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COURT OF APPEALS

STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

PAUL WILLIAMS,

No. 34
(papers sealed)

Appellant.

20 Eagle Street
Albany, New York 12207
February 19, 2015

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE SUSAN PHILLIPS READ
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:

PIOTR BANASIAK, ESQ.
HISCOCK LEGAL AID SOCIETY
Attorneys for Appellant
351 South Warren Street
Syracuse, NY 13202

JAMES P. MAXWELL, ADA
ONONDAGA COUNTY DISTRICT ATTORNEY'S OFFICE
Attorneys for Respondent
505 South State Street, 4th Floor
Syracuse, NY 13202

Karen Schiffmiller
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: Number 34, People v.
2 Williams.

3 Counselor - - -

4 MR. BANASIAK: Good afternoon.

5 CHIEF JUDGE LIPPMAN: - - - do you want any
6 rebuttal time, counselor?

7 MR. BANASIAK: Yes, two minutes, please.

8 CHIEF JUDGE LIPPMAN: Two minutes, sure, go
9 ahead.

10 MR. BANASIAK: My name is Piotr Banasiak,
11 and I represent Mr. Paul Williams in this matter.

12 CHIEF JUDGE LIPPMAN: Counsel, talk about
13 the - - - the silence here. Was there silence? What
14 was the effect of it? Should it have been commented
15 on?

16 MR. BANASIAK: It shouldn't have been
17 commented on, and it shouldn't have been ad - - -
18 admissible as evidence. Although Mr. Williams did
19 not remain completely one hundred percent silent - -
20 -

21 CHIEF JUDGE LIPPMAN: Well, I was just
22 going to ask you that. Is this really a silent
23 situation or is it that he answered some questions,
24 didn't answer some other questions?

25 MR. BANASIAK: I think it's - - - it's an

1 effective silence situation. I think this court in
2 People v. Savage said that silence doesn't have to be
3 total. Even if it's something less than complete,
4 the People are still prohibited from utilizing that
5 silence, because unless there are unusual
6 circumstances present, or unique circumstances
7 present, then silence is ambiguous. There have only
8 been two cases where - - -

9 JUDGE STEIN: Well, how - - - how does this
10 square with Salinas?

11 MR. BANASIAK: Salinas, I think, was a - -
12 - a pre-arrest, pre-Miranda situation, so I think
13 that - - - that - - - that's inapplicable. What I
14 think the - - - the federal case that's applicable is
15 - - - applicable is Doyle v. Ohio, as - - - as well
16 as - - - as well as this court's case law, which
17 prohibits even - - - even pre-arrest silence.

18 But here we have a post-arrest, post-
19 Miranda situation where Mr. Williams, I - - - I
20 think, most importantly, made no admissions
21 whatsoever about any of - - - of - - - of the
22 allegations. He simply said that he knew the
23 complainant, and had been in her kitchen earlier that
24 day. Otherwise, he denied he had any knowledge of -
25 - - of the allegations that the police were - - -

1 were accusing him of. And he responded, honestly, do
2 you think I just broke down the door, when he was
3 confronted with - - - with the allegation of - - - of
4 burglary and rape.

5 The two cases this court has said involved
6 unique circumstances were People v. Rothschild and
7 People v. Savage. In Rothschild, the defendant was a
8 police officer who actually had a duty to speak, and
9 therefore his silence was - - - was highly probative
10 when - - - when he should have reported his
11 activities to the superior officers. Mr. Williams
12 was under no such duty. If Mr. Williams was under a
13 duty, then every - - - every single criminal
14 defendant would have a - - - a duty to speak.

15 Also, in People v. - - - v. Savage, the
16 defendant there spoke to police, and as this court st
17 - - - stated, he provided the essential facts of his
18 involvement in the crime. And so when he testified
19 at - - - at trial, and then all of a sudden provided
20 an exculpatory version of offense - - - of - - - of -
21 - - an exculpatory version of - - - of the offense,
22 it - - - it took on probative value because it would
23 be strange for somebody to speak to police and to
24 admit that they did something, but not to mention the
25 - - - the exculpatory facts.

1 this - - - this court's case - - - I - - - especially
2 Savage, if - - - if something less than total silence
3 still precludes the People from - - - from utilizing
4 a defendant's failure to answer questions. And I
5 think that - - - that contemplates - - -

6 JUDGE FAHEY: Of course, under Savage - - -
7 they specifically say under Savage, that that's a
8 question to be determined under state evidentiary
9 laws. It's not a Constitutional issue.

10 MR. BANASIAK: Although Savage said that in
11 the circumstance where the defendant not only waives
12 his rights, but then proceeds to narrate the
13 essential facts of his involvement.

14 JUDGE FAHEY: You may be right under state
15 evidentiary law. I - - - I'm not saying you're not.
16 You have an argument. But what - - - it's a
17 different standard, just to - - - we're talking about
18 something a little bit different.

19 MR. BANASIAK: I - - - I think I would also
20 point out that Savage involved utilizing silence to
21 impeach the defendant, whereas this case involves the
22 People introducing silence on their direct case. The
23 People claim on appeal that they're utilizing it to
24 impeach Mr. Williams' grand jury testimony, but they
25 introduced evidence of the silence under - - -

1 JUDGE FAHEY: You're right - - - you're
2 right about that. I thought - - - but they said it
3 was harmless error, but in the - - - in the AD,
4 right?

5 MR. BANASIAK: They did, and I - - - I
6 think our - - - our pri - - -

7 JUDGE STEIN: They introduced the testimony
8 which they then sought to impeach, didn't they? The
9 - - - the grand jury testimony?

10 MR. BANASIAK: Ex - - - exactly, I - - -
11 not only that, but they introduced the evidence of
12 silence before the grand jury testimony was even
13 admitted and before there was anything to impeach.
14 So I think it's clear on this record that the
15 evidence of silence was not only admitted to impeach,
16 but also as - - - as consciousness of guilt.

17 And our primary position or our primary
18 argument to this court is that the Appellate Division
19 incorrectly found that this Constitutional error was
20 harmless beyond a reasonable doubt. I think under
21 Crimmins, the first question is, was the evidence
22 overwhelming, and I respectfully submit that the - -
23 - the jury told us that the evidence wasn't
24 overwhelming here, because they acquitted Mr.
25 Williams of - - - of first-degree rape.

1 CHIEF JUDGE LIPPMAN: Counsel, what about
2 the other issues, you know, that you want to argue
3 before your - - - your time starts to run? What
4 about the juror issue?

5 MR. BANASIAK: Sure. Reversal is required
6 for - - - for that reason as well. The - - - the
7 trial court here erred in denying the so-called
8 belated preemptory challenge under the unique
9 circumstances of this case, where all indications
10 from the record are that we have a jury selection
11 process that's moving quite quickly, quite
12 confusingly, and it was almost inevit - - -

13 JUDGE ABDUS-SALAAM: Why is it confusing,
14 counsel? Didn't the court explain, maybe more than
15 once, how the process was going to be conducted? And
16 in fact, I think once your - - - once your client's
17 lawyer made a mistake, and the court reiterated those
18 instructions, so how is it confusing?

19 MR. BANASIAK: It - - - it - - - it's
20 confusing because I think there are - - - there are
21 numerous factors to point to in the record. First
22 is, despite the court's instructions, the court has
23 had this problem in - - - in previous cases, despite
24 the fact that it had given these instructions
25 multiple times. So that suggests that something is

1 going on during this process that makes it difficult
2 for attorneys to - - - to exercise preemptory
3 challenges in a timely manner.

4 We know it's also confusing because defense
5 counsel had trouble following the court. It was
6 confused as to exactly what juror was being selected.
7 There were - - -

8 JUDGE PIGOTT: What did it - - - what did
9 it mean? I - - - I take your point. You said that
10 it's confusing the way this particular judge - - -

11 MR. BANASIAK: Yes.

12 JUDGE PIGOTT: - - - does it? How does he
13 do it that makes it particularly confusing?

14 MR. BANASIAK: I think as - - - as the - -
15 - the trial prosecutor has stated twice that the
16 process moves at "breakneck" speed.

17 JUDGE PIGOTT: Yeah, but you put twelve in
18 the box, right, and then you pick, and then you - - -
19 you exercise your preempts, and then you exercise
20 your cause, and then they fill in the blanks, right?

21 MR. BANASIAK: That - - - that's true. I -
22 - - I think in theory this should be a - - - a simple
23 process, but - - - but the reality is that in this
24 case and other cases, attorneys have a - - - a - - -
25 a difficult time following - - -

1 JUDGE RIVERA: So - - -

2 MR. BANASIAK: - - - the process and they -

3 - -

4 JUDGE RIVERA: So is that - - - there's not
5 enough time in between?

6 MR. BANASIAK: It - - - it - - -

7 JUDGE RIVERA: In other words, I may be
8 counsel. I may be planning to move to exercise one
9 of my preemptories, but the other side does. So I
10 may be now thinking of my strategy moving forward?

11 MR. BANASIAK: Exactly. I think lawyers
12 have a - - - very little time to - - - to decide what
13 to do - - -

14 JUDGE PIGOTT: But that's - - - I don't
15 that's - - - I thought - - - you know, he said that
16 the challenges to jurors would have to be in order;
17 there's no going back. Does that mean, if, you know
18 - - - is that was what confusing? I guess I
19 shouldn't be - - -

20 MR. BANASIAK: I - - - I think when I say
21 confusing, I mean that this process is moving so
22 quickly that - - - that lawyers have a - - - become
23 confused easily because, you know, the - - - the pro
24 - - - let's say, the prosecutor makes a challenge,
25 then they move on to the next juror, then counsel is

1 trying to figure out how many jurors are left, and is
2 trying to figure out whether to exercise the
3 challenge, and it makes it difficult to make a - - -
4 a - - - a reasoned, thoughtful decision in - - - in
5 conjunction with - - -

6 JUDGE STEIN: Am I - - - am I wrong,
7 though, that - - - that as I read the - - - the
8 transcript, it looks to me like counsel knew exactly
9 what she was doing, but then her client suggested
10 that he wanted to make an objection - - - a challenge
11 after - - - after even another juror had been
12 selected, the - - - the alternate.

13 MR. BANASIAK: I think it's possible, but
14 if - - - if counsel did - - - wanted this juror, I
15 think it's - - - it's - - - it's reasonable to
16 conclude that she wouldn't have - - - have gone along
17 with what her client was saying. She would have
18 simply thought, you know, I wanted this juror, and so
19 I'm not going to challenge her, but - - -

20 JUDGE RIVERA: And she would not have
21 brought to the court's attention what her client is
22 telling her specifically?

23 MR. BANASIAK: If - - - if she - - -

24 JUDGE RIVERA: Or have requested perhaps a
25 moment - - -

1 MR. BANASIAK: I think that - - -

2 JUDGE RIVERA: - - - to speak with the
3 client?

4 MR. BANASIAK: I think if - - - if she
5 wanted that juror, she had the discretion to - - - to
6 choose her over - - - over her clients' possible - -
7 -

8 JUDGE RIVERA: So you think this is more
9 like People v. McGrew - - -

10 MR. BANASIAK: I - - - I - - - I - - -

11 JUDGE RIVERA: - - - is that - - - in your
12 argument, sort of, in terms of the way this was
13 moving?

14 MR. BANASIAK: I think it's exactly like
15 People v. - - - yes.

16 CHIEF JUDGE LIPPMAN: Okay, counsel.

17 MR. BANASIAK: Thank you.

18 CHIEF JUDGE LIPPMAN: Thanks.

19 Counsel?

20 MR. MAXWELL: May it please the court, if I
21 can just address the second issue, hopefully quickly,
22 first, just to try - - -

23 CHIEF JUDGE LIPPMAN: Yeah, sure, go ahead,
24 whatever order you want.

25 MR. MAXWELL: I think, Judge Stein, first

1 of all - - - welcome, congratulations. Judge Fahey,
2 welcome, congratulations.

3 JUDGE FAHEY: Thank you.

4 MR. MAXWELL: Judge Stein, I think you've
5 hit on exactly what was going on. It was
6 handicapping defense counsel, is that - - - is her
7 client af - - - somewhat after the fact was saying,
8 well, hey, wait a minute; I want to go back. And I -
9 - - I - - - we had a trilogy of cases in the Fourth
10 Department where I lost two out of three, where - - -
11 I'm not saying it was - - -

12 CHIEF JUDGE LIPPMAN: Two out of three, not
13 bad.

14 MR. MAXWELL: I'm not - - -

15 CHIEF JUDGE LIPPMAN: Thirty - - - .333
16 batting average. Go ahead.

17 MR. MAXWELL: I'm not saying it was because
18 of who was on the panel, but the two that I lost were
19 when Judge Walsh would have someone go out of order,
20 and within thirty seconds or a few minutes - - - you
21 know, a short time - - - say, no, I want to go back.
22 The difference here, and I believe the way - - - the
23 reason the Fourth Depart - - - the Fourth Department
24 did not buy this claim here, is they were in a
25 different part of jury selection - - - were in - - -

1 were into selecting alternates.

2 People - - - attorneys are using challenges
3 for alternates. Jurors are accepted and - - - we
4 ended up with one alternate - - - ended up with
5 excuse - - - and you have a different - - - rules.
6 It would be like if a basketball game is - - - goes
7 into overtime, do you keep your timeouts? Well, the
8 rule is you have fifteen challenges during regular
9 jury selection and two for each alternate.

10 JUDGE RIVERA: Does it matter if it's the
11 first or the third alternate?

12 MR. MAXWELL: Well, I think it - - -

13 JUDGE RIVERA: Does it matter?

14 MR. MAXWELL: I don't - - - don't think it
15 matters. I think it's once you get into the
16 alternates - - -

17 JUDGE RIVERA: But the first alternate,
18 more of a possibility of ending up seated, depending,
19 right?

20 MR. MAXWELL: It's - - - I think it - - -

21 JUDGE FAHEY: Isn't the important point is
22 - - - is the jury hadn't been sworn yet, had they?

23 MR. MAXWELL: Correct.

24 JUDGE FAHEY: So that's really the
25 important point when we're looking at the judge's

1 let's get to the silence issue - - -

2 MR. MAXWELL: Yeah, and I - - -

3 CHIEF JUDGE LIPPMAN: - - - and we
4 understand your position on the - - - on the juror.

5 MR. MAXWELL: All right, thank you. I just
6 didn't want to leave that unset - - -

7 CHIEF JUDGE LIPPMAN: No, no, I agree with
8 you. But let's - - - let's go to the silence.

9 MR. MAXWELL: All right. This defendant -
10 - - he - - -

11 CHIEF JUDGE LIPPMAN: Was it silence?

12 MR. MAXWELL: - - - he waived his right to
13 remain silent. He then - - - as we were talking - -
14 - it was already mentioned - - - he goes into these
15 gibberish responses, saying questions back to people,
16 and there were times when he said nothing.

17 CHIEF JUDGE LIPPMAN: Could that be - - - I
18 - - - I guess your adversary is saying, well, you can
19 con - - - construe that as really silence. He's not
20 giving up anything in a - - - in a negative way.

21 MR. MAXWELL: Right, but on the other hand,
22 he never says, I've said enough; I'm not saying
23 anymore, or I don't want to talk to you.

24 JUDGE ABDUS-SALAAM: Is that required,
25 though, counsel? Is that - - - is that where you

1 would suggest we draw the line that someone would
2 have to verbalize - - - they don't want to say
3 anything else, or just keep their lips and tongue
4 tight, and don't say anything?

5 MR. MAXWELL: Well, there was that Supreme
6 Court of the United States case, *Berghuis v.*
7 *Tompkins*, which talks about remaining silent - - -
8 doesn't do the job. So that's one - - - one possible
9 result. But the other factor here and we talked - -
10 - your - - - Judge Stein was talking about earlier,
11 is this was a defendant who also waived his right to
12 remain silent and went before a grand jury. And he
13 tries to portray to the grand jury, I told the
14 police; I didn't rape nobody.

15 JUDGE STEIN: But he didn't raise that.
16 The People raised that.

17 MR. MAXWELL: Well, we raised that - - -

18 JUDGE STEIN: Is that - - - that - - - that
19 seems to me to be a little more problematic.

20 MR. MAXWELL: Well, let me ask you to look
21 at the - - - the entire presentation. We, in a way,
22 did him a favor by putting his defense in for him,
23 but at the same time, we put in the part that we
24 wanted in, which was he was lying.

25 JUDGE STEIN: So you're saying you just

1 anticipated that he was going to put that testimony
2 in.

3 MR. MAXWELL: Not quite, Your Honor. I'm -
4 - - I'm saying that it was legitimate and fair and
5 actually unobjected to for us to put in the grand
6 jury testimony. He's warned it could be used against
7 him. Some of things he said in there if they had
8 been true, would have helped him, and we - - -

9 JUDGE STEIN: So wa - - - was that your
10 purpose in putting in the testimony to - - - to - - -

11 MR. MAXWELL: Our purpose was to show that
12 he wasn't - - - that he was changing his story to fit
13 the evidence as he understood it. What happened here
14 is right after the arrest, we didn't know that there
15 would be a DNA match on his saliva. He was
16 slobbering over her breast and the DNA - - - when - -
17 - when we - - -

18 JUDGE STEIN: So you're using it to show
19 evidence of - - - of - - -

20 MR. MAXWELL: Consciousness of guilt.

21 JUDGE STEIN: Consciousness of guilt.

22 MR. MAXWELL: Yes. And I submit that that
23 not only wasn't objected to, but is perfectly
24 legitimate. And - - -

25 JUDGE ABDUS-SALAAM: How is that - - -

1 MR. MAXWELL: Yes, Your Honor.

2 JUDGE ABDUS-SALAAM: I'm sorry, counsel.

3 How is that legitimate? This is the People
4 submitting evidence and then trying to impeach their
5 own evidence. That's legitimate?

6 MR. MAXWELL: Well, what I'm saying is, he
7 has the - - - the Rothschild case was mentioned where
8 the - - - the officer had a sworn duty to - - - to
9 say - - - to tell his superiors what he was doing.
10 Here the defendant had a sworn duty to tell the truth
11 when he swore to tell the truth before the grand
12 jury.

13 And he's - - - and he's giving a different
14 story. He's - - - he's - - - he's saying he told the
15 police certain things that he just did not tell them,
16 and thus he's lying to the grand jury. And I think
17 that - - - that is not only not objected to, but it
18 was legitimate to do. And the argument that we
19 hadn't - - - we were - - - we were putting in the
20 officer's testimony before we had the oth - - - the
21 grand jury testimony in, was simply a matter of we
22 had to put one in before the other.

23 JUDGE PIGOTT: How do we solve this issue
24 of remaining silent? I - - - I get it that he - - -
25 he waived his right to remain silent, but at some

1 points, he wanted to stay silent. And can that be
2 used against him anyway?

3 MR. MAXWELL: Well, it can in unusual
4 circumstances. And this case is unusual
5 circumstances if you're ever - - - if you're ever
6 going to see it.

7 CHIEF JUDGE LIPPMAN: What's so unusual?
8 Go ahead.

9 MR. MAXWELL: Well, what's unusual is what
10 we were just talking about, is that he - - - he - - -
11 he does this quasi - - - you know, he tries to - - -

12 CHIEF JUDGE LIPPMAN: You can't tell
13 whether - - -

14 MR. MAXWELL: You can't tell whe - - -

15 CHIEF JUDGE LIPPMAN: - - - he's remaining
16 silent or not? That's what - - -

17 MR. MAXWELL: Right.

18 CHIEF JUDGE LIPPMAN: - - - that's what's
19 unusual?

20 MR. MAXWELL: And then goes ahead and lays
21 out a whole new story once he realizes that his DNA
22 is going to show that he did have sexual contact with
23 the victim. Then it's consensual. Then it's, yes,
24 he was there, and it was all - - -

25 CHIEF JUDGE LIPPMAN: This kind of

1 situation would not - - - not come up regularly where
2 the - - - the - - - they get him; he's saying
3 whatever he's saying and then - - -

4 MR. MAXWELL: I haven't seen it before,
5 Your Honor. And I think that's why - - -

6 CHIEF JUDGE LIPPMAN: If you haven't seen
7 it, maybe it's unusual. Go ahead.

8 MR. MAXWELL: Maybe it's unusual.

9 CHIEF JUDGE LIPPMAN: Go ahead.

10 MR. MAXWELL: Maybe I'm just not observant.
11 I don't know.

12 CHIEF JUDGE LIPPMAN: Go ahead.

13 MR. MAXWELL: But - - - either be - - - so
14 the two grounds that emerge is - - -

15 CHIEF JUDGE LIPPMAN: Right.

16 MR. MAXWELL: - - - is this - - - when you
17 waive your right to remain silent, is this remaining
18 silent, when you don't say I - - - I have no more to
19 say to you. And again, when he goes into the grand
20 jury and gives a completely different story, and lies
21 about what he told the police.

22 JUDGE PIGOTT: Do you - - - do you think
23 you have to reinvoke, then? I mean, should there be
24 some indicia of reinvoking your right to remain
25 silent in order for - - - the - - - I mean, the

1 troubling thing is, you know, on - - - particularly
2 on summation, where somebody says, you know, and he
3 remained silent, when - - - and it just sets you off,
4 because you're - - - you have a right to remain
5 silent.

6 MR. MAXWELL: Well, and again, this is not
7 a - - - our argument wasn't, see, he remained silent
8 so he had something to hide. Our argument was, well,
9 he had this gibberish to say one day, and then he had
10 this whole other story about consent another day once
11 he knew that the DNA - - -

12 CHIEF JUDGE LIPPMAN: But is the - - - but
13 is the Judge right - - - the - - - the - - - Judge
14 Pigott's question was, I think, do you have to
15 actually verbalize that? I - - - I - - - I want to
16 be - - - I don't want to say anything; I want to
17 remain silent.

18 MR. MAXWELL: Right.

19 CHIEF JUDGE LIPPMAN: Is that the tipping
20 point here, do you say that?

21 MR. MAXWELL: That is one tipping point. I
22 think that would be a logical and proper rule to
23 make, especially in this kind of case, where he would
24 go silent at some times and back and forth - - -

25 CHIEF JUDGE LIPPMAN: You don't know - - -

1 in this kind of case you don't know what he - - -

2 MR. MAXWELL: Right.

3 CHIEF JUDGE LIPPMAN: - - - what he wants
4 to do.

5 MR. MAXWELL: Right. And even after he's -
6 - -

7 JUDGE PIGOTT: As opposed to most - - - I'm
8 sorry.

9 MR. MAXWELL: I'm sorry, Your Honor.

10 JUDGE PIGOTT: I was going to say, I
11 suppose in most cases the first thing somebody says
12 is I want my lawyer - - -

13 MR. MAXWELL: Right.

14 JUDGE PIGOTT: - - - before they decide to
15 talk or not.

16 MR. MAXWELL: Right.

17 JUDGE FAHEY: But the problem is, is that
18 in the opening and in the summation, his silence is
19 used in argument against him, not that his testimony
20 was characterized, but that the actual fact that he
21 didn't respond to a question. You see, that's - - -
22 that's what I'm struggling with here.

23 MR. MAXWELL: Right. Again - - - there was
24 - - - there was absolutely no objection to that.

25 JUDGE FAHEY: Uh-huh.

1 MR. MAXWELL: And at that point, what had
2 come in had come in.

3 JUDGE FAHEY: So your argument is
4 preservation?

5 MR. MAXWELL: For that part, yes, yes.

6 JUDGE FAHEY: All right.

7 MR. MAXWELL: And otherwise the - - -

8 JUDGE ABDUS-SALAAM: Coun - - -

9 MR. MAXWELL: Oh, yeah, Your Honor, I'm
10 sorry, Your Honor.

11 JUDGE ABDUS-SALAAM: Okay, I wanted - - -
12 picking up a little bit on that, a - - - a different
13 point about the forcible compulsion and the jury
14 instruction. And in your brief, you say that the
15 defendant's - - - defendant had to preserve that
16 issue - - - the challenge to the jury's instruction
17 on forcible compulsion, but you don't really argue
18 that in detail. And there seems to be a split in the
19 Department, so could you - - - before your light goes
20 on - - -

21 MR. MAXWELL: All right. Very quickly,
22 Your Honor, afterward - - - I do have to acknowledge
23 that I - - - I did make a mistake in my brief about
24 the bill of particulars, where I - - - I goofed in I
25 think I was looking at the response to the demand to

1 produce. They did - - - we did specify in the bill
2 of particulars that it was by forcible compulsion.

3 Then the jury charge by the judge was
4 forcible - - - forcible compulsion by physical force.
5 And then the instruction to the jury was forcible
6 compulsion can be by physical force or threats,
7 express or implied. And there was no objection to
8 that. And we - - - I point that out.

9 I - - - I - - - I think there is an
10 argument to be made that that's - - - that's
11 fundamental because it changes our theory. But I
12 think the cleaner way to approach it would be, if - -
13 - if a - - - if a defendant is actually concerned
14 about that, stand up and object, that that - - - and
15 in this case - - -

16 JUDGE ABDUS-SALAAM: Your - - - your
17 position is it's not a mode of proceedings error as
18 the defendant is - - - is suggesting.

19 MR. MAXWELL: Yes, yes. But - - - and - -
20 - and also, the - - -

21 JUDGE RIVERA: But on the merits it's
22 harmless.

23 MR. MAXWELL: On the merits it's harmless,
24 because this was a force case. They - - - they knew
25 each other. When he came into the - - - the bathroom

1 and -- she just said get out of here. She wasn't
2 threatened, she wasn't scared; she was overwhelmed
3 physically.

4 JUDGE RIVERA: Then all of your evidence,
5 you're saying, went to the - - -

6 MR. MAXWELL: Yeah.

7 JUDGE RIVERA: - - - the physi - - -

8 MR. MAXWELL: All of it was, yes.

9 JUDGE RIVERA: - - - the physical force.

10 CHIEF JUDGE LIPPMAN: Okay - - -

11 JUDGE ABDUS-SALAAM: But if we had to - - -
12 I'm sorry.

13 CHIEF JUDGE LIPPMAN: I'm sorry, Judge
14 Abdus-Salaam.

15 JUDGE ABDUS-SALAAM: But if we had - - - if
16 we were forced to - - - or had to resolve this split
17 among Departments, which - - - which - - -

18 MR. MAXWELL: I - - - well, I think you
19 should reserve mode of proceeding errors for - - -
20 for very basic things, and I think this doesn't - - -
21 isn't basic enough, if that makes sense.

22 JUDGE ABDUS-SALAAM: So you would go with
23 the first - - -

24 MR. MAXWELL: I would go with - - - with it
25 - - - if you're listening to a charge, and you hear

1 something is not right, stand up and object.

2 CHIEF JUDGE LIPPMAN: Okay, counsel.

3 Thanks.

4 MR. MAXWELL: Thank you.

5 CHIEF JUDGE LIPPMAN: Counselor, rebuttal.

6 You want to talk about the last issue, the forcible

7 co - - - compulsion?

8 MR. BANASIAK: Sure, if I could just

9 briefly say a few things about preservation as to - -

10 -

11 CHIEF JUDGE LIPPMAN: Say you want.

12 MR. BANASIAK: - - - as to the first issue.

13 CHIEF JUDGE LIPPMAN: It is your time; go

14 ahead.

15 MR. BANASIAK: I think even though - - -

16 even though defense counsel did not object

17 immediately to the opening statement, defense counsel

18 still objected at a time when the court could still

19 rule on the issue and in fact - - -

20 JUDGE ABDUS-SALAAM: How would we know that

21 the objections after that first objection were to the

22 - - - to the opening statement as opposed to leading

23 questions or something like that? I grant you, it

24 would have been clearer if defense counsel had said,

25 continuing objection, all right. But I don't recall

1 seeing anything where counsel was saying this is a
2 continuing objection to the one I made about the
3 opening statement.

4 MR. BANASIAK: I - - - two points to that.
5 First, after the opening statement, defense counsel
6 said that the prosecution shouldn't be able to use
7 Mr. Williams' silence against him, nor should they be
8 able to draw an - - - an adverse inference against
9 him. And the - - - the trial court specifically
10 ruled on the issue. He said, you know, you can
11 comment on the silence, plus he didn't rein - - - he
12 didn't remain completely silent, there - - -
13 therefore his silence is admissible. So it was
14 essentially a ruling on - - - a - - - a preemptive
15 ruling on Detective Proscanasa's (ph.) testimony.

16 Plus it was obvious from the objections
17 during the - - - the detective's testimony, because
18 the questions were - - - were - - - were posed about
19 whether he remained silent, and the detective said
20 yes, and defense counsel objected immediately
21 thereafter. And plus - - -

22 JUDGE ABDUS-SALAAM: Again, that's a
23 leading question so I - - - I'm saying, how do we
24 know it wasn't just to the evidentiary problem of the
25 leading question, as opposed to - - -

1 MR. BANASIAK: I think you would know it,
2 given the extensive arguments that were had about
3 this issue ear - - - earlier in - - - in the trial.

4 With - - - with respect to point three, we
5 - - -

6 CHIEF JUDGE LIPPMAN: Go ahead.

7 MR. BANASIAK: - - - we would urge this
8 court to adopt the Fourth Department's position that
9 this is a - - - a - - - a mode of proceedings error.
10 My opponent mentioned that this is not a basic error,
11 but it's - - - it's hard to - - - to find a - - - a -
12 - - a procedural protection more basic than being
13 indicted by a grand jury and to have notice of the
14 charges against you.

15 And here where the trial court charges an -
16 - - an uncharged theory, the court effectively amends
17 the indictment and substitutes a new indictment in -
18 - - in its place.

19 JUDGE PIGOTT: Maybe. I mean, that's why
20 you got to object, it seems to me. I mean, it - - -
21 you might like it. It depends on - - - on how the
22 judge says it. I always look at the mode of
23 proceedings as kind of the structure, the
24 architecture of the - - - of the proceedings and
25 things like that, and what - - - what's said in

1 between; you know, you've got to say something, if he
2 failed to give a charge for example.

3 MR. BANASIAK: Well, I think - - - I don't
4 think there would ever be a circumstance where a
5 defendant would like this sort of charge, because it
6 essentially expands the theory under which the jury
7 could convict him.

8 JUDGE PIGOTT: In this case.

9 MR. BANASIAK: I think - - -

10 JUDGE PIGOTT: Right, I - - - I don't - - -
11 I don't disagree with that. I - - - I think in this
12 case, that might be true, but to say anytime a judge
13 misstates or - - - or let's say, overcharges, there
14 need not be an objection, that's - - - that's an
15 automatic reversal - - -

16 MR. BANASIAK: Our - - -

17 JUDGE PIGOTT: - - - would be harsh.

18 MR. BANASIAK: Our position is it would be
19 only in cases where the charge actually expands or -
20 - - or it changes the theory in the - - - in the
21 indictment, thus violating a defendant's right to be
22 indicted by a grand jury and to have actual notice of
23 the charges that - - - that he's facing, so that he
24 could prepare a - - - a defense.

25 CHIEF JUDGE LIPPMAN: Okay, counsel.

1 JUDGE READ: If it - - -

2 CHIEF JUDGE LIPPMAN: Judge Read.

3 JUDGE READ: If it adds something, isn't it
4 - - - isn't it always notably going to expand what
5 the grand jury did? If it adds something?

6 MR. BANASIAK: Well, if it adds a theory,
7 then it necessarily, I think, expands it. It would
8 be different if - - - if - - - if the court simply
9 substituted a - - - a theory, but I think in those
10 circumstances, it - - - it would probably be a mode
11 of proceedings error too, but I think given that the
12 court expanded it here, it's - - - it's that much
13 worse.

14 CHIEF JUDGE LIPPMAN: Okay.

15 MR. BANASIAK: Thank you.

16 CHIEF JUDGE LIPPMAN: Thank you both.

17 (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. Paul Williams, No. 34, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



Signature: _____

Agency Name: eScribers

Address of Agency: 700 West 192nd Street
Suite # 607
New York, NY 10040

Date: February 26, 2015