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COURT OF APPEALS

STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

NO. 71

PRINCESAM BAILEY,

Appellant.

20 Eagle Street
Albany, New York
May 2, 2018

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 71, People of the
2 State of New York v. Princesam Bailey.

3 MS. KNIGHT: Good afternoon. Margaret Knight
4 from the Office of the Appellate Defender for Mr. Bailey.
5 If I may reserve two minutes for rebuttal, Your Honor?

6 CHIEF JUDGE DIFIORE: You may.

7 MS. KNIGHT: Thank you. Princesam Bailey's
8 conviction must be reversed because the trial court refused
9 to conduct any - - -

10 CHIEF JUDGE DIFIORE: Before we get to the merits
11 of the Buford inquiry, let - - - let's get right to the
12 preservation issue.

13 MS. KNIGHT: Absolutely. Finding that the error
14 was not preserved in this case would be overly technical,
15 it would not serve any of the salutary purposes of the
16 preservation - - -

17 JUDGE STEIN: Haven't we already held, though, in
18 - - - in Berkley and - - - or sorry - - - yes, Buckley and
19 Lombardo that this very situation, that if - - - if a - - -
20 if another party makes an objection but you don't join in,
21 it's not a - - - it's not preserved, even in light of CPL
22 470.05(2)?

23 MS. KNIGHT: Absolutely not. Buckley is
24 distinguishable. That involved a case where the question
25 was whether or not to submit a lesser included offense to



1 the jurors, and clearly that's something where attorneys
2 can disagree. It's a very personal and strategic decision.
3 Lombardo is also distinguishable. It was a - - - it was a
4 pre-Buford case, but even beyond that, there the - - - it
5 did involve a codefendant. What happened is the prosecutor
6 suggested an inquiry and defense counsel apparently
7 rejected that. This is - - -

8 JUDGE GARCIA: But two follow-ups then, and I
9 think those are distinctions. But one, if you're going on
10 strategic, wouldn't this attorney, who has a different
11 relationship with this juror, potentially also have a
12 strategic reason for not wanting to question a juror,
13 potentially to alienate a juror further by bringing them in
14 and basically challenging their impartiality?

15 And two, do you have a case where we found a
16 codefendant's objection sufficient, outside of a jury
17 charge?

18 MS. KNIGHT: As to the first question, I mean,
19 there's no need to alienate the juror. Certainly defense
20 counsel could have asked the court to ask the probing
21 question so that it wouldn't have had to come from him.

22 JUDGE GARCIA: But wasn't this the lawyer that
23 actually did the questioning?

24 MS. KNIGHT: This was - - - yeah, it was his
25 cross-examination that was at - - -



1 JUDGE GARCIA: So maybe he might have a different
2 view of questioning the juror than other defense lawyers
3 who were just there and hadn't participated in that?

4 MS. KNIGHT: There was no risk to him from
5 additional questioning at that point. The court had
6 already made its ruling, and he clearly wanted this juror
7 off the case. You know, he'd asked for a mistrial, but he
8 also said that the juror had put herself in a position
9 where she shouldn't - - -

10 JUDGE GARCIA: The juror doesn't hear that,
11 right?

12 MS. KNIGHT: No, and the juror didn't need to
13 hear defense counsel's questions either. Defense counsel
14 could have said, Your Honor, I want you to probe with this
15 juror; I want you to ask this juror are your feelings so
16 strong that you can't listen to any arguments or evidence,
17 you know, are your feelings towards any of the parties so
18 intense that you can't separate your emotions?

19 JUDGE RIVERA: Let's dis - - - let's say we
20 disagree with you and we view the rules differently, is it
21 so burdensome on counsel to expect counsel to say I join
22 that objection, I join that request?

23 MS. KNIGHT: It's not a question of whether or
24 not it's burdensome. It's what CPL 470.05(2) actually was
25 meant to address when it says, if in response to a party -



1 - - or in response to a protest by a party the court
2 explicitly decides this issue. And certainly we never had
3 a case where this court has found an issue unpreserved
4 where defense counsel says the juror is grossly unqualified
5 and the court is presented with every single option, with
6 mistrial, with discharge - - -

7 JUDGE GARCIA: Have we held that - - - my second
8 question. Have we ever held that in a non-Buckley context?
9 Have we ever held that sufficient to preserve an objection?

10 MS. KNIGHT: I'm not aware of any case with facts
11 exactly like this but - - -

12 JUDGE GARCIA: Any case where there was a defense
13 objection, but this codefendant didn't object, or he said
14 that was sufficient?

15 MS. KNIGHT: I'm not aware of any case like that,
16 Your Honor, but I mean, here you have a case where all
17 three of the attorneys were unanimous in saying that this
18 juror is grossly unqualified. The court denied removing
19 the juror, and then said it was going to give a general
20 instruction. And at that point he said do you have any
21 objections to that. Counsel, our attorney, continued to
22 object, you know, I'm going to - - - I'm thinking I need to
23 bring this up in summation. At that point, the court
24 explained its reasoning and said what it interpreted Mejias
25 to mean, which we obviously argue is incorrect. And in

1 response - - -

2 JUDGE RIVERA: Yeah, but isn't the whole point of
3 the Buford inquiry to see if indeed this juror isn't
4 grossly unqualified? Yes, it is to see if they're grossly
5 unqualified, but that, of course, assumes that maybe you'll
6 determine they're not grossly unqualified. And isn't
7 counsel's position there's no way around this? This makes
8 it very clear she's not only unqualified but she's tainted
9 the rest of this jury; I just want a mistrial.

10 MS. KNIGHT: That would - - - I mean, he did say
11 that he thought she had poisoned the juror, but he also
12 said - - - poisoned the jury, but he said that she had put
13 herself in a position where, you know, she herself needed
14 to be removed because she could not consider the case, she
15 could not separate her emotions from the facts. And what
16 the court did here was flip - - - basically flip Buford on
17 its head. Buford says if the juror might be grossly
18 unqualified, you should conduct an inquiry. The court here
19 said, no, Mejias says unless, you know, we know that the
20 juror is basically already disqualified, there's no need to
21 question.

22 JUDGE STEIN: But then the court, it seems to me,
23 went on to analyze it in the proper way, even assuming that
24 that's improper. But isn't one of the - - - the main
25 purposes of a Buford inquiry to find out, you know, what



1 happened, what did - - - what did the jury know, what - - -
2 what did the juror hear or say or, you know, what
3 information came to the juror. And here the whole thing
4 played out right in front of the judge. The judge had the
5 opportunity to see and - - - and observe it all.

6 MS. KNIGHT: One of the purposes of - - - that is
7 one of the purposes is to get the facts you need, but the
8 other is to see whether or not those facts are going to
9 impact upon the juror's ability to fairly evaluate the
10 case, and I think that was squarely at issue in this
11 court's - - -

12 JUDGE FEINMAN: Well, but didn't - - -

13 MS. KNIGHT: - - - recent decision in Spencer.

14 JUDGE FEINMAN: - - - by its general instruction
15 to the jury, he invite them to tell him - - - albeit, you
16 know, have the court officer tell him, and then he would
17 follow up, I think is the fair implication - - - if they
18 could no longer be fair and impartial?

19 MS. KNIGHT: The court gave a general
20 instruction, but that's not sufficient in this case. And I
21 mean, the nature of what the court said, can you be fair
22 and impartial, I have no doubt that the juror probably
23 thought she could be fair and impartial that she was - - -

24 JUDGE FEINMAN: There are lots of jurors who tell
25 you they can't, especially when they want to get off the



1 jury.

2 MS. KNIGHT: But Buford says that this court
3 needs to conduct a probing and tactful inquiry, and the
4 question, as I had suggested earlier, is this something
5 that's going to be, you know, so - - -

6 JUDGE GARCIA: It was more than a general
7 instruction that the judge gave. I mean, he referenced,
8 you know, you're not supposed to speak from the jury box,
9 you - - - you know, don't hold it against defendants if you
10 disapprove of questioning. That being said, if you think
11 you can't be fair and impartial - - - it wasn't a general
12 be fair and impartial instruction; it was tailored to what
13 happened.

14 MS. KNIGHT: Yes, but asking the juror to
15 volunteer that they can't be fair and impartial is not a
16 probing and tactful inquiry, and it's especially
17 inappropriate in a case like this where the juror
18 undoubtedly felt that her response was appropriate to - - -

19 JUDGE FEINMAN: He wasn't telling them raise your
20 hand now if you can't be fair and impartial. I mean, I
21 think the fair implication of what he's saying is you'll
22 tell the court officer and then I'm going to follow up with
23 you. I mean, he didn't use those specific words that I
24 will follow up with you individually, but you know, he did
25 say something to the effect that the juror could tell the



1 court officer and the court officer would inform him, and
2 that, implied, is that he's going to follow up.

3 MS. KNIGHT: That is a problem under Buford. You
4 shouldn't leave it up to the juror to decide whether or not
5 they're fair and impartial; it's up to the court to ask
6 those probing questions and - - -

7 CHIEF JUDGE DIFIORE: Counsel, do you want to
8 take a moment - - - excuse me for interrupting you - - -
9 and speak to the Molineux issue?

10 MS. KNIGHT: Certainly, Your Honor. The Court
11 also abused its discretion in introducing extensive gang
12 evidence in this case. It was enough to show that - - -

13 CHIEF JUDGE DIFIORE: Was the original Molineux
14 determination, is that what you're objecting to, to allow
15 it?

16 MS. KNIGHT: Yes.

17 CHIEF JUDGE DIFIORE: Or the volume of it?

18 MS. KNIGHT: We're objecting to the original
19 Molineux - - - Molineux determination. The attorneys
20 agreed that there was some relevance but said that the gang
21 evidence was unduly prejudicial and especially extensive
22 gang evidence. And in response, the court said that not
23 only could they introduce evidence that the defendants were
24 members of the same gang, but also about the violent
25 customs and practices of the Bloods gang. And there was



1 simply no need, beyond, you know, their shared gang
2 membership, to show why - - - to satisfy the limited
3 purpose, motive, and intent, and to show why they would act
4 together. And instead we get, you know, the - - - the
5 bloods are into gangs, into drugs, into guns, that to move
6 up - - -

7 JUDGE RIVERA: But isn't that an objection about
8 the scope - - - responding to the Chief Judge's question?

9 MS. KNIGHT: It is about the scope of the
10 evidence that came in. But the court, in its initial - - -
11 in its initial ruling, said that that kind of background
12 information could come in.

13 JUDGE STEIN: So assume - - -

14 JUDGE RIVERA: But it did - - - but the court did
15 then say but I don't want to prime her. So - - - so there
16 is some grey area there, is there not?

17 MS. KNIGHT: The - - - I mean, certainly it would
18 have been the better practice for defendant's counsel - - -

19 JUDGE RIVERA: And if there is, isn't it
20 incumbent then on counsel, once there's testimony, that
21 perhaps now is exceeding whatever the judge has ordered,
22 for counsel to object?

23 MS. KNIGHT: Well, the court said it didn't want
24 a fifteen-minute primer on it, but it had already ruled
25 that evidence about their practices and customs would come



1 in. So this fits squarely on what the court's original
2 ruling was, and it was unnecessary, it was untethered to
3 the limited purpose that it was coming in, and it was
4 highly prejudicial.

5 CHIEF JUDGE DIFIORE: Thank you, counsel.
6 Counsel?

7 MS. HAUSNER: May it please the court. Rebecca
8 Hausner on behalf of the People.

9 I'd like to turn first to the juror issue and
10 speak to the preservation issues that were coming up a
11 little earlier, and just emphasize that in this case,
12 single-minded defense counsel, who was there to represent
13 his client in a multi-defendant case, insisted on a
14 mistrial. There is an extended - - -

15 JUDGE WILSON: Well, but wait a minute. Mr.
16 Hardy says - - - and I think Ms. Knight quoted this a
17 couple of times, or paraphrased it, at least. What he said
18 is: "And I think, based on her outburst, she not only put
19 herself in a position where she should be removed, but I
20 think she has poisoned the entire jury as well." Isn't he
21 asking two things there very clearly?

22 MS. HAUSNER: He - - - he may be justifying his
23 request for a remedy with multiple reasons, but he's asking
24 for a mistrial. And I think it is important to focus on
25 what his actual request for a remedy was here. And that



1 language that the juror may have poisoned the entire jury
2 really only substantiated the fact that he wasn't just
3 concerned with this juror, he was concerned about the
4 entire situation as it unfolded.

5 JUDGE WILSON: And then the subsequent discussion
6 focuses on grossly unqualified, which is the standard for
7 removal of a juror or a Buford inquiry, not a mistrial,
8 correct?

9 MS. HAUSNER: Yes, Your Honor. But I don't
10 believe that using words, even words from a statute, is
11 enough to parlay into a request for a specific remedy,
12 especially given the case law coming out of this court - -
13 -

14 JUDGE FAHEY: Well, didn't - - -

15 MS. HAUSNER: - - - that does - - -

16 JUDGE FAHEY: Didn't the - - - didn't the
17 prosecutor there say that he wouldn't object if the court
18 decided to replace the juror?

19 MS. HAUSNER: Yes, Your Honor, the pros - - -

20 JUDGE FAHEY: So the prosecutor, who we're now
21 arguing about preservation, said it would be all right to
22 replace the juror.

23 MS. HAUSNER: It's the People's position that
24 it's not appropriate to read into that too much. This is a
25 multi-defendant case where the prosecutor is dealing with a



1 lot of things all at once. There are three defendants,
2 three defense attorneys, a judge that she's trying to
3 interact with. And what she says during the colloquy is
4 that she agrees with the court's analysis that - - -

5 JUDGE FAHEY: Well, the prosecutor's statement
6 was immediately before the court ruled denying the
7 application for a mistrial, and the prosecutor added she
8 would not object if the court chose to replace the subject
9 juror with an alternate.

10 MS. HAUSNER: Yes, Your Honor. She did, if you
11 will, choose the path of least resistance there, and sort
12 of said something - - -

13 JUDGE FAHEY: Well - - -

14 MS. HAUSNER: - - - that was accommodating - - -

15 JUDGE FAHEY: - - - no, I - - -

16 MS. HAUSNER: - - - at the moment.

17 JUDGE FAHEY: I see it differently. Perhaps the
18 prosecutor was performing her fundamental duty and she
19 thought that was a correct decision.

20 MS. HAUSNER: But the content of what she said
21 during the colloquy was that she agreed with the court's
22 assessment of the situation that this juror, Juror 6, was
23 just bothered by the repeated use of a racial slur, not
24 that there was any sort of underlying concern there
25 regarding her ability to remain impartial for the remainder

1 - - -

2 JUDGE RIVERA: Let's say - - -

3 MS. HAUSNER: - - - of the trial.

4 JUDGE RIVERA: Let's say we agree with this part
5 of your argument. Why - - - why shouldn't we read CPL
6 470.05, paragraph 2, as broadly as counsel suggests, that
7 as long as anybody puts out the protest and the court
8 responds to it, then any of those defendants or any party
9 could then seek to appeal the ruling?

10 MS. HAUSNER: For two reasons, Your Honor. The
11 first is that the way that the statute - - - the language
12 in the statute 470.05(2) has been interpreted is speaking
13 to the nexus between the reason for a specific objection
14 and the ruling.

15 So for example, in this situation, had Defendant
16 Bailey's counsel requested an inquiry, and rested that
17 request on some other reason, and then the - - - and then
18 the judge found I'm not going to do an inquiry, but I'm not
19 doing it for a different reason, that would have preserved
20 it under 470.05(2), as we understand it.

21 And to the second point that you make, why not
22 just allow defendants to piggyback on the objections and
23 requests of their codefendants is precisely because in
24 these multi-defendant trials there are different strategies
25 at play. And there may have been a very particular reason



1 why this defense attorney, defending party, the - - - the
2 one whose cross-examination prompted the outcry from the
3 juror, may have wanted a particular form of relief.

4 And there are several possibilities here. He may
5 not have liked the alternate - - - alternate number 1 who
6 could have come in. He may have thought that his best
7 chance here was a mistrial because he wasn't pleased with
8 how the trial was going.

9 And finally, I don't think it's too speculative
10 to say that he might have actually wanted to retain this
11 juror. She, in fact, had a reaction - - - and that
12 requires looking at the context of the cross-examination
13 here. The defense attorney was, in some ways, trying to
14 provoke the victim who was on the stand to show that he was
15 actually the aggressor in this assault. And he got a
16 reaction not from the victim but from a juror who - - - who
17 might kind of understand why this provocative language and
18 racial slur would - - - would cause that kind of reaction
19 in a person.

20 So there are many reasons at play here, and
21 that's exactly why we expect defense attorneys and
22 defendants to make it known when they want a particular
23 course of conduct by the court. And here he simply did
24 not. He insisted on a mistrial even when he had an
25 opportunity to join in on lesser remedies.



1 JUDGE FAHEY: What about the merits?

2 MS. HAUSNER: Yes, turning to the merits, Your
3 Honor. I think it's important to emphasize that not every
4 misstep by a juror leads to an inquiry. There's a high bar
5 here for triggering the kind of inquiry that - - -

6 JUDGE FAHEY: This is very unusual.

7 MS. HAUSNER: Yes, Your Honor.

8 JUDGE FAHEY: All right. So this - - - this
9 moves way beyond what - - - what a juror - - - hey, I've
10 seen jurors fall asleep and not be removed, but - - - but
11 someone bursting out and saying something to one of the
12 parties in the middle of the cross-examination, honestly,
13 I've not - - - I've never seen it in practice, and am just
14 totally unfamiliar with anything like this.

15 MS. HAUSNER: Yes, Your Honor. We will not
16 disagree with you on that front. This was very unusual.
17 And there are a few things to say to that. Even the most
18 unusual of circumstances in trial isn't nec - - - during a
19 trial, isn't necessarily connected to a juror's ability to
20 deliberate impartially.

21 JUDGE FAHEY: Well, but clear - - - clearly this
22 juror had a - - - a proper emotional reaction to - - - to
23 the language that the attorney was using.

24 MS. HAUSNER: Yes. Yes, Your Honor. The
25 attorney was proceeding in a provocative manner during this



1 cross-examination.

2 JUDGE WILSON: You don't think that if the
3 attorney is - - - sorry, if the juror says, and if you do
4 that one more time I'm going to get up and walk off of this
5 jury and out of the courtroom, that suggests that maybe the
6 - - - the juror isn't going to fulfill her responsibilities
7 to deliberate about the case in an unbiased way?

8 MS. HAUSNER: The juror made that, we will grant,
9 that extreme remark in the context of objecting to
10 something specific that the defense attorney was saying,
11 and that was a racial slur, which is very jarring to hear
12 in court, and it's certainly very jarring to hear five
13 times in a row.

14 That being said, if - - - if there was something
15 behind that statement, if there was anything more than
16 emotion behind that statement, she might have left, or she
17 might have taken the opportunity to alert the court that
18 there were doubts about her ability to remain impartial.
19 The court's - - -

20 JUDGE FAHEY: Well, you're putting the obligation
21 on her, and it's really the court's obligation. And so the
22 question for us becomes how far does a juror have to go
23 before the court clearly has at least a duty to inquire.

24 MS. HAUSNER: Our position is that there needs to
25 be some indication that this - - - that the juror is either



1 biased, or has engaged in substantial misconduct, or cannot
2 deliberate impartially. And here none of those things
3 existed.

4 JUDGE FAHEY: She said she was going to walk out;
5 that doesn't show impartiality on - - -

6 MS. HAUSNER: It showed she was very bothered in
7 the moment, and rightfully so. This reaction was
8 understandable. It is, as I said, very jarring to hear - -
9 -

10 JUDGE RIVERA: Well, what about conduct that
11 shuts down cross-examination, and as counsel argued, meant
12 that now he would have to rethink his summation?

13 MS. HAUSNER: Again, Your Honor, yes; these are
14 unusual circumstances and she did - - -

15 JUDGE RIVERA: But how does that not render her
16 grossly unqualified if she's dictating both the cross and
17 the summation? Even the prosecutor - - - although, yes, of
18 course the judge has said now that's too much, we're done
19 with that.

20 MS. HAUSNER: Um-hum.

21 JUDGE RIVERA: But even the prosecutor, as I
22 recall - - - you'll correct me if I'm wrong - - - thought
23 that, yes, certain parts of this questioning was proper.
24 No one suggested that, on summation, counsel couldn't
25 return to the issue, perhaps without using the offensive



1 word as many times.

2 MS. HAUSNER: In terms of the cross-examination,
3 the fact had already been elicited. So defense counsel's
4 performance or strategy in cross-examination wasn't
5 hampered at all by the situation. He had already gotten
6 out what he needed to get out to make a justification self-
7 defense argument on summation. And - - -

8 JUDGE RIVERA: Well, isn't that for counsel to
9 decide until someone objects or the court cuts him off?

10 MS. HAUSNER: Well, he cert - - -

11 JUDGE RIVERA: As opposed to a juror standing up
12 and saying: stop, or I'm walking out?

13 MS. HAUSNER: Yes, I don't think in this
14 situation, though, the juror did dictate that because,
15 again - - -

16 JUDGE WILSON: Well, and just a moment ago you
17 were saying his strategy may have been to try and provoke
18 the witness, but the juror cut off the ability to do that
19 by being provoked herself. So maybe it did affect the
20 cross-examination he intended, on your theory.

21 MS. HAUSNER: It's not our position that
22 attorneys should have free reign, necessarily, during their
23 cross-examin - - - cross-examinations. They should
24 certainly be able to elicit probative facts and facts
25 important to their case, and that's exactly what he did



1 here. He elicited the fact that the victim was called this
2 racial slur by a codefendant, and he was then able to use
3 that information.

4 JUDGE RIVERA: It's understood, but he was
5 continuing with his cross, and the prosecutor had not yet
6 objected, and no one else had objected. The court hadn't
7 interrupted until the juror stood up and put a threat on
8 the table.

9 MS. HAUSNER: Yes, Your Honor. Again, but - - -

10 JUDGE FAHEY: It's very basic: who's running the
11 courtroom?

12 MS. HAUSNER: I - - -

13 JUDGE FAHEY: The judge - - -

14 MS. HAUSNER: And I think that - - -

15 JUDGE FAHEY: - - - or the juror?

16 MS. HAUSNER: Yes, Your Honor. And I think that
17 speaks exactly to what the judge did do in this situation.
18 So again, just to turn to the fact, briefly, that this did
19 not rise to the level of creating concern over ability to
20 deliberate impartially. And the judge did do something.
21 This is not a silent record in terms of what the judge did
22 here. He immediately cut in, regained control of the
23 situation, admonished the juror, and delivered a very
24 thorough curative instruction in which he told the juror
25 that - - - all the jurors, in fact, that they should not



1 hold any questions asked against the defense attorneys or
2 the parties and to let the court know if they had any
3 concerns over their continued impartiality. I see - - -

4 CHIEF JUDGE DIFIORE: Thank you, counsel.

5 Counsel?

6 MS. KNIGHT: Returning to preservation, attorneys
7 can of course have different strategies, but here, every
8 single attorney in the courtroom, even the prosecutor,
9 acknowledged that there was a serious problem here. And it
10 would be different if defense counsel had said - - -

11 JUDGE RIVERA: Well, I don't know that you can
12 say, on this cold record - - -

13 MS. KNIGHT: Yeah.

14 JUDGE RIVERA: - - - the prosecutor acknowledged
15 a serious problem. Right? I mean, the - - -

16 MS. KNIGHT: Yes.

17 JUDGE RIVERA: The prosecutor is taking the
18 position, Judge, we don't see a problem, but if you want to
19 let her off we're not going to - - - if you're going to
20 dismiss her, we're not going to object. If Your Honor made
21 the inquiry, we're not going to object. I think that's
22 very different from a prosecutor standing up and saying
23 there's a problem with this juror.

24 MS. KNIGHT: All right. Well, it was certainly
25 an uncontested motion, and all three defense attorneys



1 argued that the juror was grossly unqualified. And
2 certainly if Mr. Bailey's attorney had said, you know what,
3 I don't think anything but a mistrial will do - - -

4 JUDGE RIVERA: But counsel - - - yes, counsel
5 says he's grossly unqualified, he goes through his
6 explication of that and says: and this is what I want; I
7 want a mistrial. And another codefendant says to the
8 judge, can you at least inquire.

9 MS. KNIGHT: Yeah.

10 JUDGE RIVERA: And counsel doesn't say, yeah, I
11 need that too, at least inquire; I join that request.

12 MS. KNIGHT: And certainly we wish that counsel
13 had, but Your Honor referenced 470.05 earlier. And I think
14 it's interesting that, according to respondent's theory,
15 the purpose behind 470.05, here the attorney could have
16 made a general objection. He could have objected on
17 completely improper grounds. He could have said nothing
18 but I think this juror is grossly unqualified. And if the
19 court had rejected every remedy, we'd be looking at a
20 situation where this issue was preserved. It would have
21 been in response to a protest by a party, and the court, I
22 think, would have explicit - - -

23 JUDGE RIVERA: This is where I'm not sure that -
24 - -

25 MS. KNIGHT: Yeah.



1 JUDGE RIVERA: - - - I really appreciate the
2 analysis on the CPL - - -

3 MS. KNIGHT: Um-hum.

4 JUDGE RIVERA: - - - and how to interpret the
5 CPL. You interpret the CPL to mean any party, any protest.
6 And I don't know that that section reads that way. I think
7 it's referring to the protest of the party who then
8 appeals.

9 MS. KNIGHT: The protest here was that the juror
10 was grossly unqualified.

11 JUDGE RIVERA: Well, I know the nature of the - -
12 -

13 MS. KNIGHT: Yeah. Yes.

14 JUDGE RIVERA: - - - protest. The question is
15 the person who makes the particular protest that they want
16 to appeal. You're - - - as I understand - - - you'll
17 correct me. As I understand, your position on appeal is
18 that the judge should have done this Buford inquiry.

19 MS. KNIGHT: Yes. Yeah, our first position is
20 that, you know, once the jur - - - once defense counsel has
21 made an objection that the juror is grossly unqualified,
22 and there is an indication that the juror is - - - then the
23 ball is - - - I mean, the court - - - in the court's court.
24 Under Buford, and under 270.35, the statutory language is
25 mandatory, you must discharge, you must conduct this



1 inquiry. However, you know, this is a case where it cannot
2 - - - the court was given every possible remedy and denied
3 it, so you have a situation where the person who, by their
4 objection, indicated that the error was most prejudicial to
5 him is going to be put in a position where he is - - -

6 JUDGE RIVERA: Let me ask you a question. Do you
7 understand the CPL to mean - - - let's say it is not
8 codefendants, just one defendant - - -

9 MS. KNIGHT: Um-hum.

10 JUDGE RIVERA: - - - and he had said I want a
11 mistrial, and the judge said this doesn't require a
12 mistrial and I'm not even going to ask her. Is that
13 preserved?

14 MS. KNIGHT: If he - - - if the - - - he says I
15 object to this inquiry, it - - - it would depend on the
16 court's actual ruling. But when the court lays out every,
17 you know, basis for it, and if the court says, you know,
18 I'm not going to conduct an inquiry, I'm not going to do
19 this, I'm not going to do that, this is what the law says,
20 then the court has made a clear record of the reason for
21 deciding the issue, and we can't say that this was - - -
22 wasn't something that the court didn't have an opportunity
23 to consider and make a ruling. It did in fact make a
24 ruling.

25 Thank you, Your Honor.



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CHIEF JUDGE DIFIORE: Thank you, counsel.
(Court is adjourned)



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

I, Sharona Shapiro, certify that the foregoing transcript of proceedings in the court of Appeals of THE People of The State of New York v. Princesam Bailey, No. 71, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Sharona Shapiro

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