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COURT OF APPEALS

STATE OF NEW YORK

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PEOPLE,

Respondent,

-against-

No. 80

TYRONE PRESCOTT,

Appellant.

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20 Eagle Street  
Albany, New York 12207  
March 21, 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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Karen Schiffmiller  
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: Number 80, People v.  
2 Prescott.

3 Counsel?

4 MR. GLEASON: May it please the Court, Your  
5 Honors, Thomas F. Gleason for the appellant, Tyrone  
6 Prescott. And, Your Honor, if I could, I'd like to  
7 reserve two minutes of my time for rebuttal?

8 CHIEF JUDGE LIPPMAN: Sure, go ahead,  
9 counsel.

10 MR. GLEASON: Your Honors, as you know from  
11 the record, on August 5th, 2005, the Appellate  
12 Division in this case entered an order recognizing my  
13 client's new appellate counsel at the Appellate  
14 Division level.

15 CHIEF JUDGE LIPPMAN: Counsel, does it make  
16 a difference in this kind of a case whether the  
17 representation is simultaneous or separated by a  
18 period of time - - -

19 MR. GLEASON: I think - - -

20 CHIEF JUDGE LIPPMAN: - - - in terms of the  
21 conflict issues?

22 MR. GLEASON: I don't think it does, Your  
23 Honor. I think the key issue - - - there's two  
24 issues that are really critical. One is the nature  
25 of the conflict, and the divergent interests between

1 the two clients, which clearly existed in this case,  
2 and existed from the point in time, only twenty-six  
3 days or so after the representation of my client  
4 started.

5 At that point in time, there was clearly  
6 conflicted representation, but more importantly, to  
7 the point of the relationship between appellate  
8 counsel and the client. There needs to be that  
9 meeting of the minds with respect to the agreement of  
10 representation. And that would require a disclosure  
11 of the nature of the conflict, so that there can  
12 actually be consent.

13 CHIEF JUDGE LIPPMAN: How many years later  
14 would - - - did this issue come up?

15 MR. GLEASON: Well, the - - -

16 CHIEF JUDGE LIPPMAN: Where he's actually  
17 making the argument that reflected back on his  
18 earlier advocacy?

19 MR. GLEASON: The timing was - - - in 2005  
20 was when the representation starts. The brief in the  
21 Appellate Division was perfected, I think, somewhere  
22 around February of 2009.

23 JUDGE GRAFFEO: It's about three and a half  
24 years, isn't it?

25 MR. GLEASON: Yeah, it was a long - - - it

1 was in 2009.

2 JUDGE GRAFFEO: If you didn't have his  
3 comments about Martin - - - is that correct?

4 MR. GLEASON: Yes.

5 JUDGE GRAFFEO: If you didn't have that,  
6 and you just had the passage of time, would you still  
7 view it as a problem?

8 MR. GLEASON: Oh, yes, and the reason is,  
9 think about it from the point of view of the  
10 appellant-defendant. Here is a person who has been  
11 retain - - - has had his counsel retained, and a very  
12 short period of time later, that same lawyer is in  
13 court actually arguing for leniency at the sentencing  
14 of someone who is a key witness against the  
15 defendant. Now, what's he going to think if he  
16 actually - - -

17 JUDGE SMITH: Is the - - - is the - - - I  
18 mean, the Chief started, I think, by asking about  
19 whether you were arguing simultaneous representation.  
20 Is it important that as he's standing there arguing  
21 for Martin, he's already Prescott's lawyer?

22 MR. GLEASON: Absolutely, Your Honor.

23 JUDGE SMITH: So, simultaneity is part of  
24 the case.

25 MR. GLEASON: Oh, yes, absolutely. And

1           it's very important, but it's much more than that,  
2           Your Honor. The reason it's more is because of the  
3           duty that give - - - that that gives to - - - makes  
4           a rise for the disclosure. And also for the duty  
5           that is created with respect to both appellant  
6           counsel and the People to involve in court.

7                    JUDGE SMITH: Well, I mean, as I  
8           understand, I mean, you talk about disclosure, but I  
9           don't think anyone's saying or could say that you're  
10          client consented or waived the conflict here.

11                   MR. GLEASON: Absolutely not, Your Honor.

12                    JUDGE SMITH: So, I mean, is it - - - the  
13          question that - - - you assume you've got an unwaived  
14          something. Is the question whether this is the sort  
15          of conflict that must operate on the representation,  
16          or is it the sort of conflict that is an automatic  
17          reversal?

18                    MR. GLEASON: I think it's automatic, Your  
19          Honor, but it did operate on the representation even  
20          if it weren't automatic, but I believe the question  
21          of it being automatic, this Court - - -

22                    JUDGE SMITH: What makes it automatic? Is  
23          it just the simultaneity of the representation?

24                    MR. GLEASON: I think in your opinion, Your  
25          Honor, in People v. Solomon, in, I think, it was in

1           October - - - it was decided after we wrote our main  
2           brief in this case, but before our reply brief - - -  
3           you made it very clear that this Court makes a  
4           distinction between actual conflicts and potential  
5           conflicts. And when there's an actual conflict,  
6           absent waiver, there's going to be a reversal.

7                         JUDGE SMITH: Yeah, but that was a  
8           simultaneous representation case. And there's a case  
9           called Abar, where they were - - - the  
10          representations were sequential. And we held it had  
11          to - - - as long as it didn't operate under the  
12          representation, the same lawyer could represent the  
13          prosecution and the defense in the same case.

14                        MR. GLEASON: I believe that's a potential  
15          conflict, Your Honor, but look at the actual conflict  
16          in this case. In order for - - -

17                        JUDGE SMITH: Well, but you can say - - - I  
18          mean, you say potential - - - if they're not - - - if  
19          the representations aren't simultaneous, where's the  
20          potential? See what I mean?

21                        MR. GLEASON: Well, in this case, I think  
22          it's actual. And the reason that it's actual - - -  
23          it's beyond potential, because in order to make the  
24          argument for leniency at the sentencing of the  
25          codefendant, in order to make that argument, he

1           essentially had to say that that codefendant did a  
2           great job in testifying against my client. In order  
3           to make the argument that was made on appeal, he had  
4           to argue essentially that that same person had  
5           committed perjury. So you've got - - -

6                     JUDGE SMITH: And he did.

7                     MR. GLEASON: And he did. And I think the  
8           People actually concede that.

9                     JUDGE SMITH: Well, they not only concede  
10          it; they brag about it.

11                    MR. GLEASON: Well - - -

12                    JUDGE SMITH: They - - - I mean, that's a  
13          strong point for them, isn't it, that whether - - -  
14          maybe, maybe it was ethically wrong, and maybe it  
15          wasn't, but he sure did step all over his former  
16          client.

17                    MR. GLEASON: Well, that may be so, but  
18          don't - - - you know, if you think about the impact  
19          of that on the nature of the attorney-client  
20          relationship, the client has a right to know and the  
21          court should be involved in weighing the impact of  
22          that conflict on the representation.

23                    JUDGE SMITH: How important is it that your  
24          client asked for the transcript of that particular  
25          sentencing hearing and never got it?

1 MR. GLEASON: Well, I think that's  
2 important, but even had he not got it, the actual  
3 conflict existed due to the fact of the  
4 representation, which is why some of these cases are  
5 so difficult on coram nobis, because things come into  
6 the record from outside the record, and you don't  
7 know exactly what happened.

8 But the actual prejudice, which really  
9 should result in the granting of the coram nobis  
10 writ, is the fact that this lawyer who was in the  
11 position of representing my client on the appeal at  
12 the Appellate Division, at that same time, even  
13 though the brief hadn't been written yet, was in a  
14 position of advocating a completely contrary position  
15 for a prosecution witness and another codefendant.  
16 Now - - -

17 JUDGE SMITH: Let's assume - - - assume for  
18 the sake of the argument that you have - - - you  
19 don't have an automatic reversal situation; that you  
20 have to show operation on the representation.

21 MR. GLEASON: That's right, Your Honor.

22 JUDGE SMITH: Suppose - - - again,  
23 hypothetically - - - suppose the only thing you've  
24 got is that failure to send the transcript, that is  
25 that he asked for the transcript, and the client, not

1 knowing that his lawyer was also the lawyer for  
2 Martin, says, can you get hold of Martin's sentencing  
3 transcript? The lawyer writes back, I'll send it to  
4 you, and never does. Is that in itself enough to  
5 show operation on the representation?

6 MR. GLEASON: I would say it would, Your  
7 Honor, because it indicates that there's at least  
8 some indication of impact, okay. And even if the  
9 lawyer's motivation were completely innocent in that  
10 circumstance, again, I have to go back to - - -

11 JUDGE SMITH: You say there's a difference  
12 between impact and prejudice. It's a little hard to  
13 see how his not getting the transcript really  
14 prejudiced him.

15 MR. GLEASON: Well, impact is with respect  
16 to something that has a close nexus to the  
17 representation, and actually is involved in the  
18 arguments that are made on the appeal and the legal  
19 services that the attorney provides.

20 JUDGE SMITH: So you - - - I guess - - - it  
21 sounds to me like what you're saying is if the - - -  
22 if there's anything the lawyer did as a result of the  
23 conflict, even if it didn't actually harm his client,  
24 but if it influenced him, that's enough. That's  
25 operation on the representation?

1 MR. GLEASON: Oh, yes. I think so, Your  
2 Honor.

3 JUDGE GRAFFEO: If we agree with you, what  
4 do we advise as a caution to attorneys? You know,  
5 what do we tell the bar to avoid these problems?

6 MR. GLEASON: I think that the advice that  
7 you would give has actually been provided in the  
8 Wandell opinion that this Court discussed, the two-  
9 part obligation of counsel, both counsel for the  
10 defendant and counsel for the People. And it was as  
11 follows: "To first recognize the existence of even a  
12 potential conflict of interest and then make sure  
13 that the court is alerted to those facts and  
14 circumstances surrounding the potential conflict."

15 That's essentially the standard that this  
16 Court has already adopted.

17 JUDGE PIGOTT: Would it be a better grant  
18 of relief to have a hearing on this? I mean, to find  
19 out exactly what was going on, and, I mean, maybe - -  
20 - maybe the lawyer did a great job on both.

21 MR. GLEASON: Well, I think that this Court  
22 decided that issue in People v. Solomon, because I  
23 think what you're saying in People v. Solomon, in  
24 your opinion, Judge Smith, is that once you have a  
25 conflict - - - that first you have a constitutional

1 right to appellate counsel. And your constitutional  
2 right to appellate counsel is nonconflicted counsel.

3 JUDGE PIGOTT: But we never knew - - - we  
4 never knew in the - - - in that case what the  
5 conflict was. We - - - well, I mean, we knew the  
6 people involved in it, but we didn't know when the  
7 defense lawyer was representing the detective whether  
8 it was on a house closing or, you know, any number of  
9 things, but we tossed it anyway.

10 MR. GLEASON: Well, that's right. I mean,  
11 this is much worse.

12 JUDGE PIGOTT: Well, here we know what  
13 happened. We know - - -

14 MR. GLEASON: We do.

15 JUDGE PIGOTT: We know that the lawyer  
16 argued on behalf of Martin, and said the reason he  
17 didn't testify in the second one was because his life  
18 was threatened. We don't know - - - or that his  
19 family was threatened - - - we don't know if he was  
20 referring to your client now or somebody else in  
21 another case that may or may not have been  
22 threatening Martin, but he's making this very strong  
23 pitch for Martin to get a break on that plea.

24 And as Judge Smith pointed out, the brief  
25 in this case in the Appellate Division is pretty

1 good.

2 MR. GLEASON: Well, I think you can make  
3 the inference that he was talking about my client  
4 from the sentencing transcript, but I see my time is  
5 up. Just to briefly answer your question, Your  
6 Honor. The issue is, was there actually a conflict,  
7 not whether or not - - - I think the way Judge Smith  
8 described it, whether or not the lawyer did a good  
9 job is not the standard once you have the actual  
10 conflict, Your Honor. Once that actual conflict is  
11 there - - -

12 JUDGE PIGOTT: It just goes.

13 MR. GLEASON: Well, there's a  
14 constitutional right at issue, Your Honor. And there  
15 has to be a waiver and there has to be involvement of  
16 the court. I'll address - - -

17 CHIEF JUDGE LIPPMAN: Okay, counsel.

18 MR. GLEASON: - - - on rebuttal.

19 CHIEF JUDGE LIPPMAN: Thanks, counsel.

20 MR. GLEASON: Thank you.

21 CHIEF JUDGE LIPPMAN: Counsel?

22 MR. POWERS: Good afternoon, Your Honors.  
23 Matthew Powers on behalf of the People.

24 I would agree with this Court that this is  
25 an unwaived something. But that something is not an

1 actual conflict. In the recently decided Solomon  
2 decision, Your Honors, this Court stated that actual  
3 conflict is "the simultaneous representation of  
4 clients whose interests are opposed" - - -

5 CHIEF JUDGE LIPPMAN: Counsel, how much  
6 more - - -

7 JUDGE SMITH: You do have that here.

8 MR. POWERS: I'm sorry?

9 CHIEF JUDGE LIPPMAN: Yeah, say the same  
10 thing. Go ahead.

11 JUDGE SMITH: Yeah, you do have - - - I  
12 mean, you're going to say, it's, oh, just a little -  
13 - - it was a little technicality that doesn't mean  
14 anything, but you do have it, don't you?

15 MR. POWERS: We have a very brief window of  
16 simultaneity, Your Honor; that's absolutely true.

17 JUDGE SMITH: Is the - - - is there a de  
18 minimis exception to the rule against simultaneous -  
19 - -

20 MR. POWERS: Your Honor, I would refer your  
21 attention to this Court's decisions in People v.  
22 Alicea and Perez. In both of those cases, you had  
23 representation - - - conflicted representation - - -  
24 that began as simultaneous, and ultimately devolved  
25 into successive representation - - -

1 JUDGE SMITH: I - - -

2 MR. POWERS: - - - and in both cases - - -

3 JUDGE SMITH: I'm sorry; I've forgotten  
4 those cases. Are those codefendant cases or - - -

5 MR. POWERS: Your Honor, I believe that at  
6 least one of them is, and I suspect the other is  
7 probably a star prosecution witness.

8 JUDGE SMITH: Because we've said that  
9 codefendants are only potentially in conflict. It  
10 sounds to me like Martin and - - - Mr. Martin and Mr.  
11 Prescott were more than potentially in conflict.  
12 They're trying to cut each other's throats.

13 MR. POWERS: Your Honor, again, the  
14 definition of actual conflict includes a requirement  
15 of simultaneity, and absent that, it doesn't matter  
16 what - - -

17 JUDGE SMITH: But - - -

18 JUDGE PIGOTT: But having that, Mr. Powers,  
19 and then, as Judge Smith alluded to earlier, in that  
20 September 26th letter, where Prescott writes to his  
21 lawyer and says "It's difficult for me to get my  
22 codefendant's, Calvin Martin, sentencing to show if  
23 there was anything said that would establish that he  
24 lied on the stand." Then you would have thought at  
25 least - - - I mean, it's possible that he didn't give

1           it to him for one reason or another. Maybe he didn't  
2           want him to know that, you know - - - and for good  
3           reason, didn't want to get everybody upset. But - -  
4           - or maybe he just didn't have it. But isn't that a  
5           question that has to get answered?

6                       MR. POWERS: I find it mildly troubling  
7           myself, Your Honor, but what I would say is that the  
8           defense here, and the operation on the defense, is a  
9           claim that the verdict was against the weight of the  
10          evidence. Now, nothing that happened in that  
11          sentencing transcript was evidence. So while it's a  
12          little off-putting - - -

13                      JUDGE SMITH: So you say - - -

14                      MR. POWERS: - - - it's really of no  
15          moment.

16                      JUDGE SMITH: - - - you say that that's not  
17          operation. Even if you assume that his motivation in  
18          not sending the transcript was to conceal from his  
19          client the existence of this either potential or  
20          actual conflict, you say in that - - - even so,  
21          that's not operation on the representation?

22                      MR. POWERS: Again, I think it might be  
23          troubling. I think you're assuming a lot if you go  
24          beyond that. But again, this is not the defense.  
25          The defense is that the verdict was against the

1 weight of the evidence, and this is simply not  
2 evidence.

3 JUDGE SMITH: I guess my question is,  
4 aren't you - - - aren't you confusing operation and  
5 prejudice? I can certainly see the argument that  
6 there was no prejudice in the failure to send the  
7 transcript. Isn't operation something short of  
8 prejudice?

9 MR. POWERS: I'm not sure that I'm - - -  
10 I'm too terribly confused, Your Honor. In this  
11 Court's decisions in Jordan and Perez, you treated  
12 things like an aggressive cross-examination or  
13 summation as a showing that the conflict had not  
14 operated on the defense. And that's exactly what we  
15 see here. So, no, I don't believe so.

16 And again, with respect to the question of  
17 operation, as the Court has already pointed out, the  
18 brief here was vigorous in its attack of Calvin  
19 Martin, pointing out - - -

20 JUDGE SMITH: Suppose - - - suppose you  
21 could think of seven ways that it could have been  
22 better, which - - -

23 MR. POWERS: Your Honor, I think there are  
24 - - -

25 JUDGE SMITH: - - - which it could, easily.

1 MR. POWERS: - - - seven ways that my oral  
2 argument could have been better today.

3 JUDGE SMITH: My questions.

4 MR. POWERS: But nevertheless, it focused  
5 on two things that an attorney beholden to Calvin  
6 Martin would not have won - - - done: First, his  
7 culpability, and second, his perceived mendacity. If  
8 counsel was truly beholden to Calvin Martin, he would  
9 not have done those things. And for those reasons, I  
10 ask you to conclude that the conflict did not operate  
11 on the defense.

12 CHIEF JUDGE LIPPMAN: Okay, counsel.

13 MR. POWERS: Unless there are any  
14 questions, I'll stop there. Thank you.

15 CHIEF JUDGE LIPPMAN: Thank you, counsel.

16 Counsel, rebuttal?

17 MR. GLEASON: Yes, thank you, Your Honor.  
18 With respect to the operation on the representation,  
19 I think Solomon does establish a point that the  
20 operation is automatic, whether there's an actual  
21 conflict. But even beyond that, Your Honor, I think  
22 you could make the point that operation on the  
23 representation would certainly include the formation  
24 of the relationship of attorney and client and what  
25 happens in that.

1                   And if you think of being in the position  
2 of this defendant, he would certainly want to know  
3 that within twenty-six days after being retained as  
4 his counsel, his counsel goes and represents somebody  
5 who's a dire adversary in connection with the same  
6 criminal transaction, and argued for leniency. That  
7 clearly has something that would create an impact in  
8 terms of the client's confidence, if nothing else.

9                   And that's why I think it also doesn't  
10 matter that time elapsed, because the client would  
11 want to know, you know. And he - - - just because -  
12 - -

13                   JUDGE SMITH: Well, what about - - - in  
14 Abar, you had a former prosecutor who became the - -  
15 - became a defense lawyer, and she worked on both  
16 sides of the same case. Now, you can certainly see  
17 that - - - and it's not clear to me that the client  
18 knew that she worked on that very case, although he  
19 did know she was a former prosecutor. But certain -  
20 - - wouldn't that tend to undermine the con - - -  
21 wouldn't that legitimately make the client upset, and  
22 yet we said that as long as no operation was shown,  
23 it was okay.

24                   MR. GLEASON: Well, in this case, you  
25 actually had the central argument that was being



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CHIEF JUDGE LIPPMAN: Thank you both,  
appreciate it.

(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. Tyrone Prescott, No. 80 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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