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COURT OF APPEALS

STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

No. 225

PAUL CORTEZ,

Appellant.

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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