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COURT OF APPEALS
STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

No. 22

CHERYL SANTIAGO,

Appellant.

20 Eagle Street
Albany, New York 12207
January 15, 2014

Before:

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

Appearances:

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Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: Number 22, People v.
2 Santiago?

3 MS. NATHANSON: May it please the court,
4 I'd like two minutes for rebuttal, please?

5 CHIEF JUDGE LIPPMAN: Two minutes, sure,
6 counsel.

7 MS. NATHANSON: Thank you.

8 CHIEF JUDGE LIPPMAN: You're on. Go ahead.

9 MS. NATHANSON: My name is Malvina
10 Nathanson. I represent Cheryl Santiago.

11 Let me start by saying that People v.
12 Hines, which is the case that causes me trouble with
13 the corroboration argument, is either distinguishable
14 or should be reversed, overruled. It - - - the - - -
15 in this court, in People against - - - well, People
16 v. Hines involved a sufficiency of the evidence case.
17 It is quite true, the defense counsel did not renew
18 his motion to dismiss at the end of the defense, and
19 this court found that the issue was not preserved.

20 In People against - - - against Prado - - -
21 Prado - - - I'm not sure how to say it - - - without
22 even citing People v. Hines, this court effectively
23 came to the opposite conclusion in a case that
24 involved, in fact, a confession corroboration issue,
25 different from the one in Hines.

1 When defense counsel came to this court
2 saying, the issue was not preserved, and the trial
3 lawyer was ineffective for not preserving it, this
4 court ruled that the issue had been preserved, even
5 though defense counsel had not renewed his motion to
6 dismiss at the end of the defense case. Exactly the
7 opposite of the result that Hines would dictate.

8 I - - - I believe, therefore that - - - and
9 I believe in a - - -

10 JUDGE SMITH: As - - - as you know, I'm not
11 unsympathetic to what you're saying, but - - -

12 MS. NATHANSON: Oh, I do.

13 JUDGE SMITH: - - - but it does - - - but -
14 - - but it - - - but you first - - - it doesn't
15 matter unless you can show that there wasn't enough
16 cooperation - - - corroboration.

17 MS. NATHANSON: I'd - - - I'd be delighted
18 to move on to the substantive of the argument, but I
19 - - - I do feel, or worry, that I need to overcome
20 the preservation problem first.

21 CHIEF JUDGE LIPPMAN: Well, what don't you
22 move on to the substance, and - - -

23 MS. NATHANSON: But - - -

24 CHIEF JUDGE LIPPMAN: - - - we'll come back
25 to it, if we need to.

1 MS. NATHANSON: Okay.

2 CHIEF JUDGE LIPPMAN: Go ahead.

3 MS. NATHANSON: The - - - the medical
4 testimony unsu - - - not unsurprising, the defense
5 coun - - - doctor did not say that he could not
6 establish a cause of death. The People's doctors
7 were very, very clear that without the defendant's
8 statements, they could not do so, either.

9 JUDGE SMITH: What about - - - what of the
10 plastic bag corroboration? Well, how did they - - -
11 yeah - - -

12 MS. NATHANSON: There was a plastic bag on
13 the floor in the room. What does that - - -

14 CHIEF JUDGE LIPPMAN: Didn't the husband
15 testify it wasn't there before?

16 MS. NATHANSON: Well, there's no - - -
17 there's - - - there's - - - the testimony is that the
18 plastic bag was probably used to buy - - - to make a
19 purchase the day before. The - - - Santos Santiago
20 said he hadn't seen it. Usually they get disposed of
21 in the garbage in the kitchen or something. But that
22 just - - - so this time it wasn't.

23 JUDGE SMITH: How about - - -

24 MS. NATHANSON: It was never relied on - - -

25 -

1 JUDGE SMITH: Counsel, I mean, suppose - -
2 - I mean, she made - - - before she confessed, or
3 gave what might have been a confession, she made an
4 exculpatory statement that the jury could surely find
5 was false. Can that serve as corroboration, a false
6 exculpatory statement?

7 MS. NATHANSON: Not raised by anybody
8 before - - - before you did, sir. I think the answer
9 is - - - is no, because I think that that still has
10 to do with the sufficiency of the People's case. I
11 don't think you can rely on a negative in order to
12 prove the positive. The - - - the fact that she
13 falsely assumes - - - she falsely exculpated herself,
14 still does not establish there was a crime. I mean,
15 the purpose of the corroboration requirement is to
16 establish that a criminal act occurred.

17 You can think of lots of reasons for
18 someone to lie in order to get themselves out of a
19 tough situation when they are afraid of - - - of
20 something bad happening. It doesn't necessarily mean
21 that that - - - that something - - - that they had,
22 in fact, done something bad in the first place.

23 JUDGE ABDUS-SALAAM: Was the plastic bag
24 the only corroboration, or is there - - - are there
25 other things - - -

1 MS. NATHANSON: Well - - -

2 JUDGE ABDUS-SALAAM: - - - for example, the
3 failure to tell the parents that she had a
4 stepdaughter - - -

5 MS. NATHANSON: You know, there were - - -

6 JUDGE ABDUS-SALAAM: - - - and hiding the
7 child, and the child's clothing - - -

8 MS. NATHANSON: Yeah, yeah, I - - - you
9 know, there - - - I think that - - - I think that
10 those circumstances that the - - - the toys and so on
11 being put away, the fact that Ms. Santiago wanted her
12 husband to spend more time with her, are - - - are -
13 - - I mean, none of them are inherently or have any
14 sort of suspicious quality.

15 JUDGE GRAFFEO: But what about the medical
16 evidence?

17 MS. NATHANSON: Well, the medical evidence
18 relies on the statements and that's the - - - that's
19 the problem. Both doctors - - -

20 JUDGE GRAFFEO: The doctors also talked
21 about the forensic indicators that they - - -

22 MS. NATHANSON: Well - - -

23 JUDGE GRAFFEO: - - - that they found.

24 MS. NATHANSON: They - - - they explicitly
25 said, and - - - and - - - if I can find my glasses, I

1 will cite you the pages - - -

2 JUDGE GRAFFEO: I thought they found - - -
3 I thought they found medical evidence that the
4 child's death was asphyxiation.

5 MS. NATHANSON: The child - - - the child
6 died from a lack of - - - of oxygen. But - - - but
7 doctors - - -

8 CHIEF JUDGE LIPPMAN: The doctors testified
9 as to how many minutes it would have to be to - - -

10 MS. NATHANSON: Four to six - - - yeah.

11 CHIEF JUDGE LIPPMAN: Yeah.

12 MS. NATHANSON: Four to six minutes. But -
13 - - but on pages A-259 to 260 in Dr. Chute's
14 testimony, he explicitly says, "without the
15 defendant's statements, the cause of the death would
16 be undetermined." And Dr. Baden says at page A-345
17 that without the defendant's statements, he might
18 have left the whole thing opened and undetermined.
19 So there we - - -

20 JUDGE SMITH: They still - - - they still -
21 - - isn't a death - - - is the death consistent with
22 asphyxiation - - -

23 MS. NATHANSON: Yeah.

24 JUDGE SMITH: - - - or some corroboration
25 in as situation like this, where she's - - - she's

1 alone with the child when the child dies. There's no
2 other apparent reason. The doctors say it's
3 consistent with asphyxiation. There's a - - - she
4 has a motive. There's a bag on - - - there's a
5 plastic bag that looks - - - yeah, it might well be
6 found to be an attempt to - - - to lay a false trail.
7 Doesn't - - - doesn't that add up to corroboration?

8 MS. NATHANSON: I - - - I think there's - -
9 - first of all, I think motive is - - - is totally
10 out of the case. There is - - - there is nothing in
11 this case that indicates any motive. And in fact,
12 that's why the Appellate Division reduced the
13 sentence from intentional murder to - - -

14 JUDGE SMITH: Well, we know - - - we know
15 that she considered the - - - she did consider the
16 child an obstacle to her relationship with her
17 husband. That's - - -

18 MS. NATHANSON: No - - -

19 JUDGE SMITH: - - - we know - - - we know
20 that because of the - - - the concealment. I mean,
21 that may not be much of a motive, but people do
22 horrible things for very bad reasons.

23 MS. NATHANSON: No, I - - - I don't agree,
24 Judge. I don't think we know that at all. I think
25 that the concealment had a whole lot more - - - had

1 to do with her parents, and her concern that her
2 parents, who were very devout Christians and who
3 disapproved of that kind of thing, would - - -

4 JUDGE SMITH: Well, okay. But - - - but -
5 - - but it's - - - it can be a problem if you're
6 married to somebody that your parents don't think you
7 should be married to. I mean, that - - - yeah,
8 whether it's a relationship with the husband or the
9 relationship with the parents, they tell you, one
10 could interfere with the other. Isn't - - -

11 MS. NATHANSON: But - - -

12 JUDGE SMITH: - - - why - - - why isn't
13 that a motive?

14 MS. NATHANSON: Killing - - - killing the
15 child - - -

16 JUDGE SMITH: Obviously, a totally
17 inadequate motive, but - - -

18 MS. NATHANSON: - - - is not going to help
19 that situation. I mean, there's nothing about - - -
20 about the child dying that's going to make things
21 better.

22 JUDGE GRAFFEO: And with the fact that she
23 was pregnant, it did seem that there was some
24 jealousy about - - -

25 MS. NATHANSON: I - - - I - - -

1 JUDGE GRAFFEO: - - - his relationship with
2 the child? You don't get that - - -

3 MS. NATHANSON: I don't - - - I - - - I
4 think that - - -

5 JUDGE GRAFFEO: - - - perception from the
6 testimony?

7 MS. NATHANSON: You know, that it's - - -
8 it's certainly something that the prosecutor said,
9 but I, you know - - -

10 JUDGE SMITH: If the child - - - the child
11 dies, then her parents never have to find out that he
12 ever had a kid.

13 MS. NATHANSON: Oh, I think that it's real
14 hard to keep that kind of thing quiet. And - - - and
15 - - -

16 JUDGE SMITH: But her - - - her judgment
17 may not have been impeccable.

18 MS. NATHANSON: Well, I - - - her - - - the
19 judgment - - - there may have been other things about
20 her judgment that were not impeccable, but I don't
21 think that entered into it.

22 JUDGE PIGOTT: But when - - - when you look
23 at Borden (ph.), this is almost like a death of 1,000
24 cuts. I mean, each thing that we bring up is this
25 little slender - - - you know, the bag, the kid, the

1 - - -

2 MS. NATHANSON: But - - -

3 JUDGE PIGOTT: - - - each one, and is there
4 - - - is there a point at which if each one of them
5 is not sufficient, that the - - - the whole thing - -
6 -

7 MS. NATHANSON: But so slender, Judge, and
8 I - - - you know, frankly, I forgot one of the cuts,
9 because I wanted to respond directly, and - - - and
10 was not able to.

11 But I think it shows - - - both - - - both
12 Mr. Santiago and Ms. Santiago agreed that - - - that
13 they had discussed it and that - - - and she was
14 going to tell the parents about her pregnancy. She
15 hadn't even told her parents about her pregnancy - -
16 - about her pregnancy, and about Justice, when she
17 learned the - - - got the baby's sex, which was going
18 to be very, very shortly.

19 But all of those poss - - - all those cuts,
20 as you put it, don't add up to a suspicious
21 circumstance. The - - - the - - - they're all very
22 ordinary and normal in relationships. Yes, she
23 wished that her - - - her husband spent more time
24 with her, but he testified, he never saw her, you
25 know - - -

1 JUDGE ABDUS-SALAAM: Counsel, are you
2 arguing that there's not enough evidence here for a
3 manslaughter, even after the Appellate Division - - -

4 MS. NATHANSON: It - - -

5 JUDGE ABDUS-SALAAM: - - - reduced the
6 charge down?

7 MS. NATHANSON: Yes, there's not enough
8 evidence to show that the death occurred by criminal
9 means.

10 JUDGE PIGOTT: You almost have - - - out of
11 time. Did you want to talk about the letters?

12 JUDGE ABDUS-SALAAM: Or the - - -

13 MS. NATHANSON: Or the summation - - -

14 JUDGE PIGOTT: Or the summation?

15 CHIEF JUDGE LIPPMAN: Go ahead, counsel.

16 MS. NATHANSON: Does - - - is there - - -
17 does any - - - is there a preference - - -

18 JUDGE SMITH: Why don't you talk about
19 ineffective assistance?

20 MS. NATHANSON: I'm sorry, what?

21 JUDGE SMITH: Why don't you talk about
22 ineffective assistance?

23 MS. NATHANSON: Okay. The - - - the
24 display during summation was so egregious and so
25 unnecessary and so irrelevant and so - - -

1 CHIEF JUDGE LIPPMAN: Why was it
2 irrelevant?

3 MS. NATHANSON: Because it didn't prove
4 anything.

5 CHIEF JUDGE LIPPMAN: I understand the
6 argument is over the top - - -

7 MS. NATHANSON: Well, but - - -

8 CHIEF JUDGE LIPPMAN: - - - but why isn't
9 it relevant?

10 MS. NATHANSON: Because it wasn't - - -
11 because there was nothing it was relevant to. The
12 District Attorney - - -

13 JUDGE SMITH: Suppose - - - suppose the DA
14 just sat there silent for six minutes without a
15 picture. That would have been - - -

16 MS. NATHANSON: No problem.

17 JUDGE SMITH: Yeah. I mean, so that - - -

18 MS. NATHANSON: No problem.

19 JUDGE SMITH: The silence is legitimate,
20 but you're saying the picture - - -

21 MS. NATHANSON: Right.

22 JUDGE SMITH: - - - the postmortem picture
23 of the child is totally irrelevant.

24 MS. NATHANSON: Correct. I have no problem
25 and I've said so in the brief, with - - - with

1 showing a lapse of time. And - - - and I - - - you
2 know, you've seen it, I'm sure, in identification
3 cases. You know, it took two minutes; I was watching
4 - - - well, that's - - - it's a long time, two
5 minutes. Let's wait and see what two minutes is
6 like. That's fine.

7 But the pictures of the child fading into
8 white, with labels on them, that say things like
9 child struggling for breath, or - - - or you know - -
10 -

11 JUDGE SMITH: Well, the labels - - - you
12 see, the labels you can make a - - - you can make a
13 case - - -

14 MS. NATHANSON: Well - - -

15 JUDGE SMITH: - - - that that's telling - -
16 - that you're telling the jury the time interval in
17 which each of these things happened. But I got - - -
18 I got to admit I have a problem with the picture.

19 MS. NATHANSON: Well, that - - - but that
20 is the point. I mean, the pictures are the point.
21 And - - -

22 CHIEF JUDGE LIPPMAN: And counsel, quickly,
23 because you're light is on. What about the - - - the
24 letters? Why couldn't they be admitted for this
25 issue of trust someone who - - - who she trusted, et

1 cetera?

2 MS. NATHANSON: I - - -

3 CHIEF JUDGE LIPPMAN: It's what came along
4 with it that's bothering you?

5 MS. NATHANSON: It was - - - it was - - -
6 it was all - - - it was the entirety of the letters.
7 I mean, I never objected, and I - - - I think the
8 prosecutor said so in the brief. It's not true;
9 we're not objecting to the use of the letters - - -
10 to the letters coming in. We're objecting to the
11 letters coming in unredacted.

12 CHIEF JUDGE LIPPMAN: Right, that they
13 should have been further redacted.

14 MS. NATHANSON: There was plenty of stuff,
15 and I've quoted it, that could have been used to show
16 the relationship. Totally, again, unnecessary,
17 irrelevant, over-the-top, prejudicial - - -

18 CHIEF JUDGE LIPPMAN: Okay, counsel, you'll
19 have your rebuttal.

20 MS. NATHANSON: Thank you.

21 CHIEF JUDGE LIPPMAN: Let's see what your
22 adversary has to say.

23 Counsel, why don't you start with the last
24 two issues, the summation and the letter?

25 MS. RAPPLEYEA: Okay.

1 CHIEF JUDGE LIPPMAN: The letters?

2 MS. RAPPLEYEA: Your Honor, it's the
3 People's position that the summation was proper. It
4 was a - - -

5 CHIEF JUDGE LIPPMAN: It's not over the
6 top?

7 MS. RAPPLEYEA: It's not over the top.

8 CHIEF JUDGE LIPPMAN: Not at all?

9 MS. RAPPLEYEA: Not at all.

10 CHIEF JUDGE LIPPMAN: Nothing wrong with
11 it?

12 MS. RAPPLEYEA: It - - -

13 CHIEF JUDGE LIPPMAN: Or do you think maybe
14 better judgment could have been shown?

15 MS. RAPPLEYEA: Well, I would refer the - -
16 - the court to the case of People v. Baker. In that
17 case, even though the defendant didn't object to the
18 postmortem photograph of the child - - - excuse me -
19 - - that was displayed, it was - - - it was upheld.
20 They objected to wording from the statute as to the
21 depraved and indifference in the reckless
22 manslaughter. That was their objection.

23 But this court, in reviewing the slides,
24 found that they were not prejudicial and that they
25 did not - - -

1 JUDGE SMITH: What - - - what did the jury
2 learn from looking at the picture for six minutes?

3 MS. RAPPLEYEA: Well, what the jury learned
4 was that this was not an accident. That this six
5 minutes is a long time.

6 JUDGE SMITH: No, I know. But you don't -
7 - - you don't need a picture of the child just to
8 figure out how long six minutes is.

9 MS. RAPPLEYEA: No, you don't, Your Honor.
10 But by - - - it reflected how her death occurred. It
11 was a - - - it was an awful death. She would have
12 struggled - - -

13 JUDGE PIGOTT: It was an appeal to emotion
14 then. Don't you agree?

15 MS. RAPPLEYEA: Pardon?

16 JUDGE PIGOTT: It was an appeal to emotion.

17 MS. RAPPLEYEA: Not necessarily. The
18 People submit that it was - - - it was evidence of
19 what was presented at the trial.

20 JUDGE ABDUS-SALAAM: The death - - - the
21 death occurred to her internally. It didn't - - - I
22 mean, the picture didn't change; it just faded. It
23 didn't show how her death occurred. I'm not quite
24 sure - - -

25 MS. RAPPLEYEA: It didn't show how her

1 death occurred, no. But the picture with the
2 superimposed language, which was the medical
3 examiner's testimony and Dr. Baden's testimony, that
4 showed what this child went through during that six
5 minutes of time.

6 CHIEF JUDGE LIPPMAN: But do you think it
7 furthered analysis or emotion?

8 MS. RAPPLEYEA: I'm sorry?

9 CHIEF JUDGE LIPPMAN: Did it further
10 analysis or emotion, in terms of - - -

11 MS. RAPPLEYEA: Well, I - - -

12 CHIEF JUDGE LIPPMAN: - - - your appealing
13 to the jury?

14 MS. RAPPLEYEA: I think it - - - it
15 furthered the analysis. We had to show - - -

16 CHIEF JUDGE LIPPMAN: It wasn't - - - it
17 didn't - - - it wasn't an attempt to - - -

18 MS. RAPPLEYEA: It was the People - - -

19 CHIEF JUDGE LIPPMAN: - - - you know,
20 appeal to their - - - their emotions rather than an
21 analysis of the case?

22 MS. RAPPLEYEA: No, the People would submit
23 - - -

24 CHIEF JUDGE LIPPMAN: That - - - that
25 unique rollout of the summation was just to further

1 the analysis?

2 MS. RAPPLEYEA: Well, this - - - this court
3 has upheld similar photographs - - -

4 JUDGE PIGOTT: But you said - - - I cut you
5 off, unfortunately, as I'm doing again - - -

6 MS. RAPPLEYEA: Okay.

7 JUDGE PIGOTT: - - - but you were about to
8 say it showed the horrible death.

9 MS. RAPPLEYEA: It showed - - - it showed
10 the horrible death. And we couldn't have shown the
11 horri - - -

12 JUDGE PIGOTT: Well, that's not the point,
13 though, is it? It's - - - I mean, if - - - if you're
14 going - - - if you want to - - - if you want to make
15 a jury feel really, really bad if they don't come
16 back with a - - - with a guilty verdict, show a
17 horrible death of a young child.

18 MS. RAPPLEYEA: Well, Your Honor, the
19 People also were trying to prove that this defendant
20 intended to kill this child. And in order to do so,
21 we had to show it wasn't an accident. And it's not
22 an accident - - - maybe holding your hand over the
23 child's mouth and nose for thirty to sixty seconds,
24 you know, in her mind, maybe that was an accident.
25 But that's not what happened here. The medical

1 testimony was that it took four to six minutes - - -

2 JUDGE SMITH: Well, suppose we - - -

3 MS. RAPPLEYEA: - - - for this child to
4 die.

5 JUDGE SMITH: - - - suppose we disagree
6 with you that - - - and we think that it was improper
7 to show the picture, does that make - - - does that
8 mean that counsel was ineffective?

9 MS. RAPPLEYEA: No, Your Honor. You have -
10 - - I believe, that you have to look at the entire
11 case and how this, you know, he - - -

12 JUDGE GRAFFEO: What - - - what would have
13 been the defense strategy for not objecting to those
14 photographs?

15 MS. RAPPLEYEA: Well, to draw further
16 attention to the photographs. Perhaps, you know, he
17 - - - he felt that by sitting there - - -

18 CHIEF JUDGE LIPPMAN: Don't you think
19 that's a - - - was really a mistake in terms of
20 defense strategy?

21 MS. RAPPLEYEA: Well, it's our - - - I'm
22 sorry.

23 CHIEF JUDGE LIPPMAN: Given that particular
24 presentation?

25 MS. RAPPLEYEA: It's our - - -

1 CHIEF JUDGE LIPPMAN: And you agree that
2 one egregious mistake could be enough, right?

3 MS. RAPPLEYEA: I do agree. However, it's
4 our position that the summation was proper. That the
5 use of the photo display was proper, that it - - - it
6 simply indicated what was the evidence at trial. The
7 People showed it in a PowerPoint display, which has
8 been upheld - - -

9 JUDGE PIGOTT: What'd you think of the
10 redactions?

11 MS. RAPPLEYEA: The redactions of the
12 letters, I - - - there were definitely language in
13 two of the six letters - - - excuse me - - - that
14 were submitted that was crude, and that may have
15 reflected negatively on her character or lifestyle.
16 But the court here gave minimizing instructions,
17 which I believe, if the jury was - - -

18 CHIEF JUDGE LIPPMAN: Can you - - - can you
19 in this circumstance give minimizing instructions in
20 a situation where this so taints her character? You
21 know, at this critical time to leave some of that
22 stuff that was in the letters. Can that be cured?

23 MS. RAPPLEYEA: I think it can be cured.
24 And I think that these instructions, which said that
25 the jury was not allowed to consider this as evidence

1 of her character or lifestyle.

2 JUDGE PIGOTT: Then why was it admitted?
3 In other words, if - - - if you're redacting these
4 letters, you're taking out stuff that should not be
5 there. Why wouldn't you take it out, rather than
6 saying, I'm going - - - I'm going to let you hear
7 this salacious stuff, but don't use it in any way in
8 your deliberations or your - - - or your ultimate
9 verdict? I don't understand why that would happen.

10 MS. RAPPLEYEA: Well, his - - - his tactic
11 was not to draw further attention to it. However, he
12 chose in - - - instead to go after Michael Bryant, to
13 discredit him completely - - -

14 JUDGE SMITH: What - - - I mean, I - - -
15 what I thought - - - what I thought Judge Pigott was
16 getting at was did the - - - did the language that
17 was left in have any rele - - - I mean, had - - - was
18 there any justification for offering it in the first
19 place?

20 MS. RAPPLEYEA: No, the - - - no, the
21 language that was left in merely showed that she
22 wanted to have a long-term sexual relationship with
23 this person.

24 JUDGE SMITH: Well, but in that - - - but
25 then - - - but your theory is, I take it, is her - -

1 - yeah - - - her intense fascination with this man
2 supports the credibility of his testimony.

3 MS. RAPPLEYEA: Yes. Yes, Your Honor.
4 That's exactly what we've - - - that was what we
5 submit.

6 JUDGE PIGOTT: Really?

7 MS. RAPPLEYEA: Can I go on to the
8 corroboration or - - -

9 CHIEF JUDGE LIPPMAN: Sure, go ahead.

10 MS. RAPPLEYEA: Okay. I will rely on my
11 brief as for the preserv - - - preservation issue.
12 It's our position that it was not properly preserved.

13 65th - - - CPL 6050 requires some proof of
14 whatever weight that a crime was committed. Here we
15 have circumstances surrounding Justice's death, in
16 fact, connected the defendant to the death, and her
17 confession furnished the key to explain these
18 circumstances.

19 We had a healthy baby. She was - - - she
20 had no bronchial, asthmatic issues, according to Dr.
21 Chute and Dr. Baden. The autopsy excluded other
22 natural and unnatural causes of death. Dr. Baden - -
23 - although I agree with counsel - - - excuse me - - -
24 that Dr. Chute testified that but for her confession,
25 he would have found the death undetermined, that is

1 not what Dr. Baden testified. He said he looked at,
2 in addition to the confession, evidence from the
3 scene, the autopsy, and the police investigation.
4 The police investigation and Santos' testimony put
5 the defendant in the room by herself with the child
6 at the time the doctors testified the child died.

7 They reached their - - - the time of death,
8 based on the child's appearance at 5:30 in the
9 morning, the fact that the bladder had no urine. She
10 had a dry diaper and the st - - - based on the
11 stomach contec - - - contents.

12 Dr. Baden testified that smothering is a
13 diagnosis of exclusion, and in this case, there was
14 forensic indicators that she had been smothered. The
15 froth - - - the froth coming from the mouth and nose,
16 the petechiae of the thymus gland, all pointed
17 towards - - - was consistent with asphyxia by
18 suffocation.

19 JUDGE PIGOTT: Your - - - your opponent
20 raised the issue - - - I know you said it one way,
21 and I'm - - - I've got it written down another, but I
22 had a note that both of the People's doctors said
23 that they relied on defendant's "I did it" to reach
24 their ultimate conclusion. Is that your recollection
25 of the record?

1 MS. RAPPLEYEA: That is not my
2 recollection.

3 JUDGE PIGOTT: So you say that Dr. Baden
4 did not use it?

5 MS. RAPPLEYEA: Dr. Baden did not state
6 that, no. Dr. Chute did. Dr. Baden said he relied
7 on a myriad of factors, the confession being one of
8 them, but he also looked at the crime scene - - -

9 JUDGE PIGOTT: Oh, he did. So he did say
10 he relied on the - - -

11 MS. RAPPLEYEA: He did - - - well, he - - -
12 he considered it, yes. He said he considered it.

13 JUDGE SMITH: Was he ever asked the
14 question of whether he would reach the same opinion
15 if he didn't have it?

16 MS. RAPPLEYEA: I believe he - - - that he
17 was asked if it - - - if she had minimized or if we
18 found out that her confession was - - - was incorrect
19 or was wrong, would it change his opinion.

20 JUDGE SMITH: What did he say?

21 MS. RAPPLEYEA: And I believe he said, it
22 may have. He - - - it was inconclusive.

23 In addition to the evidence I - - - I've
24 already talked about, there was scene evidence.

25 There was the pillow that Santos said when

1 he got out of bed that morning and when he went to
2 work there was no wetness on his pillow. Yet, they
3 found that there was - - - Dr. Baden found that by -
4 - - from looking at the photographs, that there was
5 wiping wetness there, which indicated a suggestion of
6 trying to wipe away trace evidence or tampering with
7 the scene.

8 There was the plastic bag that Santos said
9 was not present when he left the room that - - - that
10 morning. But Investigator Martin found it at the
11 foot of the child's bed.

12 There was motive. Here - - - she was a - -
13 - she was jealous of Justice. She resented Justice.
14 Justice - - - Justice took time away from her and her
15 husband. They had just gotten Justice. She was
16 going to be with them for the next seven days. She
17 didn't want Justice to come that night. She had
18 preferred that she come the next day. She was
19 pregnant with Santos' child. They were going to have
20 a family together. Justice was an obstacle to that
21 family.

22 Also a consciousness of guilt. This is a
23 woman who typically stays in bed every day until 10
24 o'clock if she doesn't have to go to work, if she
25 doesn't have to go to school. The alarm went off at

1 5:10, jumped out of bed, followed Santos to the door,
2 locked the door, something she hadn't done once in
3 the last ten months.

4 All of - - - we - - - we - - - we submit
5 that the Appellate Division correctly found that all
6 of this independent evidence established that there
7 was proof of a crime and that the defendant - - - the
8 defendant committed this crime - - - proof by
9 someone, we submit, she was connected to the crime.

10 CHIEF JUDGE LIPPMAN: Okay, counsel.

11 MS. RAPPLEYEA: Any other questions?

12 CHIEF JUDGE LIPPMAN: Thank you.

13 MS. RAPPLEYEA: Thank you.

14 CHIEF JUDGE LIPPMAN: Counsel, rebuttal?

15 MS. NATHANSON: Yes, just - - - just a
16 couple of points. I just - - - the District Attorney
17 referred to the defense failure to object to the
18 summation as not wanting to call further attention to
19 the slides. I would like to believe that had there
20 been an objection, those slides would not have been
21 shown.

22 JUDGE SMITH: What - - - what about - - -
23 yeah, what - - - what about - - - may - - - maybe the
24 defense lawyer is thinking, he has just given a
25 summation, in which he says, oh, they've got nothing

1 but emotion on there, so I - - - it's a highly
2 emotional case; they have no evidence. Couldn't he
3 have viewed this as - - - as - - - at least hoped
4 that the jury would see that - - - they're playing to
5 their hands? Yeah, they don't have anything. All
6 they can do is show a picture of a kid for six
7 minutes?

8 MS. NATHANSON: I don't think so. That - -
9 - that does not strike me as being very competent
10 legal thinking at that point.

11 JUDGE SMITH: Okay, but even assuming
12 you're wrong, is - - - is every error in failing to
13 object - - -

14 MS. NATHANSON: No.

15 JUDGE SMITH: - - - to an excessive
16 summation, is that ineffective - - - ineffective
17 assistance?

18 MS. NATHANSON: It's - - - of course not.
19 But this was - - - this particular summation was - -
20 -

21 JUDGE SMITH: Suppose - - - suppose he'd
22 objected and the objection had been wrongly
23 overruled. Is that necessarily reversible error?

24 MS. NATHANSON: I would hope so. I would
25 certainly, you know, argue with great confidence that

1 it was reversible error. But not only - - - but
2 there were - - -

3 JUDGE ABDUS-SALAAM: Not only - - - are you
4 talking about only the slide show or are you saying
5 that in totality - - -

6 MS. NATHANSON: There - - -

7 JUDGE ABDUS-SALAAM: - - - the letters, the
8 slideshow - - -

9 MS. NATHANSON: I think, yes. There were
10 other - - -

11 JUDGE ABDUS-SALAAM: - - - something other
12 - - -

13 MS. NATHANSON: Yeah. And - - - and the
14 ineffective counsel argument relies on the lack of
15 objection on two of the points, and - - -

16 JUDGE SMITH: He did object to the letters,
17 didn't he?

18 MS. NATHANSON: He - - - well, it puts me
19 in a funny position. He objected to the letters
20 going in. There was some redaction for statements
21 about criminal conduct - - - I don't know.

22 JUDGE SMITH: You say he should have asked
23 for more redactions.

24 MS. NATHANSON: He should have asked for
25 more redaction, which he did not. He asked for a

1 wholesale - - - and exclusive - - -

2 JUDGE SMITH: I mean, he did some things
3 pretty well, too.

4 MS. NATHANSON: He certainly did.

5 JUDGE SMITH: He cross-examined very well.

6 MS. NATHANSON: He certainly did. But I
7 don't think that that's the test, Judge. I mean,
8 that - - - the - - - the - - -

9 JUDGE SMITH: But if you're relying on a
10 single error - - - I mean, you say you're not.

11 MS. NATHANSON: No.

12 JUDGE SMITH: But if there's - - - but if -
13 - - certainly, with one error that you dwell on, if
14 you doing that, it has to be a pretty devastating
15 error.

16 MS. NATHANSON: It - - - it does and this
17 court has found ineffective when there - - -
18 assistance of counsel in a single error when it was
19 devastating, and I think one had to do with the
20 statute of limitations, Fisher more recently, I think
21 - - - you know, it's - - - it's certainly not beyond
22 the pale. And I think that this error with respect
23 to the summation was of that nature, and even if it
24 was only close to that, then adding to the other
25 failures of counsel, although I agree that there many

1 things he did well - - -

2 CHIEF JUDGE LIPPMAN: Okay, counsel. Thank
3 you.

4 MS. NATHANSON: Thank you.

5 CHIEF JUDGE LIPPMAN: Thank you both,
6 appreciate it.

7 (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. Cheryl Santiago, No. 22 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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