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COURT OF APPEALS
STATE OF NEW YORK

PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

NO. 63

GARY THIBODEAU,

Appellant.

20 Eagle Street
Albany, New York
April 26, 2018

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE PAUL FEINMAN

Appearances:

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Official Court Transcriber



1 CHIEF JUDGE DIFIORE: The next appeal on the
2 calendar is appeal number 63, The People of the State of
3 New York v. Gary Thibodeau.

4 Good afternoon, counsel.

5 MS. PEEBLES: Good afternoon, Your Honors. May
6 it please the court, my name is Lisa Peebles. I represent
7 Gary Thibodeau, the appellant in this action. With the
8 court's permission, I'd - - - I'd like to request two
9 minutes for rebuttal, if I may?

10 CHIEF JUDGE DIFIORE: You may have two minutes.

11 MS. PEEBLES: Thank you.

12 If the ju - - - if a jury had heard the newly
13 discovered evidence that had been presented to the lower
14 court, Gary Thibodeau would be home with his family today.

15 CHIEF JUDGE DIFIORE: What's the - - -

16 JUDGE GARCIA: Counsel - - - oh.

17 CHIEF JUDGE DIFIORE: Go ahead.

18 JUDGE GARCIA: I was just going to ask the same
19 thing: what's the standard of review? What's our standard
20 of review here? They had a extensive hearing, where many
21 witnesses testified - - - I think, including the three
22 people now alleged to have done this - - - and it's
23 affirmed by the Appellate Division. What's our standard
24 for reviewing those conclusions?

25 MS. PEEBLES: The basis for the court's decision



1 denying Mr. - - - Gary Thibodeau a new trial was based on
2 his abuse of discretion as a matter of law in applying the
3 admissibility with regard to the evidence that was
4 presented. So for our - - - our position is that the court
5 - - - lower court made a - - - abuses of discretion as a
6 matter of law, when determining whether or not this
7 evidence would be admissible at a new trial. What - - -

8 JUDGE STEIN: Well, can - - - can we review - - -
9 so much of it seems to me in this case rests on the trial
10 court's credibility determinations and reliability
11 determinations of - - - of the - - - the statements against
12 penal interests. So how do we review those determinations?

13 MS. PEEBLES: Well, I'll give you an example in -
14 - - in terms of how the court decided that one - - - for -
15 - - for example, one statement that was against one of the
16 three new suspects' penal interest, Chris Combes. He's
17 called to testify at the evidentiary hearing about
18 admissions by one of the new suspects, Roger Breckenridge.
19 Roger Breckenridge, according to Chris Combes - - - and he
20 testified to this - - - told him that he was involved in -
21 - - we were - - - we burned her body, we put - - - we
22 disposed of it in a vehic - - - in a van, and we shipped it
23 off to Canada.

24 The court said he placed no reliability on that,
25 because Chris Combes, at the time, didn't believe Roger



1 Breckenridge meant what he said. That's not a requirement
2 when you look at the Settles criteria in terms of
3 reliability as far as admissions against penal interest.

4 JUDGE STEIN: But that - - - that wasn't just it.
5 I mean, there - - - there were also issues about whether
6 there was corroborating evidence and - - - and that sort of
7 thing. I - - - I think that when it comes to reliability,
8 it was based on a combination of things.

9 MS. PEEBLES: When you look at the standard under
10 the fourth prong in Settles, which it really is minimal
11 when you look at it, in terms of a statement against penal
12 interest, it suggests that there's a reasonable possibility
13 that the statement might be true. What did we bring
14 forward to establish that these statements by these three
15 new suspects to a variety of people who were not related to
16 either Gary or Richard - - - didn't even know Gary or
17 Richard - - - were related to one and another, and had been
18 trickling in, beginning from 2000 - - - what did we show?
19 We did find a cabin on Rice Road. We did have three
20 different cadaver dogs, including a state trooper cadaver
21 dog who indicated for the presence of human remains.

22 The court in its decision said that the - - - the
23 expert who testified from the Ma - - - Massasauga Volunteer
24 Rescue Center with her canine dog, said could have
25 indicated for the presence of human re - - - remains. But



1 that's not what she said. She was unequivocal when she
2 stated that her trained cadaver dog indicated for the
3 presence of human remains.

4 Now what else did we have? We have Jennifer
5 Wescott in a secretly recorded call that was monitored by
6 law enforcement, where she's talking about the three new
7 suspects bringing Heidi Allen over to her house in a van.
8 What did the court say about that? The court says - - -
9 faulted the defense, because we couldn't establish what
10 happened to Heidi Allen after she was brought over to
11 Jennifer Wescott's in the van.

12 JUDGE STEIN: But Wescott - - - I - - - I mean, I
13 - - - I read the transcript of the call, right, and - - -
14 and she didn't say very much on the recorded call, and - -
15 - and she was all over the place. She - - - she recant - -
16 - not recanted, exactly, but she denied what she said and -
17 - - and so doesn't that just really boil down to her
18 credibility?

19 MS. PEEBLES: When - - - the court determined
20 that the recording would not be admissible because it
21 wasn't a statement against penal interest. We disagree.
22 Jennifer Wescott, during the call, acknowledged that she
23 was involved in the disposal of the van.

24 JUDGE STEIN: That's the point; you disagree.
25 So, you know, I might - - - I might agree with you, but



1 that's - - - that's - - - I - - - I'm not sure that's the
2 question, because I'm not sure it's our place to second
3 guess that. The - - - the Appellate Division is - - - is
4 allowed to do that, but we can't get into those credibility
5 issues.

6 MS. PEEBLES: When you look at the - - -

7 JUDGE RIVERA: Counsel, what's the law question
8 for why it's a statement against penal interests?

9 MS. PEEBLES: Because Jennifer Wescott admitted
10 that she was involved in the disposal of the van with her
11 then-boyfriend, Roger Breckenridge. That's a statement
12 against penal interest. And it's - - -

13 JUDGE RIVERA: That's a legal question to assess
14 whether or not it satisfies that standard?

15 MS. PEEBLES: That's a legal question, correct.

16 JUDGE RIVERA: It has nothing to do with
17 credibility?

18 MS. PEEBLES: Nothing to do with credibility.
19 And the court found that because that wasn't a statement
20 against penal interest, it didn't meet the exception to the
21 hearsay rule. The recording's hearsay, therefore, you
22 couldn't get it in in a new trial, and the - - -

23 JUDGE WILSON: Well, even if you're right about -
24 - -

25 MS. PEEBLES: - - - the fact of a - - -



1 JUDGE WILSON: - - - even if you're right about
2 that statement, that doesn't get the whole recording in,
3 right?

4 MS. PEEBLES: Well, I would argue, Your Honor,
5 that it would be admissible under the defense right to
6 present a defense and his due process right to - - - to
7 establish third-party culpability under Chambers v.
8 Mississippi. It would be of probative value; a relevant
9 probative value would be outweighed by any prejudicial or
10 delay in - - - in the proceedings. So certainly Mr.
11 Thibodeau would have a due process right to have a jury
12 hear this.

13 Now what's interesting is Jennifer Wescott's
14 reaction when she was confronted by law enforcement, which
15 was videotaped, which we also offered as part of the
16 evidentiary hearing, where she flat out denies ever having
17 these conversations with Tonya Priest. When she's
18 confronted that - - - that it was recorded, she thinks Je -
19 - - she thinks Tonya Priest recorded it. So she says,
20 well, she chopped something. And then when they say, well,
21 no, I heard the tape; we monitored it, then she said, well,
22 I don't know what to say. I don't know what to say. Am I
23 going to be in trouble?

24 That's - - - those facts should have been
25 permitted for a jury to look at; and the court precluded



1 the defense from introducing this by suggesting it would be
2 inadmissible, because it didn't meet these hearsay
3 exceptions. And that, in fact, is where the court erred as
4 a matter of law.

5 Again, we also had third-party culpability or
6 reverse-Molineux evidence against one of the three new
7 suspects, who testified. All three of these individuals
8 testified, and none of their denials to these statements
9 were re - - - convincing. And at some point in time during
10 the course of their examination by counsel, they tried to
11 invoke their Fifth Amendment for a variety of reasons,
12 whether it was sending a directive to Wescott to keep her
13 mouth shut from prison, whether it was Steen talking about
14 his drug distribution. Steen admitted on the stand that he
15 learned after the fact that he may have hauled Heidi
16 Allen's remains to Canada.

17 JUDGE RIVERA: So you've set out a - - - a - - -
18 quite a lengthy list of what you see as the errors. Are
19 there one, two, or even three that are the ones that you
20 say: Your Honors, if you discount everything else, if you
21 disagreed with us on everything else, here are the ones
22 that show that the court abused its discretion by failing
23 to grant the new trial.

24 MS. PEEBLES: Yes. First of all, the Jennifer
25 Wescott recording, that's number one.



1 JUDGE RIVERA: Um-hum.

2 MS. PEEBLES: The statements against penal
3 interests that were - - - through the testimony of Amanda
4 Braley, Chris Combes, Tonya Priest, Jennifer Wescott's
5 testimony.

6 JUDGE RIVERA: You're kind of going through the
7 whole list.

8 MS. PEEBLES: Well - - -

9 JUDGE RIVERA: I was ask - - - so in your opinion
10 it takes all of them? We have to find that all of those
11 were wrong - - -

12 MS. PEEBLES: No.

13 JUDGE RIVERA: - - - to show abuse of discretion?
14 That's really what I'm trying to ask you.

15 MS. PEEBLES: The - - - the tape itself would
16 result in a new verdict.

17 JUDGE RIVERA: Enough?

18 JUDGE WILSON: What is the legal error on the
19 reverse-Molineux? What is the error of law there?

20 MS. PEEBLES: The court held us to a standard - -
21 - it failed to account for all of the evidence that we
22 presented against Michael Bohrer as a third new suspect and
23 looked at it like it's some freestanding propensity claim,
24 which is not how we offered it. We actually brought in the
25 victims and had them ready to testify from his prior



1 attempted kidnappings and prior assault which - - -

2 JUDGE STEIN: What was the modus operandi there -
3 - -

4 MS. PEEBLES: Well, in - - -

5 JUDGE STEIN: - - - that was common to everything
6 and - - -

7 MS. PEEBLES: The - - -

8 JUDGE STEIN: - - - was so unique?

9 MS. PEEBLES: The manner in which he was so
10 brazen that he went right up to a woman and grabbed her and
11 tried to shove her in his car, which the eyewitness that
12 the People called to testify at - - - during the hearing -
13 - -

14 JUDGE STEIN: And that's enough? That - - -
15 that's enough?

16 MS. PEEBLES: Well, when you look at it, not so
17 much as a freestanding claim of propensity, you have to
18 look at the fact that Michael Bohrer called in - - -

19 JUDGE STEIN: We're looking at admissibility.

20 MS. PEEBLES: He called in false leads. He began
21 to cry during the course of the evidentiary hearing. He
22 began to sob when he talked about driving by the Heidi
23 Allen sign. He said he was incapable of any violent acts,
24 which is why he told law enforcement he could not have done
25 this, because he's not a violent person. All of this he



1 said before the defense uncovered all of his prior acts.

2 CHIEF JUDGE DIFIORE: Thank you, counsel.

3 MS. PEEBLES: Thank you.

4 CHIEF JUDGE DIFIORE: Counsel?

5 MR. OAKES: Thank you. Good afternoon. May it
6 please the court, my name is Greg Oakes. I'm the District
7 Attorney for Oswego County.

8 There are a number of issues presented to the
9 court, and what I would like to do is address - - - address
10 Justice Garcia's question regarding the standard of review,
11 and Judge Stein. And I think you're exactly correct on
12 those issues, that there is no standard of review for this
13 court, because a lot of the questions - - - the decisions
14 that were presented to the hearing court relied upon issues
15 of credibility and the reliability of those witnesses and
16 were actually factual determinations in a weighing that the
17 court made, really focusing upon the weight of the evidence
18 in two different respects. One - - -

19 JUDGE RIVERA: What about whether or not a
20 statement constitutes a statement against penal interest?

21 MR. OAKES: Well, it - - - and those reliability
22 determinations relate to the fourth prong, Your Honor,
23 again, in looking at whether there's a reasonable
24 possibility that the statement may be true. Again, the
25 court's been very clear in Settles. It's a reasonable



1 possibility. So I think it's appropriate for - - -

2 JUDGE STEIN: What about - - - what about the
3 sheer number of these separate and - - - and seemingly
4 unrelated confessions by - - - by these three men and - - -
5 with some independent coopera - - - corroboration?

6 MR. OAKES: Well - - -

7 JUDGE STEIN: What - - - what do we make of that?
8 I mean, does that have any fact - - - I mean, does that
9 have any result?

10 MR. OAKES: Well, to your question, Your Honor,
11 the - - - the fact that there are multiple statements - - -
12 God bless you - - -

13 CHIEF JUDGE DIFIORE: Thank you.

14 MR. OAKES: - - - multiple statements, doesn't
15 make the independent statements more admissible. The fact
16 that a lie or an exaggeration is repeated multiple times,
17 doesn't make it inherently more reliable or admissible
18 under the court. And part of the problem we received in
19 this case - - -

20 JUDGE STEIN: But it would be a factor, right?

21 MR. OAKES: Potentially a factor, but unique to
22 this case is once the 440 motion was filed, there are a
23 number of stories in the media. And in fact, it seemed
24 that pretty much every affidavit, every video, every
25 recording, somehow made its way to Syracuse.com, was



1 published online, and really polluted the entire pool. So
2 when somebody came forward with information we had no idea
3 whether it was somebody who had actual credible
4 information, based upon their independent knowledge; if
5 they're just reading stuff online and coming forward and
6 seeking their fifteen minutes of fame.

7 But coming back to you, Judge Rivera, and your
8 issue on the reliability. When we look at, is there a
9 reasonable probability that it being true, the court looked
10 at the reliability - - - reliability of those witnesses.
11 And again, when we talk about Jennifer Wescott's recorded
12 phone call to Tonya Priest, as you said, Judge Stein, it
13 was all over the map. There are inconsistent statements
14 made even within that. And key in that, she said at one
15 point, well, I don't know; I didn't actually see Heidi. I
16 just took two and two together, and this is what I came up
17 with.

18 As the defendant has said in his motion papers,
19 there was no actual evidence that Jennifer Wescott was
20 involved in the kidnapping, the murder, or the disposal of
21 Heidi Allen. She has no criminal liability under any of
22 those theories, so if she has no criminal liability, what's
23 the standard for admitting that phone call? If she doesn't
24 have culpability, those aren't declarations against penal
25 interest relative to her.



1 But when we look at the reliability, the court
2 looked at all of the evidence that came in at the hearing
3 to see whether there was any indication, anything that
4 would make these statements potentially be true. Focusing
5 mostly on James Steen, the court could look at the
6 objective information that was developed during the trial.
7 According to Tonya Priest, James Steen said he came in
8 through the back door, that he and the other guys,
9 essentially, rushed her in the store, and forcibly carried
10 her out.

11 One, there was no evidence at the trial and
12 there's no evidence at the scene of a forcible abduction.
13 There's wasn't a newspaper, there wasn't a coffee cup or
14 anything knocked over. But more signi - - -

15 JUDGE FAHEY: And what about the evidence of the
16 man who was driving by, was it Pierce?

17 MR. OAKES: William Pierce, yes, Your Honor.

18 JUDGE FAHEY: What about his evidence?

19 MR. OAKES: His evidence, again, comes down to a
20 credibility determination. Mr. Pierce came forward after
21 twenty years; and his initial statement to the sheriff's
22 office was, you got the right guy. I saw news reports
23 shortly after this happened, and I saw that Gary Thibodeau
24 had been arrested, and I believed you got the right guy.
25 And I'm coming forward so you have that certainty of



1 knowing you got the right guy. And he steadfastly believed
2 that so much - - - again, so he came forward on his own.

3 It was only after seeing these reports in the
4 newspaper, the - - - the - the unduly influential
5 photograph of James Steen in his jail outfit related to his
6 murder conviction, that he says, oh, my goodness; I got the
7 wrong person. But when presented of a photo array that was
8 closer in time, a picture of James Steen closer in time, he
9 couldn't pick him out. Now again, it wasn't from 1994,
10 that photo of that photo array, but it was a lot closer in
11 time than his photograph from 2010, sixteen years after the
12 fact.

13 And when we talk about the issue of the standard
14 of review and reliability and credibility, Judge King was
15 in a position to hear directly the testimony of William
16 Pierce, at times being confused, paused, hesitation, when
17 presented with photographs that show that he wouldn't have
18 a correct vantage point to see what he claimed to have
19 seen. Again, he initially indicated the van being in one
20 spot, and seeing one person, but when we talked to him
21 about where he was and what he could have seen from that
22 vantage point, then suddenly it shifted a little bit.

23 His excuse for not coming forward after all those
24 years was either, well, I thought it was a domestic
25 incident and I didn't want to get involved, to later on,



1 well, actually, I just figured you guys had the right guy,
2 so I didn't want to get involved.

3 The court could hear firsthand his responses. It
4 was in the best position to make those reliability
5 determinations, particularly when weighing his descriptions
6 against, again, known evidence that was developed twenty
7 years ago in the trial.

8 And as you talked about in the case before this
9 one, if there had been a trial, if there had been a hearing
10 where people could put forth evidence, well, we did that
11 twenty years ago. And the deputies and officers testified
12 about the weather. They showed photographs relating to the
13 condition of the store. And Mr. Pierce's testimony
14 conflicted with those known established facts.

15 I don't know if in his heart he honestly believes
16 it, but again, I - - - I think this is a man, again, of
17 advanced age, who's confused, having seen a photo in the
18 paper, wants to believe he might have information; but
19 again, those are credibility determinations left to the
20 court, that, with due respect, are beyond this court. But
21 again, that really goes to the fourth prong of should it be
22 admitted as a declaration against penal interest.

23 And when we look at Steen's declaration, again,
24 according to Tonya Priest, she said they went back to Roger
25 Breckenridge's home on Rice Road. Well, there's no



1 testimony that Roger Breckenridge lived at that address.
2 In fact, one of the defense witnesses conceded, I knew
3 Roger Breckenridge back in the time; he lived with his
4 wife, Tracy - - - not Jennifer Wescott - - - and his kids
5 on Kenyon Road, which ironically was about two, three miles
6 down the road from where the defendant lived.

7 The defense tried to show that Jennifer Wescott's
8 mom may have lived there, but again, there's no testimony
9 that she was living there necessarily. And again, it
10 strains credibility to think that even if Roger
11 Breckenridge had been dating Jennifer Wescott, which again,
12 there's no evidence at that point, that he and his buddies
13 would kidnap this young lady, take her back to his
14 girlfriend's parents' place to a garage. It - - - it
15 strains credibility.

16 And again, when we look at the physical evidence
17 that was developed - - - well, actually, if I can back up a
18 moment. When we talk about them living at Rice Road,
19 again, we established who actually did live at that
20 residence, a young woman at the time, Darcy Purdy. She's
21 now a legal secretary.

22 She came forward and said I moved in at the
23 beginning of 1994. We had her lease that she signed in
24 December of 1993. She said I know I lived there; here's my
25 wedding registry. I had my bachelorette party at that



1 residence, and I lived there continuously for a couple of
2 years. And not only did I live there, I can tell you, I
3 did there - - - but here are some mailings that I received
4 at the time. Here's a card that I sent to my mom on
5 Mother's Day at the time, that's postmarked from that
6 location.

7 And again, if Darcy Purdy lived there - - - and
8 again, there's clear, factual evidence or proof that she
9 did - - - then the whole Tonya Priest story doesn't make
10 sense, because the entirety is premised upon that location
11 at Rice Road.

12 JUDGE RIVERA: So you - - - you're - - - you're
13 basically saying the way for us to look at the case is, you
14 say what they presented is not believable; they say it is.
15 Trial jury - - - judge heard it. Agreed with you, it's
16 just not believable or it's not enough, right?

17 MR. OAKES: I - - - I - - -

18 JUDGE RIVERA: And there's no - - - not a
19 question of law embedded in any of this for this court to
20 decide that would be a basis to reverse the Appellate
21 Division.

22 MR. OAKES: That's correct, Your Honor.

23 JUDGE FAHEY: You know, there were three points
24 that I think addressed Judge Rivera's question about the
25 specific instances that you would point to that Judge



1 Centra in his dissent in the Fourth Department, identified,
2 as problem areas for the - - - for the People.

3 First was pre-statements regarding Steen's
4 admissions; second was Braley's testimony concerning
5 Breckenridge's admissions; and the third was Combes'
6 testimony regarding Breckenridge's admissions. You got a
7 few seconds. Would you address those?

8 MR. OAKES: I - - - thank you, Your Honor.
9 Again, those - - - those are legal issues that are
10 presented, but within those legal issues, become a
11 credibility determination, reliability determination,
12 because this court said in Settles, perhaps the most
13 important aspect of declarations against penal interest is
14 that fourth prong. Again, there's been no independent
15 evidence, no competent physical evidence, or other evidence
16 outside of the declarations themselves - - -

17 JUDGE FAHEY: Um-hum.

18 MR. OAKES: - - - that show that these statements
19 are true.

20 Again, I've talked about the Tonya Priest
21 statement relating to James Steen. With Amanda Braley - -
22 - and again, her statement is - - - really probably fails
23 on multiple prongs, that he doesn't show competent evidence
24 - - - but again, the statement is, essentially, I'm never
25 going to go to prison for what we did to Heidi. Well, it



1 doesn't say what he did. We have no idea if it relates to
2 this case or something else, but interestingly, this came
3 out during cross-examination of Amanda - - -

4 JUDGE RIVERA: Are there no inferences that can
5 be drawn, based on all of the evidence they presented?

6 MR. OAKES: There are perhaps some inferences
7 that could be drawn, but when we talk about reliability,
8 one of the issues that came out in cross-examination of
9 Amanda Braley is, as part of the defense motion, they
10 submitted an affidavit from Amanda Braley. Ms. Peebles or
11 one of her investigators took that statement from her.
12 That was submitted as part of their motion papers. In that
13 statement, she never referenced the statement about I'm
14 never going to go to prison for what I did. I cross-
15 examined her about that issue. And again, her explanation
16 was, well, I did tell defense counsel; they just forgot to
17 put it in there.

18 Again, that - - - that itself strains
19 credibility. And again, she's saying that she really
20 believed these statements, yet she was with Tonya Priest in
21 the woods walking.

22 And if I may for a moment, Judge Wilson, you had
23 talked about the Molineux issue.

24 JUDGE WILSON: Yes.

25 MR. OAKES: Again, I think the court correctly



1 decided those issues. There is no MO other than the fact
2 of a broad sense of trying to abduct a female. There's
3 nothing specific or particular about the manner in which
4 that was carried out.

5 And interestingly, to go to your point, Judge
6 Fahey, again, the defense has limited their argument to
7 those three statements or pieces of evidence, for the
8 purpose of this appeal. The defense has not argued before
9 this court that any of the statements attributed to Michael
10 Bohrer should be admitted. Judge Centra didn't find that
11 any of the statements attributed to Michael Bohrer should
12 be submitted, so - - -

13 JUDGE WILSON: My - - - my question on the
14 Molineux was really a little different from what you
15 anticipated. It's whether the defense needs to meet the
16 same legal test that the prosecution would need to
17 introduce Molineux-type of evidence.

18 MR. OAKES: And - - - and I believe they do, Your
19 Honor, again, showing that it either goes to intent, or a
20 motive, or a lack of mistake, or modus operandi, that it
21 was carried out in a particular fashion. Because
22 otherwise, the defense who's trying to introduce third-
23 party culpability evidence, could simply pick the worst guy
24 in the jail, the worst guy in the community and say, look,
25 he's got these rape convictions; he's got these burglary



1 convictions; all of that's going to come in. And it leads
2 to juror confusion and takes away from the central issue
3 is, well, did they commit this particular act.

4 JUDGE RIVERA: But didn't they present evidence
5 that the three are connected to this crime, that you could
6 draw inferences to that effect or from their own
7 statements?

8 MR. OAKES: Well, and again - - -

9 JUDGE RIVERA: Come to that conclusion?

10 MR. OAKES: Well, the statement that Roger - - -
11 or James Steen made, again, according to Tonya Priest,
12 implicated Michael Bohrer. But again, I - - - I don't
13 think that necessarily should be used against Michael
14 Bohrer. And again, all of the statements are attributed to
15 Michael Bohrer himself; again, the hearing court and the
16 Appellate Division found it didn't meet the standard for
17 declarations against penal interest.

18 And the defense hasn't even argued that either of
19 those courts have erred. Again, before this court, they're
20 not asking you to consider the admissibility of any of the
21 statements of Michael Bohrer.

22 So the point I - - - I was going to make is, if
23 none of those statements regarding Michael Bohrer are being
24 admitted, how does his criminal history come in, because
25 clearly it was being offered as propensity evidence to show



1 that he's a bad guy, capable of violent acts, and you
2 should just - - - jury, you should think he's a bad guy and
3 did this particular act.

4 CHIEF JUDGE DIFIORE: Thank you, counsel.

5 MR. OAKES: Thank you very much, Your Honor.

6 CHIEF JUDGE DIFIORE: Ms. Peebles?

7 MS. PEEBLES: I'm just going to lead off with
8 where Mr. Oakes ended if - - - with regard to the Michael
9 Bohrer and the reverse-Molineux evidence. First of all, we
10 have not abandoned any claim regarding any admissions made
11 by Michael Bohrer. Part of our argument to this court
12 deals with the reverse-Molineux, and we're asking the court
13 to consider it into context.

14 We did not cherry-pick Michael Bohrer as a new
15 suspect, because we found that he had some prior attempted
16 abductions and rape and attempted murder of other women.
17 Michael Bohrer's name came to light first in 2000, which
18 the defense didn't know, because Tyler Hayes called the
19 sheriff's department and said this man is making admissions
20 about the abduction of Heidi Allen. It concerned him.

21 We never got that until we filed our 440 motion.
22 Tyler Hayes reached out to us when he heard about it,
23 because he saw Michael Bohrer's picture plastered on the
24 media, come to find out, he had tried to reach out to the
25 sheriff's department back in 2000. Michael Bohrer was



1 thereafter interviewed after we fi - - - or prior to our
2 motion by the Oswego County Sheriff's Department. During
3 that interview they said, well, people think you were
4 involved with this.

5 He throws out the fact that Heidi Allen's body
6 might be somewhere in a junkyard in Crosby Hill, which just
7 happens to be where Murtaugh's junkyard is, which is where
8 Jennifer Wescott was sending text messages before she went
9 to be interviewed by law enforcement. This information was
10 presented and there was no reason, under the law, why it
11 should not be able to be presented to a jury so that a jury
12 can determine whether or not it would make a difference in
13 the outcome; and we think it would.

14 Now with regard to, again, Michael Bohrer, he
15 told law enforcement when he was being interviewed that he
16 doesn't have the capacity; he's not a violent man, and
17 that's why he couldn't have done this. Well, we found out
18 that that wasn't true. He does have a very violent past.

19 So we're not offering it as some sort of
20 freestanding propensity he did it once; he did it again.
21 We're offering it into context that he lived a half a mile
22 down the road. He said he went to this store every day.
23 That Heidi Allen made him sandwiches. He collected a box
24 of written materials he wrote himself. I tried to
25 introduce those during the evidentiary hearing. The court



1 would not allow me to introduce those documents. I tried
2 to question him about the meaning behind some of what he
3 wrote. He's living in an RV. He has this box on the cha -
4 - - twenty years later, he still has this box.

5 So the People chalked him up to some nut ball,
6 not recognizing that the man is a psychopath who had tried
7 to abduct and kidnap women in the past. And that's - - -
8 again, it was not some sort of freestanding claim of
9 propensity.

10 As far as Pierce, the lower court found that
11 Pierce's credibility determination with regard to Steen had
12 no evidentiary value. What the county court failed to
13 recognize was his identification of a van that didn't
14 belong to Richard and Gary. That was the key, because the
15 van is unmistakable. The whole time they were
16 investigating the case against Richard Thibodeau, they kept
17 plastering the picture of the van all over the media.

18 And Pierce's testimony, a critical component of -
19 - - of his testimony, and the county court acknowledged he
20 saw something. In the court's own decision, he said, well,
21 what he saw that morning, he may be - - - but he wasn't
22 persuaded by his identification of Steen, some twenty years
23 later.

24 But the reality of it is, the court conceded he
25 was there, and said he drove by, but he just couldn't - - -



1 you know, he talked about how he put all these studies out
2 there and how eyewitness identification is somehow flawed,
3 and his memory's not accurate, and he couldn't place any
4 evidentiary value in that. But if the defense were able to
5 call Mr. Pierce to testify about the fact that he saw a van
6 and that wasn't the van he saw - - - it wasn't Richard
7 Thibodeau's - - - that would definitely change the outcome
8 of the trial.

9 Thank you.

10 CHIEF JUDGE DIFIORE: Thank you, counselor.

11 (Court is adjourned)

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

I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of People of the State of New York v. Gary Thibodeau, No. 63 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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