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COURT OF APPEALS

STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

No. 18

MARCUS D. HOGAN,

Appellant.

20 Eagle Street
Albany, New York 12207
January 13, 2016

Before:

ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY

Appearances:

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Karen Schiffmiller
Official Court Transcriber

1 JUDGE PIGOTT: Case number 18, People v.
2 Marcus Hogan.

3 Ms. Gorman, good morning.

4 MS. GORMAN: If it please the court, Your
5 Honor, one minute rebuttal.

6 Shirley Gorman for Marcus Hogan.

7 With respect to the presumption, this is a
8 drug factory presumption by its very terms, not a
9 drug store presumption. The legislature knows full
10 well how to say with intent to sell, yet they did not
11 do that, and the reason is, you catch the wrong
12 people if you're looking at just drugs sitting on a
13 table.

14 JUDGE STEIN: So preparation for sa - - -
15 for sale, that doesn't include - - - I mean, where
16 there's a razor blade, maybe - - - you know, breaking
17 things up and - - - and putting it into plastic
18 baggies?

19 MS. GORMAN: No, that would be preparation
20 - - -

21 JUDGE STEIN: Okay.

22 MS. GORMAN: - - - for sale.

23 JUDGE STEIN: So why - - - why wasn't there
24 evidence of that here?

25 MS. GORMAN: The evidence in the People's

1 case was that the cocaine was in the carpeting and
2 that no one saw it, that cocaine, and the razor blade
3 was on the floor and no one saw it initially, so that
4 cocaine was not in open view. If you look at the
5 cocaine that was sitting - - -

6 JUDGE STEIN: So if something's si - - -
7 sitting on - - - on a carpet, but it blends in,
8 that's not open view?

9 MS. GORMAN: I - - - I don't believe it is.
10 If you go through the scene and you take photographs
11 and people walk through and don't notice it, and then
12 somebody is searching and finds it, that's not open
13 view. The cocaine sitting on the microwave table is
14 open view, six bags sitting there already packaged,
15 individual packages that are unused, but weren't the
16 same kind as the ones that were packaged. The
17 defense witness indicated she had the cocaine that
18 was on the floor in her hands as well, and that it
19 went flying - - -

20 JUDGE RIVERA: So - - - so - - - so I'm
21 sorry. Is - - - is your position that this was for
22 personal use?

23 MS. GORMAN: The defense attorney made
24 multiple arguments and made arguments that the
25 cocaine sitting on the microwave table was for

1 personal use, six - - - only six bags. Obviously,
2 the courts didn't agree with that, or they would not
3 have found that there was an intent to sell here, and
4 one of the elements was intent to sell, so - - -

5 JUDGE RIVERA: I guess I'm just trying to
6 tease out if part of the argument is when you have
7 the kind of evidence that lends itself equally to an
8 inference that it's for personal use, as well as
9 possibly that it's - - - it's for intent to sell,
10 whether or not the presumption applies in those types
11 of cases.

12 MS. GORMAN: Well, the presumption - - -
13 lower courts have held the presumption doesn't apply
14 for a misdemeanor weight because - - - or misdemeanor
15 circumstances, because it does take this
16 circumstances of even seeing mix, compound, prepare
17 for sale - - -

18 JUDGE FAHEY: I thought it was an intent to
19 unlawfully prepare a sale or pretty much - - -

20 MS. GORMAN: I'm sorry?

21 JUDGE FAHEY: I - - - I thought the fourth
22 prong of the du - - - drug - - - drug presumption - -
23 - the drug factory presumption was an intent to
24 unlawfully prepare a sale.

25 MS. GORMAN: Prepare for sale.

1 JUDGE FAHEY: Right.

2 MS. GORMAN: And - - - and that would be
3 things like putting it in bags or doing something
4 like taking crack and cooking it. The - - -

5 JUDGE FAHEY: Well, you don't have to be in
6 the process to it. Usually it's so - - - usually
7 it's the nature of - - - there's razor blades,
8 there's drugs, and then - - - and the nature of the
9 bags themselves sometimes are pointed to.

10 MS. GORMAN: The - - - the bags would show
11 an intent to sell. If you have a lot of unused bags,
12 would probably indicate an intent to sell. But
13 again, I'm arguing an intent to sell is not enough.
14 If you have a confidential informant who goes in and
15 makes a buy and sees a bunch of cocaine sitting on
16 the table and there are five other people in there.
17 He leaves and tells the task force, there are drugs
18 in there, so execute your warrant.

19 You walk in there and there are five other
20 people in there, in addition to the guy who sold.
21 It's just sitting on the table already bagged.
22 You're catching other purchasers. There's nothing
23 there that would indicate that all of those five
24 people sitting around the table were there because
25 they were all involved in drug selling.

1 If you're measuring, if you're packaging,
2 if you're doing something with those drugs, you won't
3 be there, unless you're part of that drug business.

4 JUDGE PIGOTT: Well, this - - - this was
5 added to the - - - to the automobile presumption, and
6 - - - and it - - - it struck me that, sure, there's
7 an inference, but it - - - but it's rebuttable, and -
8 - - and if somebody, you know, said, hey, I - - - I
9 was just swinging by, I was coming in to watch the
10 football game, you - - - you can raise that, but it -
11 - - but doesn't the inference still stand? And we've
12 got a trier of fact here that found that it did.

13 MS. GORMAN: That - - - that relied on the
14 inference.

15 JUDGE PIGOTT: Right.

16 MS. GORMAN: I - - - I don't think the
17 inference - - - the presumption should be used, even
18 charge those five people.

19 JUDGE FAHEY: Well, but didn't he have a
20 cell phone bill addressed to the defendant at the
21 apartment and - - -

22 MS. GORMAN: But the - - -

23 JUDGE FAHEY: - - - some evidence of
24 contact there, more than just - - -

25 MS. GORMAN: But the judge specifically

1 found no constructive possession under a
2 nonpresumption theory, because he hadn't lived there.
3 It was an old cell phone bill.

4 JUDGE FAHEY: One of the things that struck
5 me about the case was that it was a nine-year
6 sentence, and - - - and the codefendant got
7 probation, and that - - - that it took eight years to
8 perfect a case to get to the intermediate level of
9 the Appellate Division. Just - - - I don't want to
10 take you off your argument, just briefly address
11 that, would you, for - - -

12 MS. GORMAN: The - - - the public
13 defender's office is assigned first. And then when
14 they reach a case eventually and read it, and find a
15 conflict, it then gets assigned to the conflict
16 defender who does the very same thing. And then it
17 gets handed to assigned counsel like me. So I'm
18 picking up cases that are very old to start with.

19 JUDGE FAHEY: When did you get it?

20 MS. GORMAN: I'm not sure. I - - -
21 typically, this would have been perfected within 120
22 days or it - - - maybe one extension. I don't think
23 I've ever gone more than two extensions.

24 JUDGE FAHEY: No, I don't think you have
25 either. I don't think you have either.

1 MS. GORMAN: So - - - so it - - - it's - -
2 - that's the delay built in this system, but it is
3 unfortunate.

4 JUDGE FAHEY: It really - - -

5 MS. GORMAN: Right. It's - - -

6 JUDGE FAHEY: - - - is kind of a startling
7 length of time to perfect an intermediate - - -

8 MS. GORMAN: Right, no, it's a 2005
9 incident.

10 If I may address the - - - the issue of
11 grand jury and right to counsel? If there is any
12 case where an attorney is ineffective for not
13 allowing his client - - - providing an opportunity
14 for his client to testify, it is this one.

15 JUDGE STEIN: Why isn't it quintessentially
16 a strategic decision - - -

17 MS. GORMAN: Because - - -

18 JUDGE STEIN: - - - other than a
19 fundamental one?

20 MS. GORMAN: Because the defendant knows
21 best what happened, especially at that state. The
22 defendant - - -

23 JUDGE STEIN: Yeah, but there are so many
24 pitfalls, even if the defendant knows. There's so
25 many pitfalls to - - - to testifying in front of a

1 grand jury.

2 MS. GORMAN: Clearly.

3 JUDGE STEIN: And - - - and - - - and it's
4 also - - - it's not a constitutional right, is it?

5 MS. GORMAN: No, it's not.

6 JUDGE STEIN: Right. So - - - so that
7 distinguishes it from some other rights that we've
8 held to be exclusively - - -

9 MS. GORMAN: Fundamental.

10 JUDGE STEIN: - - - the defense - - -

11 MS. GORMAN: And an attorney would be
12 expected obviously to give advice, but even if it is
13 a strategic decision, at some point, I don't believe
14 the court's decisions in Simmons and Wiggins where
15 there is never a situation where you can have
16 ineffective assistance. Here, not only did you not
17 talk to your client about it, you didn't make the
18 five-day motion which would have remedied the
19 problem, because - - -

20 JUDGE ABDUS-SALAAM: But if you don't see a
21 problem, you're not going to make that motion, and -
22 - - and I think that goes to what Judge Stein just
23 asked. If - - - if counsel believes this is a
24 strategic decision that counsel should make because
25 counsel sees the pitfalls, and may or may not be able

1 to explain to his lay, you know, client what those
2 pitfalls are, then of course, you know, it's not
3 compounding the problem, if you don't see the
4 problem.

5 MS. GORMAN: But he made the motion
6 eventually. He didn't say to the judge, sorry,
7 there's no merit to it, or sorry, I didn't make it
8 because I don't think it's appropriate.

9 JUDGE FAHEY: Two months later, was it the
10 same attorney?

11 MS. GORMAN: Fifty-nine days after
12 arraignment, and - - - and - - -

13 JUDGE FAHEY: Yeah, was it - - - just let
14 me. Was it the same attorney?

15 MS. GORMAN: Yes - - -

16 JUDGE FAHEY: Right.

17 MS. GORMAN: - - - at that point it was the
18 same attorney.

19 JUDGE FAHEY: The way I read - - - read
20 Wiggins in those cases was that it wasn't a per se
21 violation.

22 MS. GORMAN: Right.

23 JUDGE FAHEY: Right. So if there are other
24 circumstances that show that there were no tactical
25 or logical reason to do that, in this case, I - - - I

1 don't see where that would be, or where there
2 couldn't be other tactical reasons for the attorney
3 not wanting him to go in and testify in front of the
4 grand jury.

5 MS. GORMAN: But shouldn't he consult with
6 the client to come - - -

7 JUDGE RIVERA: But - - - but can he really
8 be ineffective if - - - if this court has never
9 directly ruled on this and the cases below certainly
10 find that it is strategic and - - - and - - - and
11 Wiggins seems to suggest that he wouldn't be
12 ineffective even for be - - - making an error about
13 this? Can he really be ineffective with that kind of
14 case law and - - - and - - - and this - - - the
15 jurisprudence in that position, making that call,
16 that I'm just going to make this decision based on
17 what I think is best in this case for my client?

18 MS. GORMAN: Well, and that's clearly what
19 he did. But he did that without talking to the
20 client, and had he talked to the client, the client
21 might - - -

22 JUDGE RIVERA: I understand your point
23 about that. My - - - my - - - my question is can you
24 really say he's ineffective, given the jurisprudence
25 at the time that never suggested that he had to

1 speak?

2 MS. GORMAN: I - - - I'm not sure - - -

3 JUDGE RIVERA: And your position - - - I
4 don't think - - - is that the law was crystal clear,
5 right? That's not your position.

6 MS. GORMAN: No. And - - - and there are
7 cases that say the reasonable notice is to give a
8 defendant the opportunity to consult with his
9 attorney and decide whether to testify, and that
10 consultation obviously means that it's still - - -

11 JUDGE RIVERA: Do we really know based on
12 what he said that he didn't have some sense of what
13 the client would say? He may have said - - - I
14 understand your point. They said I didn't talk to
15 him about this, once I knew about this, but can we
16 really say on this record that he didn't have some
17 sense - - -

18 MS. GORMAN: He may - - -

19 JUDGE RIVERA: - - - of what the client
20 would say and made a - - - made a choice based on
21 that?

22 MS. GORMAN: He may have had some sense,
23 but he - - -

24 JUDGE RIVERA: Does it make him ineffective
25 if he had some sense?

1 MS. GORMAN: If - - -

2 JUDGE RIVERA: Would they have perhaps
3 discussed this - - - something on a prior occasion
4 about what - - - what the defendant's position was,
5 what the facts were?

6 MS. GORMAN: If he didn't say what would
7 you say, and here's something that could be totally
8 new, because clients put in that position - - -
9 they'll tell you what happened, and then when you sit
10 down and - - - okay, do you want to testify in the
11 grand jury? What would you say?

12 JUDGE ABDUS-SALAAM: At the - - -

13 MS. GORMAN: You may hear - - -

14 JUDGE ABDUS-SALAAM: Sorry, counsel. At
15 the time that the grand jury was called for - - - he
16 was called or allowed to go before the grand jury, he
17 was - - - wasn't he also being tried along with his
18 codefendant in - - - the severance hadn't occurred by
19 then, right?

20 MS. GORMAN: No, and the - - -

21 JUDGE ABDUS-SALAAM: So, if - - - if - - -
22 if his codefendant had gone into the grand jury and
23 given one version of what went on that day, wouldn't
24 it have been important for the defendant not to go in
25 there and commit to any particular story or have some

1 impeachment ability? I mean, this is - - - it seems
2 very strategic to me.

3 MS. GORMAN: His codefendant was assuming
4 responsibility for the drugs to the point where the
5 reason this was adjourned in city court is the
6 defense attorney wanted to subpoena the codefendant
7 for this preliminary hearing, because she was saying,
8 they're my drugs. She sent a letter to the DA's
9 office saying they're my drugs; he's not responsible
10 for it.

11 JUDGE ABDUS-SALAAM: Well, would - - - had
12 that happened at the time the grand jury - - -

13 MS. GORMAN: I - - -

14 JUDGE ABDUS-SALAAM: - - - was convened?

15 MS. GORMAN: In terms of the - - - the date
16 the DA got the letter, I'm not sure, but the defense
17 attorney clearly knew she was assuming
18 responsibility, because he's asking to subpoena her
19 to the prelim.

20 JUDGE RIVERA: But - - - but your argument
21 is, as I understand it, that it's not a strategic cho
22 - - - he doesn't get to make the strategic choice.
23 It's the defendant's choice, period, in consultation
24 with counsel, but it's - - - and even if it was a
25 strategic choice, even if he could have done that, he

1 - - - there is no strategy here, because he had no
2 conversation about this particular grand jury
3 testimony.

4 MS. GORMAN: Yes.

5 JUDGE RIVERA: Just to clarify where you're
6 - - -

7 MS. GORMAN: Yes. And no strategy in not
8 making that five-day motion, because it would have
9 been dismissed and re-presented, and what do you lose
10 by that, even if you, by then, have convinced your
11 client not to testify.

12 JUDGE STEIN: So - - - so regardless of how
13 long - - - so here the notice was from Friday to
14 Tuesday, I believe, right? And I - - - I understand
15 there was a holiday weekend - - -

16 MS. GORMAN: Right.

17 JUDGE STEIN: - - - in between. It was
18 late Friday. The - - - the grand jury was at - - -
19 was in the afternoon on that Tuesday, so you know,
20 there was some time there. Again, I mean, so if it
21 was - - - if it was one more day, if it was a week,
22 if it - - - you know, at what point does it become
23 ineffective not to make the motion, because, gee, if
24 you win, you know, there's nothing to lose here. But
25 - - - but then you wouldn't you always make the

1 motion, no matter how much time you got?

2 MS. GORMAN: No, because it has to be lack
3 of reasonable notice. And the cases are - - - two or
4 three days is sufficient. Here with the three-day
5 weekend, faxing this on a Friday afternoon at 4
6 o'clock - - -

7 JUDGE STEIN: Well, if it was Friday at 4
8 o'clock and they were meeting at 9 o'clock on
9 Tuesday, you know, that would - - - that would be, I
10 think, a - - - a closer - - - a closer case, but - -
11 -

12 MS. GORMAN: Right, but the - - -

13 JUDGE RIVERA: Well, it's not - - - it's
14 not Friday at 10 p.m. 4 o'clock is still business
15 hour.

16 MS. GORMAN: Right, but the attorney had
17 left for a vacation on a three-day - - -

18 JUDGE RIVERA: No, I understand that, but
19 it's still business hour - - -

20 MS. GORMAN: - - - as no - - -

21 JUDGE RIVERA: The attorney has no backup
22 in the office.

23 MS. GORMAN: Right, and - - - and - - -

24 JUDGE ABDUS-SALAAM: He might get faxes
25 through e-mail like we do sometimes.

1 MS. GORMAN: Right, maybe - - - maybe now -
2 - -

3 JUDGE RIVERA: Well, did - - - did he - - -

4 JUDGE ABDUS-SALAAM: We're never - - -
5 we're never not on duty.

6 MS. GORMAN: - - - not in 2005.

7 JUDGE RIVERA: I was going to say, I don't
8 know about 2005.

9 MS. GORMAN: Okay, thank you.

10 JUDGE PIGOTT: Thank you, Ms. Gorman.

11 Mr. Shoemaker? Good morning.

12 MR. SHOEMAKER: Good morning. May it
13 please the court, Robert Shoemaker for the People.
14 This was a prototypical drug factory presumption
15 case.

16 JUDGE PIGOTT: Let's go to the - - - if you
17 could - - - to the second point, because it - - -

18 MR. SHOEMAKER: Sure.

19 JUDGE PIGOTT: - - - it disturbed me - - -
20 Judge Fahey enlightened me without knowing it,
21 because I thought, faxing, really? I - - - but I - -
22 - I didn't notice that it was, you know, eight or
23 nine years ago, but boy, did that seem like a cheap
24 shot to me. For a - - - for a - - - for a district
25 attorney's office to fax a defense lawyer, rather

1 than serve him or call him, a notice for a - - - for
2 a grand jury on the day after a long weekend, it just
3 didn't seem right to me. Is there an explanation for
4 that other than gamesmanship?

5 MR. SHOEMAKER: Well, I wasn't in the
6 office at the time. I don't know this particular
7 system - - -

8 JUDGE PIGOTT: Well, unfortunately, you're
9 charged with representing the entire office.

10 MR. SHOEMAKER: The - - - I don't think it
11 was gamesmanship. I think it was after the court
12 appearance when the preliminary hearing was supposed
13 to happen, the assistant district attorney realized
14 she wanted to present it to the grand jury on
15 Tuesday, faxed notice. It was during the business
16 day still on Friday, and given that it was the
17 afternoon on Tuesday, the defense attorney had that
18 amount of time.

19 JUDGE PIGOTT: How about calling? And - -
20 -

21 MR. SHOEMAKER: I think there - - - there's
22 testimony or there was talk at the - - - the motion
23 argument stage that there was a call. I don't know
24 when the call happened, but that's when the defense
25 attorney told the prosecutor that he wasn't - - -

1 JUDGE PIGOTT: Well, that's true. There
2 was one - - - at least a conversation that they
3 weren't going to - - - that they were not going to
4 appear.

5 MR. SHOEMAKER: Right. So I don't know how
6 soon before the presentation or the - - - the
7 completion of the - - -

8 JUDGE PIGOTT: I go the impression that
9 that was afterwards. I mean, not - - - not after the
10 presentation, but maybe on that Tuesday or whatever.

11 MR. SHOEMAKER: I - - - I - - -

12 JUDGE RIVERA: I don't think it was after
13 the holiday.

14 MR. SHOEMAKER: Yeah, I think I got that
15 impression too, but there was still - - -

16 JUDGE PIGOTT: But doesn't it seem odd? I
17 mean, I - - - to me, just in terms of
18 professionalism, why would you - - - you know, geez,
19 you know, the grand jury's kind of important.

20 MR. SHOEMAKER: And we don't know - - -
21 actually we don't know from this record whether the
22 assistant district attorney did try to call on
23 Friday. We just don't know. We don't know if the
24 fax was the only thing that happened, but the fax is
25 what - - - the fax is what it is the record.

1 JUDGE RIVERA: No, no, our - - - but
2 certainly didn't archive it to - - -

3 MR. SHOEMAKER: The - - - the - - -

4 JUDGE RIVERA: - - - preserve some kind of
5 record about the efforts made by the ADA.

6 MR. SHOEMAKER: Correct.

7 JUDGE PIGOTT: No matter what, I just don't
8 know why you would do this. Why - - - why on a
9 Friday you tell - - - you tell somebody that the - -
10 - you know, the next business day, you know, tomorrow
11 morning we're presenting your case to the grand jury.
12 That's effectively what it was, because Saturday,
13 Sunday and Monday were all holidays, and - - -

14 MR. SHOEMAKER: Well, yeah, and in that - -
15 - though - - - in cases like that where it actually
16 is the next business day, the Appellate Divisions
17 have reversed for lack of notice. In this particular
18 case, I know it's a holiday, but there were da - - -
19 you know, there's the Friday. There was an hour left
20 in the business day. There was all day - - -
21 basically all day Tuesday for the attorney to have
22 considered - - -

23 JUDGE PIGOTT: Okay, I - - - I took you off
24 your game. You wanted to talk about the other issue.

25 MR. SHOEMAKER: Oh, well, it's - - - it's a

1 prototypical drug factory presumption case here. We
2 have the crack cocaine in open view in the
3 kitchen/living room area. There were baggies on the
4 countertop with the new and unused cocaine. There
5 was loose cocaine and razor blades on the floor, in
6 front of that countertop.

7 JUDGE RIVERA: But - - - but should - - -
8 let me ask you the question I was asking before. So
9 those things can also - - - I - - - I think the
10 baggies is the strongest evidence to - - - to get
11 that inference of drug factory - - - but if the
12 evidence really is the kind of evidence that evinces
13 either - - - either the intent to sell or personal
14 use. It really looks - - - it could be either one.
15 There's nothing that tips the scale. Why should the
16 presumption apply?

17 MR. SHOEMAKER: If it - - - if it could go
18 either way basically?

19 JUDGE RIVERA: Correct.

20 MR. SHOEMAKER: The presumption should
21 apply because there's really - - - the presumption
22 was created to - - - as a fix for this error where
23 police would come into a house - - - well, not an
24 error, but police situation where police would come
25 into a house and there would be no proof in - - -

1 JUDGE RIVERA: Yes, but it's not set up to
2 catch people who are basically drug users in - - - in
3 their home or wherever their drug use is, right?

4 MR. SHOEMAKER: I think it's - - - no,
5 that's why you need the evidence or the evidence
6 evinces - - -

7 JUDGE RIVERA: Right, so all - - - if - - -
8 if you don't have the presumption - - - let me put it
9 this way. If you don't have the presumption, it
10 doesn't foreclose the People from nevertheless trying
11 to establish an intent to sell, correct?

12 MR. SHOEMAKER: Correct.

13 JUDGE RIVERA: It just puts you back - - -
14 right back where you are for every other case, for
15 every other case, other than where you have this
16 presumption.

17 MR. SHOEMAKER: Without the presumption, it
18 puts you back, yes, it does.

19 JUDGE RIVERA: But - - - but with the
20 presumption, the defendant now has a burden that they
21 don't otherwise have, right? Because they've got to
22 rebut the presumption. Because they're basically
23 assumed guilty, as opposed to assumed innocent.

24 MR. SHOEMAKER: Right, and the pre - - -

25 JUDGE RIVERA: Is that really the

1 effectiveness of the - - - the effect, excuse me - -
2 - of the presumption?

3 MR. SHOEMAKER: Yeah, and as to the wisdom
4 of whether the presumption - - -

5 JUDGE RIVERA: Absolutely, so that's why I
6 ask. Can we really say that - - - that when - - -
7 when the - - - the evidence evinces that really we're
8 at fifty-fifty with whether or not it's intent to
9 sell or for personal use, that that's not an
10 appropriate application of the presumption?

11 MR. SHOEMAKER: I'm not sure I would go
12 that far, because just be - - -

13 JUDGE RIVERA: You're going to shift that
14 burden. Should we do it in those kinds of cases?

15 MR. SHOEMAKER: I think maybe we should,
16 given what the statute says. The statute says when
17 it's there - - - when it's evidence that evinces
18 packaging or mixing or compounding, then the
19 presumption applies. I don't think the statute says,
20 you know, it's it equivocal, it doesn't apply. The
21 statute says - - -

22 JUDGE RIVERA: The legislature could have
23 said if it only establishes.

24 MR. SHOEMAKER: Correct. They could have
25 said that, but did not.

1 JUDGE RIVERA: One word could have made
2 that difference.

3 JUDGE ABDUS-SALAAM: Counsel, could you
4 address what your adversary said about the lack of
5 plain view of the razor blade and the cocaine that
6 was on the floor?

7 MR. SHOEMAKER: Yeah, and I disagree about
8 that. I think it was in open view. There was no - -
9 - nothing covering it. There was no furniture
10 covering it. Basically, what - - - I think the
11 theory of the People and basically what the theory of
12 this presumption in general is, is that defendant was
13 there where the drugs were, panicked as soon as the
14 first battering ram hit - - - as soon as he heard the
15 first battering ram hit, and then the drugs fell on
16 the ground.

17 The police missed it in their first sweep,
18 I think, because it was on a carpet. They weren't
19 necessarily looking. But they eventually did find
20 it. There was nothing covering it. It was exactly
21 where it - - - it would have been had someone
22 panicked - - - this is what the codefendant testified
23 that she did, but it had - - -

24 JUDGE RIVERA: Isn't the small amount of
25 drug suggesting it's really for personal use or no?

1 MR. SHOEMAKER: No, there - - - there was
2 testimony that it - - - A, there could be that's - -
3 - maybe that's all there's left and they sold all the
4 rest of it, and B, there's six packaged baggies on
5 the counter. There's more loose on the ground, I
6 think, that they were - - - the theory was that they
7 were using that loose cocaine with - - - with the
8 razor blade, they were using that loose cocaine to
9 put into the packages, and of course, here, there
10 were fifty unused baggies that were - - -

11 JUDGE ABDUS-SALAAM: What if there had been
12 no razor blade and just pieces of cocaine and bags?

13 MR. SHOEMAKER: I think it would have been
14 a closer case, but I still think the presumption
15 would have applied with all - - - especially with all
16 the baggies. If you have the - - - the packaged
17 cocaine and loose cocaine and all the baggies you're
18 putting it in, maybe you just don't have a razor
19 blade, but you can still be packaging the cocaine.

20 So the drug factory presumption was
21 rightfully applied in this case. The defendant was
22 actually seen running from the area where the drugs
23 were. As for the grand jury issue, I'd like to spend
24 just a minute on that if I could.

25 Defense counsel here did make a

1 quintessentially strategic decision not to have his
2 client testify in the grand jury. The decision was
3 counsel's to make and it was founded on the well-
4 known disadvantages of testifying in the grand jury.
5 He actually - - -

6 JUDGE PIGOTT: What's the scoop on the
7 letter that, you know, that Hope Fisher sent saying
8 that she was responsible for all of this?

9 MR. SHOEMAKER: I don't know why she did
10 that. I know he had a record, and she didn't.

11 JUDGE PIGOTT: What was the date?

12 MR. SHOEMAKER: I'm not - - - I'm not sure,
13 to tell - - -

14 JUDGE PIGOTT: I mean, because it - - - I'd
15 never put a defendant in a grand jury and - - - but
16 it - - - unless I had something like that. I mean,
17 if I got somebody who's going to take the weight, and
18 I can go into grand jury and say, Hope did it, and by
19 the way, she already told you that, and I don't know
20 why you've got me in here.

21 MR. SHOEMAKER: And even - - - even apart
22 from the - - - the date that was on the letter,
23 defense counsel did know something about - - - even
24 if he didn't have the physical letter, he knew that
25 she was going to be taking the fall for this. That's

1 why he adjourned the preliminary hearing to call her.

2 JUDGE RIVERA: And - - - and could counsel,
3 regardless of what a client might actually
4 articulate, believe that the client's manner of
5 presentation is enough to be grounds not to let them
6 testify. That is to say, you're just not credible;
7 no matter how you say this, no one's going to believe
8 you, regardless of the content. Could that be a
9 basis to - - - for a lawyer to make a strategic
10 choice to say, you're not going in there?

11 MR. SHOEMAKER: Yeah, it could be. And
12 that's - - - that's what many of the Appellate
13 Divisions have held. This court I don't think has
14 held explicitly that why it's a strategic decision to
15 have a client not testify in grand jury, but the
16 probability of a dismissal is remote. And then on
17 the other hand, you have the presentation of the
18 client - - -

19 JUDGE PIGOTT: Would he have won a motion
20 to dismiss? Would he have won a motion to dismiss
21 had he brought one for failure to properly notify
22 them?

23 MR. SHOEMAKER: No, I don't think he would
24 have.

25 JUDGE PIGOTT: No?

1 MR. SHOEMAKER: Given - - - given the
2 timeliness, you mean?

3 JUDGE PIGOTT: Yeah.

4 MR. SHOEMAKER: No, I think because it was
5 during the business day on a Friday, you had all
6 these days intervening, I don't think it was enough
7 to - - -

8 JUDGE RIVERA: How do you make a strategic
9 choice without talking to the client or to her other
10 fallback position? Versus saying not a strategic
11 choice, but even if it is, the strategic choice means
12 you're thinking about what - - - what this
13 presentation might be like, and making a choice about
14 it.

15 MR. SHOEMAKER: And he had spoken to the
16 client - - - not about grand jury, but he'd spoken to
17 him, that's why he knew the co - - - what the
18 codefendant's position was. He was involved in this
19 case. It wasn't like he just stepped in and said,
20 oh, no, we're not - - -

21 JUDGE RIVERA: So that might be a different
22 case that if - - - if he literally had not had an
23 opportunity to really have had some type of perhaps
24 robust conversation with the client. That might be a
25 case where you'd say, no, the likelihood of a

1 strategic choice is zero.

2 MR. SHOEMAKER: Potentially. And that's -
3 - - I would go - - -

4 JUDGE RIVERA: That's not this case.

5 MR. SHOEMAKER: Right, it's not. I would
6 go to Wiggins, where this court said that not
7 testifying in the grand jury does not per se amount
8 to a denial of effective assistance.

9 JUDGE PIGOTT: Thank you, Mr. Shoemaker.

10 MR. SHOEMAKER: Thank you.

11 JUDGE PIGOTT: Ms. Gorman, you have
12 rebuttal?

13 MS. GORMAN: With respect to the letter,
14 the grand jury presentment was May 31st, and I
15 remember something about the DA getting that letter,
16 I think, on June 3rd. So he - - - she would not have
17 had it before the grand jury presentment.

18 With respect to the cocaine in the carpet,
19 the officer who found it said he did not remember
20 whether anything was covering it. He said he didn't
21 have to move anything and he didn't think there was
22 furniture covering it, but he didn't remember whether
23 there was anything covering it, and it is their
24 burden beyond a reasonable doubt, to prove it's in
25 open view for that presumption to apply.

1 And the greatest danger with this
2 presumption is that it traps everybody in knowing
3 possession. So even if there is no intent to sell,
4 there's knowing possession of felony-weight cocaine.
5 Thank you.

6 JUDGE PIGOTT: Thank you, Ms. Gorman.

7 (Court is adjourned)

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

I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Marcus D. Hogan, No. 18, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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