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COURT OF APPEALS

STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

No. 176

SAMUEL SMALL,

Appellant.

20 Eagle Street
Albany, New York 12207
October 22, 2015

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY

Appearances:

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Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: Matter of Samuel
2 Small.

3 Go ahead, counsel. You want any rebuttal
4 time?

5 MR. GREENBERG: Five minutes, please.

6 CHIEF JUDGE LIPPMAN: Five minutes, go
7 ahead.

8 MR. GREENBERG: Okay. So I - - - it's
9 still me, even though Mr. Loeb's name is on the
10 brief. I think the district - - - the district
11 attorney who presented this case in the grand jury
12 knew that notice was in order here because - - -

13 CHIEF JUDGE LIPPMAN: Well, why is notice
14 in order? Where does it say you have to have notice
15 and if so, how much?

16 MR. GREENBERG: Well, 190.50(5) entitles us
17 to reasonable notice, and the reason that my client
18 was entitled to notice here was that he was in effect
19 arrested at Rikers on these charges. There was - - -

20 JUDGE PIGOTT: Had he been arraigned?

21 MR. GREENBERG: - - - there was a - - -
22 there was never an arraignment. But the problem - -
23 -

24 JUDGE PIGOTT: Isn't that the key? You
25 have to measure - - - you have to measure the five

1 days from something, don't you?

2 MR. GREENBERG: Well, the - - - the five
3 days to make the motion?

4 JUDGE PIGOTT: Or the notice that - - -
5 that you can appear. Don't they have to give you
6 notice to - - - that you can appear in front of the
7 grand jury within a certain number of days after the
8 arraignment?

9 MR. GREENBERG: Well, I think the problem
10 is here that because there was a complaint and there
11 was an associated - - -

12 JUDGE PIGOTT: Yeah.

13 MR. GREENBERG: - - - arrest warrant out,
14 which they more or less executed at Rikers, the
15 district attorney knew that notice was in order, but
16 the problem is they didn't do it right.

17 JUDGE STEIN: Can a CO arrest? Can a CO
18 effect an arrest?

19 MR. GREENBERG: I think that they did.
20 Whether there was - - - whether they're allowed to
21 under the CPL is - - - is a separate question. But I
22 think if you go to a - - - to an inmate at Rikers and
23 present a - - - a - - - a felony complaint and say
24 you're being arrested on this felony complaint, you
25 pretty much feel like you're under arrest, and I

1 think that's a reasonable perception.

2 JUDGE RIVERA: You're already - - - you - -
3 - you're already in custody, so what's the nature of
4 this arrest?

5 MR. GREENBERG: Well, it's - - - the arrest
6 is informing you that you are now in custody for an
7 extra thing.

8 JUDGE RIVERA: Um-hum.

9 MR. GREENBERG: And that extra thing has
10 attached to it a felo - - - an arrest warrant which
11 directs - - -

12 JUDGE RIVERA: Um-hum.

13 MR. GREENBERG: - - - criminal justice,
14 somebody, the police - - - but somebody should have
15 done it, to - - - to produce this defendant for an
16 arraignment but the People didn't take care of that.
17 Instead the presenting ADA, I - - - I think
18 understanding that something needed to happen, went
19 to defense counsel in the courthouse at the grand
20 jury, a - - - a lawyer who had only been appointed
21 apparently that day for this defendant - - - he
22 didn't have the same lawyer who had represented him
23 on the arraignment on the other case a few days ago -
24 - - and just dropped it on the guy.

25 JUDGE STEIN: But could he have said well,

1 wait a minute, I - - - I - - - I want - - - I want an
2 adjournment of this, I didn't have enough time to - -
3 - to prepare? I mean he certainly he had notice, you
4 - - - you could question whether that's reasonable or
5 not, but it seems to me that he made a choice to go
6 in there knowing what was going to be presented and,
7 you know, waived immunity and - - - and went forward.

8 MR. GREENBERG: No question he would have -
9 - - he would have been better off if this lawyer had
10 done that, and I think it would have been better if
11 defense counsel, who made the mo - - - still a new -
12 - - another new lawyer, who made the - - - the
13 motion, the timely 190.50 motion after the Supreme
14 Court arraignment, had fleshed this out a little bit
15 better. But the - - - the saving grace is the trial
16 judge's decision which explains exactly what happened
17 and then holds that the defendant was - - - that his
18 right to testify in the grand jury was satisfied, but
19 the problem is that the defendant didn't see it that
20 way.

21 JUDGE PIGOTT: Well, let - - - let me - - -
22 let me ask you this though. If - - - if we played it
23 out - - - in other words, if - - - let's assume the
24 lawyer, the second lawyer, said no, don't - - - don't
25 ask him anything about the second one, you - - - you

1 know, you got him on the one - - - because he's going
2 on the first one, right? He's going to the grand
3 jury. So he testifies on that and then they - - -
4 and then they - - - they submit the second one to a
5 second grand jury without notice because you haven't
6 been arraigned, is there a problem there?

7 MR. GREENBERG: Well, there's a problem on
8 the facts of this case because of the presence of the
9 arrest warrant and what happened at Rikers Island. I
10 under - - -

11 JUDGE PIGOTT: So would - - - so are - - -
12 are you looking for a rule that says if you've been
13 arrested, you cannot be indicted without notice?

14 MR. GREENBERG: I'm looking for a rule that
15 says that if there's a felony complaint - - -

16 JUDGE PIGOTT: Right.

17 MR. GREENBERG: - - - and there's an
18 arrest warrant out - - - and beyond that, you're
19 actually - - - they - - - they go through motions
20 that while not strictly what the - - - the - - - what
21 the criminal procedure - - -

22 JUDGE PIGOTT: No, but can we skip all that
23 for a minute, though? I mean, let's just assume that
24 - - - that's there a felony complaint out there. Can
25 they indict without notice because you haven't been

1 arraigned, they haven't found you, they're still
2 looking for you - - -

3 MR. GREENBERG: Well, the - - -

4 JUDGE PIGOTT: - - - but they want to
5 indict you?

6 MR. GREENBERG: - - - the statute
7 anticipates indictments without notice.

8 JUDGE PIGOTT: Right.

9 MR. GREENBERG: But what we have here is we
10 have more than that. We have the defendant being
11 confronted with the - - - with the - - - with the
12 complaint at Rikers Island. We have a direction in -
13 - -

14 JUDGE ABDUS-SALAAM: But isn't there - - -
15 isn't there another component to this, counsel?
16 Doesn't the arraignment have to be delayed to defeat
17 the - - - the defendant's right to go, or suspect's
18 right to go into the grand jury? And given the dates
19 here, wasn't - - - wasn't this a - - - assuming he
20 was arrested, wasn't that a Friday and he was going
21 into the grand jury on Monday, so where's the delay?

22 MR. GREENBERG: I don't think that the
23 problem here is that - - - that there was delay in
24 bringing him to the grand jury. That - - - I'm - - -
25 I'm not insisting on a - - -

1 JUDGE ABDUS-SALAAM: Arraigning him.

2 MR. GREENBERG: - - - on a twenty-four
3 hour rule here.

4 JUDGE ABDUS-SALAAM: Aren't you complaining
5 that he wasn't arraigned - - -

6 MR. GREENBERG: That - - - that's what I'm
7 complaining - - -

8 JUDGE ABDUS-SALAAM: - - - yeah, so - - -

9 MR. GREENBERG: - - - about and I'm not -
10 - -

11 JUDGE ABDUS-SALAAM: - - - when were - - -
12 when were they going to arraign him before they
13 brought him to the grand jury on Monday?

14 MR. GREENBERG: I think that they probably
15 needed to move the grand jury presentation in order
16 to accommodate that, because they had reached the
17 point where he was entitled to be arraigned or they
18 could have gone forth with the - - - with the grand
19 jury presentation but not presented both cases. I
20 mean, that was their choice; that wasn't our choice.

21 And - - - and what's they weren't entitled
22 to do, at least the way they did it, because he in
23 effect was ambushed with it and didn't have
24 reasonable notice, he didn't have adequate time to
25 consult with his attorney, and - - - and - - - and

1 that played out in the grand jury - - -

2 JUDGE ABDUS-SALAAM: Going back to Judge
3 Stein's question earlier, once he's told that they're
4 going to be asking him questions in the grand jury
5 about another crime, he went ahead with the waiver of
6 his immunity anyway. He could have said well, I'd
7 like to do that another time, or I'd like some more
8 time to consult with my lawyer. Couldn't he have
9 said that?

10 MR. GREENBERG: Well, he more or less did
11 that, although, you know, he - - - he could have been
12 a little more articulate about it, but he protested
13 quite a bit, but the - - - the ADA presenting the
14 case basically blew it off. These minutes are in our
15 appendix, and the defendant at the beginning and in
16 the end repeatedly complained that, you know, this
17 had just fallen on him and he hadn't had a chance to
18 talk with his lawyer - - -

19 JUDGE STEIN: Well, then don't you have an
20 ineffective assistance argument?

21 MR. GREENBERG: Well, not so far.

22 JUDGE STEIN: Well, I mean, isn't that what
23 real - - - if - - - if you're saying the ADA blew it,
24 isn't - - - isn't that what this boils down to not,
25 you know - - -

1 MR. GREENBERG: Well, I think that the - -
2 - that the various lawyers here could have done a
3 better job, but it - - - the - - - the information's
4 in the record and the judge did make a finding, which
5 I think preserves the issue for you, that - - - that
6 - - - that he did have adequate notice and he did
7 have his chance to testify. But it doesn't look like
8 that to me because he was complaining all the way
9 through, and the ADA should have taken account of
10 that.

11 If it's okay I'll turn to my - - -

12 CHIEF JUDGE LIPPMAN: Go ahead, counsel.
13 Sure.

14 MR. GREENBERG: - - - my second point.
15 Okay, the - - - the - - - the predicate felony that
16 was used here - - -

17 CHIEF JUDGE LIPPMAN: Right.

18 MR. GREENBERG: - - - shouldn't have
19 counted, the - - - the state habeas ruling that found
20 that the Division of Parole just completely screwed
21 up here and that my client shouldn't have been
22 subjected to incarceration on a parole violation - -
23 -

24 JUDGE STEIN: Isn't that - - - isn't that
25 decision subject to a couple of interpretations? One

1 is that he shouldn't have been violated in the first
2 place, and the other is is it just wasn't fair to
3 give him eighteen months on these circumstances.

4 MR. GREENBERG: I don't see how the latter
5 interpretation is possible because I don't think
6 that's what state habeas court - - - courts do.
7 Seems to me that the only issue before the state
8 habeas court was the legality of the - - - of the - -
9 - of the violation. Now, it's a - - -

10 JUDGE STEIN: Can - - - can we second-guess
11 that? For example, if we think that - - - that it -
12 - - it was proper to revoke his parole, for example,
13 because - - - or - - - or, you know, no abuse of
14 discretion there because, you know, he - - - he
15 failed to provide the documentation that he was asked
16 to and he didn't report to probation so they - - -
17 they had every right to - - - to violate him and - -
18 - and to revoke him of it. Can - - - can we - - -
19 can we find that here - - -

20 MR. GREENBERG: I don't think so.

21 JUDGE STEIN: - - - if we want to?

22 MR. GREENBERG: That - - - that's a really
23 fact-laden decision with a lot of judgment in it, and
24 - - - and let me put it this way; there's no support
25 in the record - - -

1 JUDGE STEIN: No, I say, as a matter of
2 law, he violated the - - -

3 MR. GREENBERG: Yes.

4 JUDGE STEIN: - - - the - - - the - - -
5 the provision - - - you know, the conditions of his
6 parole.

7 MR. GREENBERG: Not on these unique facts.
8 I mean, you have a New York City detective explaining
9 in the parole hearing exactly what happened, you have
10 the - - - the hearing officer and then the presenter
11 - - - I forget what their title is - - - in the - - -
12 in the hearing all coming to the conclusion that this
13 guy just - - - this - - - this shouldn't have - - -
14 he - - - there's no violation here, he's - - - he's
15 become an informant, his life's in danger, he's doing
16 exactly what he said - - -

17 JUDGE PIGOTT: But, Mr. Greenberg,
18 fundamentally, isn't the - - - isn't the purpose of
19 these - - - of - - - of these exclusions is because
20 he didn't have an opportunity to commit any crimes so
21 - - - so that's why it's not - - - you know, it's - -
22 - it's taken out? I mean whatever the reason, you
23 know, that whi - - - while he was incarcerated, he
24 didn't have any of the opportunity to go commit a
25 crime, so - - - so when we count to ten - - -

1 MR. GREENBERG: Well, but the word - - -
2 the word reason in your Dozier decision means
3 something, and in Dozier - - -

4 JUDGE PIGOTT: What I'm saying is if
5 somebody had been in jail for ten - - - ten years and
6 - - - you know, and says hey, I didn't commit a
7 single crime in ten years - - - of course not, you
8 were in Attica.

9 MR. GREENBERG: No, but the - - -

10 JUDGE PIGOTT: I mean, you can't say
11 therefore, I - - - it can't count. And I - - - and I
12 think this - - - even though you - - - you know, you
13 can say he shouldn't have been and et cetera, fact of
14 the matter was he was out of commission so - - -

15 MR. GREENBERG: Well, that's the general
16 philosophy of - - - of the - - - of the tolling time
17 part of the statute but the court - - - and based on
18 the language of the statute has established a couple
19 of situations where that doesn't work, where the
20 prior conviction was unconstitutional and in the case
21 of Dozier, there was newly discovered evidence and
22 the determination that they couldn't go forward, so
23 it really voided, in effect, the - - - the prior
24 conviction.

25 And this case to me is just like Dozier

1 because after the fact they - - - the state habeas
2 judge figured out that this never should have
3 happened because he - - - he did - - -

4 JUDGE FAHEY: What - - - what about the
5 argument that even if you're right - - - you're
6 talking about Judge Dadd's decision - - -

7 MR. GREENBERG: Yeah.

8 JUDGE FAHEY: - - - right. Even - - -
9 even - - - let's assume he's right, there still seems
10 - - - we're still stuck with the - - - the fifteen-
11 year sentence, and couldn't you be sentenced for
12 fifteen years as a violent felony offender as well as
13 a second felony offender here? So - - -

14 MR. GREENBERG: Well, it would be a legal
15 sentence - - -

16 JUDGE FAHEY: I thought he could.

17 MR. GREENBERG: - - - but if - - - if - -
18 - if you agree with me and - - - and he's - - - and
19 he's reclassified, I think he's entitled to
20 resentencing so that the sentencing judge can take
21 into - - - into account the change in his status.

22 JUDGE FAHEY: Um-hum.

23 CHIEF JUDGE LIPPMAN: Okay, counsel.

24 Thanks.

25 JUDGE FAHEY: Thank you.

1 CHIEF JUDGE LIPPMAN: Counselor.

2 MS. BORDLEY: Good afternoon, my name is
3 Ann Bordley, and I represent the respondent, the
4 People of the State of New York. The trial court
5 properly denied defendant's motion to dismiss in the
6 interest of justice. Contrary to defendant's claim,
7 the People did not violate the prompt arraignment
8 rule of 120.90. On Friday, April 7th, 2006, when
9 corrections officers approached the defendant, what
10 they were doing was lodging the warrant against
11 defendant. They were not executing an arrest
12 warrant. Corrections officials do not have the power
13 to execute an arrest warrant.

14 JUDGE ABDUS-SALAAM: So defendant was wrong
15 when he said these corrections officers approached
16 him and handcuffed him and told him he was under
17 arrest?

18 MS. BORDLEY: I don't think he said they
19 told him he was under arrest. Well, I - - - he - - -
20 he said he was formally arrested, I think that was
21 the language in the - - - in the - - - in the motion.
22 I think he's misinterpreting what they were saying.
23 There may - - - they - - - I don't know exactly how
24 the corrections officers - - -

25 JUDGE PIGOTT: Well, what they were doing?

1 MS. BORDLEY: Well, I know. The
2 corrections officers do have to lodge the arrest
3 warrant, and they do - - - do take fingerprints to
4 make sure he is the person who is the subject of the
5 arrest warrant. So they took the necessary steps
6 that they have to when they lodge an arrest warrant
7 against someone to make sure they're holding the
8 right person on - - - on the arrest warrant. So - -
9 - so there is a procedure that happens.

10 JUDGE PIGOTT: They're holding him on an
11 arrest warrant but they're not arresting him?

12 MS. BORDLEY: Correct. There's a
13 difference between executing an arrest warrant and a
14 detention.

15 JUDGE PIGOTT: I wonder if - - -

16 JUDGE STEIN: That usually happens - - -

17 MS. BORDLEY: Arrest means - - - I'm sorry.

18 JUDGE STEIN: - - - before the arrest
19 warrant is executed?

20 MS. BORDLEY: Excuse me?

21 JUDGE STEIN: Does that usually happen
22 before the arrest warrant is executed?

23 MS. BORDLEY: Yeah - - - well, yes, under
24 some circumstances. We - - - we often lodge - - -
25 they're called detainers, you use an arrest warrant

1 as a detainer. You'll frequently see the situation
2 where someone's in an out-of-state prison.
3 Somebody's arrested in New Jersey and they're doing
4 thirty days, we want them, we will get an arrest
5 warrant from our judge, it will be lodged against
6 that defendant in New Jersey. When the defendant - -
7 - that defendant finishes his thirty-day sentence,
8 they call us up and they say we're about to release
9 him, do you want him on your arrest warrant, and we
10 pick him up. I - - - so that's how it normally
11 works. But the - - - when - - - it's only when that
12 police officer goes and executes the arrest warrant
13 and then takes him - - - you know, that's the
14 execution.

15 JUDGE RIVERA: So - - - so - - - so when
16 he's in custody - - -

17 MS. BORDLEY: He's in custody - - -

18 JUDGE RIVERA: - - - here - - -

19 MS. BORDLEY: He's in custody on the felony
20 complaint.

21 JUDGE RIVERA: - - - for the year, the COs
22 lodge this warrant.

23 MS. BORDLEY: Yes.

24 JUDGE RIVERA: So he's - - - you're saying
25 he's not under arrest under that warrant?

1 MS. BORDLEY: He's being det - - -

2 JUDGE RIVERA: He would only be under
3 arrest if for some reason - - -

4 MS. BORDLEY: No, no.

5 JUDGE RIVERA: - - - he's able to be
6 released from custody?

7 MS. BORDLEY: No, Your Honor, what I'm
8 talking about is the definition of what's - - - what
9 it - - - what it means to execute the arrest warrant.
10 When a - - - an - - - when a warrant is lodged
11 against you, you are being detained pursuant to the
12 warrant. He was also being detained pursuant to the
13 other felony complaint, but he was being detained in
14 part by the warrant. And while detentions - - - you
15 can use the word arrest - - - can have a very broad
16 meaning and can refer to any kind of detention or
17 seizure, nonetheless, when we want to use it for
18 purposes of 120.90, and we're talking about what it
19 means to execute the warrant, the execution of the
20 warrant comes when the police pick him up.

21 JUDGE PIGOTT: How long can you hold him?

22 JUDGE RIVERA: How long can you be
23 detained?

24 JUDGE PIGOTT: Yeah.

25 MR. GREENBERG: Well, the defendant's also

1 being detained - - -

2 JUDGE RIVERA: If you're not being
3 arrested, how long are you detained?

4 MS. BORDLEY: Well, for - - - excuse me,
5 he's being detained also on the felony complaint, so
6 that's why the issue didn't sort of come up.

7 JUDGE PIGOTT: Yeah, forget that, though.
8 I mean you - - -

9 MS. BORDLEY: If - - - if - - -

10 JUDGE PIGOTT: It seems like a very
11 technical thing that you're - - -

12 MS. BORDLEY: No, Your Honor; say, for
13 example - - -

14 JUDGE PIGOTT: It's not technical?

15 MS. BORDLEY: Well, maybe - - - it may be
16 technical. I will agree with you it's technical.
17 But generally speaking - - - so again, take my person
18 that's arrested in New Jersey, once they're - - -
19 they're being held for thirty days, their thirty days
20 expires, the New Jersey authorities can hold him
21 briefly - - - I can't give you an exact time, but
22 they will hold him briefly on the arrest warrant,
23 call up New York authorities, and say do you want
24 him; if you want him, come now. If you do not want
25 him - - -

1 JUDGE RIVERA: And then you put him under
2 arrest?

3 MS. BORDLEY: No, then if the - - - if - -
4 - if New York says we don't want him, then they
5 release him. They - - - they - - -

6 JUDGE RIVERA: I know, but if New York says
7 I want him?

8 MS. BORDLEY: Then we come and arrest him.

9 JUDGE RIVERA: Then you arrest him.

10 MS. BORDLEY: And that's when the execution
11 of the warrant occurs.

12 JUDGE RIVERA: Okay, so in this case - - -

13 MS. BORDLEY: Yes, in this - - -

14 JUDGE RIVERA: Again, what - - -

15 MS. BORDLEY: Okay, okay, what happens in
16 this case, he's on the felony complaint. Say he's
17 been on the felony complaint and we decided we're
18 just going forward on that burglary which he's
19 arrested on the street for, and so we put the
20 evidence in the grand jury, defendant testifies,
21 grand jury decides not to return a true bill. So
22 he's supposed to be released; he's not going to be
23 released because then - - - because the police are -
24 - - because the court will issue an order saying, you
25 know, he should be released unless there's any holds

1 or warrants, corrections gets that and says well, we
2 do have a warrant, they call up the police - - -

3 JUDGE ABDUS-SALAAM: Counsel, in that - - -

4 MS. BORDLEY: - - - department and they
5 say do you want to execute this warrant now, and then
6 we would have done the circle all over again. We - -
7 - police officer would have taken him in, we would
8 have arraigned him on the additional one, we could
9 have done that procedure. It's a long procedure.

10 JUDGE RIVERA: Like a little placeholder?

11 MS. BORDLEY: It's a placeholder.

12 JUDGE RIVERA: In case he's going to be
13 released, you have to hold him in case we want to
14 come and arrest him.

15 MS. BORDLEY: Yes, but we have to come very
16 quickly. They're not going to hold him very long.

17 JUDGE ABDUS-SALAAM: If - - - if you - - -

18 MS. BORDLEY: But that's all it does. It
19 serves as a - - -

20 CHIEF JUDGE LIPPMAN: Judge Abdus-Salaam.

21 JUDGE ABDUS-SALAAM: If you had lodged the
22 complaint - - -

23 MS. BORDLEY: Yeah.

24 JUDGE ABDUS-SALAAM: - - - but not
25 arrested him or arraigned him - - -

1 MS. BORDLEY: Yes.

2 JUDGE ABDUS-SALAAM: - - - could you have
3 presented any evidence before the grand jury - - -

4 MS. BORDLEY: Absolutely.

5 JUDGE ABDUS-SALAAM: - - - on the two - -
6 - on the February '06, right?

7 MS. BORDLEY: Yes, absolutely. We could
8 have done that at any point in time. And that brings
9 up an important - - - very important point here. If
10 - - - what we could have done was we could have just
11 gone in, presented that Severin burglary, the
12 burglary where he's arrested on the street and he's
13 been arraigned; defendant could have testified about
14 that. We could nev - - - could have not told him a
15 word about the fact that we now had evidence linking
16 him to another burglary, voted out that case, then
17 presented the Severin case directly, never had him
18 testify, and then had the grand jury vote on it, and
19 that's clearly lawful.

20 JUDGE FAHEY: It's the Taitt case, the 223
21 case, right? That's the one that - - -

22 MS. BORDLEY: Yeah. Yeah.

23 JUDGE FAHEY: Yeah, that's the case you
24 mean, yeah.

25 MS. BORDLEY: Yeah, yeah. So we can - - -

1 we can make a direct presentation when a defendant
2 has not been arraigned on - - -

3 JUDGE RIVERA: No arrest, no arraignment,
4 just go straight to the grand jury.

5 MS. BORDLEY: Go straight to grand jury,
6 and that's what the law allows us to go do.

7 In this case, because we knew we had the
8 two cases, we did - - - took another option. We
9 thought, he's going to be here on Monday, right; this
10 is Friday. He's going to be here on Monday to
11 testify. We will tell him we will let him talk about
12 both. We didn't have to. But we'll let him go and
13 testify both and let the grand jury hear him about
14 both.

15 JUDGE RIVERA: So why'd you tell him on
16 Monday instead of on Friday?

17 MS. BORDLEY: There was no court proceeding
18 on Friday so he wasn't there. That was the - - -
19 just the day that we issued the arrest - - -

20 JUDGE RIVERA: It's logistics?

21 MS. BORDLEY: It's - - - it's partly
22 logistics and - - - and - - - and the fact is when -
23 - -

24 JUDGE RIVERA: You chose not to arrest and
25 arraign, so therefore you have this logistics

1 challenge?

2 MS. BORDLEY: We'd filed the detainer
3 warrant for - - - we had filed the warrant as the
4 detainer, so we're going to be there on Monday. We
5 tell him on Monday. If defense attorney thought he
6 needed more time, he could have asked for an
7 adjournment.

8 JUDGE RIVERA: Um-hum.

9 MS. BORDLEY: We're required, by People v.
10 Shemesh and a whole other lot of cases, to
11 accommodate those kinds of requests. We have to give
12 them sufficient time to go do that. And defense
13 attorney in this case never made that request.

14 JUDGE PIGOTT: Well, let me ask you - - -
15 this just occurred to me while you were talking about
16 all this. You know, if - - - if the defendant asked
17 to be in front of the grand jury, if you give him
18 notice he's coming - - -

19 MS. BORDLEY: Yeah.

20 JUDGE PIGOTT: - - - most times he's
21 talked to his lawyer and they decided it's in his
22 best interest.

23 MS. BORDLEY: Yes.

24 JUDGE PIGOTT: If you directly present it,
25 he's not there, he can't - - -

1 MS. BORDLEY: Right.

2 JUDGE PIGOTT: This middle ground where on
3 the day you're going to present it, you say to him,
4 we're presenting it, you're - - - you're going to be
5 here anyway, you want to talk about it, there might
6 be an awful lot that goes into - - - I mean, then I
7 would think the lawyer would want to say well, wait a
8 minute, come over, where were you on the 23rd of
9 February, et cetera, et cetera, et cetera.

10 MS. BORDLEY: Yes. Yes, there - - - there
11 could be in some cases. And again, one defense
12 attorney can ask for an adjournment.

13 JUDGE PIGOTT: Well, let me ask you about
14 that second defense attorney, the - - - the defense
15 attorney on the February case?

16 MS. BORDLEY: Yes.

17 JUDGE PIGOTT: Where did he - - - where
18 did he come from? Because he hadn't been arraigned,
19 so he didn't - - - it wasn't - - -

20 MS. BORDLEY: Yeah, there isn't a lawyer on
21 the second case, so there's just the fir - - - lawyer
22 from the - - - where - - - the case he just got
23 arraigned on, the Severin burglary.

24 JUDGE PIGOTT: Well, who advised him on the
25 February one?

1 MS. BORDLEY: He's got one lawyer who at
2 that point is representing - - - he was - - - who's
3 representing him on the one case is also representing
4 him on the other case. So the one lawyer - - -

5 JUDGE PIGOTT: He was assigned - - -

6 MS. BORDLEY: He hasn't been assigned yet -
7 - -

8 JUDGE PIGOTT: He'd been - - -

9 MS. BORDLEY: - - - but both cases are
10 being presented at that point.

11 JUDGE PIGOTT: Had he been re - - - I know
12 that, but had he been retained?

13 MS. BORDLEY: No, not as far as I know.

14 JUDGE PIGOTT: So he hadn't been assigned,
15 he hadn't been retained, he just said gee, I hear
16 you're up - - - up for a murder, you want to come in
17 and talk about that while I talk about my - - -

18 MS. BORDLEY: Well, at that point,
19 defendant doesn't have an attorney on that case. But
20 I would - - - I want to make another point about this
21 case. In addition - - -

22 JUDGE PIGOTT: Well, no, but wait, wait,
23 wait.

24 MS. BORDLEY: Okay.

25 JUDGE PIGOTT: I mean, I'm just - - - I'm

1 just curious about that - - -

2 MS. BORDLEY: Yeah.

3 JUDGE PIGOTT: - - - because I would never
4 let my client go in front of a grand jury unless I'm
5 pretty damn sure he's got a reason to be there, and
6 if - - - if I - - -

7 MS. BORDLEY: No, but - - -

8 JUDGE PIGOTT: - - - decide he's going to
9 be there on one and then say well, by the way we've
10 got this murder case that we're going to - - - we're
11 going to present - - - I know you're getting ready -
12 - -

13 MS. BORDLEY: I'm sorry, Judge.

14 JUDGE PIGOTT: Do you mind - - - I know
15 you don't represent him on the murder but since he's
16 going to be there, we're going to send him in, is
17 that okay with you? Well, I have no authority. I
18 can't say because I don't represent him on that.

19 MS. BORDLEY: First, I do think you do have
20 the authority to go represent him in all these other
21 kinds of issues - - -

22 JUDGE PIGOTT: Who says?

23 MS. BORDLEY: - - - that come up. Your -
24 - - Your Honor, you're rep - - - in representing him
25 on the one case, you're also giving him general

1 representation - - -

2 JUDGE PIGOTT: No, I'm not.

3 MS. BORDLEY: - - - on the other.

4 JUDGE PIGOTT: Oh, absolutely I'm not. I'm
5 representing him on this one, I'm getting paid for
6 it, and I'm - - - and I'm very carefully deciding
7 that he's going to appear in front of these people
8 where you're going to be and I'm not, and that's
9 fine. But to say that while you're representing him
10 on that, you can represent him on the fact that he
11 killed his wife and we're putting that in at the same
12 time, so what's the big deal?

13 MS. BORDLEY: But - - - but, Your Honor,
14 the ultimate result of that is that we would - - - we
15 would never do it this way and what we would always
16 do is do the direct presentation. We'd just never
17 give him a chance to testify.

18 JUDGE PIGOTT: Would - - - and wouldn't
19 that make much more sense and then - - - and then - -
20 -

21 MS. BORDLEY: But because, be - - - but I
22 would point out that there was no prejudice to
23 defendant by doing this. First, there's the fact
24 that defendant could ask for that adjournment.

25 JUDGE RIVERA: You mean, because you - - -

1 you would not have had to give him notice. You could
2 have done this without - - -

3 MS. BORDLEY: Yeah, we could have done it
4 without - - -

5 JUDGE RIVERA: - - - notice for the
6 arraignment, without notice so he's - - -

7 MS. BORDLEY: Right.

8 JUDGE RIVERA: - - - not put in a worse
9 position, and because he could have sought the
10 adjournment - - -

11 MS. BORDLEY: Yes, he could have sought the
12 - - -

13 JUDGE RIVERA: - - - and avoided what he
14 claims now is - - - is what causes him prejudice?

15 MS. BORDLEY: Yes, and - - - and when you
16 look at actually this particular case, in this
17 particular case, the defense attorney didn't need
18 additional time because of the defendant's defense in
19 this case. Defendant's defense in this case didn't
20 involve a discussion of the facts of the individual
21 burglaries. His defense for one was the same as his
22 defense as the other. His defense was, I didn't
23 commit any burglaries. And he says I don't have a
24 motive to admit (sic) burglaries because my family
25 has money, and the reason why I'm being accused of

1 burglary is because the police have a vendetta
2 against me because I - - - I - - - I sued them
3 civilly and I got a settlement and because I didn't
4 cooperate in an investigation.

5 JUDGE RIVERA: So he might also have some
6 other defense, right, in addition to that one that
7 maybe - - -

8 MS. BORDLEY: No.

9 JUDGE RIVERA: - - - only applies to the
10 other.

11 MS. BORDLEY: No.

12 JUDGE RIVERA: No?

13 MS. BORDLEY: They both - - - they both did
14 and we know that - - -

15 JUDGE RIVERA: No, I understand, but let's
16 go with the hypothetical; it's possible, right?

17 MS. BORDLEY: Yes, but we know what - - -

18 JUDGE RIVERA: Defendant may have something
19 else they would have shared.

20 MS. BORDLEY: Then they should have asked
21 for the adjournment, defense counsel should have
22 asked for the adjournment.

23 JUDGE RIVERA: I understand - - - I
24 understand your position on that.

25 JUDGE PIGOTT: But he didn't have a lawyer.

1 MS. BORDLEY: Yes, but - - - but I would
2 point out, defendant did test - - - defendant did
3 testify at trial.

4 JUDGE RIVERA: Okay.

5 MS. BORDLEY: And at trial his defense was
6 the same in the grand jury and - - -

7 JUDGE PIGOTT: Ms. Bordley - - - Ms.
8 Bordley - - - Ms. Bordley, I - - - I understand - - -

9 MS. BORDLEY: Sorry.

10 JUDGE PIGOTT: - - - what I'm - - - what
11 I'm suggesting, though, is he did - - - if he didn't
12 have a lawyer on that second one, you say his defense
13 would have been the same.

14 MS. BORDLEY: Yeah.

15 JUDGE PIGOTT: Maybe he had an alibi,
16 maybe he was in Canada when the - - - when the
17 allegations are made and no one had an opportunity to
18 prepare for that, and if you're telling me that
19 because I represent him on the first one I'm
20 representing him on the second one, and I said fine
21 and I throw him to the wolves, I'm not sure I should
22 be doing that.

23 MS. BORDLEY: No, Your Honor, I'm not say -
24 - - saying you throw him to the wolves and certainly
25 not in this case. Again, at his defense in the case,

1 they didn't raise alibi, he's got a different
2 attorney at that point.

3 JUDGE PIGOTT: This is - - - this is - - -
4 I - - - I'm going to leave you alone after this. I
5 understand that on this case.

6 MS. BORDLEY: Yes.

7 JUDGE PIGOTT: I'm worried about the next
8 one.

9 MS. BORDLEY: Okay, but then I would bring
10 up this is being raised not in the context of a
11 190.50 motion, because his 190.50 motion wasn't on
12 this ground. This was being raised in the context of
13 a motion to dismiss in the interest of justice on the
14 theory that this was such exceptionally serious
15 misconduct by the People that it warranted the
16 termination of this prosecution for two burglaries.
17 And even if you think we made a mistake here where we
18 tried to give defendant an opportunity to testify
19 when we didn't have to but we tried to give him a
20 benefit - - - the benefit of testifying, and we could
21 have given that defense - - -

22 JUDGE RIVERA: Is there any basis by - - -
23 if he had sought - - - if on that day - - -

24 MS. BORDLEY: Yeah.

25 JUDGE RIVERA: - - - he sought the

1 adjournment, is there any basis by which he would not
2 have gotten an adjournment?

3 MS. BORDLEY: I - - - I - - - I can't think
4 of one, Your Honor, where - - -

5 JUDGE FAHEY: Can - - - can I just ask on -
6 - - on the - - - on the motions. I thought there
7 were four motions to dismiss - - - three.

8 MS. BORDLEY: There's - - - there's - - -
9 there were - - -

10 JUDGE FAHEY: There's three motion to
11 dismiss.

12 MS. BORDLEY: - - - three that are at issue
13 in the appeal.

14 JUDGE FAHEY: The first was a 1 - - -
15 190.50, wasn't it, or is it 210.20?

16 MS. BORDLEY: The first one was a 190.50
17 but it was on a very narrow ground, it's not the
18 ground that it then shifted to. The first ground was
19 I was completely ambushed, they started asking me
20 questions about this, they gave me no warning. The
21 judge looks at that and he says the grand jury
22 minutes show they did warn you before the grand jury
23 presentation. He didn't say I didn't get enough
24 notice. That doesn't come up until - - -

25 JUDGE PIGOTT: Didn't he say that? Didn't

1 he say he didn't have a prop - - - proper time to - -
2 - to prepare?

3 MS. BORDLEY: Not in his 190.50 motion
4 which was very narrow. He said we completely
5 ambushed him, we never gave him any notice. And
6 that's what the judge decides and says no, you did
7 have notice, and then defense counsel then - - - and
8 then so when that gets denied, a year and - - - and
9 like eleven months later, they make a motion to
10 dismiss in the interest of justice, and now they're
11 raising he didn't get enough notice and that's
12 serious misconduct. He's raising a 190.50 motion in
13 the middle of a motion to dismiss in the interest of
14 justice.

15 JUDGE ABDUS-SALAAM: Counsel, your light is
16 on so could you address the second point about - - -

17 MS. BORDLEY: Yes.

18 JUDGE ABDUS-SALAAM: - - - the
19 resentencing?

20 MS. BORDLEY: Yes, Your Honor.

21 JUDGE STEIN: Can I - - - can I ask you one
22 question about that which is if it's a habeas corpus
23 proceeding - - -

24 MS. BORDLEY: Yeah.

25 JUDGE STEIN: - - - what other basis could

1 there be to release him other than that his
2 incarceration was not legal?

3 MS. BORDLEY: The basis is supposed to be
4 that his incarceration was not legal, but I don't
5 think that's the ruling the court made in this case.
6 I think the language of the court - - - the court
7 very specifically said the evidence did not support
8 the imposition of eight (sic) months' continued
9 incarceration. By saying - - - you're saying it
10 didn't support eighteen months' incarceration. He
11 didn't say it didn't support any incarceration, he
12 did not vacate the parole warrant. So I think the
13 habeas court exceeded its authority when it issued
14 this writ of habeas corpus.

15 But I think the more - - - more important
16 point is I think this court is not bound by what the
17 habeas court said. And in Dozier, you said you only
18 - - - you - - - you exclude any kind of incarceration
19 - - - excuse me, incarceration, except if the
20 incarceration has no reason.

21 JUDGE ABDUS-SALAAM: Well, didn't this - -
22 -

23 MS. BORDLEY: There was a very good reason
24 - - -

25 JUDGE ABDUS-SALAAM: - - - this court say

1 that this incarceration - - - that the defendant was
2 in prison without reason?

3 MS. BORDLEY: He - - - there were - - -
4 there were very strong reasons for his - - - for his
5 incarceration in this case. He stopped reporting to
6 his parole officer. The most basic, the most
7 fundamental thing that a parolee must do was stay in
8 contact and meet with his parole officer. He stopped
9 doing that. He did not report a change in his
10 residence. He - - - and - - - and what's significant
11 is some of the details about that. What he told his
12 parole officer the last time he talked to him was
13 that he was in protective custody. The parole
14 officer said, send me documentation of that.
15 Defendant doesn't send the documentation, and there's
16 a good reason; because he's not in protective
17 custody. You know, I'm sure the parole officer
18 thought he was in a safe house with law enforcement.

19 CHIEF JUDGE LIPPMAN: Okay, cou - - -
20 counsel.

21 MS. BORDLEY: He wasn't - - -

22 CHIEF JUDGE LIPPMAN: Okay, thank you.

23 Counsel, rebuttal.

24 MR. GREENBERG: Here's how bad the Division
25 of Parole was here; the detective testified that he

1 informed two parole officers about what was going on
2 here. One of them was the one who signed the - - -
3 whatever the document is that lodges the - - - the -
4 - - the charges, so that - - - and they didn't - - -
5 and the - - - and they didn't bother to call that
6 parole officer to - - - officer to help sort this out
7 at the habeas hearing. So the detective made clear,
8 he was in char - - - he was in touch directly with
9 the parole officer who then turns around and accuses
10 my client of not fulfilling his obligations.

11 The detective sorted this all out. They
12 had no basis for - - - for violating this guy, and
13 that's why the time shouldn't be counted at all.
14 It's a very fact-laden decision so there may be a - -
15 - an implication, well, it's almost a little like a
16 time cut, it's not. It's a finding - - -

17 JUDGE FAHEY: Coun - - - counsel - - -

18 MR. GREENBERG: - - - that they had no
19 basis.

20 JUDGE FAHEY: - - - he - - - counsel made
21 reference to that he was not in protective custody.
22 Can you address that?

23 MR. GREENBERG: I think that's just a term
24 of art here; you know, all things being equal it
25 would have been better if the detective, who really

1 was the one doing the communicating, had exp - - -
2 well, he did explain to them what was going on. It -
3 - - it just - - - as - - - as I said, it - - -

4 JUDGE FAHEY: He re - - - relocated to his
5 friend's house in another place at - - - at the
6 advice of the detective after being shot seven times,
7 right?

8 MR. GREENBERG: Well, it wasn't just on the
9 advice; I mean, this - - - the - - - the record, as
10 spelled out in the decision, shows that the detective
11 was shuttling him back and forth to Brooklyn pursuant
12 to his cooperation agreement. Law enforcement was on
13 top of this, but for some reason - - -

14 JUDGE PIGOTT: I got the impression,
15 though, that the judge that - - - that ruled in his
16 favor, it was more because he thought the sentence
17 was excessive than that there shouldn't have been a
18 sentence at all.

19 MR. GREENBERG: I don't think you can read
20 it that way. I don't think you should read it that
21 way. I don't think the habeas court has the power to
22 - - - to find a sentence excessive. That's not what
23 habeas courts do, and even though it's fact-laden and
24 explains the whole saga I think the ultimate finding
25 is that he shouldn't have been subjected to this

1 violation because he didn't do anything wrong. I
2 mean the law - - -

3 JUDGE PIGOTT: But he said - - - he said
4 whoever imposed the sentence didn't consider the
5 ALJ's recommendation which would have prescribed a
6 significantly lower sentence.

7 MR. GREENBERG: Well, he also says that
8 they ignored all the evidence and the evidence showed
9 that he didn't - - - that he - - - he didn't do
10 anything that warranted being violated at all.

11 CHIEF JUDGE LIPPMAN: Okay, counsel.
12 Thanks. Thank you both.

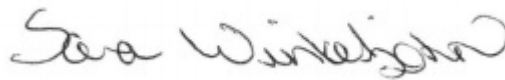
13 (Court is adjourned)

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

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Samuel Small, No. 176 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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Date: October 28, 2015