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COURT OF APPEALS

STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

No. 107

NICHOLAS SANCHEZ,

Appellant.

20 Eagle Street
Albany, New York 12207
April 30, 2013

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

Appearances:

MARGARET E. KNIGHT, ESQ.
OFFICE OF THE APPELLATE DEFENDER
Attorneys for Appellant
11 Park Place
Suite 1601
New York, NY 10007

NOAH J. CHAMOY, ADA
BRONX COUNTY DISTRICT ATTORNEY'S OFFICE
Attorneys for Respondent
198 East 161st Street
Bronx, NY 10451

Penina Wolicki
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: 107. Counselor,
2 would you like any rebuttal time?

3 MS. KNIGHT: Yes, Your Honor, please, four
4 minutes.

5 CHIEF JUDGE LIPPMAN: Four minutes. Okay,
6 go ahead.

7 MS. KNIGHT: Good afternoon. Margaret
8 Knight from the Office of the Appellate Defender on
9 behalf of Nicholas Sanchez.

10 Mr. Sanchez's conviction must be reversed
11 because he never waived the conflict of interest
12 caused by the Legal Aid Society's former
13 representation of a suspect - - -

14 CHIEF JUDGE LIPPMAN: What - - - where was
15 the - - - where did the conflict really affect the
16 defense of this action?

17 MS. KNIGHT: The defe - - - the conflict
18 affected the defense because, as defense counsel
19 himself said, he could not bring Franklin DeJesus
20 into this case, because that would create an
21 irretrievable conf - - -

22 CHIEF JUDGE LIPPMAN: What about voiding
23 the conflict. Why wasn't that sufficient, to just
24 not go there?

25 MS. KNIGHT: Well, it wasn't sufficient

1 because everything - - - I mean, because he simply
2 couldn't do that. Any reasonable attorney who saw
3 that his client - - - suspected his former client had
4 committed this robbery, suspected that Elvis Montero,
5 whose fingerprint was found in the cab, and who
6 believed that they were associated, maybe knew each
7 other, based on a former representation - - - and
8 that was from confidential communications, wouldn't
9 just bury their head in the sand and say, know what,
10 I'm not going to look into this anymore.

11 JUDGE RIVERA: Counsel, I'm a little
12 unclear. What - - - what's that connection to
13 DeJesus? I don't think - - - I understand the
14 Montero connection. What's the connection to
15 DeJesus? Other than they know each other?

16 MS. KNIGHT: Well, the connection to the
17 actual livery cab is that they looked at pictures of
18 Franklin DeJesus and they looked at photos ta - - -
19 photos taken from the livery cab and said we think
20 that's the same guy. So they believed that Franklin
21 DeJesus is in the livery cab. They believe that
22 Elvis Montero is in the livery cab.

23 JUDGE SMITH: "They" being Mr. Ippolito?

24 MS. KNIGHT: That would be Mr. Ippolito and
25 his co-counsel, Bharati Narumanchi.

1 JUDGE RIVERA: But the victim picked out
2 Mr. Sanchez, right?

3 MS. KNIGHT: He picked out Mr. Sanchez in a
4 photo array and a lineup that we say - - - we also
5 contest that that was unduly suggestive. But that's
6 not the - - -

7 JUDGE SMITH: You say that DeJesus was the
8 guy next to - - - next to the one who either was or
9 wasn't Sanchez?

10 MS. KNIGHT: Yes, correct. That's what
11 they believed. And they - - - I mean, they testified
12 to that. And the ADA Imbo said that - - -

13 JUDGE SMITH: Is there any - - -

14 MS. KNIGHT: - - - even during the - - -

15 JUDGE SMITH: - - - is there any picture of
16 DeJesus in the record?

17 MS. KNIGHT: No, there was no picture
18 introduced in the record. Defense counsel said that
19 he'd had the file unsealed and they'd looked at the
20 picture. And ADA Imbo said on the record, when they
21 were having colloquies about this before trial, you
22 know, that's their only connection. They've looked
23 at this picture, they've looked at the stills, and
24 they think that's the same guy; but they did not
25 introduce a picture.

1 JUDGE SMITH: And when - - - when did they
2 - - - when did they form that impression that that
3 was DeJesus in the back seat?

4 MS. KNIGHT: Well, ADA Imbo said that - - -
5 said that in pre-trial colloquy. She said that's
6 what they're saying their connection is. They've
7 looked at these pictures. And Bharati Narumanchi
8 also testified at the post-verdict hearing that we
9 always thought he was the unapprehended.

10 And even going beyond the - - - going
11 beyond not investigating this, there's an actual
12 conflict of interest, because everything Legal Aid
13 did suggested that they recognized there was a
14 conflict of interest. What they basically did was
15 set up a wall between these two people.

16 JUDGE SMITH: And were they - - - I mean,
17 they did sort of act like it. I mean, were the - - -
18 under Wilkins, could they have been wrong? I mean,
19 Wilkins seems to say that Legal Aid is different, and
20 just every lawyer is on his own.

21 MS. KNIGHT: I - - - that's not my reading
22 of Wilkins. My reading of Wilkins is that it says if
23 they're not aware of the actual conflict, we're not
24 going to impute it to every single member of Legal
25 Aid in the same - - -

1 CHIEF JUDGE LIPPMAN: Wilkins only implies
2 if they're like in a separate world, because the
3 Legal Aid Society's a big place?

4 MS. KNIGHT: Yes, that - - - I mean,
5 Wilkins said that maybe we won't - - -

6 CHIEF JUDGE LIPPMAN: If you don't know
7 there's a conflict, there is no conflict?

8 MS. KNIGHT: Wilkins was a case where they
9 weren't actually aware of the conflict.

10 CHIEF JUDGE LIPPMAN: That's what I'm
11 saying.

12 MS. KNIGHT: Yes, exactly.

13 CHIEF JUDGE LIPPMAN: If you don't know
14 there's a conflict, there is no conflict.

15 MS. KNIGHT: You know, I mean, maybe that
16 should be rethought now that there's computers and
17 ways to ea - - - very easily do conflict checks. But
18 that's not this case here, because they very - - -

19 CHIEF JUDGE LIPPMAN: Here - - - here they
20 know of the conflict.

21 MS. KNIGHT: Yes.

22 CHIEF JUDGE LIPPMAN: And why isn't it
23 enough to build a wall? That - - - that's obviously
24 what they did. Why isn't that enough? And to say at
25 the trial that wall is going to apply?

1 MS. KNIGHT: Because there's no informed
2 consent from Mr. Sanchez that that was okay. I mean,
3 you have a firm - - -

4 JUDGE GRAFFEO: Is your problem that the
5 judge never asked him about this in the courtroom?
6 Is that - - -

7 MS. KNIGHT: That's - - - yes.

8 JUDGE GRAFFEO: - - - is that the basis of
9 your - - -

10 MS. KNIGHT: That - - - I mean, that is,
11 yes, one of - - - very strong basis. If the court
12 had conducted an inquiry and informed him of the
13 dangers of conflicted representation - - -

14 CHIEF JUDGE LIPPMAN: And what if he said
15 it's okay?

16 MS. KNIGHT: Then we would - - - probably
17 wouldn't be here right now. If you have an informed
18 - - - I mean, if you have an - - -

19 JUDGE READ: So what - - -

20 MS. KNIGHT: - - - informed - - -

21 JUDGE GRAFFEO: Do we need to do a Gomberg
22 hearing?

23 MS. KNIGHT: Exactly. You know - - -

24 JUDGE GRAFFEO: Does Gomberg apply in this
25 type of situation?

1 MS. KNIGHT: Yes. In Lombardo, that was a
2 case of successive representation, I believe, of a
3 defendant and a prosecution witness. But it was a
4 successive representation case. And in Lombardo,
5 this court found that it was error not to do a - - -

6 JUDGE GRAFFEO: This is not contemporaneous
7 representation.

8 MS. KNIGHT: Unbeknownst to - - -
9 unbeknownst to counsel. Here, DeJesus actually was
10 re-arrested and represented by Legal Aid at that
11 point.

12 JUDGE READ: Well, it was what? It was
13 partially contemporaneous?

14 MS. KNIGHT: Partially contemporaneous.
15 But we didn't - - - counsel was unaware at the - - -

16 JUDGE SMITH: We have to treat it as
17 successive - - -

18 MS. KNIGHT: Exactly.

19 JUDGE SMITH: - - - don't we? And then - - -
20 - then, if it's successive, doesn't the problem
21 become one of substantial relationship?

22 MS. KNIGHT: If it's - - - I mean, we would
23 submit that this is an actual conflict of interest
24 here. Certainly not every - - - not every instance
25 of successive representation rises to the level - - -

1 JUDGE SMITH: I mean, presumably the day -
2 - - the day Sanchez became a Legal Aid conflict,
3 assuming DeJesus was no longer, there was no conflict
4 that day?

5 MS. KNIGHT: I'm sorry, I didn't understand
6 you.

7 JUDGE SMITH: When - - - when Sanchez's
8 file is first turned over to a Legal Aid lawyer, and
9 DeJesus' file is sitting on someone's desk and it's
10 already closed, I guess - - - let's assume it's
11 already closed - - - at that point there's no
12 conflict at any kind, is there?

13 MS. KNIGHT: There would be no conflict if
14 they had never determined that there was really a
15 nexus between these two cases.

16 JUDGE SMITH: So the conflict - - - the
17 conflict arises when - - - when DeJesus' name
18 surfaces in the Sanchez case?

19 MS. KNIGHT: Yes, absolutely. There was a
20 - - -

21 JUDGE SMITH: And - - - and then even then,
22 it's not a problem on the - - - on the know no evil
23 theory, it's not a problem until Ippolito learns that
24 DeJesus exists or that the DeJesus file exists in the
25 Legal Aid?

1 MS. KNIGHT: Absolutely. Because - - -

2 JUDGE SMITH: And that's pretty much on the
3 eve of trial.

4 MS. KNIGHT: That is very much on the eve
5 of trial. It was actually during trial. It was - -
6 -

7 JUDGE SMITH: It's a problem, isn't it? I
8 mean, something like this happens, and all of a
9 sudden, I mean, the trial has to be aborted because
10 there's a - - - yeah, and a conflict that no one
11 really could have see - - - foreseen pops up?

12 MS. KNIGHT: It very much could have been
13 foreseen, if the District Attorney's Office had
14 followed through with its obligations to turn over
15 discovery. I mean, that's part of - - -

16 JUDGE SMITH: Okay. In general - - - put
17 aside the peculiarities of this case - - - this sort
18 of thing could happen quite a lot, I would think.
19 Legal Aid represents a lot of people in a lot of
20 communities where there's a lot of crime. It - - -
21 witnesses or alternative suspects are going to keep
22 popping up, and some of them are going to be Legal
23 Aid clients. Do we have a mistrial every time?

24 MS. KNIGHT: Well, this is more than just
25 an alternative suspect here. This is an alternative

1 suspect who bear - - - who has a connection with
2 another suspect, and not just any connection, but in
3 a prior robbery investigation.

4 JUDGE READ: And then there's the
5 fingerprint, right?

6 MS. KNIGHT: There was the fingerprint of
7 Montero, that placed, we can - - - we would submit,
8 placed Montero, or gave a strong - - -

9 JUDGE RIVERA: But - - - okay, but counsel
10 says that he's concluded there's no conflict.

11 MS. KNIGHT: Um-hum.

12 JUDGE RIVERA: He's discussed it with his
13 client and the client is fine. Why isn't that good
14 enough?

15 MS. KNIGHT: Well, there's a couple things
16 there. In terms of the actual Gomberg - - - you
17 know, in terms of the inquiry, it's not up to counsel
18 to do that, it's up to the court to do it.

19 CHIEF JUDGE LIPPMAN: Could the judge rely
20 on counsel, though?

21 MS. KNIGHT: No. In Mattison and Macerola
22 and Baffi, and case after case, this court has said
23 that the trial court has an obligation, independent
24 of defense counsel's obligation, to do it. So that
25 is not enough.

1 this a little different than - - - than if he had
2 said, look, the client is absolutely fine; I'm
3 telling you, Judge, the client says it's fine. He's
4 really saying, yeah, I know there's a problem here.
5 I'm going to avoid it. Right? Is that what he said?

6 MS. KNIGHT: Yes, that is what he said.
7 And - - - and that makes it even more problematic
8 that - - -

9 JUDGE SMITH: If that had not happened. I
10 mean, suppose - - - what - - - I guess - - - let me
11 back - - - what should - - - what was the lawyer
12 supposed to do when this comes up? He's suppose - -
13 - and suppose he doesn't get consent from his client,
14 or - - - he's supposed to move - - - he's supposed to
15 move to be relieved?

16 MS. KNIGHT: Yes. Absolutely. If he - - -

17 JUDGE SMITH: And the judge has to grant
18 the motion, in your view?

19 MS. KNIGHT: Yes, absolutely.

20 JUDGE SMITH: Even - - - even though the
21 trial's about to start and the in - - - what if the
22 judge thinks the involvement of DeJesus is pretty
23 speculative, the prejudice to the People is gross
24 here, because they're all geared up to do a trial,
25 and we're going to put it off for weeks.

1 What if the judge says not worth it?
2 Couldn't the judge reasonably say no, go ahead, try
3 your case?

4 MS. KNIGHT: Absolutely not. When the
5 Legal Aid Society has recognized that they have an
6 actual divided loyalties (sic), then - - -

7 JUDGE SMITH: And that's - - - and you - -
8 - I was asking you earlier, aren't there going to be
9 a lot of these cases. And you said well, there are a
10 lot of special facts here that make it particularly
11 extreme.

12 MS. KNIGHT: Um-hum.

13 JUDGE SMITH: But suppose it's just a
14 routine case. They've come up. They have, as people
15 do all the time on the alternative - - - with a
16 possible third-party suspect or a possible key
17 witness, and they find out that that guy is a former
18 Legal Aid client. Automatic mistrial?

19 MS. KNIGHT: No. Because in that case, you
20 don't have confidential information that counsel has
21 been prevent - - - he said on the record, they're not
22 letting me touch - - -

23 JUDGE SMITH: Well, how - - -

24 MS. KNIGHT: - - - that.

25 JUDGE SMITH: - - - well, how are you

1 this would have been avoided if the People had
2 disclosed what earlier? And when - - - and at what
3 time do you think they should have disclosed it?

4 MS. KNIGHT: There was a demand for
5 discovery in March of 2005. This was more than a
6 year before the trial. The People resp - - - I
7 believe it was March of 2005, but it was spring of
8 2005. And the People responded that there were no
9 test - - - no tests done. If they had turned over
10 that a test had been done with Franklin - - - or with
11 Franklin DeJesus and Nicholas Sanchez's names on
12 that, then the Legal Aid Society would have known
13 right there, could have run conflict checks, because
14 they were representing DeJesus at that time. They
15 would have known that there was a potential issue
16 there and could have investigated it well in advance
17 of trial.

18 CHIEF JUDGE LIPPMAN: Okay, counselor,
19 thanks.

20 MS. KNIGHT: Thank you.

21 CHIEF JUDGE LIPPMAN: Counselor?

22 MR. CHAMOY: May it please the court, my
23 name is Noah Chamoy. I represent the People.

24 CHIEF JUDGE LIPPMAN: Counselor, isn't
25 there an actual conflict here?

1 MR. CHAMOY: Absolutely not, Your Honor.

2 There was no - - -

3 CHIEF JUDGE LIPPMAN: Why not?

4 MR. CHAMOY: Well, there was no conflict at

5 all here. In fact, DeJesus' interests and

6 defendant's interests never actually diverged.

7 Underlying this entire - - -

8 JUDGE SMITH: Well, it wouldn't have been

9 so good for DeJesus if Sanchez had succeeded in

10 proving that DeJesus was an accomplice in the

11 robbery.

12 MR. CHAMOY: Well, except that the only

13 evidence that the defense would be presenting at that

14 trial was evidence that the People supplied to the

15 defense.

16 JUDGE SMITH: Well, so what? It's still a

17 conflict.

18 MR. CHAMOY: Not necessarily. There - - -

19 JUDGE SMITH: I mean, if you - - - if I'm

20 trying to prove you guilty, isn't there a conflict

21 between you and me?

22 MR. CHAMOY: No, for a former client there

23 would not be. For a former client - - -

24 JUDGE SMITH: You're saying there's no

25 obligation to the former client?

1 you owed her - - - you owed this defendant an
2 obligation a year before that you didn't - - - that
3 you didn't honor, and that's why we're even here
4 today. Is that true?

5 MR. CHAMOY: No, Your Honor. In fact, the
6 document in question, a fingerprint test report, the
7 information that was on it that was disclosable was
8 the fact that it came back negative for the
9 defendant. That was supplied with plenty of time for
10 its use at trial.

11 JUDGE PIGOTT: When you say "plenty of
12 time", what do you mean?

13 MR. CHAMOY: I mean, it was supplied at the
14 beginning, before jury selection at suppression - - -

15 JUDGE PIGOTT: On May 11th of 2006. But
16 the demand - - - the demand had been made on May 3rd
17 of 2005, right?

18 MR. CHAMOY: Correct, Your Honor. But
19 there was no investigation that would be linked,
20 necessarily, to a negative report regarding the
21 defendant - - -

22 JUDGE PIGOTT: Well, what interests me is
23 that - - - you know, and the judge said, you know, he
24 had time to use it. And yet on other occasions where
25 the defense want - - - you know, for example, if the

1 defense wants to argue that a witness that should
2 have been called wasn't called, we don't say well,
3 you had time to have provided that information, but
4 we're - - - but because the defendant didn't request
5 it, we're not going to give the missing witness
6 charge.

7 I mean, we don't seem to have the same
8 elasticity with respect to late disclosure of
9 evidence that we do in this. And I just don't
10 understand why you guys get a year and they get a
11 week.

12 MR. CHAMOY: Well, Your Honor, my answer
13 has two parts. First, the late Brady claim is
14 unpreserved. But I want to get to the merits of
15 that, which is, in this case, the information they're
16 actually speaking of is DeJesus' name on the report,
17 which was initially redacted when we turned over the
18 report to them. That's really what they're saying
19 they would have liked to look into. There was
20 nothing to look into regarding defendant's
21 fingerprints coming up negative, because there's no
22 further investigation.

23 JUDGE SMITH: Well, what was the
24 justification for redacting it?

25 MR. CHAMOY: Well, we redacted DeJesus'

1 name. I don't know the justification for it. I
2 could tell you why it is that it made sense that we
3 would, which is the source for DeJesus' name was the
4 defendant's brother, who told the police officer word
5 on the street is - - -

6 CHIEF JUDGE LIPPMAN: Counselor, didn't
7 defendant have anything to do with all of this?
8 Shouldn't the judge have talked to the defendant,
9 whether it's a formal hearing in whatever manner?
10 Isn't the defendant in some way impacted by - - -
11 isn't his defense impacted by this - - - whether you
12 want to call it actual conflict, potential conflict?
13 Wasn't it - - - isn't it clear that the defendant had
14 an interest here that goes beyond the lawyer saying
15 gee, I'm going to void this conflict that we
16 apparently have?

17 MR. CHAMOY: As far as the trial court's
18 obligation, it had no obligation to conduct an
19 inquiry, because of the exact words counsel used,
20 which - - -

21 JUDGE PIGOTT: Because of what?

22 MR. CHAMOY: The words that counsel used
23 when he brought it up. He said, "We see the
24 possibility of potential for conflict, but there's
25 not necessarily one there. And I'm not asking the

1 Court to act."

2 JUDGE PIGOTT: So let me ask you this. I
3 hate to go back on this, but if you had disclosed the
4 name - - - I mean, it seems to me that DeJesus' name
5 is - - - is Brady. I mean, it's somebody that may
6 have done it and not the defendant.

7 MR. CHAMOY: We actually believed the
8 opposite, Your Honor. We believed it was inculpatory
9 because it was the defendant's brother who - - -

10 JUDGE PIGOTT: But you make that judgment.

11 MR. CHAMOY: - - - was the source.

12 JUDGE PIGOTT: In other words - - -

13 MR. CHAMOY: Yes, Your Honor.

14 JUDGE PIGOTT: - - - Brady says that you
15 have to turn over evidence that may lead to - - - not
16 simply that is favorable - - - but may lead to
17 evidence.

18 MR. CHAMOY: Correct.

19 JUDGE PIGOTT: And it seems to me that your
20 argument that - - - is that it may have led to. You
21 made the decision - - - the People made the decision
22 not to disclose it.

23 Following up on the Chief Judge's question,
24 why wouldn't a judge make that - - - why wouldn't you
25 go to the judge and say we're turning this over. We

1 got to - - - we've got an issue here, Judge, that has
2 to get resolved, and it shouldn't be our call, it
3 should be yours?

4 MR. CHAMOY: Well, it's interesting in this
5 case, because DeJesus being the second individual
6 seated in the car with nothing else out there, is - -
7 - is, even looking at it independently, is neither
8 exculpatory or inculpatory. It's just a second - - -

9 JUDGE SMITH: Well, surely - - - surely if
10 there was evidence that he was the second person in
11 the car, you could hardly keep that - - -

12 MR. CHAMOY: No.

13 JUDGE SMITH: - - - from the defense?

14 MR. CHAMOY: And we wouldn't. But like I
15 said - - - but the source of it being the defendant's
16 brother is a huge part of it, in - - -

17 JUDGE SMITH: So tell me again, why it made
18 sense to redact the names?

19 MR. CHAMOY: The only reason why this
20 became Brady material was actually the link to
21 Montero, ultimately, which is something we weren't
22 even aware of, because we didn't get that information
23 - - -

24 JUDGE SMITH: No, I don't - - - why did it
25 make sense to redact DeJesus' name? That doesn't

1 seem responsive to that question.

2 MR. CHAMOY: Well, I can't speak to exactly
3 why they chose to redact the name. It was redacted
4 for all of, I believe, it was less than two days
5 between the time that the original document was
6 supplied with the redaction and not.

7 JUDGE PIGOTT: But it would have been
8 redacted for a year. I mean, if you - - - if you'd
9 turned it over in - - - when it was demanded,
10 assuming that it fits the Brady demand, then you
11 would have given it in May of '06 (sic). And you
12 would have either redacted it or not.

13 MR. CHAMOY: Correct, Your Honor. However,
14 again, as far factoring into this, it ultimately
15 comes down to the conflict, because here the defense
16 elected not to go into DeJesus, did not object on
17 late Brady grounds.

18 JUDGE PIGOTT: Well, wouldn't it have been
19 better if they had made that decision in May of '06
20 (sic)?

21 MR. CHAMOY: It would have made their lives
22 easier, possibly, yes. But that's not the legal
23 standard.

24 CHIEF JUDGE LIPPMAN: And wouldn't it have
25 been better if the defendant had any say in all this?

1 MR. CHAMOY: Well, as far as the defendant,
2 he received zealous advocacy. In reality, he got - -
3 -

4 CHIEF JUDGE LIPPMAN: Yeah, but conflicted
5 zealous advocacy.

6 MR. CHAMOY: Not conflicted, Your Honor.
7 Again - - -

8 CHIEF JUDGE LIPPMAN: Is it not conflicted
9 because he didn't mention DeJesus?

10 MR. CHAMOY: Not only that. The - - -

11 CHIEF JUDGE LIPPMAN: Maybe he could have
12 known about this a lot earlier anyway, if you had
13 done what you're supposed to do. But putting that
14 aside, how is - - - how does that solve the problem
15 as far as the defendant's concerned, that he doesn't
16 raise DeJesus?

17 MR. CHAMOY: Well, because in this case,
18 what happened was, Charles Ippolito, who's the
19 defense counsel, went the opposite route. He
20 actually thought of it as a way in which to get a
21 benefit. In this case - - -

22 JUDGE PIGOTT: But why would you - - -

23 MR. CHAMOY: - - - he did.

24 JUDGE PIGOTT: - - - could you tell me why
25 - - - you redacted DeJesus because you got it from

1 the defendant's brother, right?

2 MR. CHAMOY: Correct.

3 JUDGE PIGOTT: Why does that make a
4 difference?

5 MR. CHAMOY: Well, we did not believe it
6 was exculpatory information.

7 JUDGE PIGOTT: All right, that aside.

8 JUDGE SMITH: But excuse me, that's less
9 reason to redact it. It's a name he already knows.
10 At least if he talks to his brother, he's heard of
11 DeJesus.

12 MR. CHAMOY: Well, as I said, I can't speak
13 to the exact reason why the trial assistant decided
14 in that short time to redact the name - - -

15 JUDGE SMITH: Or why not - - - or why not
16 tell him, as Judge Pigott keeps asking, a year ago,
17 that you - - - that you went to the trouble of
18 running fingerprints on DeJesus?

19 MR. CHAMOY: Well, the problem is, we don't
20 have a specific record regarding the exact time we
21 received that report. We have none of those records
22 because the objection the first time anything came up
23 was in a post-verdict post-hearing memorandum of law
24 in a single paragraph, that brought it up for the
25 first time in the - - -

1 JUDGE PIGOTT: But you - - - I mean, you
2 keep - - - you keep blaming the defendant for that.
3 I still want to go back to my year.

4 MR. CHAMOY: I - - -

5 JUDGE PIGOTT: I mean - - -

6 MR. CHAMOY: - - - completely understand,
7 Your Honor. But again, this - - - the late Brady
8 claim is unpreserved, and that's a huge problem here,
9 because it's a question of reviewability. You're
10 asking me questions, and some of them I can't answer
11 because simply put - - -

12 JUDGE SMITH: But isn't it clear - - -

13 MR. CHAMOY: - - - the record wasn't
14 developed.

15 JUDGE SMITH: - - - isn't it clear from the
16 record that Ippolito perceived at least a potential
17 for conflict?

18 MR. CHAMOY: That he perceived a potential
19 for conflict is - - -

20 JUDGE SMITH: And isn't it - - - isn't it
21 also - - - at least there's evidence in the record
22 that that potential influenced him not to pursue the
23 DeJesus angle?

24 MR. CHAMOY: Your Honor, just the opposite.
25 There's evidence in the record - - -

1 JUDGE SMITH: I understand there's evidence
2 to the opposite too. But isn't there evidence
3 pointing both ways?

4 MR. CHAMOY: Well, even if there were, it's
5 a mixed question of law and fact, and if there's
6 evidence pointing towards the fact that - - -

7 JUDGE SMITH: Who - - - has somebody
8 decided the mixed question?

9 MR. CHAMOY: Yes, the Appellate Division
10 decided that it did not affect the defense, because
11 he used the evidence available to him.

12 Now, as far as - - -

13 JUDGE SMITH: There - - - of course there
14 was never a hearing on that question. That was - - -
15 that was an issue that came up for the first time in
16 the Appellate Division.

17 MR. CHAMOY: Correct, Your Honor.

18 JUDGE SMITH: Is that okay that they - - -
19 you have a - - - you have a transcript in which a
20 lawyer - - - to simplify it, the lawyer says one day
21 it did affect me and the next day it didn't affect
22 me. It's never raised below, and the Appellate
23 Division decides on the record, it didn't affect him,
24 and we're bound?

25 MR. CHAMOY: If there's record support, it

1 is a factual determination - - -

2 JUDGE SMITH: We - - - wouldn't - - -
3 shouldn't there at least be a hearing, and we should
4 put - - - put the lawyer on the stand and say, hey,
5 did it affect your - - - which one of these should we
6 believe? Did it affect you or not?

7 MR. CHAMOY: Except we actually make the
8 argument that the proper remedy would have been a
9 hearing to being with, which is a 440 motion could
10 have been made before the appeal was had under the
11 circumstances.

12 JUDGE SMITH: Or it could - - - a 440
13 motion could be made tomorrow, I suppose?

14 MR. CHAMOY: Correct, Your Honor. But the
15 fact is, one wasn't.

16 JUDGE GRAFFEO: Why wouldn't a - - - why
17 wouldn't a Gomberg hearing have taken care of this?

18 MR. CHAMOY: Well, Your Honor, a Gomberg
19 hearing would have taken care of this. However,
20 again, the trial attorney said we're not asking you
21 to act. And both this court and the Supreme Court
22 has said that is key language that a trial - - -

23 JUDGE SMITH: Well, but a lawyer - - - a
24 lawyer can't waive a Gomberg hearing. The whole
25 point of a Gomberg hearing is to protect the

1 defendant from his lawyer's conflict.

2 MR. CHAMOY: Correct, Your Honor. Which is
3 why the question then becomes whether an actual
4 conflict affected the defense or the substantial
5 relation test, as you were mentioning earlier. That
6 is the test - - -

7 JUDGE SMITH: You're - - -

8 MR. CHAMOY: - - - that we're - - -

9 JUDGE SMITH: - - - you're not claiming
10 that there's a valid waiver?

11 MR. CHAMOY: I'm not claiming that there's
12 a valid waiver. We simply note that there was
13 information elicited on the record, but the court
14 provided no risk assessment on the record.

15 JUDGE SMITH: Are you - - - is it your
16 position - - - if we were to affirm here, is it your
17 position that any - - - any inquiry as to 440 is
18 precluded because the Appellate Division has already
19 found no operation?

20 MR. CHAMOY: If this court affirms, I
21 believe it would depend on the grounds on which this
22 court affirmed. But in terms of a 440, it would also
23 depend on whether or not they were presenting new
24 facts, new evidence, and what legal arguments they
25 were proposing to add to what's already been

1 presented.

2 I mean, we do have a rather complete record
3 in terms of the post-verdict proceeding where
4 Ippolito testified. Because at that proceeding, he
5 testified to the steps of investigation he took,
6 which included looking for nonprivileged sources for
7 a police report which mentioned DeJesus, which is in
8 - - -

9 JUDGE SMITH: Yeah, but they were - - - but
10 at that hearing, they were not litigating the
11 conflict issue, as I understand it.

12 MR. CHAMOY: Correct. Which is what we
13 mention in our brief. However, it still creates more
14 than a sufficient record to answer the question which
15 is, he did do an investigation.

16 JUDGE SMITH: Well was he ever - - - was he
17 ever asked the question, what did you mean when you
18 said we're avoiding this because we don't want a
19 mistrial?

20 MR. CHAMOY: No, because he actually
21 specifically said on the record at the time,
22 originally, when he spoke to - - - he's bending over
23 backwards not to declare a mistrial - - - he
24 explained exactly what that meant. And what he meant
25 was, he could not get into a - - - to the prior

1 privileged Legal Aid file, and he knew there was
2 information in there regarding a specific address,
3 which he then got from the court.

4 JUDGE SMITH: Yeah, no, but he - - - but he
5 also said, when the District Attorney moves - - -
6 says I'm moving to preclude any reference to DeJesus
7 and he says oh, don't worry, I won't touch DeJesus
8 because that would create a mistrial, isn't that kind
9 of troublesome?

10 MR. CHAMOY: He actually said that might -
11 - - he used the word "might create".

12 JUDGE SMITH: Okay. Isn't it - - -

13 MR. CHAMOY: And it's an important
14 distinction.

15 JUDGE SMITH: - - - isn't it still a little
16 troublesome?

17 MR. CHAMOY: It isn't, only because we know
18 what he then did, which is he didn't give up on that
19 potential defense. He had no evidence to submit to
20 the jury at that point that could support pointing
21 the finger at DeJesus. He continued looking for it.
22 He did so with the recognition, which is implicit
23 from the record, that it could result in a mistrial.

24 JUDGE PIGOTT: That's - - - that's what
25 troubles me. I know you say that Brady is not

1 preserved. And I - - - and you make a very strong
2 argument about that. But if that information,
3 preserved or not, would have set off an investigation
4 far sooner as to what now becomes the focal point,
5 the conflict of interest, how do we handle that?

6 MR. CHAMOY: Well, we have a very helpful
7 post-verdict proceeding - - -

8 JUDGE PIGOTT: Right.

9 MR. CHAMOY: - - - that actually resolves
10 that question, and specifically and factually to this
11 case. But the answer is, DeJesus was located. An
12 investigation was completed. And they came to the
13 conclusion, which is sworn credited testimony below,
14 that Montero and DeJesus had no connection
15 whatsoever.

16 JUDGE SMITH: But if - - - but if the - - -
17 if that would not - - - absence of prejudice would
18 not cure a conflict problem, right?

19 MR. CHAMOY: It would not cure a conflict
20 problem. However, the fact that he did an
21 investigation and a nonconflicted attorney doing the
22 same investigation would have come to the same
23 conclusion he did, does cure a conflict problem.

24 JUDGE SMITH: It does? That a
25 nonconflicted attorney would have - - - would have

1 done this - - - I see. Isn't it whether it operated
2 on him? If a non - - - maybe a nonconflicted
3 attorney could have done the same thing. But if he
4 was motivated in any way by the conflict, isn't that
5 a problem under our cases?

6 MR. CHAMOY: By "motivated in any way", I'm
7 not quite sure how to answer, because - - -

8 JUDGE SMITH: Well, suppose - - - suppose
9 he - - - suppose the fact is that he would have asked
10 at trial the question, didn't you suspect a man named
11 DeJesus? Maybe that's an objectionable question.
12 Maybe he wouldn't have been allowed to ask it. But
13 if he would have tried to ask it but for the fact
14 that he's worrying about a conflict, isn't that
15 enough?

16 MR. CHAMOY: No, Your Honor. Burger v.
17 Kemp, the U.S. Supreme Court, looked at strategic
18 reasons why a defense attorney chose to do what he
19 did in light of a potential conflict and found that a
20 strategic reason for counsel in a successive
21 representation situation, was sufficient. And in
22 that case, what they were saying was in effect what
23 this case - - - court has said before: a
24 nonconflicted attorney acting in the same way would
25 have done the same thing.

1 Here we have him saying - - - and this is
2 the - - - some record support - - -

3 JUDGE SMITH: Do we - - - is that the way
4 our cases - - - does that always work, that if a
5 nonconflicted attorney would have done it, then it's
6 okay?

7 MR. CHAMOY: It does not work in
8 simultaneous representation situations, Your Honor.
9 However, this is not one of those. And I just want
10 to end by reiterating, defense counsel said on the
11 record, it's for evidentiary reasons, and just
12 reasons related to common sense that he chose not to
13 go into DeJesus.

14 CHIEF JUDGE LIPPMAN: Okay, counsel. Thank
15 you.

16 MR. CHAMOY: Thank you, Your Honor.

17 CHIEF JUDGE LIPPMAN: Counselor, rebuttal?

18 MS. KNIGHT: Yes, Your Honor. Thank you.

19 In People v. Ortiz, this court made very
20 clear, as Your Honor was noting, that this is not an
21 outcome-based thing. It's not focused on what an
22 unconflicted attorney would have done. You know, in
23 that case, an unconflicted attorney would never have
24 had the information, just as in this case, an
25 unconflicted attorney probably wouldn't have come

1 across this information in the first instance.

2 But the question is - - -

3 JUDGE SMITH: It's whether it operated on
4 the representation?

5 MS. KNIGHT: You know - - - yes.

6 JUDGE SMITH: If a nonconflicted attorney
7 would have done the same thing, does that mean it did
8 not operate on the representation?

9 MS. KNIGHT: An - - - no. In this - - - I
10 mean, as this court held in Solomon, you know, very
11 recently, we can always second-guess what a
12 conflicted versus a nonconflicted - - -

13 JUDGE SMITH: Yes, but he says - - - he
14 says there's a difference between simultaneous and
15 successive representation. He says Solomon was a
16 simultaneous representation case.

17 MS. KNIGHT: Yes. In Solomon this court
18 found that there was an actual active conflict of
19 interest because there was a simultaneous
20 representation and because the interests were
21 adverse. However, it cert - - - this court certainly
22 didn't - - -

23 JUDGE SMITH: He says that - - - he says,
24 forgetting about the simultaneity that he didn't know
25 about - - - he says at this point Legal Aid owed

1 DeJesus nothing except a duty of confidentiality.
2 And shouldn't - - - shouldn't we use the operation
3 test there to see whether - - - whether that duty
4 impaired what counsel did?

5 MS. KNIGHT: It did impair what counsel
6 did, because at pages 156 to 164 of our - - -

7 JUDGE SMITH: So but you acknowledge that
8 there is an operation test. It's not a per se
9 conflict?

10 MS. KNIGHT: It - - - we would submit that
11 this is more like Solomon, where the interest, even
12 if it wasn't a concurrent representation, had
13 blossomed into a full-blown conflict - - -

14 CHIEF JUDGE LIPPMAN: It doesn't matter
15 whether it's successive or contemporaneous in this
16 context?

17 MS. KNIGHT: No, because the - - - what
18 matter - - - the reason that the concurrent
19 representation mattered in Solomon is because there
20 was evidence that it was an actual conflict of
21 interest. But once you have an actual conflict of
22 interest, whether it's concurrent representation or
23 successive representation, we're not going to parse
24 out, you know, various - - -

25 CHIEF JUDGE LIPPMAN: As long as we know it

1 operated on the defense?

2 MS. KNIGHT: I think what this court said
3 in - - -

4 CHIEF JUDGE LIPPMAN: Or is it per se, I
5 think, what the judge was asking you before?

6 MS. KNIGHT: In Solomon, this court said,
7 "We have not inquired into the quality of counsel's
8 performance, but have stressed the very awkward
9 position of a lawyer subject to conflicting demands
10 and have protected a defendant's right to receive" -
11 - -

12 JUDGE SMITH: Where's the ac - - - what is
13 the actual conflict here, in your view?

14 MS. KNIGHT: The actual conflict is that
15 the DA's office is saying that Mr. Sanchez is in that
16 taxicab and it's every bit in Mr. Sanchez's interest
17 if possible, to show that Montero and - - -

18 JUDGE SMITH: Okay, but what - - - but
19 ordinarily, if you have a former client, you can
20 bring a lawsuit against your former client, as long
21 as the matters are unrelated. What's the - - -
22 what's the conflict?

23 MS. KNIGHT: That there's confidential
24 information contained in this file that counsel
25 wanted to get. I mean, he said - - - at pages 156 to

1 164 of our appendix, he tried to get into that file.
2 He wanted to get DeJesus' picture. He did ultimately
3 get that from a different source. He wanted to get
4 Montero's address. He was - - - to show that he also
5 lived right near the scene of the crime. He was not
6 able to get that, because that was not introduced at
7 trial. And he said he knew an investigator - - -

8 JUDGE SMITH: But I thought they did give
9 him Montero's address, right?

10 MS. KNIGHT: No, they didn't. That was - -
11 - he - - - defense counsel made very clear on the
12 record that he did want to get the address and that
13 he'd introduce it as evidence, and said that he knew
14 that the investigator knew it, but he couldn't speak
15 to the defense attorney who'd represented DeJesus.
16 He couldn't speak to the investigator.

17 They introduced Montero's confession to a
18 robbery in the neighborhood, but they didn't
19 introduce - - -

20 JUDGE SMITH: Okay. Look, if Montero was a
21 fugitive - - -

22 MS. KNIGHT: He was a fugitive. He no
23 longer is. The Bronx DA's office has arrested him on
24 a massive gun conspiracy which also led to me
25 learning that he had a record in Maryland for weapons

1 possession, theft, and first degree assault. So he
2 is now back in the Bronx.

3 CHIEF JUDGE LIPPMAN: Okay, counselor.
4 Thanks. Thank you both.

5 (Court is adjourned)

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

I, Penina Wolicki, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Nicholas Sanchez, No. 107 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Penina Wolicki

Signature: _____

Agency Name: eScribers

Address of Agency: 700 West 192nd Street
Suite # 607
New York, NY 10040

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