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COURT OF APPEALS  
STATE OF NEW YORK

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PEOPLE,

Respondent,

-against-

No. 84

MARVIN BYER,

Appellant.

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20 Eagle Street  
Albany, New York 12207  
March 18, 2013

Before:

CHIEF JUDGE JONATHAN LIPPMAN  
ASSOCIATE JUDGE VICTORIA A. GRAFFEO  
ASSOCIATE JUDGE SUSAN PHILLIPS READ  
ASSOCIATE JUDGE ROBERT S. SMITH  
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.  
ASSOCIATE JUDGE JENNY RIVERA

Appearances:

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Karen Schiffmiller  
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: 84, People v. Byer.

2 Okay, counsel, do you want any rebuttal  
3 time, counsel?

4 MR. AUSTERN: I would like to reserve two  
5 minutes for rebuttal, Your Honor.

6 CHIEF JUDGE LIPPMAN: Two minutes, sure.  
7 Go ahead.

8 MR. AUSTERN: Good afternoon, Your Honors.  
9 Bruce Austern, on behalf of appellant, Mr. Marvin  
10 Byer.

11 The Appellate Division correctly decided  
12 the evidentiary claims here. The Appellate Division  
13 wrongly decided harmless error. There are three  
14 tests to look at: constitutional harmless error,  
15 nonconstitutional harmless error, and the separate,  
16 fundamental, freestanding right to a fair trial.

17 This Court in People v. Crimmins recognized  
18 a fundamental freestanding right to a fair trial;  
19 attributing nine murders to Mr. Byer, ten with the  
20 present case, denied Mr. Byer his right to - - -

21 CHIEF JUDGE LIPPMAN: Did that issue go to  
22 the voluntariness of his statements rather than the  
23 fact of the nine killing?

24 MR. AUSTERN: No, Your Honor, it doesn't go  
25 to the voluntariness of the statement. It - - - it

1 was an - - - it went to nothing. It was an  
2 extraneous remark. It was a brief remark. It was an  
3 unnecessary remark.

4 CHIEF JUDGE LIPPMAN: You know, I think  
5 this is such an interesting case, because on the  
6 surface, you know, you can't think of a more damning  
7 statement, that I killed nine other people. Explain  
8 - - -

9 MR. AUSTERN: I can't imagine it.

10 CHIEF JUDGE LIPPMAN: Yeah, you know, I  
11 mean, on a visceral reaction, where, you know, I  
12 think - - -

13 MR. AUSTERN: It's horrific.

14 CHIEF JUDGE LIPPMAN: I think that's a  
15 visceral reaction that would be normal. But what  
16 about in this case, do you think - - - tell us why in  
17 this case it makes such a difference.

18 MR. AUSTERN: In this case it was an  
19 elephant in the jury room. It essentially told the  
20 jurors they had a - - - exactly what defense counsel  
21 said, that they had a serial killer - - -

22 JUDGE SMITH: But, but - - -

23 MR. AUSTERN: - - - a madman. He - - -

24 JUDGE SMITH: But what's the jury - - - but  
25 take us - - - put us inside the head of a typical

1 juror for a minute. He's sitting there thinking - -  
2 - explain how he would acquit, and then he hears, oh,  
3 the man admitted to nine other murders. And I guess  
4 what I'm getting - - - part of what I'm getting at  
5 is, the juror who believes Cawley's (ph.) testimony  
6 is going to convict, anyway. He doesn't need the  
7 nine murders. And if he doesn't believe Cawley, then  
8 Cawley could be making that up, too.

9 MR. AUSTERN: Well, I don't know - - -  
10 additionally, there, I should say, there was a  
11 defense presented, and my client testified, and he  
12 did fully explain his behavior, and it's very  
13 disturbing behavior. This is a tough case. This was  
14 a tough case for the jury. This is a disturbing case  
15 even under - - - even the defendant's view and his  
16 testimony was disturbing.

17 And he did explain this testimony about  
18 these nine other bodies completely eclipsed - - - not  
19 only was it propensity evidence, it completely  
20 eclipsed his ability to present his defense to the  
21 jury, also.

22 JUDGE SMITH: Is it even believable that he  
23 killed nine other people? I mean, assuming he said  
24 it, wouldn't you tend to discount - - - I mean, nine  
25 unsolved murders somewhere.

1 MR. AUSTERN: No, Your Honor, I don't see  
2 anything - - - I understand the - - - Your Honor's  
3 view, but I don't think there's anything in this  
4 record - - - I think they were told; I think they  
5 understood. I think they had every reason to believe  
6 that there were nine bodies out there.

7 JUDGE READ: Well, there was a limiting - -  
8 -

9 MR. AUSTERN: That was what was - - -

10 JUDGE READ: There was a limiting  
11 instruction, correct?

12 MR. AUSTERN: There was a limiting  
13 instruction, which is, you know, please ignore the  
14 nine other murders; they have - - - they're not  
15 before you; they have nothing to do with this case.  
16 Let's move on. It was a bombshell. You know, there  
17 was no - - - disturbingly, there was no further  
18 discussion of this. And they were just given this  
19 bit of information without any explanation. It  
20 certainly goes to the heart of what a fair trial is.  
21 It was unnecessary.

22 JUDGE SMITH: But was the - - - was the  
23 other evidence overwhelming?

24 MR. AUSTERN: The - - - this was a case of  
25 - - - his statements were the crux of the case where

1 the - - - the whole of the case. It was his  
2 statements from the evening of the crime. So there  
3 was not overwhelming - - -

4 JUDGE SMITH: There's a videotaped  
5 confession, which he doesn't say anything about nine  
6 bodies.

7 MR. AUSTERN: No.

8 JUDGE SMITH: And he says, I did it, and  
9 here's how I did it. How does the jury disbelieve  
10 that?

11 MR. AUSTERN: Well, at the end of his  
12 videotaped statement, he said he was there - - - his  
13 - - - he - - - he explained that - - - he completely  
14 referred to his - - - the woman he loved, and  
15 explained that he was doing this, that he was taking  
16 the fall for the woman he loved. I don't remember  
17 exactly what his words were there. He repeated that  
18 later. This all had to do with his - - - his defense  
19 was this had to do with - - -

20 CHIEF JUDGE LIPPMAN: Is there reason to  
21 believe, given her weak condition, that, you know,  
22 that a juror would - - - did anyone think that he did  
23 this out of love - - - that he confessed out of love  
24 - - - when she was so obviously in a very, very weak  
25 condition?

1 MR. AUSTERN: Well, I mean, they make much  
2 of that. I don't think there's much - - - I don't  
3 know. She's not accused of doing the - - -

4 JUDGE SMITH: But the defense theory has to  
5 be that she's the killer, right?

6 MR. AUSTERN: The defense theory - - -

7 JUDGE SMITH: I mean, the woman's there.  
8 If somebody - - -

9 MR. AUSTERN: - - - appears to be he  
10 arrived home and she was there, and that was what he  
11 presented. That was his defense. Yes, that was what  
12 he testified to.

13 JUDGE READ: What about the forensic  
14 evidence? Wasn't there forensic evidence that was  
15 also consistent with your client's guilt? In other  
16 words, that what he described jibed with - - -  
17 correlated very well with the forensic evidence of  
18 the blows, and where the blows were delivered?

19 MR. AUSTERN: Your Honor, it's difficult to  
20 discuss, but, you know, he took a knife to this body  
21 after it was already - - - you know, after the death,  
22 and dismembered this body, and certainly there is - -  
23 - he had the opportunity - - - he viewed this body,  
24 so that could partially explain it. He also,  
25 perhaps, could have, you know, made those moves

1 elsewhere, so I don't find that very compelling.  
2 Certainly, it all seems to come down to his testimony  
3 and the People's case. And here it seems - - -

4 JUDGE SMITH: Well, there still - - -

5 JUDGE RIVERA: The jurors certainly could  
6 find his version fantastical, right? So if they  
7 really cannot believe this story, the fact that  
8 you've got this other statement that gets in, how is  
9 that harmless?

10 MR. AUSTERN: If they - - - I'm sorry; I  
11 didn't understand, Your Honor. If they - - -

12 JUDGE RIVERA: If they don't believe his  
13 version, obviously. They just think that is - - -  
14 it's just not believable to them.

15 MR. AUSTERN: Well, the People had the  
16 burden to prove the case beyond a reasonable doubt.  
17 So certainly it starts there, and then they look at  
18 his defense, and they - - - he had a defense here.  
19 He had the right to present that defense. I should  
20 say, too, in terms of some of this weighing - - -

21 JUDGE RIVERA: Well, he presented the  
22 defense, right?

23 MR. AUSTERN: He presented - - - he  
24 testified, right.

25 JUDGE RIVERA: Right, yes.

1 MR. AUSTERN: He testified to - - - and the  
2 jury, unfortunately, was given this nine other  
3 bodies. And I think it's difficult - - -

4 JUDGE SMITH: I'm not so - - - I'm - - - I  
5 think some of us are having trouble imagining the  
6 juror who, forgetting about the nine bodies, and  
7 forgetting about the other inadmissible stuff, how  
8 does - - - describe the state of mind of a juror with  
9 reasonable doubt. What does that juror think might  
10 have happened?

11 MR. AUSTERN: What does that juror think  
12 might have happened? That juror thinks that they  
13 have a serial - - - they've just been told by  
14 Detective Cawley that this person is a serial killer,  
15 a madman. They have an elephant in the room.  
16 They're supposed to weigh the - - -

17 JUDGE SMITH: No, no, no. I'm talking  
18 about a hypothetical juror who hasn't heard that  
19 evidence. How - - - how can that juror rationally  
20 come to the conclusion, oh, this - - - there's  
21 reasonable doubt here; I should acquit.

22 MR. AUSTERN: I think there's reasonable  
23 doubt here. He - - - there's every reason that a  
24 juror could acquit here. His defense fit with what  
25 his statement was. They had the right to look at the

1 evidence. I should say - - -

2 JUDGE SMITH: I guess, they - - -

3 JUDGE GRAFFEO: They'd have to believe that  
4 the woman on the dialysis committed the murder,  
5 right? Isn't that the only way that - - -

6 MR. AUSTERN: Well, that's one way; that  
7 was what was presented.

8 JUDGE GRAFFEO: - - - the jury would acquit  
9 him?

10 MR. AUSTERN: The idea was that he was  
11 doing - - - that she did, right, kill him, and I  
12 don't think there's any reason to believe - - - I  
13 think there's a lot out there, I should say,  
14 suggesting that, for one thing, that confessions are  
15 not always truthful. And there's a lot of cases  
16 where that's evident. And I think there are a lot of  
17 cases out there, where people on dialysis have killed  
18 people. I don't know - - - I find it, you know, hard  
19 to believe that that would not - - - that she was  
20 incapable of doing this because she was on dialysis.  
21 I think a juror could easily have found that she  
22 could have done this. I mean, they did present that  
23 she was on dialysis. They didn't present anything  
24 more. There's no real reason to know that that  
25 evening - - -

1                   JUDGE RIVERA: But they might have doubted  
2 the motive and thought that he really had the motive.  
3 I mean, there is clearly evidence that goes against  
4 your client. It - - - again, my question: what  
5 makes it so - - - if the jury believes that it's just  
6 fantastical, does that not outweigh the nine other  
7 bodies?

8                   MR. AUSTERN: Well, you know, the jury  
9 deliberated for two days, so I think the jury took  
10 this case very seriously. I think juries do take  
11 this seriously. I think when you have nine other  
12 bodies - - - when you have that statement - - - I  
13 think when you look at the Appellate Division  
14 decision, it is a very uncomfortable decision. I  
15 think it would be - - - I would ask the court to look  
16 at some other murder case and think about this; to  
17 ask a friend or someone not here oh, I'm going to  
18 tell you about this story, and this person talked  
19 about nine other bodies.

20                   And I also would think about what about the  
21 situation where - - - what if the detective had just  
22 said this, no statement, had just said, you know,  
23 look, he's got nine other bodies. And the court had  
24 said, well, please, you know, pay no attention to  
25 that. You know, I think that under a variety of

1 circumstances that we do have this fundamental right  
2 to a fair trial.

3 CHIEF JUDGE LIPPMAN: Thank you.

4 MR. AUSTERN: And then also under harmless  
5 error - - -

6 CHIEF JUDGE LIPPMAN: You'll have your  
7 rebuttal. Thank - - -

8 MR. AUSTERN: - - - we ask for reversal.  
9 Thank you.

10 CHIEF JUDGE LIPPMAN: Thanks, counsel,  
11 appreciate it.

12 MR. BRAUN: Good afternoon, Your Honors.  
13 May it please the court, Justin J. Braun for the  
14 Office of the District Attorney.

15 CHIEF JUDGE LIPPMAN: Counsel?

16 MR. BRAUN: Yes.

17 CHIEF JUDGE LIPPMAN: Counsel, what could  
18 be more - - - as I said to your adversary - - - more  
19 prejudicing, in terms of an ultimate result, then to  
20 have a statement, then, that this guy killed nine  
21 other people?

22 MR. BRAUN: I will - - -

23 CHIEF JUDGE LIPPMAN: Isn't that, on its  
24 face, a shocking thing to have come in?

25 MR. BRAUN: There's definitely prejudice in

1           that statement. I won't quibble with that. But - -  
2           -

3                       CHIEF JUDGE LIPPMAN: So how do you - - -

4                       MR. BRAUN: - - - but the reason - - -

5                       CHIEF JUDGE LIPPMAN: How do get you around  
6           that to where you want us to go?

7                       MR. BRAUN: Well, because the reason - - -  
8           first of all, there's absolutely no evidence in this  
9           record that anyone really took - - - you know, the  
10          police - - - that the police or the ADA took the - -  
11          - as Judge Smith pointed out - - - took it seriously  
12          that, oh, well, I did - - - you know, I did these  
13          nine other bodies. It comes up - - -

14                      CHIEF JUDGE LIPPMAN: But why do you think  
15          - - -

16                      JUDGE SMITH: One - - - to say I killed one  
17          might more prejudicial in a way, because you might  
18          believe that?

19                      MR. BRAUN: Well, I mean, it's more just  
20          the way it came out. It comes across as braggadocio.  
21          It comes across as, you know, exactly, which is why  
22          it was introduced.

23                      CHIEF JUDGE LIPPMAN: Don't you think it  
24          could also come across that - - - and I hear you and  
25          what you're saying - - - don't you think it also

1           could come across that this guy is a, you know, the  
2           worst person in the history of the world, and - - -

3                         MR. BRAUN:   There's - - -

4                         CHIEF JUDGE LIPPMAN:   - - - and how can we  
5           let him - - - you know, I mean, this is really quite  
6           - - -

7                         MR. BRAUN:   There's - - -

8                         CHIEF JUDGE LIPPMAN:   - - - bizarre to have  
9           that kind of thing come into the jury.

10                        MR. BRAUN:   There is a danger of that.  
11           There was limiting instructions.  It came out just  
12           once, briefly.  It wasn't brought up in summation,  
13           and it came out for a very specific purpose based on  
14           the facts of this case.

15                        CHIEF JUDGE LIPPMAN:   What's the purpose?

16                        MR. BRAUN:   Thank you for asking.  This  
17           defendant brought up the issue of voluntariness and  
18           identity.

19                        CHIEF JUDGE LIPPMAN:   So, that's what it's  
20           there for and the jury is able to segregate that in  
21           terms of looking at this, that it's supposed to show  
22           that it's voluntary?

23                        MR. BRAUN:   I believe that's correct,  
24           because there's evidence replete throughout he - - -  
25           and by the way, there were three confessions, not

1 just one.

2 JUDGE PIGOTT: Let me - - - can I interrupt  
3 you? Mr. Austern raises this nine bodies thing, but  
4 he also in his brief points out, as the First  
5 Department did, that you had the nephew testify as  
6 to, you know, what was, I guess, clearly hearsay and  
7 damaging to the defendant, that the social worker  
8 testified to what was clearly hearsay and damaging to  
9 the defendant. Then the detective testifies to this  
10 nine bodies thing and - - - which is obviously  
11 damaging to the defendant.

12 And it seems like they were trying to reach  
13 a point, where under Crimmins, in a nonconstitutional  
14 point of view, at some point, doesn't the scales get  
15 a little bit tipped, and - - - I know you're down to  
16 possibility, and you had all these confessions and  
17 stuff - - - it was going through my mind, if they  
18 were trying to send something to the trial - - - your  
19 trial lawyers about putting in all of this evidence  
20 that perhaps, A, was not - - - should not have gone  
21 in, and probably was not necessary since you had a  
22 pretty nice confession on tape.

23 MR. BRAUN: Well, I'd like to answer Your  
24 Honor's questions in two ways. The first question is  
25 even if we agree with the Appellate Division that

1 this was error, harmless error analysis clearly  
2 applies. And it clearly applies, as Your Honor said,  
3 under the Crimmins nonconstitutional standard,  
4 because that wasn't preserved at trial, and even  
5 under Crimmins, you know, where we had a prosecutor  
6 saying, you know, we - - - the defendant hasn't  
7 testified, pointing that up. That was determined not  
8 to be constitutional error, or even implicate  
9 fundamental fairness of trial.

10 So under a nonconstitutional harmless error  
11 standard, is there a reasonable probability that they  
12 would have come up with a different result? Here we  
13 have three very damaging, very specific, very  
14 gruesome confessions. We had forensic evidence that  
15 - - -

16 JUDGE SMITH: Isn't it highly likely that  
17 he - - - he was clearly trying to protect the woman,  
18 wasn't he? In the taped confession, where he says,  
19 oh, she came home after everything was all cleaned  
20 up. She never saw a thing. Wasn't it pretty clear  
21 that he was, at least, stretching a point in her  
22 favor?

23 MR. BRAUN: Well, I think what he was - - -  
24 I - - - more likely trying to control the situation  
25 and control her behavior, which is what he was doing

1 from the start. In other words, he was trying to - -  
2 - he was trying to say, don't go to the precinct  
3 without me. You know, I want to talk to you before I  
4 give my statement. I want to do - - - you know, he's  
5 - - - he's - - - when he's - - -

6 CHIEF JUDGE LIPPMAN: Yeah, but to what end  
7 other than to protect her, I think is what Judge  
8 Smith is saying.

9 MR. BRAUN: Well, because I think - - - I  
10 think ultimately, he knew - - - it's very interesting  
11 that he waited until after she died before asserting  
12 this defense that, okay, well, now, all of sudden,  
13 it's all on her, and not on me.

14 JUDGE SMITH: But that - - - that's - - -  
15 that's not - - - that doesn't necessarily prove his  
16 guilt, does it? I mean, that proves that he was in  
17 love with her, and that until - - - as long as she  
18 was alive, he kept her secret.

19 MR. BRAUN: Well, Your Honor, I mean, he  
20 said at the end of his statement, you know, that - -  
21 - not that she did it or she didn't do it. What he  
22 said was I know that she had nothing to do with this,  
23 and that's why I'm confessing here. So - - -

24 JUDGE SMITH: Yeah, he's at great pains to  
25 stress that she had nothing whatever - - - I mean, in

1 fact, he - - - he's - - - she's more innocent in his  
2 statements than she is in hers, isn't she?

3 MR. BRAUN: But I think that's more of an  
4 acknowledgement of the obvious, because I think it's  
5 obvious that she had nothing to do with it.

6 JUDGE SMITH: Well, it's not obvious that  
7 she had nothing to do with cleaning up or disposing  
8 of the body.

9 MR. BRAUN: Well, she was very, very weak.  
10 The defendant, himself, testified that - - -

11 JUDGE SMITH: It's not obvious that she  
12 never saw the body, which is basically his testimony.

13 MR. BRAUN: Well, his testimony - - -

14 JUDGE SMITH: Not his testimony, I'm sorry.  
15 His confession is it was all gone. I had disposed of  
16 every - - - all the evidence and washed the house  
17 down before she came home. Is that really - - - is  
18 that really believable?

19 MR. BRAUN: No, I mean, basically what his  
20 testimony is saying is I came into a locked  
21 apartment, found a body lying on the floor - - -

22 JUDGE SMITH: No, I'm sorry. His - - - I'm  
23 suggest - - - I understand you're saying his  
24 testimony's not believable. I'm suggesting his  
25 confession's not believable, because it so completely

1 whitewashes her.

2 MR. BRAUN: Well, no, I disagree with that,  
3 Your Honor. I think his confession is very  
4 believable, because it - - - number one, he goes into  
5 great detail about what he did, both during the  
6 murder and in disposing of the body, and that's  
7 completely backed up by the forensic evidence.

8 JUDGE SMITH: And he claims he did every  
9 bit of it before she - - - before she got home, which  
10 is contrary to what she said.

11 MR. BRAUN: Well, Your - - - well, if it's  
12 - - - again, Your Honor, I mean, that's - - - I think  
13 that there's every bit of evidence to support that  
14 she did that before he got home - - - I mean, that he  
15 did that before she got home, because - - - and even  
16 if she didn't, the very fact of the matter is, this  
17 was a domestic violence relationship.

18 JUDGE SMITH: But was it physically  
19 impossible for her to have killed the woman? I grant  
20 that it was physically impossible for her to do the  
21 cover-up afterwards, but is there evidence that she  
22 could not have struck the fatal blow?

23 MR. BRAUN: Well, it's even difficult to  
24 determine what the fatal blow is, because there were  
25 so many blows - - -

1                   JUDGE SMITH: Okay, well, then the answer's  
2 no, right? She could have done it?

3                   MR. BRAUN: I guess it's theoretically  
4 possible that she could have done it. I mean, it's  
5 theoretically possible anything. But the point of  
6 the matter is, is there a reasonable probability that  
7 she did it, and the answer is no. The reasonable  
8 probability is that - - - exactly as he said in his  
9 confession. He came home. He saw a woman who he  
10 thought was "taking her place". He became enraged.  
11 He started stabbing her with one knife. That didn't  
12 go so well. He grabbed another knife, starting  
13 stabbing her even more, and then at the end, decided  
14 to dispose of her body, rather than his completely  
15 implausible trial testimony, which is that he came  
16 home in a locked apartment, saw a body; no one else  
17 is there, decided not to call the police, waited  
18 until she got home. Then somehow she controlled him  
19 to say, okay, let's cut up the body instead of  
20 calling the police, because that's what he really  
21 wanted to do. It just - - - the pieces of his  
22 testimony make absolutely no sense.

23                   CHIEF JUDGE LIPPMAN: Counsel, what about  
24 your adversary says that this is all just  
25 fundamentally unfair? Why - - - well, how do you

1 answer to that? Why isn't it - - - again, you  
2 acknowledge that this is quite an eye-opener in terms  
3 of, you know, what might be - - - come to the  
4 attention of the fact finder.

5 MR. BRAUN: Your Honor, I would answer that  
6 by saying, first of all, fundamental unfairness is  
7 very close to the constitutional standard. In fact,  
8 in Crimmins, it even says that it parallels the  
9 constitutional standard and in some ways overlaps.  
10 Here there's no constitutional analysis warranted  
11 here, for the reasons I indicated earlier. But even  
12 so, as far as the fairness, you have to look at the  
13 circumstances of this case. He put his own  
14 voluntariness at issue. And I think that it's - - -  
15 by saying, like I said, this braggadocio - - -

16 CHIEF JUDGE LIPPMAN: That's the bottom  
17 line of your argument that once he puts that into  
18 play, this - - - it's enough.

19 MR. BRAUN: Not only that, but he also put  
20 his identity into issue. He put his motive into  
21 issue, which is why the other evidence that Judge  
22 Pigott indicated also needed to come out, because it  
23 needed to fill in gaps in the narrative - - -

24 CHIEF JUDGE LIPPMAN: You agree that that's  
25 questionable, too, the two instances that Judge

1 Pigott talks about.

2 MR. BRAUN: Well, I actually - - - when we  
3 say "questionable", I mean, I think there's law  
4 supporting the introduction of all of these things.  
5 For example, in - - - when this court said in People  
6 v. Mateo, we had a case where there was evidence - -  
7 -

8 JUDGE SMITH: Wait, wait - - -

9 MR. BRAUN: - - - of three murders that  
10 came out.

11 JUDGE SMITH: But no, the other - - - the  
12 other evidence, the statement - - - the threats to  
13 the victim and the statement to Phyllis, no one's  
14 saying that - - - they're not relevant. They're  
15 obvious hearsay, aren't they?

16 MR. BRAUN: Yes, but, well, again,  
17 obviously we also have - - - we also have the  
18 harmless error analysis and those too, but they're -  
19 - - but they're - - -

20 JUDGE SMITH: I guess, is there - - - do  
21 you concede that there can be - - - there - - - it's  
22 possible that no matter how overwhelming the evidence  
23 is, no matter how obviously guilty the guy is, some  
24 merits just render the trial unfair, and you've got  
25 to do it again?

1 MR. BRAUN: Well, there are some errors  
2 that are so prejudicial, but in this case, you have -  
3 - -

4 JUDGE SMITH: No, no, no. I guess, I  
5 wouldn't - - - I wouldn't say prejudicial, because  
6 there are some cases where you can't prejudice him in  
7 any way because you've got him on - - - you've got  
8 six movies of him committing the crime. Still,  
9 aren't there some errors that render the trial  
10 unfair?

11 MR. BRAUN: Yes, but - - -

12 JUDGE SMITH: - - - and can't be harmless?

13 MR. BRAUN: - - - this isn't one of them,  
14 where the People are entitled to respond to the  
15 arguments that he brings out, where the People are  
16 entitled to fill in the gaps in the narrative so that  
17 the jury can have - - -

18 CHIEF JUDGE LIPPMAN: But, but - - -

19 MR. BRAUN: - - - an understanding.

20 CHIEF JUDGE LIPPMAN: But you would agree  
21 that normally, in a vacuum, talking about this guy's  
22 statement that he killed nine other people, that  
23 would be unfair, absent the arguments that you're  
24 making in this - - -

25 MR. BRAUN: I would - - -

1 CHIEF JUDGE LIPPMAN: - - - particular  
2 case.

3 MR. BRAUN: I would absolutely agree with  
4 that. And I would just say that this case is very  
5 much like Mateo.

6 CHIEF JUDGE LIPPMAN: Okay, thanks,  
7 counsel.

8 MR. BRAUN: Thank you.

9 CHIEF JUDGE LIPPMAN: Counselor, rebuttal?

10 MR. AUSTERN: Yeah, just briefly, I wanted  
11 to point out in terms of constitutional harmless  
12 error, that there are three errors, so that  
13 cumulatively, as the court pointed out, that could  
14 rise to constitutional level. The other thing I  
15 wanted to point out on constitutional question is  
16 that defense counsel argued this was grossly  
17 improper. This was tremendously prejudicial, the  
18 nine bodies. And then his said it made my client  
19 look like a serial killer. I'd just like to point  
20 out that if he had mumbled "due process", you know,  
21 according to my opponent, we would have a  
22 constitutional claim.

23 What he said here was about, you know - - -  
24 he made about as a big a claim as he could have made  
25 without saying the words due process. So we do

1 maintain that it's still a constitutional claim  
2 requiring - - -

3 CHIEF JUDGE LIPPMAN: But he says your  
4 client opened the door, basically.

5 MR. AUSTERN: My client did not open the  
6 door. It's difficult - - - it is difficult to  
7 imagine a case in which you would open the door to  
8 this. I think Mateo is a good case to point to,  
9 because in that case, this court made it very clear  
10 that - - - that sort of - - - that four other bodies  
11 didn't belong there, and made - - - went - - - bent  
12 over backwards to say, "It was an unusual case."  
13 Those were unusual circumstances in Mateo, that  
14 ordinarily - - - this sort of thing just doesn't  
15 belong there.

16 There was an elephant in the jury room  
17 here. There were - - - and I should say, not just an  
18 elephant, there was a - - - these other evidentiary  
19 claims, it seemed like the court very - - - you know,  
20 was sort of - - - the court's actions were designed  
21 to convict my client.

22 I should - - - I just wanted to briefly  
23 note that all of the evidence still exists. If this  
24 court reverses, I don't think - - - the People are  
25 not in the position where they're going to lose any

1 of this evidence. If they have it on videotape, they  
2 have it on videotape. If they think that a jury  
3 could look at this rationally and convict, then let's  
4 have a retrial and find out.

5 I think that there is - - - that it's - - -  
6 this is a disturbing case in terms of what my client  
7 did, and based upon the dismemberment of this body,  
8 which was incredibly disturbing, that he admitted to,  
9 that he deserves a little heightened care here, too,  
10 and this court has an obligation to look at it and to  
11 - - - he was denied a fair trial. We ask for  
12 reversal.

13 CHIEF JUDGE LIPPMAN: Okay, counsel.

14 MR. AUSTERN: Thank you.

15 CHIEF JUDGE LIPPMAN: Thank you. Thank you  
16 both.

17 (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 v. Byer, No. 84 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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