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COURT OF APPEALS

STATE OF NEW YORK

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THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

No. 225

PAUL CORTEZ,

Appellant.

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20 Eagle Street  
Albany, New York 12207  
November 12, 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  
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM

Appearances:

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1 CHIEF JUDGE LIPPMAN: People v. Cortez.  
2 Counselor, would you like rebuttal time?

3 MR. FERNICH: Two minutes, please.

4 CHIEF JUDGE LIPPMAN: Two minutes?

5 MR. FERNICH: Yes.

6 CHIEF JUDGE LIPPMAN: Sure. Go ahead.

7 MR. FERNICH: May it please the court. A  
8 lawyer simultaneously prosecuted by the same office  
9 as her client has an actual conflict of interest.  
10 With her freedom and career at stake, such a lawyer's  
11 incentive to temper her client's offense for fear of  
12 antagonizing her personal adversary, hangs over each  
13 decision she makes - - -

14 JUDGE SMITH: Didn't we, essentially,  
15 reject that theory in Konstantinides?

16 MR. FERNICH: No, sir, because  
17 Konstantinides was just an accusation by a witness.  
18 It's not a form - - -

19 JUDGE SMITH: So here there's an actual - -  
20 - because we don't know much, but I guess we know  
21 that there was a case pending.

22 MR. FERNICH: Well, we know that there was  
23 a formal charge lodged against the lawyer by her  
24 client's prosecutors and the lawyer's own adversary.

25 JUDGE SMITH: We don't even know that from

1 the record, do we? I have no doubt you say - - -  
2 you're saying it's true, but all the record says is  
3 she's got a matter in which she might be convicted.

4 MR. FERNICH: Well, the record shows from  
5 what passed for a Gomberg inquiry in this case that  
6 it was undisputed that there was a matter that was  
7 pending.

8 JUDGE SMITH: Right.

9 MR. FERNICH: And the matter - - -  
10 unfortunately, the criminal records are sealed, but  
11 I've provided the number - - -

12 CHIEF JUDGE LIPPMAN: The other lawyer  
13 discussed it with the defendant, right?

14 MR. FERNICH: Well, the record,  
15 respectfully, does not support that, and it's  
16 rehearsed in my reply brief why it's not. But more  
17 importantly, even if the lawyer - - -

18 CHIEF JUDGE LIPPMAN: Is that enough, if it  
19 was?

20 MR. FERNICH: It is not, sir, not in the  
21 consequen - - -

22 CHIEF JUDGE LIPPMAN: Why not? Why not?

23 MR. FERNICH: Because one of the  
24 fundamental tenets of conflict of interest  
25 jurisprudence is to take the inquiry out of the hands

1 of the lawyers themselves and repose that inquiry in  
2 the court.

3 JUDGE GRAFFEO: A defendant can't waive an  
4 actual or potential conflict in open court?

5 MR. FERNICH: The defendant could have  
6 waived it, had it been properly explained to him.  
7 I'm not contending here that it's an unwaivable  
8 conflict.

9 JUDGE SMITH: You say the idea is to take  
10 the process out of the lawyer's hands. Doesn't  
11 Gomberg say the opposite? Doesn't Gomberg say you  
12 can rely on a lawyer to talk to his client?

13 MR. FERNICH: It says it's one factor that  
14 a court may consider. But in the circumstances of  
15 this case, where the lawyer, who purportedly - - -  
16 purportedly, I emphasize - - - discussed it with the  
17 client suffered from innumerable problems of her own,  
18 and had in fact been found by Judge Berkman to have  
19 lied to the court. Levy, out of the Second Circuit,  
20 says it's almost a false-in-one-false-in-all theory,  
21 Judge. This lawyer has been found to have lied to  
22 the actual judge.

23 JUDGE SMITH: Okay. Suppose you're right  
24 so far. Suppose you have a conflict, and it's not  
25 waived, do you have to show operation on the

1 representation?

2 MR. FERNICH: Not in the circumstances of  
3 this case, Your Honor. And I would point to the  
4 Jersey Cottle case and the Colorado Edebohls case  
5 where there is an - - - this court has recently  
6 reaffirmed, and after the submission of my briefs, in  
7 Sanchez and before that in Solomon, that an unwaived  
8 actual conflict of interest mandates reversal without  
9 an inquiry with respect to operation. This is  
10 really, I submit, an easy case. This is an actual  
11 conflict of interest case.

12 JUDGE ABDUS-SALAAM: How do you keep saying  
13 it's an actual conflict, counsel? The court, in the  
14 - - - what you call inappropriate or inadequate  
15 Gomberg inquiry says it was a potential conflict.  
16 This was not a case where counsel was being accused  
17 of something in the case where her client was on  
18 trial; it was some different case.

19 MR. FERNICH: Correct.

20 JUDGE ABDUS-SALAAM: It was an unrelated  
21 case.

22 MR. FERNICH: And - - -

23 JUDGE ABDUS-SALAAM: So why is it an actual  
24 conflict?

25 MR. FERNICH: Because the weight of

1 authority, across the country, sensibly holds that  
2 this is not a Konstantinides-type case where there's  
3 misconduct at issue related to the case at hand.  
4 Courts across the country - - - we can put remedy to  
5 one side for one moment, but the weight of authority  
6 is virtually unanimous that when a lawyer is  
7 prosecuted by the same office that's trying her  
8 client, the conflict is an actual one. Not every  
9 court reverses automatically for that, but plenty of  
10 courts do.

11 And the reason why it's an actual conflict,  
12 Judge, is this. This - - - there are two reasons.  
13 First of all, the incentive hangs over every decision  
14 that the lawyer makes and every aspect of the  
15 representation. That's one reason. The second  
16 reason is that the ramifications of that, the risk  
17 that she will succumb to that conflict, is  
18 incalculable. You cannot measure it. And the cases  
19 say it over and over again, from Cronin, from  
20 Holloway to Gonzalez-Lopez, to all the cases. It's  
21 not worth the cost of litigating - - -

22 JUDGE SMITH: So you're saying - - - it  
23 follows from that, I suppose, that any lawyer who's  
24 prosecuted for anything in a particular county, is  
25 unemployable in that county. He or she has a

1 conflict in every case in that county.

2 MR. FERNICH: No, sir, because a Curc - - -  
3 and this happens in the Southern and Eastern District  
4 of New York all the time. I'm not saying it's an  
5 unwaivable conflict.

6 JUDGE SMITH: So you say it's waivable?

7 MR. FERNICH: It's waivable, and the judge  
8 will give a Curcio inquiry - - -

9 JUDGE GRAFFEO: I'm looking at page 521 of  
10 the appendix.

11 MR. FERNICH: Yes, ma'am.

12 JUDGE GRAFFEO: And the judge, after  
13 talking about it being particularly serious - - - if  
14 there's a conviction she could lose her license - - -  
15 says, "So I" - - - talking to the defendant, "So I  
16 just want to make it explicit that you understand  
17 that and you understand that's going on and that you  
18 wish to proceed with her in any event." And the  
19 defendant responds, "Yes, I do understand that, and  
20 she has not compromised this case on account of her  
21 own." And the court says, "I don't need you to  
22 describe that to me, just so long as you understand  
23 that and you want to go along with that." And the  
24 defendant says, "Yeah, I would love to." Isn't that  
25 a direct statement by the defendant?

1 MR. FERNICH: It's not a knowing and  
2 intelligent statement, because the only risk that's  
3 been described for him by the judge is that she could  
4 lose her license.

5 JUDGE SMITH: But what about the risk he  
6 described himself, that she would compromise his case  
7 for her own? Isn't that the very risk that we're  
8 worried about?

9 MR. FERNICH: No, because he doesn't know  
10 what he's looking for, as I pointed out in one of the  
11 footnotes of my opening brief. If he's not told the  
12 case-specific consequences, i.e., that she has a  
13 specific incentive to curry favor with the  
14 prosecution for better treatment for herself, now and  
15 through the end of the trial, he, respectfully, does  
16 not - - -

17 JUDGE GRAFFEO: So you want us to require  
18 some specific colloquy - - -

19 MR. FERNICH: Not a - - -

20 JUDGE GRAFFEO: - - - from the court to a  
21 defendant?

22 MR. FERNICH: Not a rote catechism, but I  
23 respectfully suggest that the court adopt what we  
24 call Curcio-type procedures that are in common  
25 currency in the great majority of courts throughout



1 the country. And courts - - - and it's also to this  
2 court's ben - - -

3 JUDGE ABDUS-SALAAM: Does it matter, as in  
4 this case, that the lawyer that we're discussing, who  
5 had the conflict, whether it was actual or potential,  
6 was not lead counsel but, you know, it wasn't even  
7 clear what her role was, at some point, in the trial,  
8 except that I think defendant says that the other  
9 lawyer was his lead counsel. Does that matter?

10 MR. FERNICH: Well, I think it matters a  
11 lot. I think it's very telling, actually, that he  
12 asked that his other lawyer be nominally lead  
13 counsel, because he may well have thought, oh, that  
14 solves the problem.

15 JUDGE PIGOTT: Not nominally; I mean, the  
16 judge made it very clear that as far as she was  
17 concerned, the second lawyer wasn't even in the case  
18 and - - -

19 MR. FERNICH: Well, the second lawyer,  
20 Judge, was in the case, to the extent that she  
21 handled the entire forensic - - -

22 JUDGE PIGOTT: I'm going to agree with you  
23 on that. What I'm trying to say to you is that you  
24 make it sound as if she made the election, and I  
25 thought the judge made it very clear that well,

1           you're here, but you're not of record. I mean, it  
2           was an interesting way of colloquy among the lawyers  
3           here. But as Judge Abdus-Salaam said, the first  
4           lawyer had done quite a good job for this defendant,  
5           as near as you could tell from the suppression  
6           hearings and things like that, and maybe he didn't  
7           want to give them up.

8                       MR. FERNICH: First of all, let me answer  
9           this in two ways. What I was going to say is that  
10          the statement that he preferred that she be counsel  
11          of record, because of her problem, raises more  
12          questions and problems than it answers, because it  
13          suggests that he thinks, ah, just by designating one  
14          person this and putting a label on that, that solves  
15          the problem. It doesn't solve the problem at all,  
16          first of all. And second of all, respectfully, she  
17          had not done a good job. I mean, this is a lawyer  
18          who had been held in contempt because she said,  
19          quote, "I'm not prepared" - - - sorry - - - "not  
20          prepared, not ready to go forward". Even though  
21          there had been 18(b) funds allocated for an expert  
22          months in advance, she didn't have any expert reports  
23          done.

24                       JUDGE SMITH: Before you run out of time,  
25          could you spend a minute on the - - - what you call

1 propensity evidence?

2 MR. FERNICH: Judge, I would respectfully  
3 suggest to you that this is pure propensity evidence,  
4 because when you break down the theory of defense,  
5 okay, there was no dispute, no real dispute - - - and  
6 that's the key to this court's Molineux  
7 jurisprudence. The issue has to be genuinely  
8 disputed. It may be that you could spin out some - -  
9 -

10 CHIEF JUDGE LIPPMAN: What does it mean  
11 when the judge talks about motive as opposed to  
12 propensity?

13 MR. FERNICH: There is no difference  
14 between motive and propensity in this case, because  
15 motive wasn't genuinely disputed. As I've explained,  
16 the issue - - -

17 JUDGE SMITH: Well, I mean, is this case  
18 different from Moore? Is the - - -

19 MR. FERNICH: Absolutely different from  
20 Moore. Moore is a random attack against a total  
21 stranger, and the jury will be left to wander  
22 aimlessly and confused if it doesn't know the motive  
23 for killing the police officer. This is an intimate  
24 violence crime against a domestic partner where  
25 there's ample evidence that there was a nasty

1 breakup, and he's writing bad things about the  
2 deceased herself. There's no - - - if he did it,  
3 there's no question why he did it. The question is  
4 if he did it. He had a motive to do it. The  
5 question is how likely is it that he acted on that  
6 motive. And the fact, Judge, that he wrote bad  
7 things about other women in the past, but didn't act  
8 on them, makes it absolutely no more likely that he  
9 would have done so in this case; respectfully, it  
10 argues in the opposite direction.

11 JUDGE SMITH: And if you're ri - - - I  
12 mean, I did think that at least some of those things  
13 about the other girlfriends were the sort of things  
14 that any - - - any disappointed young man might  
15 write. If that's true, does that help you, or does  
16 it render them harmless?

17 MR. FERNICH: It doesn't render them  
18 harmless, because of the extensive use that was made  
19 in the summation by the prosecutor. He needed - - -  
20 needed those old excerpts to spin out this theory  
21 about a progressive rage disorder that Justice  
22 Friedman, in the Appellate Division, rightly said was  
23 questionably relevant to begin with. So this was a  
24 pillar of the summation; it's not harmless.

25 CHIEF JUDGE LIPPMAN: Okay, counselor.

1 Thanks.

2 MR. COHN: Good afternoon, Your Honors.  
3 David Cohn for the People.

4 CHIEF JUDGE LIPPMAN: Counselor, let's  
5 start with the second issue first.

6 MR. COHN: Yes.

7 CHIEF JUDGE LIPPMAN: How could this be  
8 anything else but propensity?

9 MR. COHN: Your Honor, this is the exact -  
10 - -

11 CHIEF JUDGE LIPPMAN: How could a judge  
12 not see this as a Molineux-type situation?

13 MR. COHN: Your Honor, this is the exact  
14 opposite of propensity evidence.

15 CHIEF JUDGE LIPPMAN: How is it the exact  
16 opposite?

17 MR. COHN: Because the idea of Molineux is  
18 that you don't want a jury to infer that because a  
19 defendant has committed crimes in the past - - -

20 CHIEF JUDGE LIPPMAN: Is thoughts different  
21 than acts?

22 MR. COHN: Absolutely, Your Honor.  
23 Thoughts - - -

24 JUDGE PIGOTT: If you've got a car thief,  
25 does the fact that he was watching the video game

1 Grand Theft Auto, is that relevant?

2 MR. COHN: I don't think that - - - well,  
3 first, I don't think that would be Molineux evidence,  
4 Your Honor.

5 JUDGE PIGOTT: Well, I don't care what it's  
6 called. What I'm suggesting is that if you're  
7 putting in evidence that, you know, he - - - he had  
8 this - - - you know, these thoughts about other  
9 women, that somehow that's relevant to whether or not  
10 he had a reason to kill this person and did in fact  
11 kill this person. And I immediately thought of, you  
12 know, if there's a sex abuse case, do you say, and by  
13 the way, he had a - - - you know, a pile of magazine  
14 - - - pornography magazines in his apartment? I  
15 mean, does that come in as somehow - - - it sounds to  
16 me like those are the things that prejudice a jury  
17 not to make an objective determination with respect  
18 to the facts that are relevant to the case. Where  
19 did I go - - -

20 MR. COHN: Your Hon - - -

21 JUDGE PIGOTT: Where did I go wrong in my  
22 thinking?

23 MR. COHN: Your Honor, the reason why the  
24 judge properly exercised her discretion in finding  
25 the evidence relevant in this case is because of the

1 unique brutality of this crime and almost the unique  
2 random nature of this crime. This was a woman who  
3 was brutally, brutally murdered.

4 JUDGE SMITH: Well, it wasn't random; it  
5 was a girlfriend who was dumping him.

6 MR. COHN: Right, I - - - I will take that  
7 back, Your Honor. Random was probably the wrong  
8 word, but the unique brutality of the crime here.  
9 What you had - - - this was not your - - -

10 JUDGE PIGOTT: So if there's a really  
11 particularly brutal sexual abuse case, you could  
12 bring in the fact that he was - - - that he had a lot  
13 of pornography in his apartment?

14 MR. COHN: This was a case where - - -  
15 where it was clear from the outset that the defendant  
16 was going to go to the jury on the theory of I'm a  
17 nice guy, I'm peaceful, I'm nonviolent, I - - -

18 JUDGE SMITH: Are you saying he put his  
19 character in issue?

20 MR. COHN: He - - - he certainly put his  
21 motive at issue.

22 JUDGE SMITH: Didn't you put this - - -  
23 apply to put this stuff in before he put his  
24 character in issue?

25 MR. COHN: Well, Your Honor, I would argue





1           assuming the motive in this context is different than  
2           propensity.

3                       MR. COHN: I believe that you can't say  
4           that motive and propensity are the same thing. I  
5           believe - - -

6                       CHIEF JUDGE LIPPMAN: In this context, is  
7           it the same thing?

8                       MR. COHN: Well, even - - - I don't believe  
9           it is, Your Honor. Even if someone could believe  
10          that there's some overlap between motive and  
11          propensity, I believe that the trial judge's  
12          instruction to the jury took propensity out of the  
13          equation.

14                      JUDGE PIGOTT: So his motive for doing this  
15          was that he had a tendency to do this?

16                      MR. COHN: His motive for doing this was he  
17          - - - he had this rage in him that was building up,  
18          which was based on - - -

19                      JUDGE PIGOTT: It had nothing to do with  
20          the fact that he'd made 500 calls to her in a month?  
21          It had nothing to do with the fact that he was madly  
22          in love with her? It had nothing to do with the fact  
23          that she was rejecting him? All of that is  
24          inconsequential. The fact is that he was on this  
25          slippery slope of - - - on his way to kill some

1 woman, this woman happened to be in the way.

2 MR. COHN: Your Honor, I think that all of  
3 that is exceedingly relevant, and - - -

4 JUDGE PIGOTT: I don't. I'm wondering - -  
5 - that's why I want to go back to my - - - I hate to  
6 keep bringing up pornography or Grand Theft Auto, but  
7 gee, somebody steals a car and you say, by the way,  
8 do you know how he spends his day? He's sitting in a  
9 basement playing Grand Theft Auto, and he's very,  
10 very good at it. So this car was stolen in his  
11 neighborhood. Now, who possibly could have stolen  
12 that car? I think I'd convict the guy because he  
13 played a video game, and I don't think I should have.

14 MR. COHN: Your Honor, I don't accept that  
15 analogy, because I don't think that this is as simple  
16 as playing a video game. I think this is a complex  
17 exploration of the process of the very - - - the  
18 mental process that evolved in this defendant over a  
19 period of years where he was saying initially - - -

20 JUDGE SMITH: Well, isn't mental process  
21 that evolves over a period of years a long way of  
22 saying propensity?

23 MR. COHN: No, Your Honor. In fact, the  
24 judge informed the jury here that it could not - - -  
25 the judge informed the jury here that the defendant

1 did not harm the two previous women, - - -

2 JUDGE PIGOTT: Why did you need it then?

3 MR. COHN: Excuse me, Your Honor?

4 JUDGE PIGOTT: Why did it go in at all  
5 then? If it wasn't to show that he didn't harm them,  
6 why was it in?

7 MR. COHN: Your Honor, it went in there to  
8 give context to the journal entries about the victim.  
9 It went there to build fuller context. I'm not - - -

10 CHIEF JUDGE LIPPMAN: Define "build  
11 context" in this kind of case. You're going to build  
12 context? I mean, that's propensity.

13 MR. COHN: Your Honor - - -

14 CHIEF JUDGE LIPPMAN: For building context  
15 you want to show that he has a tendency to do this,  
16 he thinks about it. I mean, I don't know what else  
17 it could be.

18 MR. COHN: Well, Your Honor, I respectfully  
19 submit that it is - - -

20 CHIEF JUDGE LIPPMAN: Does it matter?

21 MR. COHN: - - - that it is - - -

22 CHIEF JUDGE LIPPMAN: Does it matter in  
23 this case?

24 MR. COHN: Does it matter in this case?

25 CHIEF JUDGE LIPPMAN: Say we totally

1 disagree with you, and say we think it's propensity  
2 evidence, does it matter?

3 MR. COHN: Your Honor, I believe that these  
4 few entries about the two prior girlfriends, which  
5 took up all of ten pages of the transcript - - -

6 CHIEF JUDGE LIPPMAN: Say we disagree with  
7 you, does it matter?

8 MR. COHN: Does it matter? It does not  
9 matter, Your Honor.

10 CHIEF JUDGE LIPPMAN: Why doesn't it  
11 matter?

12 MR. COHN: This was only ten pages of a  
13 trial transcript in an overwhelming case. We had - -  
14 -

15 JUDGE SMITH: He says you jumped up and  
16 down on it in summation. Is that true?

17 MR. COHN: The prosecutor used it in  
18 summation. The prosecutor used the wealth of  
19 evidence in summation, including the entries about  
20 the victim, which were undisputedly - - -

21 JUDGE PIGOTT: That's not - - - that's  
22 conceded.

23 MR. COHN: That's conceded.

24 JUDGE PIGOTT: But I mean, if you sum up on  
25 a murder and say, and by the way, the guy's a member

1 of the NRA, and this guy was shot, I mean, do you  
2 think that's appropriate?

3 MR. COHN: Well, Your Honor, I would think  
4 - - - I would submit that the better analogy is  
5 Moore. The better analogy is a situation where you  
6 have a shooting which is motivated by an animus  
7 towards police officers.

8 JUDGE SMITH: But the guy in Moore was on a  
9 mission to kill cops, people he didn't know, because  
10 they were policemen. Is there anything in here that  
11 this man was on a mission to kill every woman he  
12 could see?

13 MR. COHN: I think that from his writings  
14 it appears that he was actually on a mission to kill  
15 or at least had - - - had the thought in mind of  
16 killing the women who rejected him - - -

17 JUDGE SMITH: Well, he - - - he - - - I  
18 mean - - -

19 MR. COHN: - - - in relationships.

20 JUDGE SMITH: But a lot of people think  
21 about doing bad things to women who reject them. If  
22 you lock up everyone who's ever done that, you're  
23 going to depopulate the world. Isn't - - - I mean,  
24 is it fair to ask a jury - - - to say to a jury, oh,  
25 this man thought about hurting the last four women

1           who dumped him, but he didn't. But it was all  
2           building up inside and he hurt this one.

3                       MR. COHN: Your Honor, I submit that this  
4           is a unique case. I certainly, in my experience as a  
5           prosecutor, have never seen writings this graphic,  
6           this detailed - - -

7                       JUDGE ABDUS-SALAAM: But what if they  
8           weren't this graphic and not detailed, but just  
9           thoughts? Is your argument that because they're  
10          thoughts and not conduct that they shouldn't be  
11          subjected to Molineux?

12                      MR. COHN: Well, I do submit, Your Honor,  
13          that Molineux is about prior bad acts. It was about  
14          the idea that a jury shouldn't be able to infer from  
15          the fact that, say, someone has stolen a car once,  
16          that they're going to steal - - -

17                      JUDGE SMITH: But isn't it - - -

18                      MR. COHN: - - - a car again.

19                      JUDGE SMITH: - - - a fortiori that they  
20          can't infer from the fact that he thought about  
21          stealing a car?

22                      MR. COHN: Well, Molineux itself recognizes  
23          that if there is any nonpropensity purpose to the  
24          information, then it can be relevant and admissible.  
25          So if, for instance, it's both motive and perhaps a

1 judge could - - - could think - - - or perhaps a jury  
2 could think of it as propensity, it can be admitted  
3 as motive evidence.

4 JUDGE PIGOTT: But it's troubling that you  
5 say that these were so bad, so graphic, so almost  
6 over the top. It sounds like that's exactly what  
7 should not come in.

8 MR. COHN: Your Honor, I think that in this  
9 case, in the full context, that these are - - - these  
10 entries about the two prior girlfriends - - - and  
11 again, it was just 10 pages of the trial transcript,  
12 10 pages out of a more than 2,000 page trial  
13 transcript. They gave some context to the entries  
14 about Catherine, which were actually only over a  
15 short period of time, actually, about a year or so -  
16 - - less than a year was the span of the entries  
17 about Catherine.

18 JUDGE PIGOTT: Well, you had some other  
19 pretty conclusive evidence in this case.

20 MR. COHN: Absolutely.

21 JUDGE PIGOTT: But you also had two  
22 suspects at the scene at the time. And it seemed to  
23 me that the fight was over, you know, which one of  
24 those two did it.

25 MR. COHN: Your Honor, Haughn was not a

1           serious suspect.  There was a fingerprint in the  
2           murder victim's blood.

3                   JUDGE PIGOTT:  Well, that's kind of my  
4           point I was getting to is, you know, if you didn't  
5           have those - - - you know, those things, maybe you'd  
6           have a - - - you know, a fair question.  But you had  
7           everything, and yet you want to - - - I just am  
8           missing why we do these things.

9                   MR. COHN:  Your Honor, I submit that the  
10          trial judge appropriately exercised her discretion in  
11          saying that this was relevant.

12                   JUDGE SMITH:  Let me follow, if I can, the  
13          harmless error question.  You say you have a  
14          fingerprint in the murder victim's blood.  How clear  
15          is it that that fingerprint was in the blood, and not  
16          just a fingerprint; the guy had been in the house  
17          many times before.

18                   MR. COHN:  It was absolutely clear.  There  
19          was a - - - a hand impression on the wall, and this  
20          is actually where I - - - I think the defense brief  
21          is - - - is confusing about what the actual evidence  
22          was.  There's a - - - a hand impression on the wall.  
23          There are spots - - -

24                   JUDGE SMITH:  I mean, I looked at the  
25          picture.  I'm sort of taking the witness' word for it



1 it was a hand impression.

2 MR. COHN: Yeah, well - - -

3 JUDGE SMITH: I wouldn't have said it was a  
4 hand.

5 MR. COHN: - - - I actually could put my  
6 five fingers - - - I'm not confessing to the crime,  
7 right? But I could actually put my five fingers on  
8 the spots in the wall and they match up to where the  
9 fingers of the murderer touched the wall. Where the  
10 left index finger touched the wall is exactly the  
11 spot where they retrieved the defendant's  
12 fingerprint.

13 JUDGE SMITH: Is that - - - is the record  
14 as clear as what you just said? Because I had some  
15 trouble finding that. I was looking for - - - for  
16 them to say, yeah, this is the hand and here's where  
17 the left index finger is. Where is that in the  
18 record?

19 MR. COHN: Well, the - - - the video - - -  
20 sorry, the photo evidence shows exactly which spot it  
21 was where the fingerprint was retrieved from, and it  
22 is the spot where - - - if you put your five fingers,  
23 like this, on the photo - - -

24 JUDGE ABDUS-SALAAM: Counsel, before your  
25 time runs out, could you address the conflicts issue?



1           this potential conflict, said I would love to retain  
2           her and she has not compromised this case on account  
3           of - - - of her own. So the defendant recognized  
4           exactly what the conflict was. He was an intelligent  
5           litigant. He knew exactly what the conflict was, and  
6           he said to the judge, I understand what it is; I want  
7           my entire legal team with me. I want - - - I want my  
8           lead counsel and I want my co-counsel.

9                         CHIEF JUDGE LIPPMAN:    Okay, counsel.

10                        MR. COHN:    Thank you.

11                        CHIEF JUDGE LIPPMAN:    Thanks, counselor.

12                        Rebuttal, counselor?

13                        MR. FERNICH:    Quickly, with respect to the  
14           last point, it blurs the distinction between the  
15           ability to make an intelligent decision, which is  
16           undisputed, and the information necessary to make  
17           one, which was not provided to him.

18                        This notion of harmless error is  
19           revisionist history; here's why. If the case was so  
20           strong, as Judge Pigott sort of intimated, it  
21           wouldn't have felt the need to do this. They knew -  
22           - -

23                        JUDGE SMITH:    Well, prosecutors have been  
24           known to do overkill. You've heard of such things.

25                        MR. FERNICH:    I have heard of it, but it

1           wasn't - - - it wasn't that strong of a case. Your  
2 Honor can't even figure out - - -

3                   JUDGE SMITH: Talk about - - -

4                   MR. FERNICH: - - - what the deal was - - -

5                   JUDGE SMITH: Talk about - - -

6                   MR. FERNICH: - - - with the fingerprint.

7                   JUDGE SMITH: - - - the fingerprint.

8                   MR. FERNICH: There's a fingerprint. It  
9 could have been made before; it also could have been  
10 made that night in blood. Let's not conflate  
11 evidentiary sufficiency with harmless error analysis.  
12 That's the inquiry here: Could there have been a  
13 different result?

14                   JUDGE ABDUS-SALAAM: Well, weren't there -  
15 - -

16                   MR. FERNICH: And if you read - - -

17                   JUDGE ABDUS-SALAAM: - - - also some boot  
18 prints in blood that matched his boots?

19                   MR. FERNICH: It didn't match the boots; it  
20 matched a general Skechers Cool Cat Bully that any  
21 number of different people wore.

22                   JUDGE GRAFFEO: It was the same size shoe  
23 that he wore, correct?

24                   MR. FERNICH: And the same size shoe that  
25 the other boyfriend wore. Harmless error - - -

1 JUDGE PIGOTT: The other boyfriend had  
2 sneakers, right? Wasn't that part of the testimony  
3 that was - - -

4 MR. FERNICH: I think - - - I think that's  
5 correct, but the - - -

6 JUDGE SMITH: But your guy denies wearing  
7 those shoes on that day.

8 MR. FERNICH: He does. It was not - - -  
9 the boots weren't linked to him. It was linked to a  
10 general sole size that any number of different people  
11 wore.

12 JUDGE SMITH: Is there any evidence, one  
13 way or the other, on whether he owned that kind of  
14 shoe, those Skechers, whatever they were?

15 MR. FERNICH: There's a guy called Spense  
16 Lebowitz - - -

17 JUDGE SMITH: No, I know what he said.

18 MR. FERNICH: Yeah.

19 JUDGE SMITH: But I mean, apart from that,  
20 did they find those things in his closet? Did they  
21 ask him - - -

22 MR. FERNICH: No, I don't believe - - -

23 JUDGE SMITH: - - - whether he owned a  
24 pair?

25 MR. FERNICH: I don't believe they did. I

1 don't believe they did.

2 Here's what I want to say about harmless  
3 error, and my time's up. Opening brief, page 79  
4 through 82. If you can read this and conclude that  
5 it's harmless - - - and the court has seen many, many  
6 more cases that I have. The kind of rhetoric that  
7 this was used to support is just repugnant. Thank  
8 you.

9 CHIEF JUDGE LIPPMAN: Okay. Thank you  
10 both. Appreciate it.

11 (Court is adjourned)

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

I, Sharona Shapiro, certify that the foregoing transcript of proceedings in the Court of Appeals of The People of The State of New York v. Paul Cortez, No. 225 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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Date: November 20, 2013