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COURT OF APPEALS

STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

PAUL THOMPSON,

No. 10
(Papers sealed)

Appellant.

20 Eagle Street
Albany, New York 12207
January 7, 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 10, People v.
2 Thompson.

3 Counselor, do you want any rebuttal time?

4 MR. LANDAU: Yes, if I might, Your Honor,
5 I'd like three minutes for rebuttal.

6 CHIEF JUDGE LIPPMAN: Go ahead, counselor.

7 MR. LANDAU: Let me - - - let me apologize
8 for my clumsiness back in my seat. I'm not going to
9 be using any electronics here; I don't think I'd be
10 real good at it.

11 To start with, this - - - the issues before
12 the court arise in the context of a proceeding in
13 which the People took two grand jury proceedings to
14 indict appellant and two trials before they were able
15 to convict him. In the context, to push the case for
16 the conviction - - -

17 CHIEF JUDGE LIPPMAN: We get that. We get
18 that. What's the - - - what's the worst error that
19 was made here? There are a lot of issues; what's the
20 worst error?

21 MR. LANDAU: It's hard to say what the
22 worst one was, but I'll mention - - -

23 CHIEF JUDGE LIPPMAN: Well, pick one.

24 MR. LANDAU: - - - I'll mention a few
25 significant ones.

1 CHIEF JUDGE LIPPMAN: Yes, start with the
2 one you think is the worst error.

3 MR. LANDAU: Okay. I think that the - - -
4 the reopening of the case was a serious error. The
5 defense attorney commented on matters of evidence in
6 his summation.

7 JUDGE SMITH: Isn't it - - - wasn't he
8 going a little far, when he knows there's a
9 suppressed glove, for him to be talking about the
10 epithelial cells on his client's hand and asking why
11 they - - - how they happened not to get on to the - -
12 - the evidence?

13 MR. LANDAU: Well, let me make a couple of
14 responses to that. First, it was based on the trial
15 evidence. Number two, the glove that the People
16 admitted in evidence didn't refute his argument. It
17 was - - - it was a single, fingerless, weightlifter's
18 glove that would not have prevented DNA from being
19 deposited on either the gun or the silencer.

20 JUDGE SMITH: It wouldn't have made it
21 impossible, but isn't - - - isn't it grossly
22 misleading to talk about the - - - about the
23 epithelial cells on the hand or the blood on the hand
24 without mentioning that there was even a partial
25 glove on the hand?

1 anything wrong on this point. He made a valid
2 argument based on the evidence. The glove did not
3 refute that argument. The timing was - - - rendered
4 the reopening prejudicial. And in any event, there's
5 a serious Constitutional issue here. This wasn't
6 summation. This wasn't evidence. The Court had
7 suppressed the glove. The Court could not reopen the
8 proceedings to allow suppressed evidence based merely
9 on a summation, and there was nothing more than that.

10 JUDGE SMITH: Suppose you have a rape case
11 in which no - - - no physical evidence is found on
12 the - - - on examination, on the rape kit
13 examination. The - - - the fact is that the - - -
14 that the defendant wore a condom which was
15 suppressed, and - - - and the trial goes on without
16 any mention of the condom. Can you argue in clo - -
17 - can the defense lawyer stand up in closing argument
18 and say, ladies and gentlemen, it's inexplicable that
19 he could have raped this woman and left no evidence;
20 how could that have happened?

21 MR. LANDAU: I'm not sure that that would
22 be a fair argument, but the remedy for that would, in
23 all likelihood, be striking of the testimony,
24 directing the jury - - -

25 JUDGE SMITH: The argument.

1 MR. LANDAU: - - - to disregard it.

2 JUDGE SMITH: Striking the argument, you
3 mean.

4 MR. LANDAU: Striking - - - I'm sorry, yes,
5 striking the argument and directing the jury to
6 disregard it. And that's a remedy the court could
7 have done here. That's one of the reasons why the -
8 - - the Constitutionally suppressed evidence should
9 not have been admitted. This is not evidence - - -
10 the defense counsel's summation is not evidence. It
11 could have been remedied by an instruction to the
12 jury. And this court has repeated, time and again,
13 that juries are presumed to follow the court's
14 instructions.

15 CHIEF JUDGE LIPPMAN: Counsel, what about
16 [redacted]? What's your argument in relation to
17 her?

18 MR. LANDAU: Well, as to - - - well, there
19 are two arguments. Are you referring to the grand
20 jury - - -

21 CHIEF JUDGE LIPPMAN: Yes.

22 MR. LANDAU: Okay. Yeah, this case - - -
23 that argument, we submit, is governed by People v.
24 Hill. In this case, the defendant, while he was
25 testifying, requested the grand jury to call

1 [redacted]. The prosecutor then questioned him about
2 how he knew who [redacted] was. When he started to
3 respond to that, she told him he couldn't give
4 hearsay. She then, when the grand jurors then
5 inquired about the possibility of calling [redacted],
6 the grand jury - - - the - - - I'm sorry, the
7 prosecutor told the grand jury that they didn't know
8 who - - - that she didn't know who [redacted] was.
9 At least that's what she said initially. Later on
10 she told the grand jury that it wasn't clear that the
11 defendant was referring to the same person she knew
12 about.

13 JUDGE RIVERA: But she did say it was their
14 determination - - -

15 MR. LANDAU: Yeah, she - - - after - - -

16 JUDGE RIVERA: She said it's your decision
17 - - -

18 MR. LANDAU: Sure. That - - -

19 JUDGE RIVERA: - - - whether or not to call
20 the witness.

21 MR. LANDAU: After essentially bludgeoning
22 the grand jury with the inability to render a
23 decision on its own, she told them it was their
24 decision. She had also told them that she had
25 determined from investigation that [redacted]'s

1 testimony would not be relevant and that they
2 couldn't call witnesses to - - -

3 CHIEF JUDGE LIPPMAN: Is it the grand
4 jury's total discretion? Who has the - - - what is
5 the role, philosophically, of the prosecutor, in this
6 back and forth with the grand jury on this issue?

7 MR. LANDAU: Well - - -

8 CHIEF JUDGE LIPPMAN: How does it play into
9 their respective roles?

10 MR. LANDAU: The grand - - - the prosecutor
11 must advise the grand jury of the defendant's
12 request. The defendant made the request in person
13 here, so that part is violated if the grand jury - -
14 - if the prosecutor disparages that request, which -
15 - - which the prosecutor did here. The prosecutor
16 has a duty of fair dealing. The prosecutor violated
17 that duty of fair dealing by, for example, asking the
18 defendant how he knew about [redacted], telling the
19 defendant he couldn't give hearsay testimony about
20 how he knew about [redacted], and then telling the
21 grand jury - - -

22 JUDGE SMITH: In general, you're not saying
23 he was entitled to give hearsay. You're saying,
24 essentially, she opened the door.

25 MR. LANDAU: She opened the door, then she

1 closed it, and then she told the grand jury that he
2 hadn't explained how he knew about [redacted].

3 JUDGE SMITH: Why is all of this - - -
4 assuming you're right that she shouldn't have done
5 it, why is all of this important enough to taint the
6 whole grand jury proceeding?

7 MR. LANDAU: Because the defendant had a
8 right to call a grand jury witness. As the trial
9 evidence demonstrate, her - - - her testimony would -
10 - - would have been exculpatory. The - - -

11 JUDGE SMITH: It would have been
12 exculpatory in that she would have put a Burberry
13 colored hood on the - - - on the murderer's head?

14 MR. LANDAU: Well, she testified at trial
15 that she didn't see appellant at the scene. She also
16 testified, yes, that there was somewhat of a
17 difference between the color of the attire of the
18 shooter and what the police found.

19 JUDGE SMITH: She said - - - she didn't say
20 he wasn't there, or did she?

21 MR. LANDAU: She said she didn't see him
22 there.

23 JUDGE SMITH: Yeah, that's - - - that is
24 different.

25 MR. LANDAU: That's a little bit different.

1 I'm not saying that she gave a magnificent
2 exculpatory testimony, but it was exculpatory. And
3 this case is governed by Hill. In Hill, the
4 prosecutor had a written list of purported alibi
5 witnesses that the defendant wanted the - - -

6 JUDGE SMITH: I guess what I'm saying is
7 doesn't this - - - wasn't what [redacted] had to
8 offer very considerably less than an alibi, and isn't
9 that enough to distinguish Hill?

10 MR. LANDAU: Defendant has a right to call
11 any witnesses or to ask the grand jury to call any
12 witnesses that he believes helpful. And the
13 defendant here - - -

14 JUDGE SMITH: Yeah, but I - - - I'm, for
15 the sake of the argument, agreeing with you that
16 there was an error. I'm asking why the - - - wasn't
17 the error less important than the error in Hill?

18 MR. LANDAU: No, I don't think so. And the
19 problem here was the evidence before the grand jury
20 was also less significant than the evidence at trial,
21 and the question of prejudice before the grand jury
22 is based upon the prejudice relating to the grand
23 jury proceeding itself, not relating to the
24 subsequent trial.

25 JUDGE SMITH: The DNA was not before the

1 grand jury?

2 MR. LANDAU: No, it wasn't. So you had a
3 request to call a witness who would have given
4 exculpatory testimony. The defendant - - -

5 JUDGE ABDUS-SALAAM: Counsel, are you
6 suggesting that the DA should have - - - they did not
7 want to call [redacted] to the second grand jury, but
8 obviously knew that she had testified in the first
9 grand jury.

10 MR. LANDAU: Yes.

11 JUDGE ABDUS-SALAAM: And are you saying
12 that did not present a dilemma for the prosecutor
13 about whether - - - about revealing the secrecy
14 aspect of the first grand jury?

15 MR. LANDAU: Well, first of all, the
16 secrecy aspect wasn't before the trial court. The
17 prosecutor didn't argue that in opposing the defense
18 motion to dismiss, so that issue is unreserved,
19 number one. It's also barred by Concepcion, since it
20 wasn't a basis of the trial court's ruling.

21 In any event, that's not enough. If the
22 People here had a valid reason why they didn't want
23 to call [redacted], they had a remedy. They could've
24 simply moved the court, pursuant to CPL 190.55, and
25 gotten a ruling from the trial court suppressing the

1 subpoena that they were required to issue.

2 JUDGE ABDUS-SALAAM: And you're saying
3 ultimately, the grand jurors determining not to call
4 [redacted] after taking a vote doesn't remedy that?

5 MR. LANDAU: Well, they were strong-armed.
6 I mean, the prosecutor - - - short of telling - - -
7 short of taking the decision away from the grand jury
8 by telling them we're not going to vote on it, I'm
9 not going to let you vote on it, the - - - the
10 prosecutor couldn't - - - could hardly have done
11 anything more here to predetermine the result of the
12 grand jury's vote.

13 CHIEF JUDGE LIPPMAN: Okay, counselor,
14 you'll have your rebuttal.

15 MR. LANDAU: Thank you.

16 CHIEF JUDGE LIPPMAN: Thank you, counselor.

17 MS. GRADY: Good afternoon and may it
18 please the court. My name is Anne Grady. I
19 represent the People of the State of New York - - -

20 CHIEF JUDGE LIPPMAN: Counselor - - -

21 MS. GRADY: - - - the respondent.

22 CHIEF JUDGE LIPPMAN: - - - start with the
23 second issue that your adversary dealt with. Why
24 wasn't the prosecutor's conduct, as your adversary
25 says, virtually took the issue away. And given the

1 fact that [redacted] did testify in the first grand
2 jury with a different result, why wasn't that
3 important?

4 MS. GRADY: There were several questions
5 there. To answer the last one first - - -

6 CHIEF JUDGE LIPPMAN: Go ahead.

7 MS. GRADY: - - - that wasn't the only
8 difference between the first and the second grand
9 jury. The major difference between the first and the
10 second was [redacted] who said I know the defendant
11 Paul Thompson is telling the truth.

12 CHIEF JUDGE LIPPMAN: Yeah, but the
13 defendant was quite strong that he wanted her to
14 testify, and we knew that she was exculpatory. So
15 again, in that context of a second grand jury, and
16 now we have a different result, why wasn't the - - -
17 why - - - where would you disagree with your
18 adversary's contention that the prosecutor virtually
19 strong-armed the grand jury, in no uncertain terms,
20 that even though they ultimately voted that way.
21 Didn't the prosecutor basically say don't go there,
22 I'm telling you, I'm your advisor? Why isn't that
23 something wrong? Or do you find that the conduct of
24 the prosecutor was appropriate in all ways in regard
25 to [redacted]?

1 MS. GRADY: Again, there were so many
2 aspects of your question - - -

3 CHIEF JUDGE LIPPMAN: Yes, go ahead.

4 MS. GRADY: - - - to answer.

5 CHIEF JUDGE LIPPMAN: Take 'em in whatever
6 order you want.

7 MS. GRADY: To the extent I can remem - - -
8 exculpatory; she testified in the first grand jury
9 that she couldn't see the shooter's face. The
10 defendant said not that he had a witness - - - this
11 was not a witness designated by him, like an alibi
12 witness like in Hill; he said the People have a
13 witness, one of the People's witnesses that they're
14 not calling.

15 JUDGE SMITH: Okay. But then - - -

16 MS. GRADY: How he knew that - - -

17 JUDGE SMITH: But then a grand juror wants
18 to hear from that witness. And he says, before we
19 vote could we hear from. The prosecutor interrupts
20 him, "I am instructing you that it is not relevant at
21 this time, based on the evaluation of the evidence
22 and witnesses. I am instructing you that it is not
23 relevant to this proceeding. Okay. Anything else?"
24 The juror is actually strong enough to say, "I don't
25 understand." Ms. DeOliveira, "It's not relevant."

1 The juror keeps coming back: "A witness is not - - -
2 ". She interrupts him, "It's in our purview to
3 decide that." Is that a way a prosecutor's supposed
4 to act in a grand jury?

5 MS. GRADY: It is in the purview of the
6 prosecutor, I believe - - -

7 JUDGE SMITH: Is that okay?

8 MS. GRADY: - - - to determine - - -

9 JUDGE SMITH: What she did there was fine?

10 MS. GRADY: Yes. She said the witness is
11 not relevant, and that was true, because she knows
12 that the witness, first of all, didn't see the
13 shooter's face, and second, was - - - was afraid to
14 come back, has - - - had told her she's not willing
15 to come back to the second grand jury.

16 JUDGE SMITH: Well, what does that have to
17 do with relevance?

18 MS. GRADY: She's unwill - - - she's - - -
19 in terms of she had nothing relevant to offer to - -
20 - relevant to the grand jury's determination of
21 whether the case should be indicted, should go
22 forward to prosecution and resolution - - -

23 JUDGE SMITH: And if she - - - I mean, why,
24 you know - - - first of all, I don't understand - - -
25 I have trouble; I guess maybe I'm like the grand

1 juror. I don't understand. Firstly, I don't
2 understand if it's not relevant, why she couldn't
3 explain why - - - why it wasn't relevant. And I also
4 don't understand why she had a problem - - - if the
5 problem was the witness was unwilling to appear, she
6 couldn't tell him that.

7 MS. GRADY: I would think - - - I would
8 think those two things would have been error. Those
9 are the two things she's struggling not to say. She
10 can't testify to the grand jury. That was exactly
11 what the prosecutor did wrong in Huston was
12 testifying to the grand jury what the witness would
13 say if she came in. That's a - - - that would have
14 been error.

15 JUDGE SMITH: Well, maybe I - - - I've
16 never been in a grand jury, but it sort of surprises
17 me that what a prosecutor is supposed to do is to say
18 it's not relevant, I'm telling you it's not relevant,
19 you have to take my word for it, it's in our purview,
20 and say nothing else. That's what - - - that's - -
21 - I thought the grand jury is supposed to be able to
22 make decisions.

23 MS. GRADY: This is a lot like the judge at
24 trial. The judge at trial doesn't tell - - - doesn't
25 explain to the jury why the evidence is being

1 excluded; objection, sustained, done.

2 JUDGE SMITH: So the - - -

3 MS. GRADY: The jury gets no explanation.

4 JUDGE SMITH: I under - - - I suppose
5 there's an analogy, but it's really the - - - is the
6 prosecutor in the grand jury really supposed to act
7 just like the judge at the trial?

8 MS. GRADY: In this regard, yes. As far as
9 being the gatekeeper to the evidence that comes in,
10 yes. But - - -

11 CHIEF JUDGE LIPPMAN: But can the
12 prosecutor get to the point where they - - - I'm
13 talking in the context of this case - - - where they
14 take away the discretion that the grand jury is
15 supposed to have, in light of these very strong
16 assertive answers that, in essence, when they
17 ultimately voted for it, I think a fair view of it
18 might be that they had no choice at that point. The
19 prosecutor said I decide, almost in effect saying I
20 decide, you don't; it's my discretion. Can't you get
21 to that point, and did it go that far in this case,
22 and why not? It seems from, if you read the sections
23 that Judge Smith was just reading to you, the
24 prosecutor was awful strong about what - - - what she
25 believed the grand jury could do or not do here, and

1 did it get to the point where it took away their
2 discretion?

3 MS. GRADY: I think - - - I think that if
4 we sat around the conference table and wrote the
5 screenplay of how a prosecutor should respond, some
6 of what was said wouldn't make the cut. But they
7 weren't following a script. They were reacting to
8 something. And they are - - - obviously they're
9 alarmed on a number of levels. I think that if you -
10 - -

11 CHIEF JUDGE LIPPMAN: But they're reacting
12 to the - - -

13 MS. GRADY: - - - read the final - - -

14 CHIEF JUDGE LIPPMAN: But they're reacting
15 to the grand jury - - -

16 MS. GRADY: No.

17 CHIEF JUDGE LIPPMAN: - - - expressing a
18 desire to do something. The defendant raised it; the
19 grand jury expresses a desire. What is their role in
20 that case? And when that happens - - -

21 MS. GRADY: I think - - -

22 CHIEF JUDGE LIPPMAN: - - - what should the
23 prosecutor be doing?

24 MS. GRADY: - - - their role in that case
25 is to try to refocus the grand jury's attention on

1 the question that's properly before them. And that's
2 why statements like this is not a trial - - -

3 CHIEF JUDGE LIPPMAN: Refocus them on not
4 hearing a witness that they want to hear?

5 MS. GRADY: Refocus them on not hearing a
6 witness that there's been no offer of - - - no bona
7 fide offer of proof of what this witness has to say.
8 The defendant disavows any knowledge of what the
9 witness might say.

10 JUDGE SMITH: Well, but the prosecutor
11 knows perfectly well that she was present at the
12 scene of the shooting.

13 MS. GRADY: The prosecutor knows who he's
14 talking about; I grant you that.

15 JUDGE PIGOTT: No, because at one point she
16 says I don't even know who he's talking about. We're
17 not even clear on the names here, even if it - - -
18 even if it is the same individual.

19 MS. GRADY: Because at this point the
20 defendant is saying, well, [redacted] - - -

21 JUDGE PIGOTT: No, but you get the - - -

22 MS. GRADY: The - - -

23 JUDGE PIGOTT: You said she knew who it
24 was, and I think you're right.

25 MS. GRADY: By the end.

1 JUDGE PIGOTT: Let me finish.

2 MS. GRADY: I'm sorry.

3 JUDGE PIGOTT: And so what I think is - - -
4 what's troubling here is it sounds like she's
5 dissembling in front of the grand jury, and - - - and
6 that - - - and I agree with you, I think there's a
7 quasi-judicial role here. But I don't - - - you
8 know, I don't think you should be treating a grand
9 jury like this. And it sounds like she's - - - she's
10 not telling them the truth.

11 MS. GRADY: I think in that point what
12 she's saying is that this is not - - - this is not a
13 bona fide - - - she was not implying bona fide; I'm
14 saying bona fide - - - this was not a defendant
15 actually designating a witness - - - I've got the
16 name and address, it's my sister and it's an alibi
17 witness - - - in a fair way. The defendant is saying
18 the People know; they've got a witness - - -

19 JUDGE RIVERA: And what's wrong with that?

20 MS. GRADY: - - - they're not bringing in.

21 JUDGE RIVERA: Well, but, no, no, no, no,
22 let's go back, because let's deal with what the
23 record says. She says, I don't know who it is. She
24 does know who it is. You know that she knows who it
25 is. He is simply saying there's another eyewitness,

1 they call that person, that person can speak to the
2 fact that I didn't do this. She knows who it is;
3 call this person. And the grand jurors say, okay,
4 we'd like to hear this person. And she basically
5 spends, I don't know how much time, browbeating them,
6 saying it's not relevant, you don't need to hear it,
7 I'm instructing you that it's not relevant. She then
8 suggests it's late, the hour is late, we can't
9 continue. How - - -

10 MS. GRADY: Again, she's - - -

11 JUDGE RIVERA: What more are you expecting
12 - - - let me put it this way. What more does this
13 prosecutor need to hear from this defendant - - -
14 from the defendant? Because you say he's got to give
15 the name, the address, I guess the ZIP code, too.

16 MS. GRADY: No, not necessarily. The - - -
17 no, he has to be designating a defense witness. He's
18 trying to tell the People - - -

19 JUDGE RIVERA: He's saying this person has
20 something that is important to his defense.

21 MS. GRADY: He's trying to tell the People
22 - - - he's trying to tell the grand jury to tell the
23 People how to put the case in the grand jury.

24 JUDGE RIVERA: No, he's trying to tell the
25 grand jury there's someone who I think has something

1 helpful to my defense; please ask for that person to
2 be called.

3 MS. GRADY: And - - -

4 JUDGE RIVERA: And then the prosecutor
5 spends a great deal of time saying they're irrelevant
6 and I instruct you not - - - not to - - - I'm telling
7 you they're - - - that person's not relevant. Even
8 though at the end she says it's my decision, but
9 that's begrudging.

10 MS. GRADY: I think actually to go that - -
11 - thank you.

12 JUDGE RIVERA: But okay, let me ask - - -

13 MS. GRADY: By the end - - -

14 JUDGE RIVERA: Let me ask you - - -

15 MS. GRADY: - - - the last two pages - - -

16 JUDGE RIVERA: Let me ask you this. What's
17 wrong with the prosecutor pursuing the procedure your
18 adversary has suggested? Suppress the subpoena, if
19 her real concern is I can't call this person in.

20 MS. GRADY: I think that it - - - well, I
21 think it wasn't necessary to go that route. I think
22 that the - - - the prosecutor, at that point, is the
23 gatekeeper for the - - - whether evidence is
24 admissible in the grand jury. You have a witness who
25 is afraid to testify, refusing to testify, has said

1 I'm not coming back, and has - - - and the pr - - -
2 what the prosecutor knows is that this is somebody
3 who had been an identifying witness and then came in
4 the grand jury and said I didn't see his face.

5 JUDGE RIVERA: But then it sounds like
6 you're saying she's got a professional conundrum that
7 she's got to deal with.

8 MS. GRADY: Definitely.

9 JUDGE RIVERA: Okay.

10 MS. GRADY: A witness who was threatened,
11 whose life - - -

12 JUDGE RIVERA: So why not - - -

13 MS. GRADY: - - - was threatened - - -

14 JUDGE RIVERA: - - - why not let the grand
15 jury make their decision without trying to strong-arm
16 them in a particular direction, and then if they
17 still want to see this witness, pursue the avenue
18 suggested by defense counsel?

19 MS. GRADY: Because again, I go back to
20 something Judge Smith alluded to earlier, surely the
21 prosecutor should not have said, hey, her life was
22 threatened and so she's afraid to come in.

23 JUDGE RIVERA: I didn't say she needed to
24 say that - - -

25 MS. GRADY: Well, but that's the basis - - -

1 -

2 JUDGE RIVERA: - - - to the grand jurors.

3 JUDGE GRAFFEO: There's - - -

4 MS. GRADY: - - - that's what she's

5 meaning.

6 JUDGE GRAFFEO: There's another step they
7 can take, though; I've seen where the prosecutor will
8 ask the members of the grand jury for a vote, how
9 many want to hear the witness. That happens
10 sometimes, doesn't it?

11 MS. GRADY: That happened here. That
12 happened here. And I - - - if you look at the last
13 two pages, of when Wanda DeOliveira is explaining
14 here's what - - - you know, not to marshal the
15 evidence too much but here's what he has said, and he
16 hasn't said any personal knowledge; for that reason
17 it's not relevant, and - - - but it's up to you, and
18 if twelve of you want to hear from the witness, by
19 all means. And so then she allows them to vote and
20 they say no.

21 JUDGE SMITH: Can you explain - - - explain
22 the dilemma a little more. Why was she in a dilemma?

23 MS. GRADY: Because - - - because she knows
24 that what is really happening here is - - - see, what
25 I think is really happening here is the defendant is

1 trying to, more or less, create a runaway grand jury.
2 He's telling them - - - his summation comments were,
3 my life is on the line, they're just going to bring
4 the witnesses in here and - - -

5 JUDGE SMITH: Well, the defendant - - -

6 MS. GRADY: - - - you need to cross-examine
7 them.

8 JUDGE SMITH: - - - the defendant obviously
9 wants the grand jury not to indict; that's not the
10 dilemma.

11 MS. GRADY: More than that, he was trying
12 to encourage a mindset in this grand jury that
13 they're not being told the whole story, they need to
14 grill these witnesses, and that they shouldn't trust
15 the prosecutor. That was his whole theme.

16 JUDGE SMITH: I haven't heard the dilemma
17 yet.

18 JUDGE GRAFFEO: So you think he was - - -
19 you think the defendant was trying to intimidate this
20 witness by asking for this witness to come in?

21 MS. GRADY: I think that he knew she wasn't
22 coming in. I think he knew - - - he shows that she -
23 - - I know - - - he said I know she was brought to
24 the other grand jury; I don't know if she testified
25 or not. And he knows she wasn't coming - - - that

1 she didn't come to the second grand jury. Meanwhile,
2 her life was threatened before the first grand jury,
3 when she came in said I couldn't see the shooter's
4 face.

5 JUDGE SMITH: I still want - - - I mean,
6 I'm not - - - this is actually a question I want to
7 know the answer to, which is not always true. But
8 what - - - what is the dilemma? What are the two
9 choices, both of which are difficult, that she was
10 facing?

11 MS. GRADY: The dilemma is to reveal what
12 the defend - - - to reveal too much, to the
13 defendant's prejudice, that what he was doing was not
14 on the up and up, that what he was doing was trying
15 to - - -

16 JUDGE SMITH: You mean, in other words - -
17 -

18 MS. GRADY: - - - that there was - - -

19 JUDGE SMITH: - - - she could prejudice the
20 grand jury by saying I think he's really trying to
21 intimidate this witness?

22 MS. GRADY: I definitely think that was not
23 on the table, that they could not reveal anything
24 about witness intimidation to the grand jury as a
25 reason why the witness might not want to come in.

1 That, I don't think, would have been proper. But
2 more than that, to just try to keep it very simple,
3 it's not relevant, protects the defendant.

4 JUDGE SMITH: Maybe it's my naivete about
5 grand juries. The grand jury wants to hear from a
6 witness. You happen to know that the witness is in
7 hiding and terrified because he's been threatened.
8 You can't - - - you can't even - - - you can't
9 suggest in any way to the grand jury that there might
10 be some problem along those lines?

11 MS. GRADY: I mean, I would want to point
12 out, the grand jury also said - - - remembering also
13 you say "juror"; there may have just been one juror -
14 - -

15 JUDGE SMITH: Yeah.

16 MS. GRADY: - - - who was interested in
17 this whole thing. There was also a juror who said,
18 well, he says that he was physically capable as of
19 October 10th; did you have a doctor examine him for
20 his physical capacity to jump over fences, et cetera?
21 There was another - - - at one point they said, did
22 you test his hands for gunshot residue? So this jury
23 - - - this grand jury was in great danger of becoming
24 - - - thinking of themselves as a petit jury. Their
25 job was not to - - -

1 CHIEF JUDGE LIPPMAN: Yeah, but can't you
2 also view it that maybe the jury was - - - grand jury
3 was not going to do what the prosecutor wanted them
4 to do? Isn't that one of the criticisms of our grand
5 jury system, that people say it's a rubber stamp?
6 There's a famous - - - one of my predecessor saying
7 they could indict a ham sandwich.

8 MS. GRADY: Sandwich.

9 CHIEF JUDGE LIPPMAN: All of that, isn't
10 there - - - couldn't - - - can't you look at this and
11 say, from looking at it objectively, that gee, the
12 grand jury is threatening to do something I don't
13 want them to do. And the grand jury, in its - - -
14 philosophically, should not just be doing exactly
15 what the prosecutor wants them to do. Isn't the way
16 - - - that the way our system is supposed to work,
17 putting aside the stereotypes of what actually
18 happens? Don't they ultimately have the discretion?

19 MS. GRADY: As to the question - - -

20 CHIEF JUDGE LIPPMAN: Yes or no?

21 MS. GRADY: Yes.

22 CHIEF JUDGE LIPPMAN: Okay.

23 MS. GRADY: As to the question of - - -

24 CHIEF JUDGE LIPPMAN: Go ahead.

25 MS. GRADY: - - - the - - - of whether the

1 indictment should - - - whether a true bill should
2 result. And I think, if anything, the first no bill,
3 and followed by the juror's questions here, shows
4 there's no ham sand - - - there's no rubber stamping
5 going on, and the ultimate decision that had been
6 made - - -

7 JUDGE SMITH: But she already lost one case
8 without an adversary; she wasn't about to lose a
9 second one then.

10 MS. GRADY: I don't think that that's fair.
11 I think that she's trying to refocus them on the true
12 question before them, which is not competing
13 inferences. That's all [redacted] would have
14 possibly been able to bring in - - -

15 JUDGE PIGOTT: Would you address the glove
16 before you - - -

17 MS. GRADY: - - - is competing - - - I'm
18 sorry?

19 JUDGE PIGOTT: Could you address the glove
20 issue before you lose your time? I -- I apologize.

21 MS. GRADY: I've already lost my time,
22 pretty close. The glove issue - - - I think the - -
23 - the shortest way for me to say this is that I think
24 the defense posture in coming in is suggesting that
25 this court would need to create a new exception to

1 the exclusionary rule, and my counter argument is
2 it's not true. This court would have to give the
3 exclusionary rule special status that only if the
4 evidence has been suppressed pursuant to the
5 exclusionary rule then it's untouchable. And that's
6 just not consistent - - -

7 JUDGE PIGOTT: Shouldn't a mistrial have
8 happened here instead of a reopening?

9 MS. GRADY: Based on defense summation?

10 JUDGE PIGOTT: Well, you, the People, said
11 that he's opened the door to new evidence. And it
12 would seem to me that, particularly after you're done
13 with summations, it's a little hard to unring the
14 bell. And wouldn't a mistrial be the better way to
15 go here?

16 MS. GRADY: I guess I'm taken aback a
17 little bit by how much the trial - - - the order of
18 trial aspect of this claim is being focused on. It's
19 - - - first of all, it's unpreserved. Even defense
20 counsel conceded, yeah, you have the power to reopen.
21 Clearly the law does not require that an entire case
22 now - - - that a mistrial has to be declared when
23 there's a more - - - a more moderate remedy available
24 of just reopen the evidence. People v. Massie, it's
25 - - - it's pretty well-established law that - - -

1 that even at - - - even during summations, as long as
2 the case hasn't gone to the jury yet, that the
3 evidence may be reopened.

4 So the trial - - - and I also want to
5 address, it wasn't like the judge literally
6 interrupted defense counsel's summation, as seems to
7 be implied. There was a break. The case went home -
8 - - everybody went home for the night. The next
9 morning the case was reopened for this quick evidence
10 about the glove and then the People's summation,
11 after the defense counsel had the opportunity to
12 reopen his summation if he chose to. That is all
13 absolutely consistent with the procedural law that -
14 - - that that can happen, that this case can be
15 reopened during summations.

16 CHIEF JUDGE LIPPMAN: Okay, counselor.

17 JUDGE ABDUS-SALAAM: I just have some - - -

18 CHIEF JUDGE LIPPMAN: I'm sorry, Judge
19 Smith.

20 JUDGE ABDUS-SALAAM: Yeah, I - - -

21 JUDGE SMITH: One - - -

22 JUDGE ABDUS-SALAAM: - - - I also have a
23 question.

24 CHIEF JUDGE LIPPMAN: Sure, go ahead.

25 JUDGE SMITH: It's a long - - -

1 CHIEF JUDGE LIPPMAN: Then Judge Abdus-
2 Salaam.

3 JUDGE SMITH: - - - you know, a long
4 question; I hope we'll get a short answer. On the -
5 - - you - - - we were talking earlier about the grand
6 jury, and you said basically it's okay for the - - -
7 for the DA to act, essentially, as a judge, telling
8 them what's relevant and what's not, but it's not
9 okay for him to tell them things about the
10 possibility of witness intimidation. My question is
11 have you got authority for that and where can I find
12 it?

13 MS. GRADY: People v. Hill, your dissent,
14 that the - - - that the prosecutor is in a - - - is
15 in a difficult situation, not wanting to say anything
16 to prejudice - - -

17 JUDGE SMITH: Well, I mean - - -

18 MS. GRADY: - - - the defendant - - -

19 JUDGE SMITH: Actually, believe it or not,
20 I've read that one. I mean, is there somewhere I can
21 go to become smarter than I am on the subject of what
22 a prosecutor is and isn't supposed to do in a grand
23 jury, that you think states it correctly?

24 MS. GRADY: Maybe not. I think Huston - -
25 - I think Huston speaks about that even if there are

1 limited instances of a prosecutor's wrongdoing or
2 there are errors, that the question is whether the
3 ultimate decision reached by the grand jury was
4 correct. I think that I actually really appreciate
5 some of what you did say in People v. Hill about the
6 delicate balance that has to be struck. And I think
7 the prosecutor here zealously tried to do that.

8 JUDGE SMITH: I mean, I agree with you that
9 my dissent in People v. Hill is a magnificent
10 statement of law, but it did - - - it did fall short
11 of a majority.

12 CHIEF JUDGE LIPPMAN: Okay.

13 JUDGE ABDUS-SALAAM: I just have a
14 question.

15 CHIEF JUDGE LIPPMAN: Counselor, Judge
16 Abdus-Salaam. Go ahead.

17 JUDGE ABDUS-SALAAM: This is because I want
18 to ask your adversary this on rebuttal, and you won't
19 have a chance to get back up. It's about Shawn Berry
20 and his sequester from the courtroom.

21 MS. GRADY: Um-hum.

22 JUDGE ABDUS-SALAAM: The People had made a
23 promise to him not to call him at trial against the
24 defendant. So what kind of promise was that? Was
25 that a promise that he would never be called as a

1 witness or just on the first trial, or - - - I was a
2 little confused about their promise not to call him
3 as a witness and why that played into his being
4 removed from the courtroom.

5 MS. GRADY: Well, even when she's saying
6 that we don't intend to call him as a witness, very
7 next sentence, obviously, we can't control whether
8 codefendant Paul Thompson could call him. So
9 inherent in all of that, his guilty plea was only a
10 few - - - a couple weeks before the first trial
11 began. And the concern he had was he's not now going
12 to be called as a witness. And the People said no,
13 that's not our intention to call him as a witness.
14 That doesn't mean he's no longer a witness. He was
15 literally a witness in - - - as - - - in the sense
16 that he observed; he was there for both the July
17 shooting of the defendant at Rasheem Williams' hands
18 and the shooting of Rasheem Williams at Paul
19 Thompson's hands. So he's literally a witness and
20 has information. So in that sense, he was a
21 potential witness and he should have been
22 sequestered.

23 CHIEF JUDGE LIPPMAN: Okay. Thanks,
24 counsel.

25 Counselor, you want to - - - two questions:

1 One, answer Judge Abdus-Salaam's question. And two,
2 answer Judge Smith's question: Do you have a place
3 we should look so that Judge Smith and the rest of us
4 could be more enlightened about what a prosecutor
5 should be doing in front of the grand jury?

6 MR. LANDAU: May I - - -

7 CHIEF JUDGE LIPPMAN: In whatever order you
8 want.

9 MR. LANDAU: Okay. I'm going to answer
10 your question, Judge Smith, first. First of all, you
11 have CPL 190.50(5), which indicates that the
12 prosecutor has the right to make a motion to the
13 court. The prosecutor doesn't have to say much to
14 the grand jury at all. The prosecutor simply has to
15 make a prompt motion to the court to quash the
16 subpoena and then explain later on to the grand jury
17 that the judge has ruled that the witness will not be
18 called.

19 JUDGE SMITH: What - - -

20 MR. LANDAU: No - - -

21 JUDGE SMITH: What about the analogy to the
22 judge, that the prosecutor can essentially rule on
23 relevance in a grand jury?

24 MR. LANDAU: The prosecutor's - - - the
25 People's entire argument here completely reads out of

1 the CPL the grand jury's right to call a witness and
2 the defendant's right to ask it to do so.

3 JUDGE SMITH: So the short answer is you
4 don't think she has any authority that supports that.

5 MR. LANDAU: There's no authority on that.
6 The - - -

7 JUDGE SMITH: Okay. And what about - - -

8 MR. LANDAU: There's a specific statute - -
9 -

10 JUDGE SMITH: - - - what about the idea - -
11 - would it be improper for the DA to say to the grand
12 jury, I don't want to call this witness because I
13 have talked to her and she has serious concerns about
14 testifying?

15 MR. LANDAU: I think in - - - certainly the
16 way that Your Honor has phrased it, I think, would
17 create a problem. I'm not a - - -

18 JUDGE SMITH: Because it would imply that
19 the defendant had been doing something bad?

20 MR. LANDAU: Right. I think that there - -
21 - perhaps there might have been a more neutral way of
22 indicating that we will not be able to get the
23 witness into court, maybe something as simple as
24 that.

25 JUDGE SMITH: Is there authority on that

1 issue, as to how much the - - - how frank the
2 prosecutor can be about communicating some of the
3 problems he's having in getting witnesses in?

4 MR. LANDAU: I don't think there's specific
5 authority on that; I haven't seen it. But I think
6 that 190 - - - 190.50(5) relieves the prosecutor of
7 having to face that dilemma most of the time.

8 CHIEF JUDGE LIPPMAN: Okay. Judge Abdus-
9 Salaam's question - - -

10 MR. LANDAU: Okay.

11 CHIEF JUDGE LIPPMAN: - - - get into the
12 public trial issue.

13 MR. LANDAU: The public trial issue - - -
14 this was part of a plea agreement. The plea
15 agreement - - - Berry's counsel said that he's not
16 going to testify at the codefendant, meaning
17 appellant's, trial. The prosecutor agreed. Did they
18 agree that the defense would not call him? No, they
19 couldn't make that agreement. All they could agree
20 to was that they wouldn't call him. They didn't say
21 we're not going to call him as a direct witness.

22 JUDGE ABDUS-SALAAM: Question: What was
23 their agreement?

24 MR. LANDAU: Their agreement was they
25 wouldn't - - -

1 JUDGE ABDUS-SALAAM: That they would never
2 call him or just at the first trial or - - -

3 MR. LANDAU: They didn't specifically limit
4 their agreement, so the agreement was they wouldn't
5 call him. Since it wasn't time limited, the plain
6 meaning is they're not going to call him. Since
7 there was no reasonable possibility that Berry could
8 be a witness against appellant, he wasn't really - -
9 - he wasn't really a potential witness against
10 appellant.

11 JUDGE PIGOTT: Didn't they suggest that he
12 might be a rebuttal witness if the defendant claimed
13 that he was physically unable to jump the fence?

14 MR. LANDAU: Well, they made that claim,
15 but the problem with that is, first of all, the plea
16 agreement; he wasn't a potential witness. The plea
17 agreement didn't limit it to a direct case. Two - -
18 -

19 JUDGE ABDUS-SALAAM: Well, would Berry have
20 to assert his own inability - - - unavailability by
21 saying I'm not going to testify or - - -

22 MR. LANDAU: No, I don't think so.

23 JUDGE ABDUS-SALAAM: He didn't have to - -
24 -

25 MR. LANDAU: No, this is - - -

1 JUDGE ABDUS-SALAAM: The defendant could,
2 on behalf of Berry, raise that issue that Berry
3 couldn't testify?

4 MR. LANDAU: This isn't a standing issue;
5 the question is whether there's a reasonable
6 possibility that - - - that Berry might be a witness
7 in the case. I'm not saying the People have to - - -
8 have to exclude it - - - my time is up; if I might
9 finish my answer.

10 CHIEF JUDGE LIPPMAN: Finish your answer,
11 sure.

12 MR. LANDAU: Okay. I'm not saying that the
13 People have to demonstrate for certain that they're
14 going to call him, but that he is a legitimate
15 witness. The defense challenged the legitimacy of
16 his designation as a witness and they had a solid
17 basis. The trial court ruled on the agreement
18 itself, and then it appeared to adopt the People's
19 standing argument that the defense had no standing to
20 raise Berry's rights under the plea agreement, but
21 this was not a standing issue. The issue was never
22 standing; the issue is the Constitutional public
23 trial analysis of whether or not there's a reasonable
24 possibility that Berry might be a witness. Because
25 there was none, his sequestration from the trial

1 violated the appellant's public trial right.

2 JUDGE SMITH: Is that really the law that
3 if you say - - - if the court erroneously decides, as
4 to one person, that there's a reasonable possibility
5 that he will be a witness, that's it, you get a new
6 trial; because that one witness was excluded, the
7 right to a public trial has been impaired?

8 MR. LANDAU: Well, you can have a public
9 trial violation based on the exclusion of a single
10 person. Berry wasn't just a member of the general
11 public; he was the defendant's friend. He was the
12 defendant's business partner. He was the former
13 codefendant in the case. There was a substantial
14 relationship between Berry and appellant. So I'm not
15 just saying anyone could be excluded and there's a
16 public trial violation; I'm not going quite that far.
17 But here Berry had a substantial connection to - - -
18 to appellant. His exclusion from the courtroom,
19 without a legitimate basis, violated appellant's
20 public trial right.

21 CHIEF JUDGE LIPPMAN: Okay, counselor.
22 Than you both for indulging us.

23 MR. LANDAU: Thank you.

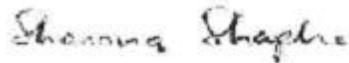
24 CHIEF JUDGE LIPPMAN: Appreciate it.

25 (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. Paul Thompson, No. 10, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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