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COURT OF APPEALS

STATE OF NEW YORK

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PEOPLE,

Respondent,

-against-

No. 232

WENDELL PAYTON,

Appellant.

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20 Eagle Street  
Albany, New York 12207  
November 14, 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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Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: 232, People v.  
2 Payton.

3 MR. BRANDT: May it please the court,  
4 counsel - - -

5 CHIEF JUDGE LIPPMAN: Counselor, do you  
6 want some rebuttal time?

7 MR. BRANDT: Three minutes, please.

8 CHIEF JUDGE LIPPMAN: Three minutes. Go  
9 ahead.

10 MR. BRANDT: I respectfully request that  
11 this court reverse the appellant's conviction and  
12 adopt a per se rule which mandates reversal whenever  
13 a defense attorney is the target of a criminal  
14 investigation being conducted by the same district  
15 attorney's office that is prosecuting - - -

16 CHIEF JUDGE LIPPMAN: In this case, did we  
17 know he was a target?

18 MR. BRANDT: Yes. The - - - there was no  
19 inquiry by the trial court when it was informed after  
20 the defendant's conviction whether - - - he never  
21 questioned the defense attorney whether or not he was  
22 a target of the search - - -

23 JUDGE PIGOTT: Should that work both ways?  
24 In other words, it's a - - - if a district attorney  
25 has a conflict, in that he is prosecuting the

1 attorney for the defendant, that he or she should get  
2 up?

3 MR. BRANDT: That - - - a special  
4 prosecutor could be appointed in such a situation.

5 JUDGE PIGOTT: Well, wouldn't it - - -  
6 wouldn't you say should be? I mean, you're saying as  
7 a per se matter, if a - - - if the district attorney  
8 has made a charge against the lawyer, the concern is  
9 that he will go soft on his - - - he will not give  
10 his best efforts to the defendant, because he wants  
11 to curry favor with the prosecution.

12 MR. BRANDT: That's correct.

13 JUDGE PIGOTT: The concern on the other  
14 side could be - - - I'm not suggesting it is - - -  
15 but could be that the prosecutor could be going soft  
16 on the defendant so that he can - - - so he can nail  
17 the lawyer.

18 MR. BRANDT: I - - -

19 JUDGE PIGOTT: In other words, you know,  
20 we'll give you a good plea, if you - - - if you agree  
21 with us that your client was in - - - that your  
22 lawyer was in there smoking weed while you were being  
23 interviewed.

24 MR. BRANDT: Well, that - - -

25 JUDGE PIGOTT: And that would tarnish the

1 People, so - - -

2 MR. BRANDT: Well, I'm saying that would  
3 have to be a case-by-case basis.

4 JUDGE PIGOTT: Well, you want a per se.

5 MR. BRANDT: A per se - - - a per se rule  
6 when the defend - - - yes, when the defendant is - -  
7 - excuse me - - - the - - -

8 JUDGE PIGOTT: Defense lawyer - - -

9 MR. BRANDT: - - - defense attorney is  
10 being a target of the - - - of the - - -

11 CHIEF JUDGE LIPPMAN: Who has to tell the  
12 judge?

13 MR. BRANDT: - - - investigation. There's  
14 a mandatory affirmative obligation on the part of the  
15 district attorney office as well as the defense  
16 attorney to inform the judge of the conflict.

17 CHIEF JUDGE LIPPMAN: So if they don't tell  
18 the judge, end of story?

19 MR. BRANDT: No, because there's a - - -  
20 the issue here, the pivotal issue here is, if they  
21 don't tell the judge, the judge is unable to speak to  
22 the defendant and explain to him the potential risks  
23 of proceeding with an attorney - - -

24 JUDGE SMITH: I mean, aren't you going to  
25 compromise some investigations that way? The

1 prosecutor has to go to the judge. The judge has to  
2 talk to the defendant. The defense - - - obviously,  
3 the defense lawyer, who we started out by saying is  
4 the target, is going to find out about this. Isn't  
5 that a problem.

6 MR. BRANDT: This defense attorney already  
7 knew about it.

8 JUDGE SMITH: Well, but you're asking for a  
9 per se rule. You're saying every time the prosecutor  
10 is investigating a lawyer, and that lawyer shows up  
11 in a courtroom, the prosecutor has to go to the judge  
12 and say, hah, I'm investigating that lawyer, you  
13 better talk to his client.

14 MR. BRANDT: Because the - - - because the  
15 client needs to - - - the - - - without being - - -  
16 without it being explained to the client, the client  
17 is - - - is not aware of the potential risks of going  
18 - - - of proceeding to trial with this - - - with  
19 this counsel. And he has a right - - -

20 JUDGE SMITH: Well, let me ask you a  
21 different question. Aren't you asking us to overrule  
22 some of our own - - - I mean, we've - - - we decided  
23 Konstantinides not that long ago. This would be - -  
24 - would squarely contradict that decision, wouldn't  
25 it?

1 MR. BRANDT: I believe that this - - - this  
2 case is more egregious than the previous cases. You  
3 have - - -

4 JUDGE SMITH: Yeah, but you're asking for a  
5 per se rule. You can't be telling us which one is  
6 more egregious than the other one.

7 MR. BRANDT: They should - - - it should be  
8 presumed that the - - - an attorney who's being  
9 investigated by the same district attorney's office  
10 that's prosecuting his client cannot attempt to curry  
11 favor with the district attorney's office. It might  
12 temper his representation - - -

13 JUDGE SMITH: My question is, how do you  
14 square your per se rule with Konstantinides, or don't  
15 you?

16 MR. BRANDT: If I remember correctly, I  
17 think Konstantinides that were two - - - maybe two -  
18 - -

19 JUDGE SMITH: There were two lawyers in the  
20 case.

21 MR. BRANDT: - - - two lawyers, correct.  
22 Two lawyers. One who had the conflict and the other  
23 did not. And this court, in - - -

24 JUDGE SMITH: Your per se rule would not  
25 apply where it's only one of two?

1 MR. BRANDT: No, that case can be  
2 distinguished because there were two attorneys.

3 JUDGE GRAFFEO: Counsel, if we don't agree  
4 with you for the per se rule, what's the rationale  
5 you would ask us to adopt here, under - - -

6 MR. BRANDT: Okay.

7 JUDGE GRAFFEO: - - - under our existing  
8 case law, how would you analyze this?

9 MR. BRANDT: I would - - - I would argue  
10 that the three parties that were tasked - - -

11 JUDGE GRAFFEO: Is it potential or actual  
12 conflict? What category are you putting this in?

13 MR. BRANDT: This would be an ac - - -  
14 based on this - - - the particulars of this case,  
15 this would be an actual conflict of interest. And I  
16 - - - and I would argue that the three parties that  
17 were tasked with protecting the defendant's Sixth  
18 Amendment right to conflict-free representation,  
19 meaningful representation, failed in their  
20 obligation.

21 The district attorney - - -

22 CHIEF JUDGE LIPPMAN: Do we need a hearing  
23 to determine that, if it's not a per se rule?

24 MR. BRANDT: If a hear - - - even if a  
25 hearing took place after the conviction, it would not

1 remedy the situation that the defendant has a right  
2 to make an informed decision whether or not he wants  
3 to proceed - - -

4 CHIEF JUDGE LIPPMAN: So you don't need a  
5 hearing in this case?

6 MR. BRANDT: Prior - - - it would have  
7 helped prior to - - -

8 CHIEF JUDGE LIPPMAN: Right, but now - - -

9 MR. BRANDT: - - - the beginning - - - no.

10 CHIEF JUDGE LIPPMAN: - - - you see no  
11 purpose to remand?

12 MR. BRANDT: It wouldn't. Because it would  
13 not remedy the situation where the defendant could  
14 make an informed decision, do I want to proceed with  
15 this attorney.

16 JUDGE PIGOTT: Wouldn't a hearing - - -

17 MR. BRANDT: He never waived the conflict.

18 JUDGE PIGOTT: Wouldn't a hearing determine  
19 whether or not there was, in fact, a conflict that  
20 impacted on the trial? And if that - - - if that  
21 turned out to be true, then the conviction would be  
22 set aside, a new trial ordered.

23 MR. BRANDT: Well, that would be - - -  
24 well, the judge who conducts the hearing would have  
25 to determine if it in any way affected the

1 representation of the defense attorney. The conflict  
2 - - - he could say well, it didn't affect the - - -  
3 his representation. I viewed the case. He did a  
4 very competent job.

5 But that's not the pivotal issue in this  
6 case. The pivotal issue is the defendant's right to  
7 decide do I want this attorney representing me who  
8 has these conflicts? Is he going to be single-  
9 mindedly devoted to my interests? Is he - - - will  
10 the possibility that he's going to be possibly  
11 disbarred or lose his liberty distract him from  
12 giving his full attention to my cause?

13 JUDGE SMITH: You're not - - - you're not  
14 claiming there was anything wrong that you can point  
15 to with the job that this lawyer actually did.  
16 You're just saying that he was entitled to know that  
17 he had - - - that the client was entitled to decide  
18 whether he wanted the guy.

19 MR. BRANDT: Many times, the harmful  
20 effects of a conflict are difficult to determine by  
21 the record. However, this - - - by the attorney's  
22 failure to inform the defendant of the conflict  
23 before the commencement of the trial, indicated that  
24 he was pla - - - already placing his interests above  
25 that of a client.

1 JUDGE PIGOTT: Did the DA disclose it?

2 MR. BRANDT: No, he did not. So both the  
3 DA and the defense attorney had a mandatory  
4 affirmative obligation to disclose it, and they both  
5 failed to do so.

6 JUDGE GRAFFEO: Does the record tell us if  
7 this ADA was aware of the investigation? Or was that  
8 being done - - -

9 MR. BRANDT: No.

10 JUDGE GRAFFEO: - - - by the police  
11 department?

12 MR. BRANDT: The search warrant that was  
13 executed at the defense attorney's office two weeks  
14 prior to the commencement of trial, was executed by  
15 the DA's office. So irrespective, though, however,  
16 of if that prosecutor knew about the investigation -  
17 - -

18 CHIEF JUDGE LIPPMAN: It's conceivable -

19 MR. BRANDT: - - - it should be implied.

20 CHIEF JUDGE LIPPMAN: - - - it's  
21 conceivable he didn't, right?

22 MR. BRANDT: Correct. But it should be  
23 implied - - -

24 CHIEF JUDGE LIPPMAN: Okay. But it's the  
25 DA's office.

1 MR. BRANDT: Yes.

2 CHIEF JUDGE LIPPMAN: They know that.

3 MR. BRANDT: Yes.

4 CHIEF JUDGE LIPPMAN: Okay, counselor. You  
5 have your rebuttal. Let's hear from your adversary.

6 MR. GREEN: Good afternoon, Your Honors.

7 CHIEF JUDGE LIPPMAN: Counsel, was there an  
8 unequivocal obligation on the part of, really, all of  
9 the players here in the courtroom, to make clear that  
10 there was a conflict here?

11 MR. GREEN: As this court has held - - -

12 CHIEF JUDGE LIPPMAN: At the very least, a  
13 potential one?

14 MR. GREEN: As this court has held, even  
15 where there's just a potential conflict, there are  
16 ethical obligations on the part of both counsel for  
17 the defendant and the People.

18 CHIEF JUDGE LIPPMAN: So what happens when  
19 that obligation is not met?

20 MR. GREEN: In this case, this court's well  
21 established principle which rejects any kind of a per  
22 se rule, looks to whether or not the failure to make  
23 that notification, and then the court's failure to  
24 make an inquiry because the court was unaware of the  
25 potential for a conflict, whether it operated on or

1 had any effect on the defense.

2 CHIEF JUDGE LIPPMAN: Wouldn't - - -  
3 wouldn't a hearing here be helpful in determining  
4 whether there was an actual conflict?

5 MR. GREEN: In terms of whether there was  
6 an actual conflict? No. Because an actual conflict  
7 only arises where the conflict actually operates on  
8 or affects the defense in this case. And as Judge  
9 Smith, in asking counsel a question about whether or  
10 not there was an effect on the representation, this  
11 case is the perfect case for showing why some sort of  
12 a per se automatic rule is not required.

13 When you look at the record of this case -  
14 - -

15 CHIEF JUDGE LIPPMAN: Actual as opposed to  
16 potential? Potential, we want to know if it  
17 operates, right?

18 MR. GREEN: Potential, right. And there  
19 are - - - there are a few situation - - -

20 CHIEF JUDGE LIPPMAN: What about if it's  
21 actual?

22 MR. GREEN: Well, if it's actual, there has  
23 to be an inquiry. And therefore the failure - - -

24 CHIEF JUDGE LIPPMAN: So that's why I asked  
25 - - -

1 MR. GREEN: - - - of an inquiry would  
2 require reversal.

3 CHIEF JUDGE LIPPMAN: - - - you would - - -  
4 would a hearing be helpful in determining - - -

5 MR. GREEN: Not in this case. Because the  
6 only time that this court has found or courts have  
7 found an actual conflict is where the defense  
8 attorney's implicated in his client's own wrongdoing  
9 or - - -

10 JUDGE PIGOTT: Do we - - - do we know that  
11 that is or is not the case here?

12 MR. GREEN: Yes.

13 JUDGE PIGOTT: When everybody is charged  
14 with criminal possession of a controlled substance?

15 MR. GREEN: Yes. In this case where the  
16 defendants are four - - - well, there are three  
17 individuals, one of whom is an uncharged accomplice,  
18 who rob a Salvadoran immigrant, 5 a.m. in the  
19 morning, on the streets of Riverhead, where all the  
20 testimony is, they're driving around looking for  
21 drugs and money, drugs and money, in a cycle of, you  
22 know, abuse. There's no evidence of that. And we  
23 know that there's no allegation and no implication.  
24 And Mr. Macedonio, even though his plea is to  
25 criminal possession of a controlled substance, fifth,

1 for conduct of crime between 2004 and 2008 in Suffolk  
2 County, there's no suggestion and it's never been  
3 implicated in any way, shape or form, that that  
4 violent robbery on the streets of Riverhead had  
5 anything to do with counsel in this case.

6 JUDGE SMITH: How do we know, though, that  
7 - - - I mean, if there's no hearing, how do we know  
8 that there wasn't some point during this  
9 representation when the lawyer said, yeah, I know,  
10 maybe I could go to get - - - I could try to get my  
11 client a pretty good deal right now, but I'm going to  
12 save my bargaining chips for myself; I don't want to  
13 be - - - I don't want - - - how do we know something  
14 like that didn't happen, unless we hold a hearing?

15 MR. GREEN: The record in this case. In  
16 October of 2007, there are plea discussions. It is  
17 on the record. Mr. Macedonio has discussed with his  
18 client the plea. His client is asserting his  
19 innocence.

20 JUDGE SMITH: I'm sure you can refute the  
21 specific hypothetical that I - - - any one I can  
22 think up. But we don't really know that it didn't  
23 operate on the representation unless we ask some  
24 questions, do we?

25 MR. GREEN: Yes, we do. Because we do have

1 two things in this case. One is the record, which  
2 does speak very clearly for the effectiveness of  
3 representation. He didn't pull punches. He didn't  
4 try to curry favor. He accused the district  
5 attorney's office, on the record, of playing games.  
6 He accused the district attorney's office of making  
7 deals with rats and called into question our conduct  
8 in the prosecution of this case. He accused the  
9 police of playing games. This is not somebody who's  
10 pulling punches and currying favor with his own  
11 problems in any way.

12 JUDGE SMITH: All right. I'll switch gears  
13 on you. He was so angry at the district attorney's  
14 office for prosecuting him, that it clouded his  
15 judgment and he overtried the case and alienated the  
16 prosecutor and the jury.

17 MR. GREEN: The same record shows that he  
18 didn't do that.

19 JUDGE PIGOTT: Wasn't that zealous, huh?

20 MR. GREEN: He was very zealous. Look, he  
21 pointed out the inconsistency in - - -

22 JUDGE SMITH: You can find out - - - you  
23 can tell from reading this record, without a hearing,  
24 that this guy was perfect?

25 MR. GREEN: Perfect, never. And of course,

1 the court doesn't require perfect representation.

2 And counsel had the opportunity - - -

3 JUDGE SMITH: But we do - - - we do require  
4 pretty much perfect loyalty to the client.

5 MR. GREEN: Loyalty, yes. And if there's  
6 anything that impairs that loyalty, and there's a  
7 good standard the court has set forth that requires,  
8 again, not an automatic or per se reversal, which is  
9 that it operates on, which doesn't require any  
10 showing of prejudice, and there is no showing of  
11 prejudice here - - -

12 JUDGE PIGOTT: But both - - -

13 MR. GREEN: - - - but there's also no  
14 showing of operation.

15 JUDGE PIGOTT: - - - both of you agree,  
16 though, that there were obligations on the part of  
17 defense counsel and the DA's office to disclose this.

18 MR. GREEN: In a perfect world, yes.

19 JUDGE PIGOTT: Both of you failed. Now, if  
20 the DA's office fails and nobody finds out about it -  
21 - - and I'm not suggesting Suffolk County. We'll  
22 pick one of those counties - - -

23 MR. GREEN: Um-hum.

24 JUDGE PIGOTT: - - - up near Buffalo or  
25 something. But if - - - if someone says well, this

1 inured - - - no harm no foul, we didn't disclose, and  
2 you know, whether it did or did not have an effect,  
3 you know, that's not our problem now. He's  
4 convicted, he's gone away.

5 Where if you had disclosed, then the judge  
6 would have said, well, Mr. Defense Lawyer, you know,  
7 you better talk to your client, and we would have had  
8 all this - - - all the cards face up on the table,  
9 and it would have been over.

10 MR. GREEN: Well, the interesting - - -

11 JUDGE PIGOTT: But does that excuse the  
12 People in, not your case, but in the next case, from  
13 doing what he or she is supposed to do, which is to  
14 disclose?

15 MR. GREEN: There is a difficulty,  
16 concededly, if there's a confidential investigation.  
17 An absolute or per se rule can play untold mischief  
18 on the effectiveness of counsel and the ability to  
19 represent. Say counsel's former client calls the  
20 district attorney's office, I'm going to come  
21 forward, I'm going to accuse my former counsel of  
22 misconduct. I know he's doing this. And it's a  
23 spurious allegation, entirely designed to then create  
24 this disqualifying rule.

25 And we start investigating, and it's

1 confidential. We have witnesses. Maybe in a  
2 legitimate case where there are witnesses whose  
3 security and safety is in jeopardy. It's not an easy  
4 thing to say that we have to bring this information  
5 to light.

6 If we do, what do we do? Bring it to the  
7 court so the court can be aware of the issue? That  
8 may be the better rule in that sense, but in terms of  
9 the effectiveness and whether or not this client,  
10 this defendant - - -

11 JUDGE RIVERA: Well, how should that be  
12 handled? How should your example be handled?

13 MR. GREEN: The best I could say is if the  
14 court were to require some active part, because the  
15 court has held - - - there's this obligation where  
16 there's an investigation even to bring that to light  
17 so that the client can make an informed choice, then  
18 maybe you have to go to the court and say look, I'm  
19 bringing this to the court's attention, but you  
20 cannot disclose for the following reasons.

21 Certainly if it's a matter of public  
22 knowledge, then that's a different question. That's  
23 not going to jeopardize the investigation. We don't  
24 have that same difficult issue.

25 JUDGE RIVERA: Some time of ex - - - some

1 type of ex parte or in camera?

2 MR. GREEN: You may need that under those  
3 circumstances. So as - - - when there is a  
4 confidential investigation which is going on.

5 One other - - -

6 JUDGE RIVERA: And the judge - - - and the  
7 judge says it's - - - it's a conflict, what do you  
8 do?

9 MR. GREEN: Well, we know from Cancross  
10 (ph.) there are circumstances that could arise where  
11 this court has held that the trial court should  
12 actually remove counsel, even if there's a waiver.  
13 And so there are means and remedies to protect the  
14 interests of the defendant in the appropriate case.  
15 And the courts have always looked to the judges to  
16 make a proper exercise of that - - -

17 JUDGE RIVERA: Without informing - - -

18 MR. GREEN: - - - discretion.

19 JUDGE RIVERA: - - - why?

20 MR. GREEN: Excuse me?

21 JUDGE RIVERA: Without informing, why? How  
22 do you protect your investigation?

23 MR. GREEN: Without - - -

24 JUDGE RIVERA: In your example, you want to  
25 protect the investigation?

1 MR. GREEN: Yes.

2 JUDGE RIVERA: How do you protect the  
3 investigation without informing counsel what the  
4 removal is for?

5 MR. GREEN: Well, again, the only way to do  
6 this - - - two issues are in play here. One is the  
7 investigation, and we have a presumption of  
8 innocence. In fact, this is one of the weird cases  
9 where the presumption of innocence, we're going to  
10 push that aside that the attorney who has done  
11 nothing wrong in a hypothetical, is being  
12 investigated, we'll presume him guilty for purposes  
13 of a conflict, that he's actually operating under a  
14 conflict.

15 If I want to preserve the integrity of the  
16 investigation, the only thing I can do, if the court  
17 requires, is to go to the judge and inform the court,  
18 and ask the court not to disclose, unless, of course,  
19 counsel's already aware. If defense counsel's  
20 already aware, then I'm letting nothing out. That  
21 issue should be - - -

22 JUDGE RIVERA: I don't know that you - - -

23 MR. GREEN: - - - on the table. And the  
24 practice is, of course, to let the client make an  
25 informed choice.

1                   JUDGE RIVERA: I don't know that you have  
2 to presume he's guilty. You're just presuming that  
3 he may have a certain reaction to this - - -

4                   MR. GREEN: Of course.

5                   JUDGE RIVERA: - - - bit of information.

6                   MR. GREEN: It is better practice to let  
7 the attorney notify - - - the People or the defense  
8 try to notify the court so that the defendant can  
9 make an informed choice. But failing that, none of  
10 the court's precedences have ever looked at this as a  
11 reversible error to not make that inquiry, unless  
12 there's an actual conflict.

13                  JUDGE SMITH: Assume we agree with you that  
14 it's not a per se reversal. Why should we not make  
15 the rule that when you have a situation like this,  
16 where the lawyer, unknown to the court or his client,  
17 was under a criminal investigation, that's enough to  
18 get you to an evidentiary hearing on the 440, so that  
19 people can find out what happened?

20                  MR. GREEN: Well, the reason why you didn't  
21 have an evidentiary hearing on the 440 is because  
22 they never made any of the allegations. If you look  
23 at Armienti, one of the cases they cite from the  
24 federal courts, another decision - - -

25                  JUDGE SMITH: If he - - - if put in an

1 inference - - - he put an information and belief  
2 affidavit. He says nobody will talk to me, so I  
3 don't know what happened, but here are some  
4 inferences I can draw. And he draws the same kind of  
5 inferences I was just pulling out of my head a few  
6 minutes ago. Is that enough to get a hearing?

7 MR. GREEN: You get a hearing if you make  
8 specific allegations. Counsel didn't call witnesses,  
9 didn't speak to me, was distracted, wouldn't return  
10 phone calls, didn't have a trial strategy that made  
11 sense, asked questions that shouldn't have been of  
12 me.

13 JUDGE SMITH: Well, but wait a minute.  
14 Wait a minute. Isn't it - - - isn't it perfectly  
15 possible that the - - - that this was operated on the  
16 representation in a way the client had no idea?

17 MR. GREEN: The client - - -

18 JUDGE SMITH: And the lawyer - - - remember  
19 the lawyer won't talk.

20 MR. GREEN: Right.

21 JUDGE SMITH: You have a lawyer who's  
22 refusing to cooperate.

23 MR. GREEN: But after - - -

24 JUDGE SMITH: So he can't - - - he can't -  
25 - - he hasn't even said, oh, no, it never - - - never

1           bothered me a bit.

2                   MR. GREEN:  The signposts for conflict are  
3           very much the signposts for ineffective assistance of  
4           counsel.  And in this record, which if there was any  
5           - - -

6                   JUDGE SMITH:  Okay, granting that there's  
7           nothing in the record, what's so terrible about  
8           having a hearing and getting the - - - getting the  
9           lawyer to come in and tell his story?

10                   MR. GREEN:  And I know Your Honor's  
11           previously spoken about the need for a hearing.  But  
12           in this case, and in Sanchez, where there was no  
13           hearing, the court said there was no need for a  
14           hearing.

15                   If there was one, if there was a legitimate  
16           issue of fact or a question about performance,  
17           absolutely, let's have a hearing to resolve that.  
18           But on this record, where they had an opportunity in  
19           a 440 motion to articulate specific deficiencies, and  
20           failed to articulate a one, there was no need for a  
21           hearing.

22                   CHIEF JUDGE LIPPMAN:  Okay.

23                   JUDGE RIVERA:  But isn't - - - I'm sorry.

24                   CHIEF JUDGE LIPPMAN:  Go ahead.

25                   JUDGE RIVERA:  But isn't there - - - there

1 is a difference you mentioned about the ineffective  
2 assistance of counsel in the same stand. But isn't  
3 there a difference to presuming even in the  
4 ineffective assistance of counsel situation, that  
5 defense counsel is, at least attempting to be a  
6 zealous advocate?

7 I mean, I think, right, what drives the  
8 question here is if there's a conflict, perhaps not.

9 MR. GREEN: It's perhaps not. But then you  
10 still are looking at ultimately what the performance  
11 was and what claims might exist., as this court has  
12 looked at in other contexts, as far as specific  
13 deficiencies. And on this record there are - - -

14 CHIEF JUDGE LIPPMAN: Okay - - -

15 MR. GREEN: - - - no apparent deficiencies.

16 CHIEF JUDGE LIPPMAN: - - - okay,  
17 counselor. Thanks.

18 MR. GREEN: Thank you, Your Honors.

19 CHIEF JUDGE LIPPMAN: Counsel, rebuttal?

20 MR. BRANDT: Very briefly.

21 CHIEF JUDGE LIPPMAN: Counselor, you're  
22 happy with a hearing, right?

23 MR. BRANDT: Yes.

24 CHIEF JUDGE LIPPMAN: Okay. Go ahead.

25 JUDGE PIGOTT: In this - - - in this

1 particular case you've got - - - as counsel argues,  
2 you have the trial judge, you know, who presided over  
3 the whole thing, he had the 330. And he said based  
4 upon what I saw, I don't - - - I don't see where the  
5 conflict entered at all. What's left to do?

6 MR. BRANDT: I'd just like to emphasize  
7 also that it's very important that the defendant have  
8 a right to make the decision whether or not he wants  
9 to proceed with that attorney, knowing there's a  
10 conflict. He may say, knowing all these things - - -  
11 and he already - - - he already proceeded to trial.  
12 He was al - - - he was convicted. And he's saying,  
13 you know, if I knew all this, I would have never kept  
14 him as my attorney. I would have asked that another  
15 attorney be assigned to represent me.

16 I never waived the conflicts and said,  
17 fine, I know the conflicts, but I'll still have him  
18 represent me. And that - - - and that's what I think  
19 is a very important issue in this case.

20 Okay, thank you.

21 CHIEF JUDGE LIPPMAN: Okay. Thank you  
22 both. Appreciate it.

23 (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. Wendell Payton, No. 232 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