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COURT OF APPEALS

STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

No. 67

MIGUEL MEJIAS,

Appellant.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

No. 68

ANTONIO RODRIGUEZ,

Appellant.

20 Eagle Street
Albany, New York 12207
March 19, 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

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1 CHIEF JUDGE LIPPMAN: 67 and 68, Mejias and
2 Rodriguez.

3 MR. TOUGER: Good afternoon, Your Honors.

4 CHIEF JUDGE LIPPMAN: Good afternoon,
5 counselor. Who do you represent, counselor?

6 MR. TOUGER: Antonio Rodriguez.

7 CHIEF JUDGE LIPPMAN: Okay. Go ahead.

8 MR. TOUGER: May I have - - -

9 CHIEF JUDGE LIPPMAN: Do you want any
10 rebuttal time?

11 MR. TOUGER: I'm not taking rebuttal time.

12 CHIEF JUDGE LIPPMAN: Okay. Go.

13 MR. TOUGER: Okay. Your Honors, the trial
14 court here did not have the discretion, under People
15 v. Buford, to avoid isolating jurors by conducting
16 only a group inquiry.

17 CHIEF JUDGE LIPPMAN: What should the judge
18 have done under Buford?

19 MR. TOUGER: Under Buford, the judge should
20 have conducted an individual, probing and tactful, in
21 camera inquiry of the author of the note.

22 JUDGE SMITH: But was anybody saying that
23 there was a juror who was grossly disqualified?

24 MR. TOUGER: Yes.

25 JUDGE SMITH: Which juror?

1 MR. TOUGER: The author of the note.

2 JUDGE SMITH: And you - - - were you
3 claiming that there was some disqualifying factor, or
4 you just wanted him to find out whether - - - you
5 wanted her to find out whether there was such a
6 factor?

7 MR. TOUGER: The disqualifying factor, Your
8 Honor, was that the note said, "We want to know
9 how/when and under" - - -

10 JUDGE SMITH: Well, I understand the note
11 said "we" - - -

12 MR. TOUGER: Right.

13 JUDGE SMITH: - - - and from that you draw
14 the inference, which seems not ridiculous, that maybe
15 they were talking to each other.

16 MR. TOUGER: Correct.

17 JUDGE SMITH: But talking to each other - -
18 - and they're not supposed to talk to each other, but
19 you wouldn't say that just premature deliberations,
20 in itself, is grossly disqualifying, would you or
21 would you?

22 MR. TOUGER: I would say it would depend on
23 the fact of - - - fact of the case.

24 JUDGE SMITH: Actually, is there - - -

25 MR. LEWIS: Hence, the necessity - - -

1 JUDGE SMITH: Is there any case that you
2 can cite where we have held - - - where any court has
3 held that premature deliberations disqualified a
4 juror?

5 MR. TOUGER: People v. McClenton, I
6 believe, did hold - - - did make such a holding. In
7 that case, what happened was a - - - during jury
8 deliberations, a juror sent the court a note that
9 said - - - or asked the court to call his employer,
10 okay? The note said, "It is beyond a reasonable
11 doubt that I will make it to work tonight." That's
12 what it said. The trial court refused to conduct an
13 individual inquiry. However, the Appellate Division
14 First Department in McClenton said this could have
15 indicated that the juror had prematurely discussed
16 the facts of the case and was, therefore, going to
17 render a verdict so as to get to work. The juror
18 could have just wanted to get done with the case to
19 get to work. We didn't know or we don't know because
20 the court refused - - -

21 JUDGE SMITH: Okay. I understand - - - I
22 understand your point, but they didn't actually hold
23 in that case that there was gross disqualification;
24 they just held there should have been more inquiry?

25 MR. TOUGER: Right, not - - -

1 JUDGE GRAFFEO: The judge in McClenton
2 didn't ask anything, correct?

3 MR. TOUGER: Correct.

4 JUDGE GRAFFEO: Whereas - - -

5 MR. TOUGER: Just more inquiry.

6 JUDGE GRAFFEO: - - - the judge here - - -
7 I understand that you felt it had to be individual
8 questioning, but the judge here did make an inquiry
9 of the jurors.

10 MR. TOUGER: It made a group inquiry, not a
11 Buford inquiry, Your Honor. Buford has to be
12 individual, again, probing and tactful and in camera.

13 CHIEF JUDGE LIPPMAN: And once he doesn't
14 make it - - - once he doesn't make that inquiry in
15 camera, that's it?

16 MR. TOUGER: Yes, Your Honor.

17 CHIEF JUDGE LIPPMAN: I mean, there's no -
18 - - there's no other looking into the circumstances?

19 MR. TOUGER: No, Your Honor.

20 CHIEF JUDGE LIPPMAN: He's got to do it or
21 - - -

22 MR. TOUGER: Correct. I mean, the judge
23 simply does not have the discretion to fashion
24 whatever kind of inquiry the judge deems appropriate,
25 given this court's rule in People v. Buford. This

1 court said the court must conduct this specific kind
2 of inquiry.

3 CHIEF JUDGE LIPPMAN: And basically, the
4 "we" is enough? Once we see that, in this case where
5 really it's all about that - - - that use of that
6 word, right?

7 MR. TOUGER: In this case, Your Honor, yes.

8 JUDGE GRAFFEO: You would - - -

9 JUDGE SMITH: What is the - - -

10 JUDGE GRAFFEO: - - - view no ambiguity?

11 JUDGE SMITH: What - - -

12 MR. TOUGER: I'm sorry?

13 JUDGE GRAFFEO: You see no ambiguity in the
14 note?

15 MR. TOUGER: Ambiguity as to what "we"
16 means?

17 JUDGE GRAFFEO: The use of the word "we".

18 MR. TOUGER: No, Your Honor. But McClenton
19 says even if there is ambiguity, trial courts should
20 still conduct an inquiry so as to demystify that
21 ambiguity. In other words, the only person who knew
22 what "we" meant is the author of the note who wrote
23 it.

24 JUDGE RIVERA: So I'm going to ask you two
25 questions. Let me just start with this one. What -

1 - - what, if any, meaning, in this context, does the
2 word or the phrase where they're asking "and/or under
3 what pretext" - - - do you know what does that part
4 of that question signify?

5 MR. TOUGER: It signifies that at least one
6 juror agreed with the prosecution's theory that the
7 defendants in this case used coded and cryptic
8 language to conceal their criminal intent. Okay?
9 There was numerous testimony, significant testimony
10 throughout the trial that these defendants would hide
11 what they meant. So "pretext", in that context,
12 clearly means that.

13 JUDGE RIVERA: So your argument is that
14 it's not just the word "we", it's the sentence; "we",
15 of course, implying more than one.

16 MR. TOUGER: Yes, Your Honor.

17 JUDGE RIVERA: The rest of the sentence,
18 that sort of triggers this.

19 And then my second question - - - I know
20 your time is up, so just very quickly. What if - - -
21 are you also suggesting that the judge saying, "I can
22 say I received a note about evidence from the jury,
23 and I assume they have not discussed the case and
24 move on from here," suggests that the judge had
25 already made a decision without having actually

1 inquired of the jurors?

2 MR. TOUGER: Yes, Your Honor, but the
3 reason why the judge decided not to conduct an
4 individual inquiry here is not that there was nothing
5 to inquire about, but rather because the judge did
6 not want to isolate jurors. Earlier in this case,
7 there was an unfortunate incident - - -

8 JUDGE PIGOTT: But isn't that a
9 discretionary call? In other words, in the cases you
10 cite, there was no inquiry, and in this one you're
11 right, he said, you know, I went through this once
12 before, I'm not going to do it - - - I'm just - - -
13 I'm going to ask the array - - - and he did, and no
14 one raised their hands.

15 MR. TOUGER: No, and - - - would you repeat
16 the question? I'm sorry.

17 JUDGE PIGOTT: Well, he did make an inquiry
18 here. You - - -

19 MR. TOUGER: Not a Buford inquiry, though.

20 JUDGE PIGOTT: Well, you - - - you say that
21 inquiry has to be individual, in chambers with
22 counsel present. He's saying, you know, I'm going to
23 ask them, but because of what I went through with
24 that other lady I'm not going to - - - I'm not going
25 to do it that way.

1 MR. TOUGER: Correct, Your Honor. But I do
2 not think that what happened before, with the
3 malodorous juror, gave the trial court more
4 discretion than either the law or Buford allows.

5 JUDGE SMITH: I'm sorry; I know he's out of
6 time - - -

7 CHIEF JUDGE LIPPMAN: Go ahead, Judge
8 Smith.

9 JUDGE SMITH: - - - but suppose the note
10 had said "I" and not "we", would a Buford inquiry
11 still have been necessary?

12 MR. TOUGER: I don't know, Your Honor. I
13 mean, all we have here is "we", so we're kind of
14 stuck with the record. To speculate - - -

15 JUDGE SMITH: I guess I'm going back to
16 Judge Rivera's question about "pretext". Does the
17 word "pretext", in itself, trigger the need for a
18 Buford inquiry?

19 MR. TOUGER: I think - - - I think it does.

20 JUDGE SMITH: Did anybody say that at the
21 time of trial, said, Judge, apart from the "we",
22 apart from premature deliberations, you better check
23 out whether this person has already made up his or
24 her mind?

25 MR. TOUGER: The specific objection was

1 geared toward "we", however, in the response to that
2 objection, the judge did discuss the meaning of the
3 word "pretext", and the judge stated the jury - - -
4 or the judge theorized that the juror just had an
5 awkward way of expressing herself.

6 CHIEF JUDGE LIPPMAN: Okay, counselor.

7 MR. TOUGER: Thank you.

8 CHIEF JUDGE LIPPMAN: Counselor, you want
9 any rebuttal time?

10 MR. LEWIS: I will want one minute, yes.

11 CHIEF JUDGE LIPPMAN: One minute, sure. Go
12 ahead.

13 MR. LEWIS: May it please the Court. My
14 name is John Lewis; I represent Miguel Mejias.

15 First of all, let's be clear about one
16 thing. The judge made, essentially, no inquiry at
17 all. Asking a group question - - -

18 CHIEF JUDGE LIPPMAN: Well, he did a
19 collective - - -

20 MR. LEWIS: One ques - - - one question
21 saying, I assume none of you have been discussing the
22 case; if I'm wrong, somebody raise their - - - you
23 know, raise your hand. Your Honors, with all due
24 respect, nobody's going to raise their hand - - -

25 JUDGE SMITH: Could that - - -

1 MR. LEWIS: - - - under those
2 circumstances.

3 JUDGE SMITH: I mean, I see your point, but
4 couldn't that - - - didn't that, perhaps superficial
5 inquiry also serve the function of a warning saying,
6 look, if you've - - - if you've done it, I don't
7 really expect to hear about it, but don't do - - -
8 but stop doing it?

9 MR. LEWIS: I don't care about a warning;
10 the damage has already been done. A warning would
11 prevent it being done again.

12 JUDGE SMITH: What is the damage - - -

13 MR. LEWIS: But the damage - - -

14 JUDGE SMITH: What is the damage that's
15 already been done?

16 MR. LEWIS: A juror's right to have a jury
17 of twelve deliberating as one.

18 JUDGE SMITH: So the damage is the
19 premature deliberations?

20 MR. LEWIS: It's two things: the premature
21 deliberation; the other thing is, and let's go back
22 to "pretext", because it is buying a major theory of
23 the prosecution in this case. Their theory, as Mr.
24 Moore (sic) said, is that that deception was the
25 modus operandi - - -

1 JUDGE SMITH: Okay. I know that, but let
2 me - - -

3 MR. LEWIS: - - - of this group.

4 JUDGE SMITH: I - - -

5 MR. LEWIS: And they're - - - and they're
6 saying - - -

7 JUDGE SMITH: I understand - - -

8 MR. LEWIS: - - - we buy it.

9 JUDGE SMITH: I see that you have two
10 points - - -

11 MR. LEWIS: But with the word "pretext".

12 JUDGE SMITH: - - - but let me do one at a
13 time. Suppose all you have is premature
14 deliberations. You say the damage has been done;
15 you're not entitled to a mistrial or to removal of a
16 juror just because there have been premature
17 deliberations, are you?

18 MR. LEWIS: No, you're entitled to an
19 inquiry, and that's what Buford makes you entitled
20 to, and the judge didn't do it. Now, let's do a
21 little bal - - -

22 JUDGE SMITH: Well, wasn't - - -

23 MR. LEWIS: Let's do a little balancing
24 test here.

25 JUDGE SMITH: In Buford - - - in Buford,

1 there was some reason to think that the jury had - -
2 - the juror had a preconceived opinion. Now, I
3 understand you say "pretext" might mean the same
4 thing.

5 MR. LEWIS: Yes, I do. It's not - - -

6 JUDGE SMITH: But I - - - there's a serious
7 question as to whether you preserve that issue, isn't
8 there?

9 MR. LEWIS: Well, the couns - - - trial
10 counsel preserved the issue of individual inquiry
11 over about six pages - - -

12 JUDGE SMITH: Yes, but - - -

13 MR. LEWIS: - - - I mean, repeatedly.

14 JUDGE SMITH: - - - the idea - - -

15 MR. LEWIS: He did not bring up the
16 "pretext" - - - the specific "pretext" thing; I don't
17 think he has to. He brought up the "we" thing. I
18 think it more than alerted the trial court of what
19 the problem was.

20 JUDGE SMITH: All you had was the "we"; is
21 Buford triggered?

22 MR. LEWIS: I think it is. I think it is,
23 because the - - - because - - - and we - - - and the
24 briefs cite case law saying that - - - don't forget,
25 there had not been closing argument yet, and we - - -

1 you have the right not to have - - - if you're a
2 defendant - - - not to have the jury deliberating
3 before they've heard counsel's closing argument.
4 That is why at every trial, judges - - - at every
5 break judges say, jury, keep an open mind, don't - -
6 - you know, you've only heard one side of the case,
7 you haven't heard all the - - - keep an open mind.

8 CHIEF JUDGE LIPPMAN: Is your argument that
9 if you don't have the inquiry you don't know whether
10 there was a premature discussion and, therefore - - -

11 MR. LEWIS: Of course, exactly that's the
12 argument.

13 CHIEF JUDGE LIPPMAN: - - - and therefore,
14 you assume that - - -

15 MR. LEWIS: Exactly that's the argument.
16 In a sense, you know, what the People are doing here
17 are using the trial court's own error as a reason not
18 to reverse. You know, they're saying it's
19 speculative; we don't know exactly what went on in
20 that jury room. Well, we don't, but that's because
21 the judge didn't do her job.

22 CHIEF JUDGE LIPPMAN: And your argument is
23 the problem that the judge had earlier just is - - -
24 is irrelevant?

25 MR. LEWIS: I'm sorry?

1 CHIEF JUDGE LIPPMAN: Your argument is the
2 problem that the judge had earlier, with isolating
3 the juror or whatever - - -

4 MR. LEWIS: Completely - - -

5 CHIEF JUDGE LIPPMAN: - - - was irrelevant?
6 Is that - - -

7 MR. LEWIS: Completely irrelevant - - -
8 completely - - - and a completely different
9 situation; completely different situation. There is
10 nothing - - - you know, I'd really like to do a
11 balancing test. Let's look for an abuse of
12 discretion on the - - - what would - - - what would
13 be the interest in making the inquiry? The inquiry -
14 - - the interest in making the inquiry is depect
15 (sic) - - - defect (sic) - - - I'm sorry, protecting
16 a defendant's right to have - - - and the New York
17 State Constitution, by the way, emphasizes this - - -
18 to have his guilt or innocence determined by a jury
19 of twelve persons, all of whom deliberation ought to
20 be carried on as one body of twelve, in People v.
21 Ryan of this court.

22 The other interest is not to have the jury
23 form conclusions without being exposed to summation.

24 JUDGE SMITH: Okay. Let me - - -

25 MR. LEWIS: Now, what was - - - but what's

1 on the other side? Not isolating a juror? Where, in
2 New York juris - - -

3 JUDGE SMITH: Well, let me - - -

4 MR. LEWIS: - - - is that a value?

5 JUDGE SMITH: Let me walk you through - - -
6 I mean, and let me take "pretext" out of it, even
7 though I know you think I shouldn't. But suppose the
8 note just said, we want to know on what occasion
9 these two people met, so there's no - - - there's no
10 "pretext" in the note, it's just - - - just the "we".
11 You have your inquiry. How - - - give me a scenario
12 whereby that inquiry leads to some relief other than
13 a warning.

14 MR. LEWIS: Oh, the scenario is - - -
15 here's what - - - here's what could potentially
16 happen. The jurors - - - the judge makes individual
17 inquiries; it turns out that that "we" reflects five
18 different jurors, not just two, not just three, but
19 five jurors who want to know this, they may want to
20 know a lot of things, and they should not even know
21 what they want - - -

22 JUDGE SMITH: Well, are you allowed - - -

23 MR. LEWIS: - - - they shouldn't be
24 discussing.

25 JUDGE SMITH: Are you allowed to get into

1 the content of the premature deliberation?

2 MR. LEWIS: Yes.

3 JUDGE SMITH: Isn't that - - - aren't there
4 problems with that?

5 MR. LEWIS: You have to get into the
6 content of the premature deliberation.

7 JUDGE SMITH: So you're saying if they've
8 had premature deliberations, you say what did you
9 talk about, what did you say to each other?

10 MR. LEWIS: Yes.

11 JUDGE SMITH: Really?

12 MR. LEWIS: Emphatically, yes.

13 JUDGE PIGOTT: Well, then - - - then, I
14 mean, at that point - - -

15 MR. LEWIS: Emphatically, yes.

16 JUDGE PIGOTT: - - - it doesn't make any
17 difference if they're prematurely deliberating; you
18 should get a mistrial right there?

19 MR. LEWIS: It depends what they say, but
20 yes.

21 JUDGE PIGOTT: Why? Why?

22 MR. LEWIS: If you find that they have been
23 prematurely getting into the real merits - - -

24 JUDGE PIGOTT: Let's assume for a minute
25 this - - -

1 MR. LEWIS: It depends what they talked
2 about.

3 JUDGE PIGOTT: Let's assume for a minute
4 that this question they had was favorable to the
5 defense. In other words, they're not buying what was
6 - - - I mean, he may have been helping you. I know
7 we don't know.

8 MR. LEWIS: I - - - I don't know. The
9 point is it depends what they've been talking about,
10 and you don't know what they don't - - - what they
11 were talking about if you don't ask. And why the
12 heck not ask?

13 JUDGE GRAFFEO: Why - - - why does the
14 court have to specifically find out what they've said
15 to each other?

16 MR. LEWIS: I think - - -

17 JUDGE GRAFFEO: Can't they just - - -

18 MR. LEWIS: I think Buford - - -

19 JUDGE GRAFFEO: - - - ask if there's been
20 conversations between them about - - -

21 MR. LEWIS: And if so - - -

22 JUDGE GRAFFEO: - - - the evidence?

23 MR. LEWIS: - - - that's the first
24 question: Have there been conversations? And if so,
25 about what?

1 JUDGE GRAFFEO: Well, isn't that beyond
2 what we've usually said that the court should do?

3 MR. LEWIS: I think that's the whole - - -
4 I think that's the whole spirit behind Buford,
5 because - - - because what's at stake?

6 CHIEF JUDGE LIPPMAN: You're saying there
7 are certain things they could discuss that would be
8 okay?

9 MR. LEWIS: Yeah, lunch, you know. And
10 actually there was - - - the other side brought up a
11 case where I think - - - where lunch was an issue.
12 Yeah, you know, I think there is a de minimis
13 situation where if we - - - you know, if after proper
14 inquiry we find out that what we're talking about was
15 baseball scores or whatever - - -

16 JUDGE GRAFFEO: Well, wouldn't the first -
17 - - wouldn't the first question be, were you
18 discussing something pertaining to the evidence in
19 this case or were you just talking about something
20 that didn't have anything to do with the issues in
21 this case?

22 MR. LEWIS: Well, I like the way Your Honor
23 just phrased that question. I think that would be a
24 great way to phrase it. It's not the only way to
25 phrase it.

1 JUDGE SMITH: And then if the answer to
2 that question is we were talking about the evidence,
3 isn't - - - is the next - - - isn't the next
4 question: Whatever you talked about, can you put it
5 aside and decide this case fairly?

6 MR. LEWIS: Well, the judge can ask that
7 question, and - - -

8 JUDGE SMITH: You're saying he's got to
9 say, okay, tell me what you talked about?

10 MR. LEWIS: Yes, because - - - because
11 otherwise - - - otherwise the whole Buford - - - the
12 whole inquiry thing is - - - is a joke; it doesn't
13 mean anything, unless you can get to the heart of the
14 matter. We have to know to what degree, if any - - -
15 to what degree, if any, the whole jury system has
16 been compromised.

17 CHIEF JUDGE LIPPMAN: Okay, counselor.
18 You'll have your rebuttal.

19 MR. LEWIS: Thank you.

20 THE COURT: Counselor?

21 MR. STONE: Timothy Stone for the People.

22 CHIEF JUDGE LIPPMAN: How do you get around
23 Buford?

24 MR. STONE: This is not a Buford case.

25 This is - - -

1 CHIEF JUDGE LIPPMAN: What is it, if it's
2 not a Buford case?

3 MR. STONE: There needs to be - - -
4 although this court hasn't specifically articulated
5 what triggers the need for a Buford inquiry, there
6 has to be a credible or meaningful reason to believe
7 that a juror has engaged in - - -

8 CHIEF JUDGE LIPPMAN: What about "we" and
9 "pretext" in this case?

10 MR. STONE: I want to draw the court's
11 attention - - - I'll ask for your indulgence, just to
12 - - - I don't think I, in as detailed enough fashion,
13 set out the - - - the facts of this case, and I'd
14 just like to - - -

15 CHIEF JUDGE LIPPMAN: Yeah, but what - - -
16 answer my question, though, what about "we" and
17 "pretext"?

18 MR. STONE: That's what I want to - - - I
19 want to draw the court's attention to the context in
20 which this note arose. The - - -

21 CHIEF JUDGE LIPPMAN: Okay, go ahead.

22 MR. STONE: The witness that had just
23 testified, before the note arose, was co-defendant
24 Lantigua's former boss, who testified about
25 Lantigua's prior legitimate employment. The exhibits

1 that the jurors were looking at when the note came
2 forward were related to Lantigua's prior legitimate
3 employment. They talk aloud in the jury box; the
4 record shows that. The judge admonishes them. Then
5 the note gets passed up. And the note, in effect,
6 says, we, the jurors, want to know how Lantigua, who
7 had this legi - - - legit - - - excuse me - - -
8 legitimate job in the past, got roped into this drug
9 deal. That's the context in which the judge is
10 responding to this note. She's looking at it. The
11 note is immediately responsive to the testimony that
12 the jury just heard and the exhibits that they're
13 looking at, literally, while - - -

14 CHIEF JUDGE LIPPMAN: Why don't you need a
15 - - -

16 MR. STONE: - - - the note is passed up.

17 CHIEF JUDGE LIPPMAN: Why don't you need a
18 Buford questioning - - -

19 MR. STONE: There's noth - - - there's - -
20 -

21 CHIEF JUDGE LIPPMAN: - - - based on, even
22 in the context if you give - - -

23 MR. STONE: The only indication that there
24 was any discussion in this case was it happened in
25 the jury box, in open court, in front of three

1 defense attorneys, the judge and the attorney. And
2 that's the context, and I don't think - - -

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

4 JUDGE GRAFFEO: So then they were never in
5 the deliberation room?

6 MR. STONE: No. And this - - - they had
7 not been in the deliberation room this entire day.
8 They had heard this testimony of this defense
9 witness. They were examining the exhibits.

10 JUDGE PIGOTT: Is that normal? I was
11 surprised to find that, that - - - I pictured them
12 standing around the jury box looking at exhibits
13 before summation?

14 MR. STONE: They had just rest - - - the
15 defense had just rested, and the exhibits were being
16 published. And the exhibits - - -

17 JUDGE PIGOTT: Oh, I see.

18 MR. STONE: - - - and so they were passing
19 them around, and - - -

20 JUDGE SMITH: So it's a scene where one
21 juror points and whispers to the other, hey, what is
22 he talking about there?

23 MR. STONE: That's exact - - - that's - - -
24 that - - -

25 JUDGE SMITH: And then the judge says, cut

1 it out, you can't talk to each other. And then the
2 juror writes a note saying, we want to know such and
3 such.

4 MR. STONE: And that note is directly,
5 immediately responsive to the exhibits they're
6 looking at and the testimony - - -

7 JUDGE SMITH: To some degree - - -

8 MR. STONE: - - - they just heard.

9 JUDGE SMITH: - - - of course, you're
10 speculating, and Mr. Lewis is warming up to say
11 you're speculating. But that's your inference?

12 MR. STONE: Yeah, and you have to view it
13 from Judge Wittner's - - -

14 CHIEF JUDGE LIPPMAN: Yeah, but - - - but
15 should we be guessing?

16 MR. STONE: But you view it from Judge
17 Wittner's point of view, that at the very worst there
18 were two jurors, one saying to another - - -

19 CHIEF JUDGE LIPPMAN: Yeah, but - - -

20 MR. STONE: - - - did we ever find out - -
21 - did you ever find out how - - -

22 CHIEF JUDGE LIPPMAN: - - - but isn't there
23 an oblig - - -

24 MR. STONE: - - - how Lantigua met Mejias?

25 CHIEF JUDGE LIPPMAN: Isn't there an

1 obligation?

2 MR. STONE: There has to - - - I mean,
3 Buford inquiries can't be for the asking. I mean,
4 which - - - what defense attorney, trial defense
5 attorney - - -

6 CHIEF JUDGE LIPPMAN: Well, again, you go
7 back to the original question, what triggers - - -

8 MR. STONE: It has to be - - -

9 CHIEF JUDGE LIPPMAN: - - - a Buford - - -

10 MR. STONE: - - - I submit, a credible or a
11 meaningful allegation of juror impropriety. And I'd
12 also submit that what defense attorney, at this
13 point, after a two-week trial, right before
14 summations, doesn't want a probing and tactful
15 inquiry of a juror? Because these kind of inquiries
16 can create more problems - - - can create problems -
17 - -

18 CHIEF JUDGE LIPPMAN: Yeah, but when they -
19 - -

20 MR. STONE: - - - that didn't exist before.

21 CHIEF JUDGE LIPPMAN: When they raise the
22 issue, though, and says, you know, quite insistently,
23 that this is a problem, why wouldn't you do a Buford
24 inquiry?

25 MR. STONE: Because sometimes there's

1 something to be said for a judge stepping back and
2 not - - -

3 CHIEF JUDGE LIPPMAN: Okay. But it's being
4 hit the judge in the face that this is a problem,
5 right?

6 MR. STONE: But the judge - - - but based
7 on the fact that the note is responsive - - -
8 completely responsive to everything that had just
9 unfolded in open court, the judge has no reason to
10 believe - - -

11 CHIEF JUDGE LIPPMAN: So you think - - -

12 MR. STONE: - - - that anything - - -

13 CHIEF JUDGE LIPPMAN: - - - that she had a
14 right in that circumstance to just kind of poo-poo it
15 and say you're not talking, are you, and don't?

16 MR. STONE: It was - - - it did not rise to
17 the level of a meaningful allegation of impropriety.
18 And Buford, in all of these cases, their - - - the
19 conclusion is inescapable that there's got to be some
20 inquiry. In Buford it was a juror saw - - - there's
21 some extraneous influence - - - a juror saw two
22 witnesses getting into a car, or a juror realized she
23 hadn't - - -

24 CHIEF JUDGE LIPPMAN: Well, what do you
25 think "pretext" means in this context?

1 MR. STONE: "Pretext" actually - - - number
2 one, as Judge Smith noted, none - - - there were
3 three defense attorneys; none of them viewed
4 "pretext" as having the meaning that it now has - - -
5 they claim it now has. I think the judge - - -

6 CHIEF JUDGE LIPPMAN: But in - - -

7 MR. STONE: - - - the judge - - -

8 CHIEF JUDGE LIPPMAN: - - - the context of
9 "we", what do you think "pretext" means?

10 MR. STONE: There is a - - - the judge - -
11 - there is a view that "pretext" meant - - -
12 Lantigua's defense was that he entered this drug
13 conspiracy thinking it was a truck driving business.
14 He entered it under the pretext that it was a truck
15 driving business; it was actually a drug smuggling
16 business. Given that they're looking at the exhibit
17 relating to Lantigua's former job as a legitimate
18 job, there's no reason to believe the jury was just
19 not maybe buying the People's argument, that they're
20 considering Lantigua's defense which was, look, I
21 entered this under a pretext. That's one reason - -
22 - that's one way the judge understood that note.

23 And also, none of the defense attorneys, if
24 it was so obvious, none of them piped up. The judge
25 said, I view that as incorrect wording; I view it as

1 probably meaning circumstances, that essentially
2 that's what she said. Three defense attorneys; no
3 one said anything. If you're going to speak up and
4 raise this theory - - -

5 CHIEF JUDGE LIPPMAN: Well, not that they
6 didn't say anything. They were all over the "we"
7 business.

8 MR. STONE: They were all over the "we"
9 business, but the "we" meant whatever was said in the
10 jury box in open court, in front of the judge, three
11 defense attorneys and a prosecutor.

12 JUDGE RIVERA: Can I - - - I'm just trying
13 to clarify your arguments then. So is your - - - is
14 part of your argument that what went on here doesn't
15 rise to the level of requiring the inquiry?

16 MR. STONE: Doesn't rise - - - I submit - -
17 -

18 JUDGE RIVERA: And if it does - - - if it
19 does, the inquiry depends on what happened and this
20 is an appropriate inquiry?

21 MR. STONE: I - - -

22 JUDGE RIVERA: Is that what you're saying?

23 MR. STONE: My argument is that, in these
24 circumstances, it was enough just merely to admonish
25 the jurors you can't talk about the case and you

1 don't get to ask questions about the evidence. The
2 judge actually - - - she did that and then she did
3 more than was required. She did - - - she gave bonus
4 relief, which was - - -

5 JUDGE RIVERA: Okay.

6 MR. STONE: - - - questioning the jury as a
7 group. But she didn't even need to do that.

8 JUDGE RIVERA: Right. And what was the
9 expectation on questioning the jury? That someone
10 would say, yes, I did indeed - - -

11 MR. STONE: Yeah, well - - -

12 JUDGE RIVERA: - - - violate every
13 admonishment you've given me so far?

14 MR. STONE: I think she - - -

15 JUDGE RIVERA: That's what - - -

16 MR. STONE: The judge laid out - - - she
17 laid out the context for her question. She said,
18 look, I've told you you're not supposed to be
19 speaking about the case, but if you have, I need to
20 know that fact. And she asked the jury and she gave
21 them an opportunity to raise their hand and bring it
22 - - -

23 CHIEF JUDGE LIPPMAN: Doesn't that sound -
24 - -

25 MR. STONE: - - - to her attention.

1 CHIEF JUDGE LIPPMAN: - - - like Buford
2 though, even what the judge is saying? Does it sound
3 like she's saying it's Buford and I want to know if
4 you talked about this or didn't?

5 MR. STONE: I think the judge viewed it as
6 - - - no, I think the judge viewed it as the
7 admonition was enough and that out of deference to
8 the defendant's positions, step below, that she was
9 going to go an extra - - - she went a little extra,
10 bent over backwards and said: Look, if any - - - if
11 anyone said anything, raise your hand, let me know.
12 I don't think she had the obligation to do that in
13 this case.

14 JUDGE RIVERA: But if it is a Buford
15 inquiry, your position is that doing it - - - making
16 that inquiry of the group and expecting an individual
17 to - - - among all those jurors, in open court, in
18 front of that judge, to admit to having violated the
19 admonishment, satisfies the legal standard?

20 MR. STONE: I'd say this is not a Buford
21 situation. If a juror had raised their hand and
22 said, you know, Judge - - -

23 JUDGE SMITH: Hypothetically, if it were -
24 - - because as I understand Judge Rivera's question,
25 it's if you have Buford, you have the facts of Buford

1 and suppose the judge had taken all of the jurors
2 together and said, okay, anybody who has formed a
3 firm prejudice about how to decide this case, raise
4 your hand, would that be an adequate inquiry?

5 MR. STONE: If you had a credible reason to
6 believe that there was some kind of - - -

7 JUDGE SMITH: Would that - - -

8 MR. STONE: - - - impropriety - - - if you
9 had a credible reason, this would not suffice, under
10 Buford. But Buford's not implicated in this case.

11 And in terms of the alienation issue raised
12 by my adversaries, I think the judge did consider
13 that as one factor, and you know, sometimes judges
14 engage in inquiries that are unnecessary just out of
15 respect for the defense attorneys and for their
16 position. I think just that - - - that prior
17 incident in this case just gave the judge a reason
18 not to engage in a needless inquiry. She just saw
19 she didn't - - -

20 CHIEF JUDGE LIPPMAN: What does the prior -
21 - - the prior incident have to do with this?

22 MR. STONE: Because in that incident
23 inquiring of a juror, it made her unable to continue
24 deliberating. It was an uncomfortable situation.

25 JUDGE SMITH: You're saying - - -

1 MR. STONE: It was divisive.

2 JUDGE SMITH: - - - essentially she - - -
3 she thought she'd disrupted the jury enough with the
4 previo - - - that maybe the jury should focus on the
5 case and not be bothered for a moment.

6 MR. STONE: Exactly, that she should step
7 back, and this was probably in her - - - this was a
8 wise decision to just step back and let - - - let it
9 unfold.

10 CHIEF JUDGE LIPPMAN: It would have been
11 better if she did a Buford inquiry, wouldn't it have
12 been?

13 MR. STONE: No, I - - - I don't - - -

14 CHIEF JUDGE LIPPMAN: Wouldn't it not have
15 been better? Given - - - given counsel's making a
16 big stink about this "we" business, it wouldn't have
17 been better?

18 MR. STONE: I just want to - - - can I just
19 quote some - - -

20 CHIEF JUDGE LIPPMAN: Yeah, but wouldn't it
21 have been better?

22 MR. STONE: No. And can I quote - - -

23 CHIEF JUDGE LIPPMAN: Yes.

24 MR. STONE: - - - some language from a
25 Second Circuit case?

1 CHIEF JUDGE LIPPMAN: Sure. Go ahead.

2 MR. STONE: People v. Abrams.

3 CHIEF JUDGE LIPPMAN: Go ahead.

4 MR. STONE: "Any such investigation" - - -
5 this is talking about inquiring of jurors in this
6 exact context where a judge thinks there might be
7 premature - - - premature deliberation. "Any such
8 investigation is intrusive and may create prejudice
9 by exaggerating the importance and impact of what may
10 have been an insignificant incident." And in that
11 case, the Second Circuit found that cautionary
12 instructions were sufficient. But you - - - you
13 know, you throw a monkey wrench, sometimes, into the
14 jury process. You might sow discontent among the
15 jurors if you go ahead and conduct a needless
16 inquiry. And I - - -

17 CHIEF JUDGE LIPPMAN: Okay, counselor - - -

18 MR. STONE: - - - I don't think a Buford
19 inquiry - - -

20 CHIEF JUDGE LIPPMAN: Thank you.

21 MR. STONE: - - - is necessary here.

22 CHIEF JUDGE LIPPMAN: Thank you, counselor.
23 Counselor, rebuttal?

24 MR. LEWIS: Thank you, Judge. First, we
25 can put aside any question about whether this is a

1 Buford case or not, because the First Department even
2 thought this was a Buford case. And I'm now reading
3 from the First Department affirmance of the
4 conviction. "The Court did not abuse its discretion
5 when it declined to conduct any individual inquiries,
6 but instead addressed the problem by way of inquiries
7 directed to the jury as a group along with careful
8 instructions. See Buford - - - People v. Buford."
9 Now, what - - - you know - - -

10 JUDGE READ: We don't have to agree with
11 them.

12 MR. LEWIS: No, I don't agree with them. I
13 mean - - -

14 JUDGE READ: We don't have to agree with
15 them.

16 MR. LEWIS: But the point is - - - is that
17 even the First Department saw a Buford situation.
18 However, the First Department also misread Buford,
19 because I don't know what part of the phrase
20 "individually, in camera" the First Department did
21 not understand.

22 CHIEF JUDGE LIPPMAN: But counselor, he
23 acknowledged - - - your adversary acknowledges if its
24 Buford, she should have done more.

25 MR. LEWIS: And the First Department refers

1 to Buford in its own opinion. That's always - - -

2 CHIEF JUDGE LIPPMAN: Right, but tell us
3 again how you know it's Buford.

4 MR. LEWIS: You know it's - - - you know
5 it's Buford because you have two red flags - - - two
6 red flags. One is the use of the word "we" - - - I
7 don't have to go over it again - - - and the other is
8 the use of the word "pretext". But it was - - -

9 JUDGE PIGOTT: Yeah, but I'm going to bet
10 that you, in your career, have seen situations such
11 as Mr. Stone is talking about, where they're - - -
12 where they're handing exhibits back and forth and
13 everything else and they're talking and you tell them
14 to shut - - - well, you don't tell them to shut up
15 but you tell them, you know, you're not supposed - -
16 -

17 MR. LEWIS: Right.

18 JUDGE PIGOTT: - - - to be doing that.
19 Then how are we, you know, with all of the time and
20 effort that we can put into this, try to put
21 ourselves back in the position of that judge at the
22 time when she was making these determinations? As I
23 said, I was surprised that they were fiddling through
24 these exhibits before summations, but as Mr. Stone
25 pointed out, I guess, that, you know, they were

1 publishing the exhibits. So - - -

2 MR. LEWIS: Well, I'm not - - -

3 JUDGE PIGOTT: - - - there's nothing wrong
4 with herding the cats.

5 MR. LEWIS: - - - I'm not sure I understand
6 the question. If you're asking, you know, in the - -
7 - in the confusion of everything that's going on, how
8 does the judge get to this, that's very simple; trial
9 counsel points - - -

10 JUDGE PIGOTT: No, but I'm - - -

11 MR. LEWIS: - - - it out to her attention.

12 JUDGE PIGOTT: - - - suggesting is it's
13 possible that the defense counsel has a slender reed
14 upon which to base an argument, and it's taking "we"
15 and saying this is - - - this is monumental, this is
16 incredible, this is something, when at the time the
17 judge is handling exhibits and jurors that are
18 handling things back and forth, and does what, in her
19 - - -

20 MR. LEWIS: With all due respect, I've
21 never heard of that particular justification as - - -
22 as a justification for judicial misconduct - - -

23 JUDGE RIVERA: No, I think - - -

24 MR. LEWIS: - - - for plain - - -

25 JUDGE PIGOTT: Well, you're - - - I'm not

1 calling it judicial misconduct.

2 MR. LEWIS: I'm not - - - I'm not - - -

3 JUDGE PIGOTT: Wait a minute.

4 MR. LEWIS: Let me explain - - -

5 JUDGE PIGOTT: Let me finish now.

6 MR. LEWIS: - - - judicial evidence.

7 JUDGE PIGOTT: Now, I don't see judicial
8 misconduct, and I know you don't either.

9 MR. LEWIS: No, not misconduct.

10 JUDGE PIGOTT: What I was trying to
11 describe, and apparently didn't make it clear, was
12 that when you have jurors and they're looking at all
13 these exhibits, and you had a big argument on the map
14 and all this other stuff, sometimes they talk to each
15 other, sometimes they just step on each other's feet,
16 sometimes they drop things and they talk. And the
17 judge can say, don't discuss the case, which is what
18 she says she did here.

19 MR. LEWIS: Well, she did that, but it may
20 have been too late. The point is we're in the
21 position of speculating when we shouldn't have to
22 speculate.

23 CHIEF JUDGE LIPPMAN: What about his - - -

24 MR. LEWIS: The law - - -

25 CHIEF JUDGE LIPPMAN: What about his

1 contextual argument that he says as to what was
2 actually going on in the courtroom at the time?

3 MR. LEWIS: That is speculation. The
4 record isn't clear that what he says was going on in
5 the courtroom is what was going on in the courtroom.

6 CHIEF JUDGE LIPPMAN: So he's reading into

7 - - -

8 MR. LEWIS: He's reading into it. And I
9 think the People are in the unfortunate position of
10 having to argue that the plain English definitions,
11 you know, of words in the English language don't mean

12 - - -

13 JUDGE SMITH: Well, is - - -

14 MR. LEWIS: - - - don't mean what they
15 mean.

16 JUDGE SMITH: - - - is he wrong - - - is it
17 - - - obviously it's speculative either way, but is
18 he necessarily wrong to say that "pretext" in that
19 context might have meant the question was favorable
20 to the defendant?

21 MR. LEWIS: It's not - - - nothing is
22 necessarily wrong, but the point is you don't know
23 until you ask.

24 JUDGE READ: Don't we have to give - - -

25 MR. LEWIS: The whole thing is about a duty

1 to ask.

2 JUDGE READ: Don't we have to give some
3 kind of - - - some kind of deference - - - maybe
4 that's not the right word - - - to the trial judge
5 who was there in the middle of the situation, rather
6 than second guessing it from Eagle Street?

7 MR. LEWIS: Well, I think that there - - -
8 to me that attacks the whole concept of appeal. You
9 could say that on any - - - on any question of appeal
10 in any case.

11 JUDGE PIGOTT: No, you can't.

12 MR. LEWIS: I mean - - -

13 JUDGE PIGOTT: No, you can't.

14 MR. LEWIS: Well - - -

15 JUDGE SMITH: But some things are
16 discretionary and some aren't, and this is
17 discretionary, isn't it?

18 MR. LEWIS: No, it's not. In Buford it's
19 not discretionary. But it's also - - - and even if
20 it were, it's an abuse of discretion because of the
21 unbelievable imbalance between the competing
22 interests. I already enunciated what the interests
23 in favor of inquiring are, and Buford goes to that,
24 too. And the only counter-interest in not doing it,
25 not isolating a juror, where is that in New York

1 jurisprudence? Where - - - I tried to find a case -
2 - -

3 JUDGE SMITH: What about - - -

4 MR. LEWIS: I tried to find a case - - -

5 JUDGE SMITH: What about what your
6 adversary is saying that there's - - - that there is
7 a general principle that says when in doubt keep your
8 mouth shut and leave the jury alone? Is that such a
9 bad idea?

10 MR. LEWIS: Yes, under some - - - under
11 some circumstances.

12 JUDGE SMITH: You say when in doubt, you
13 have the jurors in one at a time and cross-examine
14 them?

15 MR. LEWIS: Well, you know, we talk about
16 the earlier incident with the malodorous juror, and
17 as a matter of fact, the judge did dismiss that juror
18 and the judge had to dismiss that juror because it
19 was a distraction. So whether it was a nice
20 situation or not - - -

21 CHIEF JUDGE LIPPMAN: Isn't that - - -

22 MR. LEWIS: - - - that the juror was
23 isolated, it had to be done.

24 CHIEF JUDGE LIPPMAN: Do you think the
25 judge was in doubt, or she just didn't follow the

1 law?

2 MR. LEWIS: I think she didn't want a
3 mistrial. I think she was afraid - - - you know,
4 there was no - - - they were down to one alternate.

5 CHIEF JUDGE LIPPMAN: Right.

6 MR. LEWIS: This was a long trial, the
7 People put on a very elaborate proof, and I think
8 that she was genuinely afraid - - - and I think it's
9 also what the People were afraid of - - - in arguing
10 against the inquiry, that all this work was going to
11 end up being for naught.

12 CHIEF JUDGE LIPPMAN: You mean she was
13 afraid that if she asked a question that that would
14 cause a mistrial?

15 MR. LEWIS: That she might not like the
16 answer, yes, that - - - that she might not like - - -
17 that she might get an answer that unfortunately is as
18 bad as we all fear it - - - it might have been, and
19 then that she would have no choice. I think judges,
20 you know, do try to avoid mistrials sometimes - - -

21 CHIEF JUDGE LIPPMAN: Okay, counselor.

22 MR. LEWIS: - - - you know.

23 CHIEF JUDGE LIPPMAN: Okay, thank you - - -

24 MR. LEWIS: Thank you.

25 CHIEF JUDGE LIPPMAN: - - - both.

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Appreciate it.

MR. LEWIS: Thank you.

(Court is adjourned)

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

I, Sharona Shapiro, certify that the foregoing transcript of proceedings in the Court of Appeals of THE PEOPLE OF THE STATE OF NEW YORK v. MIGUEL MEJIAS, No. 67 and THE PEOPLE OF THE STATE OF NEW YORK v. ANTONIO RODRIGUEZ, No. 68 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Sharona Shapiro

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