 - - - didn't tip that off to - - -

3 MS. REILLY: No, he - - - a - - - a defense
4 attorney handles hundreds and hundreds of cases. And
5 we don't recall the victims' names.

6 JUDGE ABDUS-SALAAM: But - - - but how many
7 cases involving the murder of somebody named Goodwin
8 did Mr. Kouray handle that was connected to Mr.
9 McLean?

10 MS. REILLY: You - - - you don't remember
11 and - - - and maybe that's how I handle it. I don't
12 remember the victims' names. I remember my
13 defendants' names. And I think that Kouray, although
14 he had gone in to investigate for three, four hours
15 on two separate dates - - - so he - - - he triggered
16 Sims - - - you know, Sim (sic) to know that he was
17 the attorney. I think that if he had said I'm going
18 back up to investigate this and to investigate the
19 murder of Leon Goodwin or the homicide of Leonder
20 Goodwin, that would have been something different.

21 CHIEF JUDGE LIPPMAN: So you're saying that
22 the question could not have elicited an answer that
23 was informative in relation to representation,
24 potential representation?

25 JUDGE GRAFFEO: So what's - - - what's the

1 particular question you want the police to ask Mr.
2 Kouray?

3 MS. REILLY: I don't think there is a
4 particular question. I don't think that the
5 investigators can play fast and loose with the
6 representation.

7 JUDGE SMITH: Well, he - - - he - - - he -
8 - - he just - - - as far as I can tell, he asks,
9 without any prologue, do you still represent Sam
10 McLean?

11 MS. REILLY: Right.

12 JUDGE SMITH: If he had said I'm reopening
13 a homicide investigation - - - and - - - and - - -
14 and Kouray says - - - Kouray says no, I don't. The -
15 - - the investigator - - - the - - - now suppose the
16 officer had said we're reopening a homicide
17 investigation. Do you - - - do you represent Sam
18 McLean? How could Kouray have given a different
19 answer? The fact's still the same, isn't it?

20 MS. REILLY: They're not the same. Because
21 in - - - in a defense attorney's mind - - -

22 JUDGE SMITH: The question is do you still
23 represent him.

24 MS. REILLY: Well, because they're saying
25 on the - - -

1 JUDGE SMITH: You mean - - - you mean it
2 depends on what you're up to as the - - - as - - -

3 MS. REILLY: Yes, I think that if Sims went
4 down there candidly and says hey, listen. You sat in
5 the - - - you recall sitting in there? You recall
6 coming down to the grand jury room, you know.

7 JUDGE SMITH: You're - - - you're - - -
8 you're talking about playing fast and loose. Isn't
9 the hypothetical defense attorney you're talking
10 about playing a little fast and loose here? He says
11 no, I don't still represent - - - oh, wait a minute.
12 If that's what you're doing I still represent him.

13 MS. REILLY: No, I think that if anybody
14 had said to any seasoned defense attorney such as
15 Kouray, hey, listen, we're going to talk to him about
16 a homicide.

17 JUDGE SMITH: Yeah - - - yes - - - yes, of
18 course. Any seasoned defense attorney gives the
19 answer to that question that he thinks is going to
20 help his client.

21 JUDGE ABDUS-SALAAM: Counsel - - -

22 JUDGE SMITH: But how can you - - - then -
23 - - then how can you be so outraged that a seasoned
24 police officer gives the question, thinks he's going
25 to get the answer he wants?

1 MS. REILLY: Because - - -

2 JUDGE SMITH: It's not a crime.

3 MS. REILLY: Because he's violating a
4 fundamental right of that defendant.

5 JUDGE ABDUS-SALAAM: Well, didn't Mr.
6 Kouray say at the 440 hearing that until he read a
7 later decided Third Department case he didn't think
8 that he represented - - -

9 MS. REILLY: That was in response to some
10 seasoned cross-examination.

11 JUDGE ABDUS-SALAAM: - - - McLean?

12 MS. REILLY: But - - - no, he - - - he did
13 say - - - he did say that I - - - I represented him
14 on the homicide investigation.

15 CHIEF JUDGE LIPPMAN: Isn't what he said if
16 he knew that he was a suspect?

17 MS. REILLY: Well, if - - -

18 CHIEF JUDGE LIPPMAN: Isn't that the issue
19 that it - - - it wasn't clear to him - - - is that
20 what you're arguing? It wasn't clear to him that, in
21 any way, he was saying that your guy is now a suspect
22 in that murder case that, you know, we had - - - he
23 helped us with?

24 MS. REILLY: I think that if Sims had gone
25 down there and even said to him listen, you know the

1 case that we had talked about where the - - - Leonder
2 Goodwin was a homicide and Sam McLean was a witness.
3 We're going to go back up to talk to him about that.
4 There's - - - some other information has come to
5 light. I don't think there's any way that Sam - - -
6 that Steve Kouray would have said oh, go ahead. Talk
7 to him without my presence.

8 JUDGE SMITH: Why did Kouray think they
9 were asking him the question?

10 MS. REILLY: I - - - I think that that's -
11 - - if you talk to Steve Kouray and you re - - - if
12 you read the transcript, he represented Sims. They
13 are friends. They're - - - the buildings are
14 literally across the street.

15 JUDGE SMITH: Wait - - - wait - - - wait a
16 minute. He's a seasoned defense lawyer. A - - - a
17 cop comes to him and says do you still represent
18 so-and-so. The defense lawyer isn't supposed to
19 think hmm, sounds like he wants to talk to so-and-so?

20 MS. REILLY: About what, though?

21 JUDGE SMITH: Yeah, yeah.

22 MS. REILLY: You know, if it - - - if it's
23 so - - -

24 JUDGE SMITH: Well, isn't - - - isn't - - -
25 isn't the real problem not that it was about the

1 homicide investigation but that McLean had become a
2 suspect in the homicide investigation?

3 MS. REILLY: I think that that's the bigger
4 issue.

5 JUDGE SMITH: Did - - - did the - - - well,
6 did the officer have to tell him that?

7 MS. REILLY: It's not what does he have to
8 tell him or what he doesn't have to tell him. It's
9 that was - - - when Sims went down there, was his
10 purpose to just cover his bases and say - - - so down
11 the road he could say to a - - - a - - - a court,
12 such as this, I did it. Or - - -

13 JUDGE SMITH: Yeah, yeah, of course it was.
14 Everybody is trying to make a record here. But there
15 are rules you play by. He figure - - - he - - - he
16 read - - - somebody read People v. West for him and
17 told him that's what you got to do, so he did it.

18 MS. REILLY: Well, yeah, I - - - I
19 appreciate that. But I think when he went down there
20 it was tongue-in-cheek. Because I - - - I think that
21 Bob Carney should have been the one who's going down
22 there to say - - -

23 JUDGE SMITH: No, he's not - - - no - - -
24 no police officer goes to a defense lawyer trying to
25 do his best to help the defense lawyer get the guy

1 off. It doesn't work that way. There - - - there
2 are things he's required to do, and he does what he's
3 required to do. Why was he required to do more than
4 what he did here?

5 MS. REILLY: Because he didn't clearly
6 indicate to Mr. Kouray what he was actually asking
7 about. If he had said you remember that case that I
8 had been involved in; you remember that case that you
9 had represented him in, to trigger something in
10 Kouray's mind. Kouray says robbery, closed.

11 JUDGE ABDUS-SALAAM: Well, Kouray
12 remembered that he represented Mr. McLean on the
13 robbery.

14 MS. REILLY: Right.

15 JUDGE ABDUS-SALAAM: So what - - - why
16 wouldn't he have also remembered that in order to try
17 to get a lighter sentence on the robbery he was the
18 one who brought to the police the Goodwin murder?

19 MS. REILLY: I - - - I understand your
20 point. But the thing is is that, again, with Kouray,
21 what he said and how it came across at the hearing to
22 me was that he represented Kouray (sic) in the
23 robbery, yes. He also represented him in the
24 homicide. So when the officer - - - and Kouray only
25 thought that he was - - -

1 JUDGE ABDUS-SALAAM: And the robbery was
2 over.

3 MS. REILLY: Right, but Kouray only thought
4 that he was a witness in the homicide. So to him, it
5 wouldn't have triggered that now he's a suspect, now
6 they're going to go up and speak to him.

7 JUDGE RIVERA: There - - - there's - - -
8 there's no basis in his mind - - -

9 MS. REILLY: Correct.

10 JUDGE RIVERA: - - - as defense counsel to
11 believe that the inquiry is about this homicide.

12 MS. REILLY: Right.

13 JUDGE RIVERA: Because he's - - - he's not
14 - - - because his client was not on the radar for the
15 homicide.

16 Let me ask you: what, if anything, does
17 the fact that the defendant made reference to the
18 lawyer when they went to see him have on the
19 responsibility of law enforcement in the case?

20 MS. REILLY: I think that's the biggest
21 part of this case. Because if Sims really wanted to
22 play on the up and up, as soon as Kouray's name was
23 mentioned he would have said we went to see him, he
24 says he doesn't represent you. Does he still
25 represent you? And this court has repeatedly held

1 that a simple inquiry is not an unrealistic burden.

2 So everyone - - -

3 JUDGE PIGOTT: It just struck me, though,
4 that, I mean, he didn't represent him. I mean it was
5 years before. And he - - - he didn't. But if - - -
6 if I was in his shoes and - - - and if somebody
7 walked into my - - - a state trooper said do you
8 represent somebody? I'd say absolutely, what's he up
9 to.

10 MS. REILLY: All right, but, you know, they
11 also have a friendly relationship. This is also
12 Schenectady County, but - - -

13 JUDGE SMITH: Did - - - did - - - did
14 Kouray - - - did Kouray really think this was just
15 his old friend Sims asking what client - - - oh,
16 yeah, asking him - - - asking him about his client
17 list?

18 MS. REILLY: Well - - -

19 JUDGE SMITH: And I don't think you've
20 answered my question; what did Kouray think was Sims'
21 purpose in asking the question?

22 MS. REILLY: I think that the way that Sims
23 asked the question it was is that case still open.
24 Is it the robbery case?

25 JUDGE SMITH: What was the purpose? What

1 in Kouray's mind was Sims' purpose in asking the
2 question?

3 MS. REILLY: I don't think he had a clue,
4 honestly.

5 JUDGE RIVERA: Well - - - well, just a
6 moment here. But - - - now, obviously, the - - - the
7 DA's office thought that there might be a possibility
8 that this defense ascerny - - - defense attorney had
9 still some professional duty and obligation with
10 respect to the homicide. Otherwise, what is the
11 point - - -

12 MS. REILLY: Right.

13 JUDGE RIVERA: - - - of going to speak?
14 Everybody knows the robbery's over.

15 MS. REILLY: Right, and that's what - - -

16 JUDGE RIVERA: But what - - - what, if
17 anything, does that mean with respect to the response
18 from the defense counsel?

19 MS. REILLY: And that's what - - - I don't
20 think Kouray had a - - -

21 JUDGE RIVERA: What if the defense counsel
22 decided not to say anything?

23 MS. REILLY: I - - - I think - - -

24 JUDGE RIVERA: I don't have to answer your
25 question. I don't know why you're here.

1 MS. REILLY: Right.

2 JUDGE RIVERA: And I don't talk about my
3 clients.

4 MS. REILLY: But I don't think that Kour -
5 - - I don't think that Sims went down there on the up
6 and up and said this is why I'm really here.

7 JUDGE RIVERA: Okay, well, you think
8 there's some nefarious intent in there. Okay, but
9 what if the defense attorney had not said a word,
10 said I cannot speak to you about anything about my
11 clients? What - - - what should he then have done?

12 MS. REILLY: Well, then there's still that
13 ambiguity. I think that at that point he has to
14 still try to resolve it. And then maybe ask, again,
15 McLean.

16 JUDGE RIVERA: And - - - and - - - but how
17 would he resolve that?

18 MS. REILLY: He can - - -

19 JUDGE RIVERA: Does he have to go to McLean
20 and ask?

21 MS. REILLY: Well, he could ask McLean, or
22 I think that he errs - - -

23 JUDGE RIVERA: Why didn't they just ask
24 McLean?

25 MS. REILLY: Or I think he errs on the - -

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JUDGE RIVERA: I'll ask him.

MS. REILLY: That's true. Or he errs on the side of caution and does what he did in 2003. In 2003 they produced McLean from a state correctional facility to come talk to them.

JUDGE SMITH: Well, suppose - - - suppose Kouray does say I don't talk about my clients. And Sims says, gee, because I sort of wanted to talk to McLean, and I wanted to know how you felt about that. But if you're not his lawyer, I - - - there's no point in my asking you. Are - - - are you his lawyer?

MS. REILLY: Again, are you his lawyer? Are you still representing him on the homicide investigation? Are you still representing him in the murder that you staffed?

JUDGE SMITH: And why - - - well, why - - - why shouldn't Kouray be able to handle the question in the form that I just suggested?

MS. REILLY: Because I don't - - - I don't think that that's how it happened. I'm not even saying nefarious. I think that Sims goes down there and says hey, do you still represent him, and they start talking about something else.

1 JUDGE RIVERA: Again, why does it matter?
2 Why don't they just ask McLean?

3 MS. REILLY: Right, exactly. And that's
4 the problem. And that's a prob - - -

5 JUDGE GRAFFEO: West - - - West says you -
6 - - the police have to make an inquiry. I mean they
7 were following our precedent - - -

8 MS. REILLY: Right.

9 JUDGE GRAFFEO: - - - where we said they
10 have to make an inquiry.

11 MS. REILLY: And he - - -

12 JUDGE RIVERA: But I think your point is
13 that the defense counsel, perhaps, is not very clear
14 in his response.

15 MS. REILLY: Right.

16 JUDGE RIVERA: Then you got to go ask the
17 client.

18 MS. REILLY: Right, and I think that when -
19 - - but then - - - and that's why I don't think that
20 Sims was acting - - - and again, no - - - no attack
21 on Sims, but when McLean says to him, you know, does
22 Kouray - - - you know, how's Kouray, I mean that's a
23 perfect opportunity. Kouray, Kouray, the person you
24 just went to talk to. Does he still represent you?

25 JUDGE GRAFFEO: What - - -

1 JUDGE SMITH: Is it - - - is it a viable
2 rule of law to say that you're - - - that they're
3 allowed to talk to him but if he happens to mention
4 the lawyer's name in social conversation the - - -
5 the - - - the inquiry has to stop?

6 MS. REILLY: No, and I'm not suggesting
7 that. However - - -

8 JUDGE ABDUS-SALAAM: And if Mr. Kouray was
9 still representing Mr. McLean, why didn't he ask the
10 police where's Kouray?

11 MS. REILLY: Well - - -

12 JUDGE ABDUS-SALAAM: He was with me when
13 you questioned me before. Why isn't he here now?

14 MS. REILLY: Well, I think that if you go
15 back to what happened in 2003, he went to Kouray and
16 said I need your help dealing with the police, you
17 know. He didn't write Sims a letter, and he knows
18 Sims because he's been a Schenectady boy through and
19 through. He knows Investigator Brown. He knows the
20 system. He doesn't write directly to him. He
21 interposes Kouray in between him and - - -

22 JUDGE ABDUS-SALAAM: That's what I mean. If
23 he was - - -

24 MS. REILLY: - - - the authorities.

25 JUDGE ABDUS-SALAAM: - - - savvy enough

1 initially to bring Kouray in on the Goodwin mur - - -
2 murder. And when they're back to ask him some more
3 questions about it, why doesn't he say, you know, I
4 had Kouray with me before. Where is he now?

5 MS. REILLY: Well, because when they come
6 up - - - they go up there, first of all, they take
7 him out of his little cell, which he usually only
8 gets out for an hour. He gets to go down and visit
9 with people. And then he says oh, by the way, here's
10 a letter - - - here's a statement from Antwan Baker
11 (ph.) pointing the finger at you. Now do you want to
12 talk. I mean it's coercive.

13 CHIEF JUDGE LIPPMAN: Okay - - -

14 MS. REILLY: He's - - -

15 CHIEF JUDGE LIPPMAN: - - - counselor.

16 MS. REILLY: Okay.

17 CHIEF JUDGE LIPPMAN: Let's - - - you'll
18 have your rebuttal.

19 Let's hear from your adversary.

20 MR. DWYER: Thank you, Your Honors, Gerald
21 Dwyer for the respondent.

22 CHIEF JUDGE LIPPMAN: Counselor, don't you
23 have to ask a question that's designed to get an
24 informed answer?

25 MR. DWYER: Well, I think they did because

1 - - -

2 CHIEF JUDGE LIPPMAN: Isn't that police's
3 responsibility?

4 MR. DWYER: They were very direct. They
5 said do you represent him anymore? And he - - - you
6 represent Sam McLean anymore?

7 CHIEF JUDGE LIPPMAN: Isn't that - - -

8 MR. DWYER: Or they may have said - - -

9 CHIEF JUDGE LIPPMAN: How long ago was that
10 case?

11 MR. DWYER: That was 2000. You mean when
12 they did that, Judge? That was in '06.

13 CHIEF JUDGE LIPPMAN: From the - - - from
14 the murder case to the - - - to the - - - when he was
15 not a suspect - - -

16 MR. DWYER: Yeah, the murder was in '02,
17 Judge. The - - -

18 CHIEF JUDGE LIPPMAN: And when he
19 questioned him, Kouray, when was that?

20 MR. DWYER: Initially, Judge? You mean
21 when - - -

22 CHIEF JUDGE LIPPMAN: No, no. When he - -
23 -

24 MR. DWYER: - - - when he questioned Kouray
25 it was '06. And Kouray said - - -

1 CHIEF JUDGE LIPPMAN: But I'm saying - - -
2 but - - - but just mentioning the name of the case,
3 why don't you ask what you've come in to ask and what
4 your responsibility is - - -

5 MR. DWYER: Well - - -

6 CHIEF JUDGE LIPPMAN: - - - under the law,
7 which is to ask a question that gets an informed
8 answer so you can know that there's - - - if you know
9 that there's a possibility of representation, what is
10 your burden? That's the same question I asked - - -

11 MR. DWYER: Well - - -

12 CHIEF JUDGE LIPPMAN: - - - your adversary.

13 MR. DWYER: Your Honor - - -

14 CHIEF JUDGE LIPPMAN: What - - - what - - -
15 what should the police do?

16 MR. DWYER: Exactly what they did. Do you
17 still represent Mr. McLean in anything? And he said
18 no.

19 CHIEF JUDGE LIPPMAN: By mentioning the
20 Goodwin case - - -

21 MR. DWYER: I mean, he's in custody - - -

22 CHIEF JUDGE LIPPMAN: - - - by mentioning
23 the Goodwin case that's enough?

24 MR. DWYER: They said - - - yeah, we're
25 going up to talk to him on the Goodwin case, the Leon

1 - - - Leonder Goodwin case, which I believe any
2 seasoned - - - I was a defense lawyer. The very
3 first case I tried was against Steve Kouray. I was
4 the defense lawyer in 1978. He was the prosecutor.

5 CHIEF JUDGE LIPPMAN: Do you think Kouray
6 immediately said oh, he's now a suspect in this case
7 and they're going to go - - - they're going to - - -
8 in - - - talk to him and get him to say something
9 incriminating - - -

10 MR. DWYER: This - - -

11 CHIEF JUDGE LIPPMAN: - - - and oh, I'm
12 going to say I don't represent him? Or do you think
13 it's possible that the question wasn't designed to
14 elicit an informed answer but rather, just to kind of
15 make a swipe at - - - at - - - at - - - at
16 sort of you did kind of what you're supposed to do
17 but not what you're supposed to do?

18 MR. DWYER: I believe, Your Honor, that
19 they believed he knew what they were talking about.
20 And that if he hadn't he would have said - - -

21 CHIEF JUDGE LIPPMAN: You believe that he
22 said go - - -

23 MR. DWYER: - - - what's the Leonder
24 Goodwin case?

25 CHIEF JUDGE LIPPMAN: - - - go question

1 him.

2 MR. DWYER: Right.

3 CHIEF JUDGE LIPPMAN: Go get an
4 incriminating statement from him?

5 MR. DWYER: He - - - he - - - at that time,
6 he believed he had never represented him on the
7 homicide. He testified to that at the hearing.

8 CHIEF JUDGE LIPPMAN: Do you think he knew
9 that - - - that he was a suspect in the murder case?

10 MR. DWYER: No, I don't think he knew or
11 cared. He had never represented him on the homicide
12 in Steve Kouray's mind.

13 CHIEF JUDGE LIPPMAN: Do you think that if
14 knew that he was a suspect, if they said you know
15 what, you remember that murder case - - -

16 MR. DWYER: I don't - - -

17 CHIEF JUDGE LIPPMAN: - - - there's stuff
18 that's come up. And, you know, your guy may be a
19 suspect. Okay if we go get some - - -

20 MR. DWYER: I - - -

21 CHIEF JUDGE LIPPMAN: - - - incriminating
22 statements from him? That would be okay?

23 MR. DWYER: It would have been okay if
24 they'd asked that, Your Honor. I don't think - - -

25 CHIEF JUDGE LIPPMAN: Yes?

1 MR. DWYER: - - - they're required to do
2 that. Under any interpretation of the law the police
3 don't have to tell the defendant - - -

4 CHIEF JUDGE LIPPMAN: So they're just
5 allowed to make a fleeting - - - a fleeting - - -

6 MR. DWYER: Yeah.

7 CHIEF JUDGE LIPPMAN: - - - reference to a
8 - - -

9 MR. DWYER: As I understand the cases,
10 they're required to go find out - - - if there's
11 ambiguity, which I don't really think there was - - -

12 CHIEF JUDGE LIPPMAN: But my point to you,
13 I guess, is what's the purpose of this exercise?

14 MR. DWYER: Well - - -

15 CHIEF JUDGE LIPPMAN: Why do police have a
16 burden - - -

17 MR. DWYER: Okay.

18 CHIEF JUDGE LIPPMAN: Why'd they do it?

19 MR. DWYER: At that time, Your Honor, as -
20 - - as the DA understood the law, and this is
21 pre-Callicutt by five years, the - - - the cases said
22 if there's any ambiguity unclarity (sic), it's not up
23 to the police to try to resolve that. They are
24 required to go ask in this type of a circumstance.
25 You know, that we have those cases with the time;

1 that if they - - - if - - - if they go in and said
2 this guy's a suspect in a homicide. We want to talk
3 to him. Is that okay with you? Very few defense
4 lawyers are going to say - - -

5 MR. DWYER: Yeah.

6 JUDGE SMITH: - - - oh, yeah, sure, go
7 ahead.

8 MR. DWYER: I agree, though, Judge.
9 Although, in this case, Mr. Kouray was assigned - - -
10 and as he said, I don't represent criminals; if - - -
11 he's a part-time conflict defender. I represent
12 people when I am assigned or when I am retained. And
13 that's - - - that's different from the city where
14 every - - - you know people are all full time. The
15 answer, I believe, in the city, would be definitely
16 under any circumstances. They don't care what you're
17 asking. I think we can - - -

18 JUDGE SMITH: Well, we're - - - we're - - -
19 we're all like Judge Pigott. We all say oh, sure. I
20 represent him. What are you - - -

21 MR. DWYER: Yeah, exactly.

22 JUDGE SMITH: Yeah.

23 JUDGE PIGOTT: Well, I - - - I have - - -

24 JUDGE RIVERA: May I ask a different - - -
25 different question?

1 JUDGE PIGOTT: My bad, yes. Go ahead.

2 JUDGE RIVERA: Just a slightly different
3 question. I'm just going to follow up on.

4 MR. DWYER: Yes.

5 JUDGE PIGOTT: I can wait.

6 JUDGE RIVERA: Oh, I'm sorry.

7 JUDGE PIGOTT: Go ahead.

8 JUDGE RIVERA: Go ahead. No, no, please.

9 JUDGE PIGOTT: I - - - I was going to ask
10 you if you - - - Judge Lippman said the inquiry
11 should - - - should be - - - should be such as to
12 extract an informed answer. Do you real - - - do you
13 agree that would be a good standard? That the
14 questioning should be such as to - - - as to - - -

15 MR. DWYER: You mean to say how specific
16 does it have to be?

17 JUDGE PIGOTT: Right, in other words, you -
18 - - you disagree - - - you disagree as to what - - -
19 a lot of people disagree as to what was said and what
20 - - - and - - - and what the result is.

21 MR. DWYER: I mean - - -

22 JUDGE PIGOTT: In - - - in - - - in trying
23 to get a - - - a rule going forward - - -

24 MR. DWYER: Right.

25 JUDGE PIGOTT: - - - should the inquiry be

1 such as to - - - as to extract or - - - or exact the
2 - - - the - - -

3 MR. DWYER: I don't - - - I don't think we
4 should deviate - - -

5 JUDGE PIGOTT: - - - an informed answer?

6 MR. DWYER: - - - from having to say to
7 someone your client, his - - - his - - - his position
8 in this has changed. Or he is now a suspect.

9 CHIEF JUDGE LIPPMAN: Yeah, but you agree
10 you want an informed answer, don't you? You don't
11 want an - - -

12 MR. DWYER: I think if you ask him if - - -

13 CHIEF JUDGE LIPPMAN: - - - uninformed
14 answer?

15 MR. DWYER: Judge, if you ask an attorney
16 do you still represent someone - - -

17 CHIEF JUDGE LIPPMAN: I know but my
18 question to you is you want an informed answer, don't
19 you?

20 MR. DWYER: Yeah, I think that's all you
21 have to ask.

22 CHIEF JUDGE LIPPMAN: Okay, continue. Go
23 ahead.

24 MR. DWYER: I think that's true. But as he
25 said, if they said we're going up to talk to him

1 about that homicide case again - - -

2 JUDGE SMITH: Well, you don't - - - you - -
3 - you - - - you - - -

4 MR. DWYER: - - - it wouldn't have - - -
5 wouldn't have meant anything.

6 JUDGE SMITH: - - - say you want an
7 informed answer. You want - - - isn't it enough to
8 say that you want an accurate answer? I mean you - -
9 - you - - - you want to know the truth.

10 MR. DWYER: Right.

11 JUDGE SMITH: You don't necessarily want
12 the person who's going to tell - - - who - - - who's
13 going to answer your question to know exactly what
14 it's in his interest to say?

15 MR. DWYER: I - - - that's right, Judge.
16 But I don't - - - the pol - - - the police are not
17 charged with doing that, Your Honor. And I think
18 that would have an - - - an enormous impact on the
19 criminal justice system if every time they talked to
20 a defendant, which I would presume it would extend to
21 them, as well, as well as his counsel, you have to
22 say you are now a suspect in this homicide, and
23 that's the reason we want to talk to you.

24 JUDGE RIVERA: So - - -

25 MR. DWYER: They do sometimes, but they're

1 not required to do that.

2 JUDGE RIVERA: So - - -

3 MR. DWYER: And I think it would have a - -
4 - a real - - -

5 JUDGE RIVERA: So then - - - then - - - so
6 let me - - -

7 MR. DWYER: - - - chilling effect.

8 JUDGE RIVERA: - - - ask the question I
9 wanted to get to.

10 MR. DWYER: Yeah, I'm sorry, Judge.

11 JUDGE RIVERA: Which was the question I
12 asked - - - no, no - - - I asked your adversary. So
13 let's assume for one moment that either the attorney
14 refuses to answer - - -

15 MR. DWYER: Right.

16 JUDGE RIVERA: - - - or it's very clear - -
17 - not - - - not - - - there's not an ambiguity. It's
18 very clear that the answer that the attorney has
19 given does not - - - is not responsive, doesn't - - -
20 doesn't let you know, as the investigator - - -

21 MR. DWYER: Right.

22 JUDGE RIVERA: - - - whether or not they're
23 representing them.

24 MR. DWYER: Right.

25 JUDGE RIVERA: What should law enforcement

1 do?

2 MR. DWYER: I think, Your Honor - - -

3 JUDGE RIVERA: What's the next step?

4 Should they go, then, at that point - - -

5 MR. DWYER: They should go back to the DA
6 and tell them - - -

7 JUDGE RIVERA: - - - and speak to the
8 defendant?

9 MR. DWYER: - - - that, initially. And - -
10 -

11 JUDGE RIVERA: And then what?

12 MR. DWYER: And then I think the DA would
13 say, well, I - - - I would ask him if we're going up
14 to talk to him about this homicide, unless you tell
15 us that you represent him, we are going to go.

16 CHIEF JUDGE LIPPMAN: So did they - - -

17 MR. DWYER: That's what I would do.

18 JUDGE RIVERA: But they should go back and
19 - - - and make it - - -

20 MR. DWYER: Well, at that time I would have
21 said that.

22 JUDGE RIVERA: - - - crystal clear?

23 MR. DWYER: If they said - - -

24 JUDGE RIVERA: Crystal clear?

25 MR. DWYER: - - - what you posited, which

1 is, you know - - -

2 CHIEF JUDGE LIPPMAN: Yeah, but why
3 shouldn't they say that - - -

4 MR. DWYER: - - - yeah, get out of here.
5 I'm not - - -

6 CHIEF JUDGE LIPPMAN: Why shouldn't they
7 say that anyway? Why shouldn't they go down and say
8 hey, we want to talk to him - - -

9 MR. DWYER: Well - - -

10 CHIEF JUDGE LIPPMAN: - - - about this
11 homicide?

12 MR. DWYER: Your Honor, the state of the
13 law - - -

14 CHIEF JUDGE LIPPMAN: Is that okay with
15 you?

16 MR. DWYER: - - - if they went there - - -
17 and that's part of the problem here. We're
18 reconstructing an - - - an office conference in 2000
19 and - - - when was it, 2006, and the hearing's in
20 2014. So the - - - the recollections of everything
21 that was said were - - - were a little bit vague.
22 And - - - but that's what - - - we're stuck with the
23 record as it is. And I - - - I think even the police
24 said we did not tell him - - - A, number one, we did
25 not tell him he was a suspect.

1 JUDGE RIVERA: Right.

2 MR. DWYER: He - - - he didn't remember
3 saying - - - he thought he had said - - - he didn't
4 remember saying it was a murder case - - - the murder
5 case. He thought he just knew what it was. I mean
6 again - - -

7 CHIEF JUDGE LIPPMAN: But counselor - - -

8 MR. DWYER: - - - it's Schenectady.

9 CHIEF JUDGE LIPPMAN: - - - if - - - if the
10 police - - - if the police are uncertain, you don't
11 question him.

12 MR. DWYER: Yeah.

13 CHIEF JUDGE LIPPMAN: That's what the cases
14 are so unequivocally clear.

15 MR. DWYER: But - - -

16 CHIEF JUDGE LIPPMAN: If you don't know - -
17 -

18 MR. DWYER: No, you go ask.

19 CHIEF JUDGE LIPPMAN: - - - don't question
20 them. So - - -

21 MR. DWYER: I would submit, Judge, the
22 cases say - - -

23 CHIEF JUDGE LIPPMAN: You don't question
24 the defendant - - -

25 MR. DWYER: If you - - -

1 CHIEF JUDGE LIPPMAN: - - - if you don't
2 know.

3 MR. DWYER: If you don't know, go ask.

4 CHIEF JUDGE LIPPMAN: Then go back and
5 know.

6 MR. DWYER: I - - - I don't think it
7 attached, Judge. You're in a situation in 2003 where
8 nobody in the room thinks that - - - and the
9 defendant claims he does now, but I don't think
10 that's credible. Nobody's in the room, when he's
11 being questioned on this cooperation agreement. And
12 those of who have been in criminal law know you bring
13 people in to talk about four or five possible cases
14 where they claim to have information. Those defense
15 lawyers don't believe that just by fact of being with
16 the person disclosing that information that they are
17 representing the place.

18 JUDGE SMITH: You're - - - you're - - -
19 you're - - - you're - - - you're now saying that - -
20 - that Callicutt is - - - is rightly decided.

21 MR. DWYER: Right.

22 JUDGE SMITH: That - - - that regardless of
23 what question was asked or what question wasn't
24 asked, this - - - this represented - - - McLean was
25 not represented as a - - -

1 MR. DWYER: Right.

2 JUDGE SMITH: - - - as a - - - as a - - - a
3 suspect in the homicide and never was?

4 MR. DWYER: Yeah, you know, Judge, in every
5 case where it's ambiguous, it's because the lawyer
6 did something to - - -

7 JUDGE SMITH: But isn't - - - isn't - - -
8 isn't - - - isn't the distinction between repres - -
9 - I mean he did represent him. Obv - - - obviously,
10 Kouray represented him as a potential witness in the
11 homicide. That was the point of being at the
12 meeting, right?

13 MR. DWYER: He said the - - - my only role
14 there was to get him a better sentence in the
15 robbery.

16 JUDGE SMITH: Well, the purp - - - yeah,
17 but - - - but in order to get him the better sentence
18 in the robbery, he took him in to tal - - - and in -
19 - - in - - - in Callicutt - - -

20 MR. DWYER: Well - - -

21 JUDGE SMITH: - - - he was - - - clearly,
22 the lawyer was giving advice about - - -

23 MR. DWYER: Yes, there's facts - - - and
24 that's why I think we ought to look at every case
25 individually. In Callicutt there were indications to

1 the police where they knew or should have known.

2 They said to the guy in front of the police you
3 shouldn't undergo a polygraph exam in that homicide.

4 They - - - and they went with him to the homici - - -

5 JUDGE SMITH: And - - - and if - - - and -
6 - -

7 MR. DWYER: - - - to the - - - to the
8 polygraph exam.

9 JUDGE SMITH: But is there any doubt - - -

10 MR. DWYER: There was none of that in this
11 case.

12 JUDGE SMITH: - - - is there any doubt that
13 in - - - in this case, if - - - at the meeting in
14 2003, if somebody had said to McLean you want to - -
15 - you want to go to a poly - - - you - - - you - - -
16 you - - - you - - - you want to take a polygraph?

17 McLean would have looked at his lawyer, and his
18 lawyer would have - - - would have given him advice?
19 I mean isn't that - - - isn't that the whole - - -

20 MR. DWYER: Well, I know, but that didn't
21 happen here, Judge.

22 JUDGE SMITH: - - - point of having the
23 lawyer there?

24 MR. DWYER: That - - - that - - - none of
25 those things - - - nothing happened.

1 JUDGE SMITH: Yeah, but if - - - if - - -

2 MR. DWYER: The only piece of advice he
3 gave him - - -

4 JUDGE SMITH: - - - we're trying - - we're
5 trying to determine the nature of his representation
6 - - -

7 MR. DWYER: Okay.

8 JUDGE SMITH: - - - at that meeting.

9 MR. DWYER: So I think, Judge, to find that
10 there was even a limited attachment with - - - as the
11 Third Department said, we have to say, on the facts
12 in this case alone, that it - - - that attachment
13 occurs when you sit with a person who only gives
14 information.

15 Even where both - - - they both testified
16 at the hearing there was no advice given on the
17 homicide. Kouray believed the entire time that what
18 he saying was gospel. He was an eyewitness slinking
19 down the alleyway who saw this homicide. He - - - he
20 never gave him any advice. And that's why Kouray
21 said I didn't think I was representing him in the
22 homicide. I was only trying to get him a better
23 deal.

24 JUDGE SMITH: Do - - - do you - - - do you
25 argue that - - -

1 MR. DWYER: If - - -

2 JUDGE SMITH: - - - Callicutt was wrongly
3 decided, or it just was distinguishable?

4 MR. DWYER: No, Your Honor, I'm not. I'm
5 saying that it's distinguishable.

6 JUDGE SMITH: Well, we're not bound by - -

7 -

8 MR. DWYER: Because in that case there was
9 ambiguity.

10 JUDGE SMITH: But, yeah, we're not bound by
11 it, are we?

12 MR. DWYER: You - - - well, yeah, you
13 denied leave on it. But - - - but in that case,
14 there were facts that were elicited in the Third
15 Department decision. Now this is five years after
16 the DA tells him to go. The DA told him to go
17 because he didn't really know the facts. But he
18 knows the law says when you got a guy sitting there,
19 if there's any potential, you know, question or
20 issue, you should go ask the guy. And that was the
21 state of the law under Grice and all the other - - -
22 you know, Arthur and all these other cases. And so
23 he just - - - he didn't really know everything that
24 had happened at the time this guy was debriefed.

25 CHIEF JUDGE LIPPMAN: Okay, counselor.

1 Thanks a lot.

2 MR. DWYER: Okay, thank you, Your Honors.

3 CHIEF JUDGE LIPPMAN: Let's get - - - let's
4 get some rebuttal time for your adversary.

5 Go ahead, counselor.

6 MS. REILLY: Just briefly, Judge. I just
7 want to point out to the court that his - - - his
8 right to counsel did indelibly attach, because he
9 testified - - - Kouray testified at the hearing and
10 McLean testified at the hearing that they did meet
11 previously to this.

12 And actually, McLean went to him with the
13 information he had. He gave him information as to
14 what was going to happen with the photo array, what
15 was going to happen with the statement, how it was
16 going to go. They con - - -

17 JUDGE ABDUS-SALAAM: Counsel, assum - - -
18 assuming that's true - - - assuming that the right to
19 counsel did attach, are you saying that it never
20 ended?

21 MS. REILLY: No, it didn't. It indelibly
22 attached, and it continued on. And I think that it's
23 important - - -

24 JUDGE ABDUS-SALAAM: Even though - - -

25 CHIEF JUDGE LIPPMAN: Well, is the issue -

1 - - I'm sorry, go ahead.

2 JUDGE ABDUS-SALAAM: I was going to say
3 even though the - - - Mr. Kouray thought he was not
4 representing Mr. McLean anymore and Mr. McLean never
5 indicated that - - - or had any contact with Mr.
6 Kouray apparently after he was sentenced for the
7 robbery?

8 MS. REILLY: I don't think you have to have
9 constant contact with - - - with your client. But I
10 think it's very telling that when Mr. McLean is
11 actually arrested on this, he's brought back for the
12 arraignment on the indictment, the name that's
13 brought up immediately to see who can represent him
14 is Kouray. Kouray and McLean are always connected as
15 the defendant and attorney.

16 CHIEF JUDGE LIPPMAN: Is the question
17 whether he's actually representing him or whether
18 there's potentially continuing representation?

19 MS. REILLY: What was the question?

20 CHIEF JUDGE LIPPMAN: What's the - - -
21 what's the question that's got to be in the police's
22 mind is that he's actually representing him or that
23 there's potential - - - potentially continuing
24 representation?

25 MS. REILLY: Right.

1 CHIEF JUDGE LIPPMAN: That - - - that's
2 what the police has to focus on, isn't it?

3 MS. REILLY: Correct, absolutely.

4 JUDGE READ: Are you - - - are you saying
5 he can be representing him even if he doesn't think
6 he is?

7 MS. REILLY: He - - - that's - - - he did
8 represent him on that. You don't get involved in
9 representing a defendant on a case just to get a
10 better deal. You represent them on the case that
11 they are doing.

12 JUDGE READ: Yeah, but - - - but Kouray
13 doesn't seem to think he was still representing him.
14 Does that matter? Are you saying that doesn't
15 matter?

16 MS. REILLY: I don't think the question was
17 ever asked of him.

18 JUDGE ABDUS-SALAAM: Yeah, but if it was -
19 - - if the investigation was five years after he was
20 sentenced on the robbery and there'd been, as you
21 say, no - - - no contact between these two, and Mr.
22 McLean's just serving his sentence on the robbery are
23 you saying that Mr. Kouray still represented him on
24 the murder?

25 MS. REILLY: I think that it's defendant's

1 indelible right, and I don't think that's it
2 something that can be waived in the absence of him.
3 And I think that's the distinction. I think that
4 that it would have been such a small burden on
5 everybody to have this right waived in Kouray's
6 presence.

7 CHIEF JUDGE LIPPMAN: Okay, counsel. Thank
8 you both. Appreciate it.

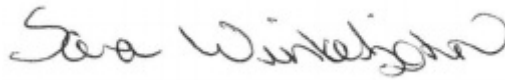
9 (Court is adjourned)

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

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Samuel McLean, No. 154 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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