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COURT OF APPEALS

STATE OF NEW YORK

PEOPLE OF NEW YORK,

Respondent,

-against-

NO. 83

PHILLIP WRIGHT,

Appellant.

20 Eagle Street
Albany, New York
September 13, 2017

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE PAUL FEINMAN

Appearances:

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1 CHIEF JUDGE DIFIORE: Number 83, the People of
2 the State of New York v. Phillip Wright.

3 Good afternoon, counsel.

4 MR. VORKINK: Good afternoon, Your Honors. If I
5 could request one minute for rebuttal, please?

6 CHIEF JUDGE DIFIORE: You may.

7 MR. VORKINK: Thank you.

8 Good afternoon, Your Honors. May it please the
9 court. Mark W. Vorkink of Appellate Advocates for
10 Appellate Phillip Wright.

11 Your Honors, the trial court's denial of a for-
12 cause challenge for a juror whose statements showed a clear
13 tendency to credit police testimony was error.

14 JUDGE RIVERA: Before you - - - you get to
15 details of the error as you've described it in your brief
16 and in response to any questions you may hear from us, I -
17 - - I just want to clarify something in this transcript.
18 It's appendix pages - - - beginning on page 92.

19 MR. VORKINK: Yes, Your Honor.

20 JUDGE RIVERA: I'm interested in knowing whether
21 or not these responses by what appears to be a female
22 prospective juror regarding having family who are police
23 officers is the same prospective juror, or is this a
24 different prospective juror? Unfortunately, the transcript
25 I see does not have prospective jurors numbered.



1 MR. VORKINK: This is A-92, Your Honor?

2 JUDGE RIVERA: Yeah, A-92, yes, correct.

3 MR. VORKINK: 92, where it's blacked out?

4 JUDGE RIVERA: Correct.

5 MR. VORKINK: I think that both parties would
6 agree that that's a different juror.

7 JUDGE RIVERA: It's a different prospec - - -

8 MR. VORKINK: This is not - - - that's not S.B.
9 who is at issue - - -

10 JUDGE RIVERA: That's what I assume, but I want
11 to confirm.

12 JUDGE FEINMAN: So the juror that we're talking
13 about actually begins at page 93 of the record where she
14 says - - - or he says, "We are all human and we make
15 mistakes"?

16 MR. VORKINK: Yes, Your Honor. That's - - -
17 that's S.B.

18 JUDGE FEINMAN: And the juror that we're talking
19 about stops at page 94, line 22, or?

20 MR. VORKINK: I believe that the - - - the - - -
21 the final colloquy - - - yes, the "sure" on 94.

22 JUDGE FEINMAN: Okay. That's the last thing that
23 we're talking about?

24 MR. VORKINK: Yes, Your Honor.

25 JUDGE FEINMAN: Okay.



1 MR. VORKINK: Just to clarify.

2 JUDGE RIVERA: Just to clarify that.

3 MR. VORKINK: Yes, Your Honor.

4 JUDGE RIVERA: Then the prospective juror who
5 says "no" on page 95 is someone else?

6 MR. VORKINK: Is someone else, exactly. So after
7 the colloquy regarding police testimony, the question is
8 put to the vaneer as a whole, and another juror responds to
9 that.

10 JUDGE RIVERA: Thank you.

11 JUDGE FAHEY: So - - - so originally, there were
12 three jurors being talked about, but now really, we're down
13 to this one; is that right?

14 MR. VORKINK: Yes, Your Honor.

15 JUDGE FAHEY: And that's at 93 and 94?

16 MR. VORKINK: Yes, Your Honor. S.B., who we
17 identify - - -

18 JUDGE FAHEY: Right. Right.

19 MR. VORKINK: - - - in the brief. So S.B.'s
20 remarks, Your Honor, as Your Honors have pointed out on 93
21 and 94, at a minimum, evince clear bias in favor of police
22 testimony.

23 CHIEF JUDGE DIFIIORE: Counsel, you started by
24 saying that the juror expressed a clear tendency to credit
25 police.



1 MR. VORKINK: Yes, Your Honor.

2 CHIEF JUDGE DIFIORE: Didn't she say that she
3 doesn't automatically believe everything she hears?

4 MR. VORKINK: She does not. She says she does
5 not automatically credit testimony, and this is a position
6 that I think the People have brought up repeatedly.

7 CHIEF JUDGE DIFIORE: Is there a difference?

8 MR. VORKINK: There is a difference, because - -
9 -

10 CHIEF JUDGE DIFIORE: What is that difference?

11 MR. VORKINK: - - - she then - - - counsel
12 immediately asks a follow-up question, which is, "Do you
13 lean towards that conclusion", and coupled with the
14 question, immediately prior to that, which is, "So if a
15 police officer comes here and tells you something, are you
16 already giving them, because they are police officers - - -
17 so therefore they are probably telling the truth?" She
18 says automatically, "No, I don't automatically believe
19 things." "Do you lean towards that conclusion", i.e. do
20 you lean towards believing that police officers are
21 probably telling the truth? And she says, "Sure".

22 CHIEF JUDGE DIFIORE: Could that be interpreted
23 as an expression of someone's confidence in the system?

24 MR. VORKINK: I don't believe so, Your Honor.
25 But I think even if her viewpoint is that officers, because



1 of their duty to protect, she believes they have a
2 responsibility to do right; she expects them to do this.
3 This is the - - - sort of the questions immediately prior
4 to this point. She's clearly showing on this record that
5 she treats police officers different than average citizens.
6 She's asked - - -

7 JUDGE WILSON: Can't you - - -

8 MR. VORKINK: - - - that question directly.

9 JUDGE WILSON: Can't you read what's at the
10 bottom of page 93, where the middle of the end is sort of
11 cut off of what she was going to say or did say as saying,
12 well, you know, I know the police officers are humans and
13 they make mistakes, and if they make a mistake, they
14 probably want to - - - and the missing words are something
15 like cover it up or make an excuse for it or something like
16 that?

17 MR. VORKINK: I think that's possible, Your
18 Honor.

19 JUDGE WILSON: So the - - - this may exhibit a
20 bias or may not exhibit a bias; it's ambiguous.

21 MR. VORKINK: I think that, with respect, I don't
22 believe it's ambiguous. I think that these remarks make it
23 likely that she would treat police officers different than
24 other witnesses, and that's the threshold for a for-cause -
25 - -



1 JUDGE RIVERA: Yeah, but the standard is not
2 clear. I know you - - - you've started out with it's clear
3 bias, but that's not the standard.

4 MR. VORKINK: That is not the standard - - -

5 JUDGE RIVERA: The threshold - - -

6 MR. VORKINK: - Your Honor.

7 JUDGE RIVERA: - - - is lower.

8 MR. VORKINK: It's much lower. It's - it's a
9 likelihood. So a - - - likely that they would be unable to
10 render an impartial verdict, and once that threshold is
11 reached, the juror must be excused unless the trial court
12 conducts a follow-up inquiry and is able to elicit an
13 unequivocal assurance of impartiality. So our position - -
14 -

15 JUDGE FEINMAN: Well, just so we're clear, and I
16 know this didn't happen here, it doesn't necessarily have
17 to be the trial court. It could be one of the attorneys
18 who is trying to rehabilitate that prospective juror.

19 MR. VORKINK: That's true. In - - -

20 JUDGE FEINMAN: Okay. I - - -

21 MR. VORKINK: - - - a hypothetical - - -

22 JUDGE FEINMAN: - - - just want to be clear,
23 because you said the trial court has to do it.

24 MR. VORKINK: Well, I think the reason why I say
25 that, Your Honor, is because this court has repeatedly



1 stated - - - it's stated in Johnson; it's stated in Harris;
2 it's stated in Nicholas that a trial court - - - when the
3 trial court fails to conduct a follow-up inquiry where
4 there are remarks suggesting a possibility that the
5 attorney - - - that the - - - that the prospective juror is
6 biased, that that itself is reversible error because it's
7 incumbent on the trial court to clarify what could be
8 perceived to be ambiguous remarks suggesting a possibility
9 of bias.

10 JUDGE RIVERA: But in those cases, just a follow
11 up on Judge Feinman's point and question. In those cases,
12 because you don't have some other - - - because the laws we
13 look at the totality of this colloquy, look at what the
14 questions are, as you would point out different questions.
15 And so it could be, as it wasn't in those - - - that didn't
16 happen, excuse me, in those cases, that along the lines,
17 something else is said based on inquiries from - - - from
18 the prosecution or another counsel, that rehabilitates or
19 clarifies or makes clear that these are unequivocal
20 assurances.

21 MR. VORKINK: Precisely, Your Honor.

22 JUDGE RIVERA: But absent that - - -

23 MR. VORKINK: Absent that - - -

24 JUDGE RIVERA: - - - your argument is that then
25 the judge - - - our case law is that the judge has to



1 ensure that those unequivocal assurances are on the record.

2 MR. VORKINK: Precisely, Your Honor. Absent
3 that, absent some sort of follow up, be it by the judge, be
4 it by defense counsel, be it by the prosecutor, the juror
5 must be excused, unless, of course, the follow up occurs,
6 and you get an unequivocal assurance of impartiality. And
7 this court's case law is absolutely clear in that regard.
8 And I - - -

9 JUDGE RIVERA: So let me - - - let me - - - let
10 me ask you this. The judge here, when he denies the for
11 cause challenge says, "All she's articulated is the hope,
12 that we should all hope that police are honest." If - - -
13 if - - - let's take for one moment your argument is that's
14 not what she said, because that's what I remember your
15 brief being. But - - - but let's say that there had been
16 in this colloquy, a statement from her, I hope that's what
17 they do. Is that still leaving serious doubt, which is the
18 language we've also used in these cases about her
19 partiality or ability to be impartial?

20 MR. VORKINK: I think so, Your Honor. I think if
21 she said I hope and she said these other things as well, I
22 think that, again, it would still be incumbent on the court
23 or someone else to - - -

24 JUDGE RIVERA: Well, why is that - - - why is
25 that not, as we've said in other cases, every - - - every



1 juror comes with their life experience and particular
2 predispositions and they might say things like, I hope,
3 I'll try, and so forth. And as you say, in the context,
4 you're trying to ensure that this juror will indeed give
5 these unequivocal assurances that they - - - they are going
6 to be driven not by their bias or that they can overcome
7 their bias.

8 So if she just says I hope - - -

9 MR. VORKINK: I think - - -

10 JUDGE RIVERA: - - - doesn't that still leave you
11 with a - - - a problem, if the judge, indeed, in his
12 recollection of what she had said was correct that she had
13 merely said I hope?

14 MR. VORKINK: I think if the judge was correct in
15 - - - in the judge's recollection that she said I hope, and
16 again, she did not say I hope on this record, I think that
17 might be a closer question as to whether or not a follow-up
18 inquiry was required.

19 This, of course - - - that is not this case.
20 That's not what the juror said, and I think - - - you know,
21 the court - - - not only does it not conduct a follow-up
22 inquiry, but it - - - I mean, with respect to the trial
23 court, I think, inaccurately characterizes what occurs and
24 then cuts off discussion, so I think - - -

25 JUDGE STEIN: Did anyone suggest that they go



1 back and look at the record to see what she actually said?

2 MR. VORKINK: I think trial counsel pointed out
3 to the court that she said I give the benefit of the doubt
4 to the police.

5 JUDGE STEIN: Well, but there seemed to be this -
6 - - this discussion about what people remembered, and isn't
7 there a simple way to - - - to find out what she actually
8 said in the moment?

9 MR. VORKINK: I think there could have been, Your
10 Honor, but I don't think that this court's case requires
11 the defense counsel to prompt the court to do so. I think,
12 again, this court has been very clear that at the end of
13 the day, it's the court's responsibility to conduct the
14 follow up inquiry, to verify the juror's impartiality.

15 CHIEF JUDGE DIFIORE: Thank you, counsel.

16 MR. VORKINK: Could I briefly address the
17 Apprendi issue, if I might?

18 CHIEF JUDGE DIFIORE: You have - - - I'll give
19 you a little extra time in your rebuttal.

20 MR. VORKINK: Thank you, Your Honor.

21 CHIEF JUDGE DIFIORE: You're welcome.
22 Counsel.

23 MS. JOYCE: May it please the court. Good
24 afternoon, Your Honors. Jean Joyce, for respondent.

25 This juror had a very nuanced answer - - - a set



1 of answers. She acknowledged that police officers could
2 lie, can lie; that they are humans, just like everyone
3 else. She expected police officers to do the right thing.
4 That is not saying that she expected them to tell the truth
5 more than anyone else.

6 JUDGE RIVERA: No, you're - - - you're right
7 about that part of it, but again, our case law is you have
8 to look at this in context, and - - - and everything that's
9 said. And I want you to respond to your adversary's point
10 that when she's asked, "So if a police officer comes here
11 and tells you something, are you already giving them - - -
12 they are police officers, so therefore, you're probably
13 telling the truth". She responds automatically, "I don't
14 believe that I hear all the - - - all - - - I don't believe
15 what I hear all of the time." "Do you lean towards it?"
16 "Sure." Why isn't that different from the language that
17 you were first referring to?

18 MS. JOYCE: That language is fine. She - - - he
19 - - - she is asked - - - she says - - -

20 JUDGE RIVERA: It's fine to say that if a police
21 officer comes here and tells you something you are already
22 giving them the benefit of the doubt that - - -

23 MS. JOYCE: That was not - - -

24 JUDGE RIVERA: - - - that they are probably
25 telling the truth? You lean towards that?



1 MS. JOYCE: That was not the question that was
2 asked.

3 JUDGE RIVERA: The ques - - - I read the question
4 that's asked.

5 MS. JOYCE: That's - - -

6 JUDGE RIVERA: "So if a police officer comes here
7 and tells you something, are you already giving them - - -
8 they're police officers, so therefore you're probably
9 telling - - - they are probably telling the truth?"

10 MS. JOYCE: And then the juror says,
11 "Automatically, I don't believe what I" - - -

12 JUDGE RIVERA: I know, but - - -

13 MS. JOYCE: - - - "hear all of the time."

14 JUDGE RIVERA: I understand. You're missing the
15 rest of it. I want you to respond to your adversary's
16 point that you have to read the rest of it when the - - -

17 MS. JOYCE: Correct.

18 JUDGE RIVERA: - - - follow up is, "Do you lean
19 towards that," - - -

20 MS. JOYCE: Right.

21 JUDGE RIVERA: - - - or it.

22 MS. JOYCE: Correct. And what the juror is
23 responding to is do you lean toward believing what you
24 hear, which is what she had just said. Sure, I believe - -
25 -

1 JUDGE RIVERA: It - - -

2 MS. JOYCE: - - - I lean toward believing what I
3 hear.

4 JUDGE RIVERA: All right. I - - - I - - -

5 MS. JOYCE: She - - -

6 JUDGE RIVERA: - - - I feel it difficult to - - -

7 MS. JOYCE: - - - broadened the answer.

8 JUDGE RIVERA: - - - interpret it the way you
9 suggest based on this - - - the rest of this. Does anyone
10 - - - if I may, does anyone agree with her, because he is a
11 police officer and he is testifying, you lean more towards
12 them. She doesn't react to that. She doesn't say that's
13 not what I said, or no. You have, I asked this at the
14 beginning, is page 95 the answer after this and the
15 colloquy after this from a different perspective juror,
16 I've been told no. The pros - - - that prospective juror
17 says no, immediately says I don't - - - I don't - - -

18 MS. JOYCE: Right. He mischaracterizes - - -

19 JUDGE RIVERA: - - - measure police officers
20 differently.

21 MS. JOYCE: - - - her answer. Right. Defense
22 counsel then mischaracterizes her answer, does anyone agree
23 with her because - - -

24 JUDGE RIVERA: Well, that's the - - - but she
25 doesn't say anything.



1 MS. JOYCE: - - - because she's a police officer.

2 JUDGE RIVERA: She's not making it clear that
3 that's a mischaracterization. That's not what she means.

4 MS. JOYCE: Every time she's asked a question in
5 this colloquy - - -

6 JUDGE RIVERA: Yes.

7 MS. JOYCE: - - - she broadens the answer beyond
8 just police officers. She says, "Let me ask you something.
9 There's an interesting point, because they are police
10 officers. Are you giving them more credit than you would
11 the average citizen?"

12 JUDGE FEINMAN: But - - - but let me - - -

13 MS. JOYCE: She doesn't say - - -

14 JUDGE FEINMAN: - - - ask you this. If - - - if
15 - - - if you can't agree as to what this question and
16 answers back and forth with this juror mean, did not the
17 judge have some sort of duty to clarify - - -

18 MS. JOYCE: This - - -

19 JUDGE FEINMAN: - - - and bring the juror in, or
20 - - -

21 MS. JOYCE: The standard is this.

22 JUDGE FEINMAN: - - - or interrupt right in the
23 middle and clarify.

24 MS. JOYCE: The standard is this. It is not that
25 if the juror says something ambiguous that the judge must



1 jump in and fix the question by defense counsel, which was
2 somewhat convoluted. The standard is the juror must
3 exhibit a state of line - - - mind likely to preclude the
4 juror from rendering an impartial verdict.

5 There is a huge difference between bias and
6 ambiguity. And if you look at the entirety of the record,
7 which you should with deference to the trial court, the
8 entirety of the record indicates a juror that automatically
9 would not believe what she heard all of the time, refused
10 to say directly yes, I would credit police officers more
11 than anyone else. When she was asked that directly, she
12 did not answer the question.

13 JUDGE RIVERA: But - - - but - - -

14 JUDGE WILSON: The standard - - -

15 JUDGE RIVERA: But she says she leans towards it.
16 Again, even going with your suggestion that every answer is
17 now broader, it's now responding not to this category of
18 questioning, which is about police officers, but just in
19 her general frame of mind, you're saying that she said I
20 don't automatically believe everything I hear, but I lean
21 towards believing what I hear - - -

22 MS. JOYCE: Right. She's got - - -

23 JUDGE RIVERA: - - - even though the whole
24 conversation has been about whether or not police officers,
25 because they are police officers, are people that - - -



1 that you might be more likely to believe.

2 MS. JOYCE: She never agreed with counsel's
3 statements. He asked it three or four times.

4 JUDGE FAHEY: You made a - - - you made an
5 interesting point, I thought. The difference between bias
6 and ambiguity. Is that what's required here, though? It
7 seems to me that what's required is that there has to be a
8 manifestation of doubt, serious doubt, as to impartiality.
9 And either bias or ambiguity, either one - - - and I agree
10 with you they aren't the same things. I think you're right
11 about that. But either one of those things can lead you to
12 doubt about impartiality, which is not the same thing as
13 either one of those. Do you see the distinction I'm
14 drawing?

15 MS. JOYCE: Yes. There is a distinction;
16 however, counsel's questions, I believe, led to some of the
17 confusion. But if - - -

18 JUDGE FAHEY: Well, that's their job.

19 MS. JOYCE: - - - you're looking for - - -

20 JUDGE FAHEY: His job is to make things confusing
21 - - -

22 MS. JOYCE: Exactly.

23 JUDGE FAHEY: - - - as possible for them, you
24 know.

25 MS. JOYCE: But if you're looking for an



1 assurance of impartiality, it's there, by the juror
2 herself, automatically, I don't believe what I hear all the
3 time.

4 JUDGE FAHEY: Um-hum.

5 JUDGE RIVERA: But I do some of the time, and I
6 lean towards it.

7 MS. JOYCE: Well - - -

8 JUDGE RIVERA: Aren't we still back to this
9 question of whether or not it meets this lower threshold,
10 not of certainty of bias, but of just some serious doubt, a
11 likelihood.

12 MS. JOYCE: What we're back to is giving
13 deference to the trial court, who heard, who saw her body
14 language, saw the - - -

15 JUDGE FAHEY: Well, wouldn't - - -

16 MS. JOYCE: - - - interplay.

17 JUDGE FAHEY: Wouldn't this be an entirely
18 different case if you're sitting there and the judge and
19 the jury selection and you're looking and you go, Ms., hey,
20 I need to know, can you be fair and impartial to both
21 sides, and this - - - no, will you judge the police
22 officer's testimony the same way you would judge any other
23 witnesses. We wouldn't be here now; would we?

24 MS. JOYCE: Right. But that's a rule of
25 practice. It's not a rule of law. And sure, there are



1 many times when if just one more question were asked - - -

2 JUDGE FAHEY: Well, God help us, maybe it should
3 be, but - - - but you see what I'm saying?

4 MS. JOYCE: Sure, yes.

5 JUDGE FAHEY: Yeah, okay.

6 MS. JOYCE: I grant you that, absolutely, but
7 this judge was there, saw what she said - - -

8 JUDGE RIVERA: But in the - - -

9 MS. JOYCE: - - - and - - -

10 JUDGE RIVERA: - - - in the - - - in the cases
11 have we done that? I thought we look at the actual cold
12 record colloquy and decide from there. Have we said we'd
13 defer specifically - - -

14 MS. JOYCE: You have said that - - -

15 JUDGE RIVERA: - - - to the judge?

16 MS. JOYCE: You have said that there is deference
17 to the trial judge who has the ability to - - -

18 JUDGE RIVERA: What - - - what case did we say
19 that? That we decide whether or not there's a serious
20 risk, but in that context, we deferred to the judge's
21 observations? Where did we say that?

22 MS. JOYCE: Your most recently, in Warrington,
23 which you decided in December of last year just said
24 repeatedly that the standard is an abuse of discretion
25 standard.



1 JUDGE RIVERA: Um-hum.

2 MS. JOYCE: And you've also said - - -

3 JUDGE RIVERA: And in that case, did we do
4 anything other than read what the cold record said - - -

5 MS. JOYCE: There are cases - - -

6 JUDGE RIVERA: - - - and make a decision based on
7 that?

8 MS. JOYCE: There are cases which state that the
9 - - - the trial judge has the ability to view the juror - -
10 -

11 JUDGE RIVERA: Um-hum.

12 MS. JOYCE: - - - and it's cited in my brief. I
13 can't find the page right now. View the juror, watch the
14 interplay, look at the body language; and so deference is
15 owed. It's, you know - - -

16 JUDGE RIVERA: Even in the face of language, that
17 at a minimum, is ambiguous? You defer even when the - - -
18 assume for one moment that one would read this - - - these
19 responses, this colloquy, and agree, well, there's
20 ambiguity there. I'm just not sure. Are you saying then,
21 the law is from this court that we tip in favor - - -

22 MS. JOYCE: If - - -

23 JUDGE RIVERA: - - - of deferring to the judge?

24 MS. JOYCE: If there's some ambiguity under
25 270.21(b) whether a juror should be challenged for cause,



1 it's up to the party - - -

2 JUDGE RIVERA: Okay.

3 MS. JOYCE: - - - who is making the challenge to
4 say something, make the - - - meet his burden.

5 JUDGE FEINMAN: Other than - - - and I'm
6 completely changing and I know the red light's on, but is
7 there anything you want to say about the Prindle issue
8 other than - - - or the Apprendi issue other than we just
9 decided this in Prindle?

10 MS. JOYCE: The court just decided Prindle and I
11 urge you to apply Prindle in this case.

12 JUDGE FEINMAN: Okay.

13 CHIEF JUDGE DIFIORE: Thank you, counsel.

14 JUDGE RIVERA: Short and sweet.

15 CHIEF JUDGE DIFIORE: Counsel?

16 MR. VORKINK: Thank you, Your Honors.

17 CHIEF JUDGE DIFIORE: Counsel, do we get in
18 trouble if a lawyer, during - - - defense counsel, during
19 voir dire, asks a prospective juror - - - we're going to
20 have police testimony in this case, do you expect that
21 police officers uphold their sworn duty and honor their
22 oath of office?

23 MR. VORKINK: If defense counsel were to ask that
24 to a perspective juror?

25 CHIEF JUDGE DIFIORE: Or pros - - - well, yeah.



1 MR. VORKINK: Well, I - - - I'm not sure exactly
2 what that question would mean to a prospective juror. They
3 would - - - that would depend on their interpretation on
4 what the officer's sworn duty is.

5 CHIEF JUDGE DIFIORE: Well, if - - - if the juror
6 answered yes, I expect police officer's do, when they swear
7 their oath of office that they do swear to do their job
8 honorably, which impliedly includes testifying truthfully,
9 right, arguably?

10 MR. VORKINK: Arguably.

11 CHIEF JUDGE DIFIORE: Do we get in trouble there?

12 MR. VORKINK: I - - - I - - - I think so, Your
13 Honor. I think that would raise a doubt as to the
14 prospective juror's ability to treat police officers just
15 like any other witness, which is what we require.

16 JUDGE STEIN: So if there's a follow-up question,
17 and said do - - - would you expect the same of any other
18 witness even though there may not be a sworn duty, they're
19 swearing under oath, and - - - and - - - and the
20 prospective juror said yes, I - - - I - - - I - - - I feel
21 the same way toward any other witness, then end of story,
22 right? Not a problem.

23 MR. VORKINK: Probably, Your Honor. Under that
24 hypothetical, I think probably. I think, again, I - - - of
25 course, that's not what happened here, and I think that the



1 colloquy here was more focused on, I think, officers versus
2 civilians in terms of their ability to be truthful, not
3 necessarily to uphold their oath.

4 I mean, obviously, the prospective juror gets
5 into officers - - - her view of what their duties are;
6 their duty to do right, but again, it comes back to, I
7 think, Judge Fahey's remarks about doubt, and I think that
8 this record is full of doubt. At a minimum, our position
9 is, of course, that it evinces clear bias, but doubt at a
10 minimum.

11 I just want to address deference, really quickly.
12 I think this - - - this court's decision from Warrington
13 last term is a classic example of what the trial court is
14 supposed to do. There, there was doubt. The court
15 conducted the follow-up inquiry, the follow-up inquiry, and
16 was able to elicit an unequivocal assurance. This said - -
17 - this court said that in that context you can defer to the
18 trial court once it's done that follow-up inquiry as to the
19 record as a whole. Of course, no follow-up inquiry was
20 done here.

21 Just briefly as to the Apprendi point, Your
22 Honors. This court - - - this decision, this case is not
23 controlled by Prindle. Prindle did not raise the Hurst or
24 the Descamps arguments that we raised in our brief.

25 JUDGE FEINMAN: But Hurst is actually cited in



1 Prindle; isn't it?

2 MR. VORKINK: Hearst is cited in Prindle, Your
3 Honor, of course. But the specific holding in Hurst had to
4 do with the Florida Supreme Court's interpretation and its
5 - - - its conclusion that its statute did not violate Ring
6 and so our argument is focused on that issue.

7 Descamps is not addressed in Prindle, and then as
8 the as-applied challenge, because we've raised both the - -
9 -

10 JUDGE RIVERA: Well, we've already said that -
11 that the PFO is not unconstitutional under - - -
12 considering the determination in Ring, so Ring did not lead
13 this Court to believe that the PFO should - - - well, our
14 interpretation of the PFO should be revisited.

15 MR. VORKINK: Uh, it - - -

16 JUDGE RIVERA: And as you say, Hurst is just
17 another application to a different jurisdiction of the rule
18 of Ring.

19 MR. VORKINK: Well, actually, our position is
20 that Hurst is not simply a reinterpretation of Ring; that
21 Hurst dealt with a particular scenario where the Florida
22 Supreme Court had construed its death penalty statute to
23 get around an Apprendi problem. And the Supreme Court said
24 that - - - that the Florida Supreme Court needed to focus
25 on the statutory language at issue on the practical effect



1 of the statute.

2 And our position is that under that reading,
3 Hurst, which is an expansion of Ring, that the PFO statute
4 remains unconstitutional, particularly as applied to Mr.
5 Wright, in which during the PFO hearing, the trial court
6 made a particular factual finding regarding whether or not
7 he attempted to use the firearm at issue; a finding that
8 the jury never found. A finding that the jury arguably
9 rejected in acquitting him of the more serious counts and
10 that that involved a count, the possession with intent to
11 use that the court itself chose not to submit.

12 The People concede, of course, that the trial
13 court made this factual finding during sentencing, and so
14 we would argue that at a minimum, and as applied to Mr.
15 Wright, the PFO statute is unconstitutional under Apprendi.

16 CHIEF JUDGE DIFIORE: Thank you, counsel.

17 MR. VORKINK: Thank you, Your Honors.

18 CHIEF JUDGE DIFIORE: You're welcome.

19 (Court is adjourned)
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C E R T I F I C A T I O N

I, Gina Gattone, certify that the foregoing transcript of proceedings in the Court of Appeals of People of New York v. Phillip Wright, No. 83 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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