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COURT OF APPEALS

STATE OF NEW YORK

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PEOPLE,

Respondent,

-against-

No. 67

FLOYD L. SMART,

Appellant.

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20 Eagle Street  
Albany, New York 12207  
March 24, 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: People v Smart.

2 Counsel, would you like any rebuttal time?

3 MR. FUNK: Yes, Your Honor, I'd like two  
4 minutes for rebuttal.

5 CHIEF JUDGE LIPPMAN: Two minutes, sure, go  
6 ahead.

7 MR. FUNK: May it please the court, good  
8 afternoon, Mark Funk appearing for the defendant-  
9 appellant Floyd Smart. Mr. Smart's Sixth Amendment  
10 rights to confrontation and cross-examine the  
11 witnesses against him was violated when the trial  
12 court permitted a witness' grand jury testimony to be  
13 - - -

14 CHIEF JUDGE LIPPMAN: Do you think that the  
15 - - - that the trial court went too far in finding  
16 that - - - that basically the defendant procured the  
17 - - - Grant not testifying?

18 MR. FUNK: Yes.

19 CHIEF JUDGE LIPPMAN: Why? Why? How so?  
20 You had the conversations from prison and all of  
21 that. What - - - what's wrong with making that  
22 assumption? Why - - - why is - - -

23 MR. FUNK: Because the witness, when  
24 brought into court through her counsel, asserted the  
25 Fifth Amendment privilege.

1                   JUDGE READ: Is - - - is that enough? Is  
2 that a bright line rule? You're saying whenever a  
3 witness asserts the Fifth Amendment, that's it?  
4 That's the end of the inquiry?

5                   MR. FUNK: Yes and no. What I mean by that  
6 is the trial court has the authority, and has for the  
7 last 120 years since this court decided Taylor v.  
8 Forbes in 1894, to say a witness is - - - when they  
9 assert their Fifth Amendment privilege, is  
10 unreasonable or unlawful, the court can dig further.

11                   JUDGE SMITH: Suppose - - - suppose - - -

12                   JUDGE GRAFFEO: She had - - - she had  
13 immunity, right, because she had testified in front  
14 of the grand jury.

15                   MR. FUNK: She had immunity for these  
16 charges - - -

17                   JUDGE READ: For the burglary.

18                   MR. FUNK: For the burglary.

19                   CHIEF JUDGE LIPPMAN: Transaction, okay.

20                   MR. FUNK: She had four other sets of  
21 charges pending - - -

22                   JUDGE PIGOTT: But how do you know then  
23 that - - - that - - - I would - - - where does the -  
24 - - where does the Fifth Amendment come in? I - - -  
25 it seems to me in my experience, you got to ask

1 questions and, you know, what's your name? She can  
2 answer that. Where do you live? She can answer  
3 that. Do you know the defendant? She can answer  
4 that. And - - - and a whole series of things that  
5 may relate to this particular crime that - - - that  
6 there is no Fifth Amendment issue.

7 And - - - and as to the ones when - - - as  
8 you're about to talk about the other - - - the other  
9 crimes that she allegedly is charged with or - - - I  
10 don't know why they're relevant. So it - - - it  
11 would - - - I was trying to get to where she - - -  
12 where the Fifth Amendment applies in this case, in  
13 terms of then getting - - - getting to that issue.

14 MR. FUNK: The witness, through counsel,  
15 asserted the Fifth Amendment privilege.

16 JUDGE PIGOTT: Against - - - about what? I  
17 guess is my question. What was she going to testify  
18 that she - - - that she was worried about being - - -

19 MR. FUNK: And the short answer to that is  
20 the trial court could have had the authority to ask  
21 that question and did not do that. And - - -

22 CHIEF JUDGE LIPPMAN: So if they don't ask  
23 the question, then we accept at face value that it's  
24 Fifth Amendment?

25 MR. FUNK: Well, the trial court did hear,

1 as did the petitioner's attorney.

2 CHIEF JUDGE LIPPMAN: The trial court  
3 really doesn't deal with the Fifth Amendment issue,  
4 though, do they or do they?

5 MR. FUNK: I'm sorry; I couldn't hear your  
6 question.

7 CHIEF JUDGE LIPPMAN: Does the trial court  
8 really doesn't deal with the whole Fifth Amendment  
9 issue, or they just say, look, the defendant procured  
10 her not wanting to testify without really any great  
11 wisdom on the Fifth Amendment, on her taking it or  
12 not?

13 MR. FUNK: No, that was error, I believe,  
14 on the court's - - - the trial court's - - - part.  
15 The court essentially - - -

16 JUDGE SMITH: Well, didn't - - - didn't - -  
17 - didn't the court find as a fact that her motive for  
18 taking the Fifth was that she had been either  
19 threatened or persuaded by the defendant?

20 MR. FUNK: No, Judge, I would disagree with  
21 that. What the trial court said is that this is  
22 irrelevant. This issue is irrelevant. The court  
23 never found - - -

24 JUDGE SMITH: Well, well, the court - - -  
25 well, okay.

1                   MR. FUNK:   - - - she asserted the Fifth - -  
2                   -

3                   JUDGE SMITH:   Suppose - - - maybe - - -  
4                   maybe you're right.  In principle, if - - - if the  
5                   court did find as a fact - - - let's suppose you have  
6                   someone who's really into - - - a perfectly  
7                   legitimate assertion of the Fifth Amendment, and the  
8                   witness is ready to waive the Fifth Amendment and  
9                   testify, but then the defendant comes to her and  
10                  says, by the way, if you - - - if you don't take the  
11                  Fifth Amendment, I'm going to put a bullet to your  
12                  head, and she takes the Fifth Amendment.

13                  Is there a problem there?  Or can you put  
14                  the grand - - - can you put in her grand jury  
15                  testimony?

16                  MR. FUNK:   If the trial court made factual  
17                  determinations that the basis for the assertion of  
18                  the Fifth Amendment was unlawful, and that's what I'm  
19                  asking the court to rule.

20                  JUDGE SMITH:  No, no, no, no.  My question  
21                  was assume it's perfectly lawful, but her motive is  
22                  she was threatened.

23                  MR. FUNK:   Well, if - - - the issue would  
24                  be whether she did have a lawful reason.  If there's  
25                  no reason whatsoever to assert the Fifth - - -

1                   JUDGE SMITH: So what you're saying is - -  
2                   - what you're saying is, if she has a lawful reason,  
3                   it doesn't matter whether - - - what the defendant  
4                   did to persuade her to exercise that lawful right she  
5                   had.

6                   MR. FUNK: That is correct. I'm asking the  
7                   court to make that - - -

8                   JUDGE SMITH: Including - - - including the  
9                   threat of death?

10                  MR. FUNK: Well, if she has a lawful right  
11                  to assert the Fifth Amendment privilege - - -

12                  JUDGE SMITH: If she - - - if she has - - -  
13                  if she has a lawful right to take the Fifth  
14                  Amendment, and the defendant says I'll kill you if  
15                  you don't take it, and she takes it, then there's - -  
16                  - then the defendant - - - you have no right to put  
17                  in the grand jury testimony.

18                  MR. FUNK: The trial court, as I've noted,  
19                  for 120 years - - -

20                  JUDGE SMITH: This is all - - - that's less  
21                  than a yes or no answer to my question.

22                  MR. FUNK: No, I would submit that the  
23                  refusal to testify must be unlawful. And that is - -  
24                  - I would base that on the Sirois case from the  
25                  Second Department that is, kind of we'll say, the

1 landmark ruling in this area from 1983. That's what  
2 that court held.

3 This court has never explicitly addressed  
4 that, but I think has implied that in People v.  
5 Johnson, where there must be more than wrongful  
6 conduct and a refusal to testify. There has to be  
7 something linking those two things together for the -  
8 - -

9 JUDGE GRAFFEO: Well, Johnson had no  
10 hearing.

11 MR. FUNK: Correct.

12 JUDGE GRAFFEO: In this case there is a  
13 hearing with a pretty fair amount of evidence in  
14 terms of the conversations that Mr. Smart had with  
15 his mother.

16 MR. FUNK: That is correct. However - - -

17 JUDGE GRAFFEO: I mean, there's no doubt he  
18 was clearly trying to - - - at least from the record  
19 it appears he was clearly trying to prevent this  
20 woman from testifying.

21 MR. FUNK: Well, I'm sure every criminal  
22 defendant would like a witness not to appear, but  
23 whether anything that he may have done - - -

24 JUDGE RIVERA: But they may not threaten  
25 them - - -

1 MR. FUNK: I'm sorry?

2 JUDGE RIVERA: They may wish that, but they  
3 may not go around threatening them, and that's the  
4 focus, right?

5 MR. FUNK: Well, in - - - I think, the  
6 focus in this - - - you know, under Geraci, is  
7 whether the defendant actually procured the - - -

8 CHIEF JUDGE LIPPMAN: But you know what?  
9 There - - - there are usually multiple reasons maybe  
10 why a person wouldn't want to testify. How do we  
11 sift through that? Let's say - - - let's say for the  
12 sake of argument, that the defendant was - - -  
13 whether it was direct or trying to do it in a subtle  
14 way, was trying to get her not to testify.

15 And let's say - - - and this isn't that  
16 different, I guess, than the question Judge Smith was  
17 asking you - - - but let's say, she didn't want to  
18 testify because she loved him. And they had a  
19 relationship, and she didn't - - - that's why she  
20 didn't want to testify. And yet, he was trying,  
21 let's assume, to - - - to get her not to testify.  
22 What - - - what happens then?

23 MR. FUNK: In a situation like that - - -

24 CHIEF JUDGE LIPPMAN: Or a third - - - and  
25 third - - - she doesn't want to go to jail for

1 perjury, so she's afraid to test - - - so there are  
2 lots of reasons why she doesn't testify. What - - -  
3 what - - - how do we wade through all of that?

4 MR. FUNK: The trial court - - -

5 CHIEF JUDGE LIPPMAN: From the judge's - -  
6 - from the judge making a ruling.

7 MR. FUNK: The trial court should, I would  
8 submit, first hear from this witness. And that was  
9 an error; the trial court did not hear from this  
10 witness. I would draw the court's attention to  
11 People v. Savinon, a decision written by Judge  
12 Rosenblatt, who's present today.

13 JUDGE SMITH: Well, she took the stand and  
14 then said she didn't want to testify, right?

15 MR. FUNK: She did during the defense case  
16 outside the presence of the jury. During the Sirois  
17 hearing, she appeared through counsel and asserted  
18 the Fifth. And this court, in People v. Hamilton,  
19 allowed or affirmed that a witness could testify at a  
20 Sirois hearing even explaining their reasons why they  
21 were going to assert the Fifth - - -

22 JUDGE ABDUS-SALAAM: What - - - counsel - -  
23 -

24 MR. FUNK: - - - if called to testify at  
25 trial, and that's what should have happened here.

1 JUDGE ABDUS-SALAAM: Counsel, in this case,  
2 the trial was going on when the witness appeared,  
3 right? She was in the wind, essentially, until the  
4 trial. Wasn't that correct?

5 MR. FUNK: I - - -

6 JUDGE ABDUS-SALAAM: And then she - - - or  
7 during the hearing and then she comes in the middle  
8 of the hearing.

9 MR. FUNK: She came in the middle of the  
10 hearing - - -

11 JUDGE ABDUS-SALAAM: Right.

12 MR. FUNK: The trial had not started yet.

13 JUDGE ABDUS-SALAAM: Yeah.

14 MR. FUNK: They didn't pick the jury until  
15 after the hearing concluded.

16 JUDGE ABDUS-SALAAM: Right, so that she  
17 comes in the middle of the hearing, but her lawyer  
18 has already told the court that she's not going to  
19 testify. She's going to assert her Fifth Amendment  
20 right. And he couldn't - - - the lawyer couldn't  
21 understand why she would want to do that or couldn't  
22 explain it to the court, but the lawyer tried to talk  
23 her out of asserting that right or - - -

24 MR. FUNK: I disagree with that, Judge.

25 JUDGE ABDUS-SALAAM: - - - advising her - -

1 - or advising her that she, you know, didn't - - -  
2 she - - - she had no real reason to assert the Fifth  
3 Amendment because she had immunity in the grand jury.

4 MR. FUNK: I disagree with that, Judge. In  
5 fact, what her counsel said was that "The People are  
6 not giving her immunity, so on that basis, Ms. Grant,  
7 if called to testify, would be utilizing her Fifth  
8 Amendment rights to remain silent."

9 JUDGE SMITH: Didn't - - - didn't he also  
10 say she's not going to testify, immunity or no  
11 immunity?

12 MR. FUNK: She did say that. If I could -  
13 - - that quote I just gave was at page 270 of the  
14 record. Later on, when the court said, well, is she  
15 competent to make that decision, that's when counsel  
16 then said, she's not testifying, immunity or no  
17 immunity. However, again, I would submit that the  
18 court could have had her testify at this Sirois  
19 hearing, and explain her rationale.

20 CHIEF JUDGE LIPPMAN: As to the Fifth, or  
21 as to the reasons in general why she didn't want to  
22 testify?

23 MR. FUNK: As to her reasons why she did  
24 not want to testify. I would submit that would be  
25 consistent with Savinon and Hamilton - - -

1 CHIEF JUDGE LIPPMAN: So, again, the court  
2 didn't real deal with the Fifth part of it. The  
3 court is just going on, you know, what they assume  
4 from the prison conversations, right?

5 MR. FUNK: That was the basis of the  
6 court's decision, and the court should have looked  
7 further than that.

8 CHIEF JUDGE LIPPMAN: Okay. Thanks,  
9 counsel.

10 MR. DUNHAM: Good afternoon, Matthew  
11 Dunham, appearing on behalf of the Monroe County  
12 District Attorney's Office.

13 CHIEF JUDGE LIPPMAN: Counsel, what about  
14 the court not - - - not mentioning her - - - her  
15 wanting to take the Fifth? Is that strange, that the  
16 court didn't even want to delve into that at all? Or  
17 why didn't the court delve into that?

18 MR. DUNHAM: I think the court didn't delve  
19 into it primarily because Ms. Grant's attorney was so  
20 adamant that Ms. Grant was not going to testify under  
21 any circumstances whatsoever.

22 JUDGE PIGOTT: She could be found in  
23 contempt of court for that, right, if she's - - - if  
24 the court says she can and will testify?

25 MR. DUNHAM: She could have, and I think

1 really that would have been the - - - the more  
2 appropriate avenue here.

3 JUDGE PIGOTT: I was thinking about a  
4 situation, albeit hypothetical, where you're about to  
5 put in the grand jury testimony in lieu of - - - of  
6 the defendant, and - - - or the recalcitrant witness  
7 and then you get a call saying she's on her way, and  
8 then she's crossing the street, gets run over by a  
9 car.

10 Does that - - - did - - - can you still use  
11 the grand jury testimony even though she was now  
12 willing to testify, but unfortunately death, not  
13 caused by the defendant, prevents her from  
14 testifying?

15 MR. DUNHAM: I don't think we could use it.  
16 I'm not sure on the case law on that for sure, but I  
17 think we would have to have testimony where she was  
18 cross-examined, whether it was a right to  
19 confrontation that was exercised at a prior hearing,  
20 as long as the defendant was not involved.

21 JUDGE PIGOTT: So what - - - do - - - are  
22 you satisfied with what the trial court and the - - -  
23 both the Sirois court and the trial court did in  
24 terms of determining what exactly she's talking about  
25 when she says I'm going to take the Fifth?

1                   MR. DUNHAM: Well, the record certainly  
2 could have been fleshed out a bit. Well, I don't  
3 know if it could have been fleshed out a bit more,  
4 actually, because I think the problem was Ms. Grant's  
5 attorney - - - or Ms. Grant herself; the attorney was  
6 acting on her behalf - - - but he cut off any  
7 possibility of examining this - - -

8                   CHIEF JUDGE LIPPMAN: Yeah, but - - - but  
9 again, can't there be a lot of different explanations  
10 of why she want - - - doesn't want to testify?  
11 Wouldn't - - - wouldn't the court want to get into  
12 that a little bit? And like I said, it could be just  
13 the relationship between the two of them.

14                   If he's assuming, as - - - as we asked your  
15 adversary, assuming that the court felt that - - -  
16 that the defendant was trying to get her not to  
17 testify, what happens if there are other reasons why  
18 she's not testifying that - - - that, you know,  
19 override that, or she just didn't want to testify,  
20 because she loved him, or she didn't want to testify,  
21 because she didn't want to go to jail on perjury, or  
22 - - - wouldn't you - - - wouldn't you want to know  
23 why she didn't want to testify?

24                   MR. DUNHAM: If she was willing to tell us.  
25 Unfortunately, she simply wasn't willing to tell us,

1 and so we were left with the record that we had at  
2 the Sirois hearing, and - - -

3 JUDGE PIGOTT: Well, I looked at that  
4 record, and - - - in probably a dif - - - a different  
5 view, but I thought now, the People, they're asking  
6 for this hearing, because they want to use the grand  
7 jury testimony, which they know they've read and they  
8 like. The defendant doesn't want her to testify  
9 because he knows what she's going to say, presumably,  
10 but at the same time, doesn't want the grand jury  
11 thing.

12 So - - - so I'm wondering, you know, who's  
13 looking out for Lady Justice in the middle? You  
14 know, the - - - the confrontation issue and the Fifth  
15 Amendment issue, because I - - - it just didn't seem  
16 to me that they were fleshed out of the way they - -  
17 - they should have been, in terms of exactly what  
18 questions would have been asked for which she would  
19 then invoke a Fifth Amendment privilege, because it's  
20 not every question.

21 MR. DUNHAM: I think ideally we would have  
22 had Ms. Grant testify and explain herself. We  
23 couldn't have that, but the testimony we did present,  
24 I think was - - - was sufficient, in fact,  
25 overwhelming that Mr. - - - the defendant here,

1 engaged in tampering with this witness, and that in  
2 fact, he - - - he helped procure her absence. And -  
3 - -

4 JUDGE SMITH: I mean, do you - - - as you  
5 read the record, is there a finding of fact that her  
6 motive for invoking the Fifth was either the - - -  
7 was the defendant's persuasion?

8 MR. DUNHAM: I think there's an implicit  
9 finding. Unfortunately it wasn't - - - it wasn't  
10 spelled out by the judge, but I think the judge - - -  
11 I think it kind of jumps out of the record. It's - -  
12 - there's an implicit finding that the Fifth was - -  
13 -

14 JUDGE RIVERA: But didn't it - - -

15 MR. DUNHAM: - - - was not invoked  
16 genuinely.

17 JUDGE RIVERA: Didn't the actions that he  
18 took really go towards her not ever showing up as  
19 opposed to showing up and trying to take the Fifth?

20 MR. DUNHAM: Yes, I think that's what  
21 happened.

22 JUDGE RIVERA: Where - - - where do you get  
23 the cause? Which I think is his point, you can't  
24 show that any of any of his actions caused, right,  
25 her invocation of the Fifth - - -

1 MR. DUNHAM: Well, I - - -

2 JUDGE RIVERA: - - - and chose not to be  
3 available.

4 MR. DUNHAM: I think his actions caused her  
5 to find a way not to testify in this case. And - - -  
6 and ideally that would be the - - -

7 CHIEF JUDGE LIPPMAN: Is there a leap to  
8 get to that? I mean, it's really - - -

9 MR. DUNHAM: No, I think - - -

10 CHIEF JUDGE LIPPMAN: Do you find enough to  
11 make that - - - that judgment?

12 MR. DUNHAM: Well, I think if we look at  
13 what other reason did she have to invoke the Fifth,  
14 what - - - was there a genuine reason for her to  
15 invoke the Fifth?

16 CHIEF JUDGE LIPPMAN: What about going to  
17 jail?

18 MR. DUNHAM: Well, she - - - for - - - for  
19 either perjury or these other - - - I think the  
20 defense is saying either she invoked the Fifth for  
21 one of two reasons: to avoid perjury, because she  
22 supposedly lied at the grand jury and now she would  
23 have to tell the truth; or to - - - somehow she would  
24 be implicating herself in these other crimes that she  
25 had warrants out for. But I don't think either

1 reason really makes sense.

2 JUDGE PIGOTT: But that would have been  
3 irrelevant. Is this a two-part case? I guess that's  
4 what I'm focusing on. You - - - I think you're  
5 right. You prove very clearly that - - - that the  
6 defendant tried - - - in fact, that's what the judge  
7 said, "I find by clear and convincing evidence that  
8 the defendant, acting in concert" et cetera.

9 But then the defense is saying, that's  
10 over; here she is. You got her; now you can - - -  
11 now you can use her. And then she says, oh, I'm  
12 going to invoke my Fifth Amendment rights, and - - -  
13 and what - - - what's troubling maybe only to me is  
14 that, I - - - that was not established, that - - -  
15 that she had a Fifth Amendment right not to testify.

16 MR. DUNHAM: Right, I think - - - I think -  
17 - - but I think the absence helps our case, the  
18 absence of a legitimate reason to invoke the Fifth.  
19 I - - - I agree there was no reason for her to invoke  
20 the Fifth that made any kind of sense. And so she -  
21 - -

22 JUDGE PIGOTT: But don't you - - - you  
23 don't - - - well, one of things I think about. This  
24 happens a lot in domestic violence cases, you know,  
25 where witnesses don't appear. And whatever we

1           decided could be construed to say, anytime a witness  
2           doesn't appear, the People can use a statement that  
3           was previously issued; it's not confined to grand  
4           jury. And - - - and we don't want have a situation  
5           where it's in anyone's best interest not to have a  
6           witness testify, right?

7                     MR. DUNHAM: Absolutely, yes.

8                     JUDGE PIGOTT: So how would we frame that?

9                     MR. DUNHAM: Well, I think the Geraci rule  
10           sets it up nicely, and I think we go a little further  
11           here. But the Geraci rule, you have to have a  
12           connection between the absence and the misconduct.  
13           So just simply the absence, even in some of the  
14           cases, I think that was a - - - maybe the implication  
15           that the defendant did something wrong or improper,  
16           but there was no - - - there was no evidence of it.

17                    CHIEF JUDGE LIPPMAN: Yeah, but here she's  
18           not absent. It's in the context - - - if you have a  
19           physical presence - - -

20                    JUDGE PIGOTT: Yeah, you get that at second  
21           part.

22                    MR. DUNHAM: Right, so we get to the  
23           physical presence in this case, but I think that we  
24           had a physical availability but a practical  
25           unavailability, because she was still refusing to

1           testify.

2                       JUDGE PIGOTT: Whose burden was that then,  
3 I guess? You know, now she's there, and she says  
4 she's going to invoke her Fifth Amendment. That  
5 helps you, because you've got the grand jury  
6 testimony that you want to use, and it's not subject  
7 to cross-examination, so you're in pretty good shape.

8                       She's taken the Fifth. I don't know if  
9 that helps the defense or not. Obviously, they're  
10 thinking it does, because, you know, if she's going  
11 to testify and testify truthfully, it could be - - -  
12 it could be harmful. But how do you make that  
13 determination, if as the judge said here, you know,  
14 she doesn't want to testify for a number of reasons,  
15 as Judge Lippman keeps pointing out?

16                      MR. DUNHAM: Well, I think if there's  
17 multiple reasons, if there's competing reasons why  
18 the witness doesn't want to testify, I think the rule  
19 should be, if the defendant has - - - if by  
20 misconduct, even partially procured the absence of  
21 the witness. Even if - - - if he's now playing a  
22 role, if he's in her head and he's playing a role as  
23 to why she's going to testify, even if it's five  
24 percent of the reason, I think that that - - - he  
25 should waive and forfeit, in fact, his right to

1 confront the witness.

2 JUDGE GRAFFEO: She didn't come in  
3 voluntarily, right? She was arrested on a bench  
4 warrant.

5 MR. DUNHAM: She was picked up on a  
6 warrant, I believe, yes. And - - - and so - - - so  
7 she comes in; she had to do something at that point.  
8 If she was going to stick with the program of  
9 avoiding testifying, then she had limited options,  
10 and one of the few options she had was to invoke the  
11 Fifth. However, I don't think - - -

12 JUDGE SMITH: I - - - I can certainly see  
13 there's enough in the record to support an inference  
14 that part of her motivation for not testifying was -  
15 - - was what the defend - - - her boyfriend didn't  
16 want her to. But where - - - doesn't - - - doesn't  
17 the judge have to make that finding, and does he make  
18 it?

19 MR. DUNHAM: I think he made the finding.  
20 He was - - - the judge was left with, unfortunately,  
21 the record that he had, and he - - - he could not get  
22 her, Ms. Grant, to - - - to take - - - to testify at  
23 all. And her attorney - - - and that's why - - - I  
24 don't think she even invoked the Fifth, because her  
25 attorney said, she's not going to testify under any

1           circumstance, immunity or no immunity.

2                       So when immunity was floated or talked  
3           about, as a possibility, she kind of just - - - just  
4           said, oh, forget it. I'm - - - she's not going to  
5           testify no matter what.

6                       CHIEF JUDGE LIPPMAN: Yeah, but then we  
7           want to know why? The second part that Judge Pigott  
8           keeps talking about.

9                       MR. DUNHAM: Right, but I think the why is  
10          - - - that's all of our evidence that we presented at  
11          the hearing up to that point, and I think that what  
12          we presented after that point was the why is - - -

13                      CHIEF JUDGE LIPPMAN: Yeah, but then - - -  
14          but we know we have that earlier testimony. But now  
15          she's there, and - - - and she's not testifying in  
16          any event, but why, when - - - when again, there are  
17          - - - there are all kinds of reasons why one could  
18          see in this situation she might not want to testify.

19                      And I think your - - - your answer is, if  
20          in the smallest measure, he tried to get her not to  
21          testify, that's the end of the story, even if in  
22          reality that had very little to do with her not  
23          testifying?

24                      MR. DUNHAM: I think as long as it had  
25          something to do - - - as long as it - - - it at least

1 partially caused - - -

2 CHIEF JUDGE LIPPMAN: Well, you gave the  
3 example of five percent versus ninety-five percent.

4 MR. DUNHAM: Yes. I - - - I think as long  
5 as it had - - - if it was part of the reason she was  
6 not testifying, then he has forfeited his rights, and  
7 I think that should be the rule that this behavior is  
8 completely unacceptable by defendants, and we have to  
9 avoid witness tampering and - - - and - - -

10 JUDGE ABDUS-SALAAM: Do we already have  
11 that rule?

12 MR. DUNHAM: Well, we have the rule - - -  
13 not - - - it's not spelled out quite as clear as  
14 that. If - - - I don't think there is a clear answer  
15 on the competing reasons situation that we perhaps  
16 have in this case.

17 JUDGE READ: But the judge can draw that  
18 inference?

19 MR. DUNHAM: Based on the testimony  
20 presented at trial. As long as the judge finds by  
21 clear and convincing evidence that at least some of  
22 the reason why the wit - - - the witness is not  
23 testifying is tampering.

24 JUDGE ABDUS-SALAAM: So, in other words,  
25 the People don't have to prove that the sole reason

1 for her not testifying is the defendant's misconduct?

2 MR. DUNHAM: The case law's unclear on  
3 that, but that's my position. I think that's the  
4 rule that Your Honors have the opportunity - - -

5 CHIEF JUDGE LIPPMAN: You don't have to - -  
6 - you don't have to prove even that it's the  
7 predominant reason.

8 MR. DUNHAM: I don't - - - I don't think  
9 that should be the rule.

10 CHIEF JUDGE LIPPMAN: Okay, no, we're just  
11 trying to sharpen what - - -

12 MR. DUNHAM: Yes.

13 CHIEF JUDGE LIPPMAN: - - - what you would  
14 like the rule to be.

15 MR. DUNHAM: I think that's right.

16 JUDGE PIGOTT: Oh - - -

17 JUDGE READ: And you're saying that's good  
18 from a policy point of view?

19 MR. DUNHAM: Yes, that furthers the policy  
20 that was laid out in the Geraci case to avoid witness  
21 tampering and preserve the integrity of the  
22 adversarial process.

23 JUDGE PIGOTT: In the Holtzman case, they  
24 went to great lengths to spelling what they - - -  
25 what they thought ought to be done. Does that make

1 sense to you what they did?

2 MR. DUNHAM: In the Holtzman case, that was  
3 the case that I believe gave - - - kind of - - -

4 JUDGE PIGOTT: Right.

5 MR. DUNHAM: - - - gave birth to the Sirois  
6 hearing.

7 JUDGE PIGOTT: Yeah.

8 MR. DUNHAM: As I recall it, I thought - -  
9 - and I don't recall the specifics of what they laid  
10 out in that case, but I had no problem with that  
11 case. I thought that was handled appropriately.

12 JUDGE PIGOTT: Okay.

13 CHIEF JUDGE LIPPMAN: Okay, counsel,  
14 thanks.

15 MR. DUNHAM: Thank you.

16 CHIEF JUDGE LIPPMAN: Counsel, what's the  
17 rule, when there are multiple reasons why she might  
18 not have testified - - - why a witness might not  
19 testify? What should be the rule in your mind?

20 MR. FUNK: The rule should be that - - -  
21 back to what Judge Pigott just asked my adversary, is  
22 what was laid out in the Holtzman case is that  
23 there's an unlawful refusal to testify. If there's a  
24 lawful refusal, then the Sixth Amendment rights of  
25 the defendant should not be set aside.

1                   JUDGE GRAFFEO:  And tell me practically how  
2                   the judge makes that determination, when in this  
3                   case, the lawyer is saying she's not going to  
4                   testify?  She's not going to come in; she's not going  
5                   to say anything.  How does the judge determine what  
6                   reason or reasons that refusal is based on?

7                   MR. FUNK:  The court could have ordered her  
8                   into court and had her testify.  She had no Fifth  
9                   Amendment right to refuse to testify at the Sirois  
10                  hearing.  And no one even suggested get her in here;  
11                  let's hear what she has to say directly.  And that  
12                  was error on the trial court's part.

13                  JUDGE PIGOTT:  Well, what did the defendant  
14                  do about that?  I - - - you know, when I - - - when I  
15                  spot all this stuff about, you know, they should be  
16                  pursuing questions and stuff, the defendant didn't -  
17                  - - didn't seem to have any interest in doing that.

18                  MR. FUNK:  Well, at the hearing, the burden  
19                  of proof was on the People.

20                  JUDGE PIGOTT:  Right, let's assume for a  
21                  minute, they did that - - - they - - - they  
22                  accomplished that.  What would - - - what should the  
23                  defendant had done after he heard all of these phone  
24                  calls from the jail, et cetera, that was obviously  
25                  his voice to his mother.  I mean, and she's there - -

1           - I mean, not the mother, but the - - - the witness  
2           is there.  Shouldn't he have done something?

3                       MR. FUNK:  He could have as could the  
4           People have said, let's have this witness come in.  
5           Let's hear why she's asserting the Fifth.  Again,  
6           this court approved of that in the Hamilton case.

7                       JUDGE GRAFFEO:  And if she says, I'm not  
8           going to tell you.  I'm not going to say anything.

9                       MR. FUNK:  Then I think the court - - -

10                      JUDGE GRAFFEO:  Here's my name; here's my  
11           address.  Other than that, I'm not saying anything.  
12           Wouldn't you be back to the same situation we are in  
13           this case?

14                      MR. FUNK:  It was mentioned earlier that  
15           she could be found in contempt.  The court could have  
16           her brought in to say that, which wasn't done.  I  
17           believe, in the Cotto decision that the court wrote,  
18           a trial court heard from the witness.  He said I  
19           wasn't threatened, and the court said, well, I find  
20           other evidence saying that you were, so I am allowing  
21           that in.  And this court approved of that.

22                      So, I'm not asking the court to take any  
23           discretion away from the trial court.  The trial  
24           court should have done more in this case, and that's  
25           why reversal should be warranted.

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CHIEF JUDGE LIPPMAN: Okay, counsel.

Thanks.

MR. FUNK: Thank you, Your Honor.

CHIEF JUDGE LIPPMAN: Thanks, counsel.

Thank you both.

(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 Floyd L. Smart, No. 67, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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