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COURT OF APPEALS

STATE OF NEW YORK

PEOPLE,

Appellant,

-against-

No. 6

MICHAEL S. BRUMFIELD,

Respondent.

20 Eagle Street
Albany, New York 12207
January 06, 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

Appearances:

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Sara Winkeljohn
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: Number 6, People v.
2 Brumfield.

3 Counsel.

4 MS. WOLFORD: Good afternoon, Your Honors.
5 May it please the court, Kelly Wolford - - -

6 CHIEF JUDGE LIPPMAN: Would you like any -
7 - -

8 MS. WOLFORD: - - - on behalf of the
9 People.

10 CHIEF JUDGE LIPPMAN: You - - - would you
11 like any rebuttal time, counsel?

12 MS. WOLFORD: I would, Your Honor. I'd ask
13 for two minutes.

14 CHIEF JUDGE LIPPMAN: Two minutes. Sure,
15 go ahead.

16 MS. WOLFORD: Thank you. This afternoon
17 we're asking the court to review an Appellate
18 Division decision which reversed a judgment of
19 conviction of the defendant, finding that the defense
20 attorney properly crossed out portions of the waiver
21 of immunity.

22 CHIEF JUDGE LIPPMAN: Counselor, is this
23 whole thing moot?

24 MS. WOLFORD: Actually, I thought maybe
25 that's where you would go; absolutely not, for a few

1 reasons.

2 CHIEF JUDGE LIPPMAN: Go ahead.

3 MS. WOLFORD: One of which is that this is
4 a situation where the People do not have a right to
5 ask for a stay to this court. So unlike a situation
6 where a defendant has a right to stay the
7 proceedings, the People have no statutory right to
8 such a stay.

9 JUDGE ABDUS-SALAAM: Is that what you mean
10 - - - when you say that, do you mean that you
11 couldn't have just made a direct appeal to the - - -
12 the issue or - - -

13 MS. WOLFORD: Well - - -

14 JUDGE ABDUS-SALAAM: - - - instead of - - -
15 instead of representing to the grand jury, that you
16 couldn't appeal the Supreme Court or the - - - the
17 Appellate Division's - - -

18 MS. WOLFORD: Well, we did do both in this
19 case.

20 JUDGE ABDUS-SALAAM: Okay.

21 MS. WOLFORD: Because what we did was we
22 asked this court for leave to appeal, which is
23 required. We need leave to come here. So when we
24 lost at the Appellate Division, we asked for leave.
25 But then we're stuck with a situation where we have a

1 defendant who had been convicted of a - - - of a
2 felony offense, who now stands unindicted even, under
3 the Appellate Division's decision, and we don't know
4 whether or not this court is going to accept the case
5 to be heard.

6 So now we have a situation where we have -
7 - - we have almost a Hobson's choice situation. And
8 instead of Hobson, we picked both. We - - - we
9 decided, in an effort to speed up the process
10 regardless of the decision of this court, should - -
11 - should this court either not - - - not be inclined
12 to take the case for - - - to hear it on appeal, or
13 we get to this point and the court decides the
14 Appellate Division was right, now we're ready to go
15 with the defendant's case.

16 Unfortunately, what happened and what I
17 will - - - what I do want to talk about with respect
18 to the mootness situation is City Court in this case
19 refused our request to adjourn the matter and wait
20 for this court's decision. And this is where the
21 problem arises and why this is something that is not
22 mute - - - or moot because we can't ever stop that
23 from happening. And a city court then would have the
24 ability to take away from this court its ability to
25 decide an issue of law that was clearly presented on

1 - - - and, you know, Your Honor, granted leave on.

2 So we're in a - - - we're in a very
3 difficult situation here because we asked for leave.
4 We wanted this court to hear it. And now we have a
5 city court who has dismissed the case in the interest
6 of justice, and we're stuck here in a situation where
7 the first question is is it moot. I would ask the
8 court to consider the fact that this will continue to
9 repeat itself under these situations because - - -

10 CHIEF JUDGE LIPPMAN: But can it be
11 addressed if it repeats itself?

12 MS. WOLFORD: Can it be?

13 CHIEF JUDGE LIPPMAN: Yeah.

14 MS. WOLFORD: It can be addressed right
15 here if there - - -

16 CHIEF JUDGE LIPPMAN: I mean, yeah, but - -
17 -

18 MS. WOLFORD: - - - if the opportunity's
19 out there.

20 CHIEF JUDGE LIPPMAN: - - - but will it?
21 But you know the test. Will it escape attention
22 later on, as one of the reasons why you take it even
23 though it might - - - or you decide it even though it
24 might appear moot.

25 MS. WOLFORD: Right.

1 CHIEF JUDGE LIPPMAN: Why couldn't this be
2 resolved if it comes up again? It's the form you're
3 using. Your point is let's - - - let's just decide
4 now so that there's no question.

5 MS. WOLFORD: Right.

6 CHIEF JUDGE LIPPMAN: But - - - but it
7 won't evade adjudication later, right? If it comes
8 up, it will - - - it will be addressed.

9 MS. WOLFORD: But we are in a situation
10 here - - -

11 CHIEF JUDGE LIPPMAN: If you're using the
12 form. That's all I'm saying. If - - -

13 MS. WOLFORD: I'm sorry.

14 CHIEF JUDGE LIPPMAN: - - - if you continue
15 to use the form, it's not going to evade resolution
16 in the courts, though, right?

17 MS. WOLFORD: Well, it - - - it very well
18 could evade resolution in the courts.

19 CHIEF JUDGE LIPPMAN: Why, because no one
20 else would challenge it?

21 MS. WOLFORD: Well, we have a difficult
22 time getting to this - - - to this level. So now
23 we're stuck with an Appellate Division decision that
24 is binding on us, so we need to follow that Appellate
25 Division decision. And getting to this court is not

1 as a matter of right.

2 CHIEF JUDGE LIPPMAN: So you're here. It
3 took you awhile, and you want to get it resolved?

4 MS. WOLFORD: Absolutely, Your Honor.

5 CHIEF JUDGE LIPPMAN: Okay. Go ahead.

6 MS. WOLFORD: And I do think the merits are
7 worth - - - are worth discussing here because it is
8 an issue of statewide importance.

9 CHIEF JUDGE LIPPMAN: So - - - so talk to
10 the merits. Why - - - why isn't what they agreed to
11 enough?

12 MS. WOLFORD: Well, let's start with the
13 impact of an im - - - of a waiver of immunity.
14 Because - - -

15 CHIEF JUDGE LIPPMAN: Okay.

16 MS. WOLFORD: - - - immunity is the grand-
17 all end-all of criminal cases.

18 CHIEF JUDGE LIPPMAN: Yes. Go ahead.

19 MS. WOLFORD: So unlike a guilty plea,
20 where if the court does not do a sufficient legal
21 colloquy and the People can now try it, if you don't
22 do a sufficient colloquy in the grand jury to a
23 waiver of immunity, the defendant gets immunity.
24 Done; we can't go forward. There's no out. So
25 instead of a situation where we have - - - we have

1 some sort of redress if it's not done correctly, here
2 the defendant gets, potentially, a windfall.

3 So we have a situation that is very
4 important to prosecutors across the state. And I - -
5 - I can say, having been a young prosecutor at one
6 time, one of the most dangerous and scary parts of
7 being a prosecutor is making sure you do that right,
8 because you never want a person to come in and be
9 granted immunity because you didn't follow the right
10 steps.

11 So with that in mind, we have to look at
12 what he crossed out, and I - - - I will analogize it
13 back to the - - - the guilty plea - - -

14 CHIEF JUDGE LIPPMAN: So why don't you take
15 it - - - take it down the - - - the different things
16 that - - - that were crossed out and why that
17 represents noncompliance with CPL 190.45.

18 MS. WOLFORD: Okay. So the one thing I do
19 want to suggest to you is that we have to look at 190
20 - - - 190.45 in context of everything we do where a
21 defendant waives his rights.

22 CHIEF JUDGE LIPPMAN: Right.

23 MS. WOLFORD: So a waiver of rights in a
24 guilty plea, a waiver of right to counsel, a waiver -
25 - - waiver Miranda.

1 CHIEF JUDGE LIPPMAN: Right.

2 MS. WOLFORD: In every one of those cases,
3 we have to make sure that that is a knowing,
4 intelligent, and voluntary waiver. So now we take
5 the form that was presented to Mr. Brumfield and the
6 fact that he crossed out even such a simple thing as
7 I understand I have the right to an attorney.

8 CHIEF JUDGE LIPPMAN: Yeah. But again, if
9 he complied with the statute, the whole issue is are
10 they in compliance with the statute.

11 MS. WOLFORD: Right. Okay. So - - -

12 CHIEF JUDGE LIPPMAN: Right?

13 MS. WOLFORD: - - - the statute requires -
14 - -

15 CHIEF JUDGE LIPPMAN: Isn't that the - - -
16 the bottom line issue?

17 MS. WOLFORD: Right. The statute requires
18 that he waive - - - that he waive his right to self-
19 incrimination and prospective immunity under the
20 state of - - - under the state statute.

21 CHIEF JUDGE LIPPMAN: Right.

22 MS. WOLFORD: So he didn't cross out those
23 limited portions. However, by crossing out the rest
24 of it, he did make some material alterations and
25 prevented us from being able to ensure that he was

1 knowing, intelligently, and voluntary waiving his
2 rights.

3 JUDGE PIGOTT: Could you ask him that at
4 the time that he appears in front of the grand jury?

5 MS. WOLFORD: Did we ask him? Could we?

6 JUDGE PIGOTT: Do you realize - - - do you
7 realize you have a right to an attorney and if you
8 can't afford one we'll get you one? Even though he
9 crossed it out on the written document, you could ask
10 him at the time of the grand jury?

11 MS. WOLFORD: We could have asked him that
12 before the grand jury. This is the way that it had
13 been taken care of in the past, because he has a
14 right to talk to his attorney outside the presence of
15 the grand jury. And the attorney can go over with
16 him in detail, like you would expect in a - - - in a
17 guilty plea situation.

18 JUDGE ABDUS-SALAAM: Well, what is - - -

19 JUDGE READ: But what are you - - - you're
20 not - - - are you still using the form or you're not
21 still using the form?

22 MS. WOLFORD: Well, after - - - after the
23 Appellate Division decision, we did have to alter the
24 form to some degree.

25 JUDGE READ: What's wrong with just

1 reciting on the form, as I think the Chief Judge was
2 - - - was suggesting, literally what's in the
3 statute?

4 MS. WOLFORD: Well - - -

5 JUDGE READ: Why does it have to be
6 embellished?

7 MS. WOLFORD: It doesn't - - -

8 JUDGE READ: Or explained. Explained, I
9 should say.

10 MS. WOLFORD: The effort in - - - in - - -
11 the effort in explaining the form is to ensure that
12 we had a knowing, voluntary, and intelligent waiver
13 of immunity. That is our obligation. We stand in
14 the place of the court in the - - - in the grand
15 jury. So in this circumstance, what the defense
16 argument actually is is you over-advised my client of
17 his rights. That's my job, he says. That's my job,
18 not your job as the People. Well, I suggest
19 otherwise, because the People are in the position of
20 the court. It is the court's job to - - -

21 JUDGE RIVERA: Well, I think his argument
22 is that his client has the right to testify before
23 the grand jury as long as he's in satisfaction of the
24 requirements of the statute, and you've imposed more
25 than the statute requires. Can I just go back? What

1 - - - what are the alterations in the form? You said
2 the form has been altered.

3 MS. WOLFORD: He actually took the form and
4 crossed out para - - - paragraphs.

5 JUDGE RIVERA: No, no, no. I'm sorry. The
6 form you currently use.

7 MS. WOLFORD: The form that we currently
8 use?

9 JUDGE RIVERA: Yes.

10 MS. WOLFORD: It basically is what he left
11 with addition to the - - - the - - - paragraph 6, or
12 I'm sorry, paragraph 4 of the immunity waiver which -
13 - - which still deals with the fact that he tried to
14 make this a limited waiver of immunity, which is not
15 something that they can unilaterally do. That is
16 something that must be negotiated and it can only
17 occur - - -

18 CHIEF JUDGE LIPPMAN: How has the new form
19 worked for you?

20 MS. WOLFORD: I - - - well, they'll sign
21 the form now at this point. And this is, quite
22 frankly - - -

23 CHIEF JUDGE LIPPMAN: So is that a - - - a
24 problem when - - - isn't the whole goal of this - - -
25 this exercise to - - - to - - - to have the right to

1 - - - to testify be scrupulously protected? Isn't
2 that - - -

3 MS. WOLFORD: Abs - - -

4 CHIEF JUDGE LIPPMAN: - - - what we - - -
5 what we want to do and not - - - not - - - if there
6 are things in the form - - - if - - - underlined - -
7 - that are not - - - do not re - - - re - - - reflect
8 noncompliance with the statute, why are we making
9 such a big deal about it?

10 MS. WOLFORD: Well - - -

11 CHIEF JUDGE LIPPMAN: You - - - you know,
12 let's say you put it in the form but let's say for
13 the sake of argument that they're not essential in
14 terms of complying with the statute. Why are we - -
15 -

16 MS. WOLFORD: I - - -

17 CHIEF JUDGE LIPPMAN: - - - getting into
18 this? He crossed out. And as, I think it was Judge
19 Pigott said, if you want to ask him about something,
20 well, you could have done it when he's on the - - -
21 you know, at the - - - at the - - - he's testifying.
22 Why - - -

23 MS. WOLFORD: Well, I do think - - -

24 CHIEF JUDGE LIPPMAN: - - - why couldn't
25 you do it that way?

1 MS. WOLFORD: I do think that in order to
2 have it be appropriate - - - an appropriate waiver of
3 immunity, we have to ask them - - - we have to make
4 sure that they are knowing, intelligently, and
5 voluntary waiving. So we have - - - we have a number
6 of issues here. They have to know what their rights
7 are before they can waive them.

8 JUDGE READ: He had - - - he did have a
9 counsel. I mean he had an attorney there, right? I
10 mean it might be different - - -

11 MS. WOLFORD: Right, but - - - and - - -
12 and oftentimes, and even in the police situation, we
13 do have an attorney present. But we - - - we're
14 assuming here, as we stand here today, that the
15 attorney who was representing him understood the
16 grand jury proceeding, understood what would happen
17 when they walked into there.

18 CHIEF JUDGE LIPPMAN: But he crosses out I
19 have a right to counsel, but I have counsel, I think,
20 is what Judge Read is saying.

21 MS. WOLFORD: Right.

22 CHIEF JUDGE LIPPMAN: What does it matter?

23 MS. WOLFORD: He - - - he crossed out the
24 portion that said my counsel can't participate in the
25 proceedings, that I understand that.

1 JUDGE PIGOTT: I know - - - I know district
2 attorneys have a lot of worry about protecting
3 defendants' rights for a number of reasons. But if
4 we look at this now, you sent it back to a grand
5 jury. They no billed him, directed the filing of the
6 prosecutor's information. How are you going to un-
7 ring that bell?

8 MS. WOLFORD: Well, I would suggest that
9 under - - - in CPL 470, and I think - - - I
10 apologize; the number is escaping me. 470.40(2) does
11 ha - - - does take into account this potential
12 situation where we don't have a second - - - we don't
13 have a second jeopardy issue here.

14 JUDGE READ: So if we agree with you on the
15 merits on this, then effectively it's the - - - the
16 first conviction of the felony stands, right?

17 MS. WOLFORD: Right, absolutely. It's like
18 - - -

19 JUDGE READ: That's your argument?

20 MS. WOLFORD: - - - the Appellate Division
21 never - - - the Appellate Division decision didn't
22 exist. And that makes sense if you think about it,
23 because we're not in a pre-conviction setting here.
24 We are post-jury conviction with respect to Mr.
25 Brumfield at the point in time when the convic - - -

1 the conviction's reversed.

2 So we have a - - - we wouldn't want a
3 situation, I don't think, in our criminal justice
4 system where a grand jury considering different
5 evidence down the line has the ability to supersede a
6 trial conviction. That - - - that would be something
7 that we never hear of in our - - - in our criminal
8 justice - - -

9 JUDGE READ: This is not a superseding
10 indictment?

11 MS. WOLFORD: No, we had no indictment at
12 the time. It had been reversed by the Appellate
13 Division.

14 CHIEF JUDGE LIPPMAN: Okay, counsel.

15 MS. WOLFORD: Thank you.

16 CHIEF JUDGE LIPPMAN: And you'll have your
17 rebuttal. Let's hear from your adversary.

18 MR. JUERGENS: Good afternoon, David
19 Juergens. I'm representing Michael Brumfield.

20 CHIEF JUDGE LIPPMAN: Counsel, talk about
21 the mootness issue first.

22 MR. JUERGENS: I would say that - - -
23 People v. Franco. The principle should be applied
24 where if a first grand jury has an indictment,
25 nothing wrong with it, the People present the same

1 charges to a second grand jury. That second grand
2 jury takes action inconsistent with the first grand
3 jury. The first grand jury's action's a nullity.
4 It's null and void.

5 JUDGE ABDUS-SALAAM: So what about the - -
6 - the situation that your adversary posits where the
7 Appellate Division has overturned the conviction and
8 essentially vacated the indictment and there - - -
9 according to her there's no indictment - - -

10 MR. JUERGENS: And - - - and - - -

11 JUDGE ABDUS-SALAAM: - - - at that point?

12 MR. JUERGENS: And - - - and at that point,
13 they took a calculated risk. They could have just
14 stood pat, pursued their direct appeal, tried to get
15 the conviction reinstated. They took a calculated
16 risk and they presented the exact same case to a
17 second grand jury. Only this time, Mr. Brumfield got
18 a chance to tell his side of the story to the grand
19 jury. The grand jury heard that evidence. They
20 dismissed the felonies. They sent it back to City
21 Court as misdemeanors as it was originally charged,
22 because it didn't become felonies until eight months
23 after the original arrest when a prosecutor decided
24 hey, he's not taking a plea.

25 CHIEF JUDGE LIPPMAN: So what's the

1 consequence of their risk that they took?

2 MR. JUERGENS: Well, if they would have
3 obtained a valid indictment and lost their direct
4 appeal, they could have had a second trial and re-
5 prosecuted them. They didn't get that. The nature
6 of the criminal action fundamentally changed when the
7 second grand jury dismissed the felonies. Now you
8 have one criminal action that is now a misdemeanor
9 criminal action.

10 And an anomaly arises if we consider the
11 People to be allowed to go on with their direct
12 appeal, because you could have one criminal action
13 with two appeals. You could have the People filing a
14 notice of appeal to appeal Judge Johnson's dismissal
15 in the interest of justice of the misdemeanor case,
16 and we have this appeal.

17 CHIEF JUDGE LIPPMAN: Counsel, is it
18 important to know whether their form is good, the old
19 one or the new one?

20 MR. JUERGENS: Well, they've changed it,
21 and the most egregious paragraph is paragraph 4 where
22 they're asking the defendant to give them a blank
23 check and that any questioning on any topic is fair
24 game. And they've taken that out of their new
25 waiver. They've also changed their new waiver to,

1 instead of an acknowledgement of a right to counsel,
2 they just have a little warning up there. And I
3 would also submit that if you're reading a waiver of
4 indictment and you cross it out and initial it,
5 you've already read that. I mean, that's evidence
6 that the - - -

7 JUDGE PIGOTT: Well, you're making a leap
8 of, you know, reaching a conclusion. And one - - -
9 one thing that I think the trial courts look at in
10 all of our decisions is how many 440s are we going to
11 get as a result of the decision by the Court of
12 Appeals.

13 MR. JUERGENS: Well, the 440s I think will
14 flow if the Peop - - - if the - - - if this court
15 rules that their original indictment is the required
16 form in the state of New York. And that if we have
17 forms maybe in some other county that don't have this
18 acknowledgement of right to counsel, don't have this
19 we can cross-examine, ask you about anything, and
20 also you have to agree in advance of unlimited future
21 use of whatever testimony you give, I think that's
22 going to - - - that's going to open the floodgates.
23 And that's where we're going to have - - -

24 JUDGE READ: What about these forms, either
25 the - - - the form that - - - in this case or the

1 revised one - - - are they unique to Monroe County?
2 Do other counties - - -

3 MR. JUERGENS: I - - - I can only say that
4 the - - - the one form I saw from Wayne County was
5 similar to the original form. I don't know if
6 they've modified it. But there's really - - -
7 there's really no reason for them to be adding on
8 this extra material. I mean, they have no lawful
9 authority to force the defendant to give a blank
10 check or to agree to things that are not required
11 statutorily.

12 Mr. Brumfield gave written notice that he
13 wanted to testify. He showed up when it was
14 scheduled. He signed a waiver of immunity that said
15 that I give up all my rights of - - - Fifth Amendment
16 right to, you know, not incriminate myself with
17 respect to this traffic stop incident, and you're
18 asking me to sign a piece of paper that says you can
19 ask me about anything. I may have - - - I don't know
20 what you're going to ask me. I'm - - -

21 JUDGE RIVERA: What does this second waiver
22 look like, the one that he signed, the second waiver?

23 MR. JUERGENS: I submitted a copy to the
24 court, but it is very similar. It includes the
25 language that I would say is the - - - the effective

1 language per the statute. And that's the only
2 language that they really need because then they're
3 protected. The defendant - - - how can the defendant
4 sign that and come back later and says well, you know
5 what, I really should get immunity because even
6 though we've got clear language here that says I'm
7 waiving immunity, I - - - I think I should get it
8 because you didn't tell me I had a right to an
9 attorney, you know, even though I have an attorney
10 next to me. And you didn't - - - you know, you
11 didn't get me - - -

12 JUDGE PIGOTT: Stranger things have
13 happened, Mr. Juergens.

14 MR. JUERGENS: Well, that's - - - but
15 basically what we have is, you know, their argument
16 all rests on a false premise that their original
17 waiver is it. It's golden, and all those paragraphs
18 must be in there, and that's simply - - -

19 CHIEF JUDGE LIPPMAN: In a nutshell, your
20 argument is you complied with the statute?

21 MR. JUERGENS: That's - - - that's - - -
22 that's correct.

23 JUDGE READ: And that's all that's
24 required?

25 MR. JUERGENS: That's correct. And - - -

1 and - - - and I'm - - - and I especially don't like
2 paragraph 4 because that almost violates the - - -
3 the - - - the DA's duty of fair dealing. I mean
4 they're supposed to give the defendant notice of what
5 topics are going to be subject to the grand jury
6 investigation. And, you know, as far as - - -

7 CHIEF JUDGE LIPPMAN: They can't go all
8 over the place?

9 MR. JUERGENS: Yeah. And as far as Mr.
10 Brumfield knows, you know, I've got this traffic stop
11 incident that I'll, you know, be free to testify on,
12 and they want me to sign off on who knows what. And
13 that's - - - you know, that - - - that - - -

14 JUDGE ABDUS-SALAAM: Well, when - - - when
15 the defendant elects to go into the grand jury,
16 though, doesn't the defendant open up his background
17 for credibility reasons and other reasons? And if
18 the DA does a background check and finds out that
19 there's something about him that, you know, might
20 undermine his credibility in the grand jury, wouldn't
21 they be allowed or want to use that? And if it turns
22 out that he answers in some way that suggests that he
23 has committed some other crime, wouldn't they be able
24 then to maybe indict him on that crime?

25 MR. JUERGENS: They have some - - - they

1 have some ability to, for credibility purposes,
2 conduct a cross-examination. They certainly don't
3 have a right to ask him about any pending uncharged
4 crimes that he - - - he's not required to waive
5 immunity on that.

6 The situation that I think they're getting
7 confused about is if there's more than one case that
8 they're presenting and they want - - - you know, the
9 defendant says well, I want to testify about case A
10 and not case B, they can say no, it's all or nothing,
11 you know. And in some cases maybe they say well,
12 we'd rather just go ahead and have him testify on A
13 and, you know, forget about B for now.

14 But it has to be in writing, and that's the
15 defendant's burden to get that express agreement in
16 writing. They're turning it upside down and saying
17 now that we have to agree in advance to questioning
18 on whatever, you know, they feel like they want to
19 present in this particular grand jury presentation.
20 I think the second grand jury presentment here
21 highlighted the original error in preventing Mr.
22 Brumfield from testifying because - - -

23 JUDGE PIGOTT: What should have been the
24 remedy then? I - - - they sent - - - they sent you
25 away, right?

1 MR. JUERGENS: They - - - yes, they - - -
2 and that's - - - and that's what was the prejudice is
3 them - - - not them trying to, you know, advise the
4 defendant of all these rights and stuff. The - - -
5 the prejudice flowed from them saying you can't
6 testify. Goodbye.

7 JUDGE PIGOTT: So - - - so, I mean, and
8 I'll pick on Ms. Wolford a minute about this. So if
9 we were - - - if we were to agree with the People, we
10 would be reinstating an indictment in which, while
11 the defendant wanted to testify, he was not allowed
12 testify - - -

13 MR. JUERGENS: Right.

14 JUDGE PIGOTT: - - - because of his - - -

15 MR. JUERGENS: Right, and also keeping in
16 the mind that the time he did testify, the grand jury
17 heard his side of the story and threw out the
18 felonies and sent it back to a - - - a misdemeanor
19 criminal action like it was originally. So I think
20 I've got two pretty strong points that - - - that I
21 would ask the court to consider.

22 A valid indictment is a Constitutional
23 imperative, and the basic argument on the second
24 presentation is that that original indictment, which
25 is in a dismissed status, now becomes forever dead

1 and cannot be resurrected because there has been an
2 independent action by the second grand jury making
3 that null and void. And is the rare factual
4 procedural circumstance that I don't know that's
5 going to run to the court's attention anytime soon.

6 But I think given all the facts that the -
7 - - the unanimous five judges in the Appellate
8 Division should be affirmed. An alternate ground
9 would be that the People at this point in time really
10 don't have a right to get that null and void original
11 indictment conviction reinstated.

12 CHIEF JUDGE LIPPMAN: Okay, counsel.
13 Thanks.

14 Counselor, rebuttal?

15 MS. WOLFORD: Thank you, Your Honor. Just
16 - - - just as a preliminary matter, I feel somewhat
17 like we're in a civil lawsuit here, as I seem to be -
18 - - it seems like our action after the Appellate
19 Division, which is binding on us, is now being used
20 against us at the - - - at the Court of Appeals, and
21 we are simply just trying to follow the laws as - - -
22 as - - - by the Fourth Department at this point.

23 JUDGE PIGOTT: Couldn't you have not
24 indicted him or - - - yeah, not indicted him on the
25 first one unless and until you got a - - - a ruling

1 from county court saying this - - - this - - - this
2 waiver is good or this waiver is not good?

3 MS. WOLFORD: The county court here decided
4 the waiver was - - - that we did the right thing.

5 JUDGE PIGOTT: I see. And then - - - then
6 the Appellate Division - - -

7 MS. WOLFORD: And then we went to trial,
8 right.

9 JUDGE PIGOTT: Then you're stuck.

10 MS. WOLFORD: And then the Appellate
11 Division reverses. So we're in a - - -

12 JUDGE PIGOTT: Because if - - - if we agree
13 with you, he has a right to appear in the front of
14 the grand jury. You don't dispute that. And - - -
15 and when you sent him away, he didn't have a right to
16 appear. Then he appears in the second one. Why
17 would we want to resurrect one in which he wanted to
18 appear, apparently?

19 MS. WOLFORD: He - - - he only has - - -
20 right, and that's what we're assuming, because if we
21 - - - he only has a right to appear under statute.
22 And the statute specifically requires that he sign a -
23 - - a waiver of immunity which includes right against
24 self-incrimination, the privilege against self-
25 incrimination, and the statutory immunity provision.

1 By - - - by crossing out the portions of the waiver,
2 which I have to - - - I want to point the court to.
3 It's page 38 and 39 in the record. It very clearly
4 says you're giving up your right to self-
5 incrimination. You're giving up your right to
6 prospective immunity, and then the rest is an
7 advisement of rights. And - - -

8 CHIEF JUDGE LIPPMAN: But he sign - - - but
9 he did sign one?

10 MS. WOLFORD: He - - - no, he crossed out
11 all the advisement of rights and signed.

12 JUDGE PIGOTT: But - - - but I mean he
13 signed - - - he signed the - - - the - - - the - - -
14 the amended one, right?

15 MS. WOLFORD: Right, after he already knew
16 all of this litigation had occurred. So we're - - -
17 we're assuming a lot when we look at what happened
18 after the Appellate Division's - - - the Appellate
19 Division's decision in this case, because we now are
20 being asked - - - we're being held to a standard that
21 we had to follow based on Appellate Division decision
22 in order to allow any defendant into the grand jury.

23 CHIEF JUDGE LIPPMAN: What - - - what about
24 Judge Pigott's point though that you're reinstating
25 something where he wanted to testify and he couldn't?

1 MS. WOLFORD: But he chose not to go in by
2 - - - by crossing out that portion of the waiver that
3 was important, and I think probably the most
4 important portion of that waiver is the - - - is the
5 limited immunity portion of the waiver, because as
6 was stated, he could have brought up anything. If he
7 had two pending criminal charges but we were just
8 putting in one, there was nothing to prevent him from
9 coming in there and saying hey, grand jurors, by the
10 way, I want to talk about this other incident because
11 I feel like I was done wrong, and he goes into that
12 and suddenly, we gave him tran - - - we gave him
13 limited immunity because he crossed out the portions.
14 Now he's got full immunity on a case we weren't even
15 presenting, and he did that himself. That is
16 absolutely an - - - an untenable situation for the
17 People.

18 JUDGE PIGOTT: That's - - - that's kind of
19 paranoid, though, isn't it? I mean - - -

20 MS. WOLFORD: It isn't, though, Your Honor,
21 because what happens is when we walk into the room
22 and we go through the waiver of immunity, we say to
23 him, so-and-so, this is your opportunity to tell the
24 grand jurors what you have to say. We don't do
25 direct examination. We give them an opportunity to

1 say what they want to say. If he choo - - - chooses
2 to take it on a tangent and go in a place that he
3 chooses - - -

4 JUDGE PIGOTT: So if he says, after I
5 killed my mother, they stopped me in the - - - in the
6 car with a weapon and now I'm charged with a weapon.
7 And you think that's going to immunize him against
8 the murder charge?

9 MS. WOLFORD: It could, and he could do
10 that himself without - - - without us asking a single
11 question.

12 JUDGE RIVERA: You're arguing that your
13 concern is that a - - - a defendant may go into the
14 grand jury and admit to some other crime?

15 MS. WOLFORD: If he - - - if he goes in and
16 does what this individual did and crosses out the
17 part - - - part of the waiver that makes the immunity
18 waiver all encompassing, then he knows going in that
19 he has immunity for everything except what we
20 specifically told him he doesn't.

21 JUDGE RIVERA: I don't know that it makes -
22 - - I don't know that it makes immunity all
23 encompassing. It just disagrees with the language
24 you've used.

25 MS. WOLFORD: Well, he crossed it out so

1 now it's gone.

2 JUDGE RIVERA: Yeah, he disagreed with the
3 language you used.

4 MS. WOLFORD: Well, he doesn't get a right
5 to disagree with the language that we use.

6 JUDGE RIVERA: But - - - yes, but the point
7 of the case is whether or not you are able to change
8 the language of the waiver to encompass all of these
9 other rights or concerns that are reflected in the
10 language. That's - - -

11 MS. WOLFORD: Well, I do think - - -

12 JUDGE RIVERA: That's the merits of the
13 case.

14 MS. WOLFORD: I do understand that that's
15 the merits of the case, but in this - - - in this
16 particular instance, he - - - he tried to
17 unilaterally create a limited - - - a limited waiver
18 of immunity. By doing so, had he been successful in
19 doing that, he could have immunized himself. And in
20 this particular case he could have immunized - - -

21 CHIEF JUDGE LIPPMAN: Okay.

22 MS. WOLFORD: - - - himself to the felony.

23 CHIEF JUDGE LIPPMAN: Okay, counsel. We
24 get both of your arguments. Appreciate it.

25 MS. WOLFORD: Thank you, Your Honor.

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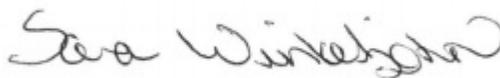
CHIEF JUDGE LIPPMAN: Thank you so much.

(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. Michael S. Brumfield, No. 6 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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