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COURT OF APPEALS
STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

NO. 30

AGAPE A. TOWNS,

Appellant.

20 Eagle Street
Albany, New York
March 26, 2019

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

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1 CHIEF JUDGE DIFIORE: Number 30, People of the
2 State of New York v. Agape Towns.

3 Good afternoon, counsel.

4 MS. RUSSELL: Good afternoon, Your Honor. May I
5 reserve two minutes for rebuttal?

6 CHIEF JUDGE DIFIORE: You may.

7 MS. RUSSELL: May it please the court, my name is
8 Dianne Russell. I represent the appellant, Agape Towns, in
9 this matter.

10 The court below made a misstep, and - - - or the
11 trial court made a misstep. And what - - - what the Fourth
12 Department failed to recognize that this misstep - - -

13 JUDGE STEIN: What exactly was the misstep that
14 you're - - - that you're - - -

15 MS. RUSSELL: The misstep - - -

16 JUDGE STEIN: - - - talking about. You're - - -
17 you're not - - - I mean, courts are involved in plea
18 negotiations all the time, and they make sentencing, you
19 know, promises, and so on, and so forth. Is - - - is that
20 what you're complaining about?

21 MS. RUSSELL: I'm complaining about a quid pro
22 quo cooperation agreement - - - not a sentencing deal, but
23 a quid pro quo cooperation agreement that essentially
24 flipped a codefendant to testify against the defendant in
25 that trial court's matter.



1 And it's that - - - that error is of
2 Constitutional dimension, is our argument.

3 JUDGE GARCIA: Counsel, is it - - - I'm sorry.

4 JUDGE STEIN: Go ahead.

5 JUDGE GARCIA: Is it because of what was said
6 specifically here related to the confession, or is it as a
7 matter of Constitutional law that once the judge enters
8 into this type of cooperation agreement, no - - - assume
9 the judge said to the defendant, all you need to do is tell
10 the truth, all right? You tell the truth, and that's all
11 I'm asking for in terms of cooperation, and I'll sentence
12 you to X. Or is it because of what the judge specifically
13 told this defendant in the course of that proceeding?

14 MS. RUSSELL: I - - - our argument is that any
15 time - - -

16 JUDGE GARCIA: Um-hum.

17 MS. RUSSELL: - - - the court enters into a
18 cooperation agreement that is between not - - - not the
19 district attorney - - -

20 JUDGE GARCIA: Um-hum.

21 MS. RUSSELL: - - - but between a - - - a
22 codefendant or witness in a case that says hey, I'll do
23 this for you if you do this - - - basically for the
24 prosecution. He affirmatively in this case - - -
25 affirmatively aided the prosecution.



1 JUDGE STEIN: Does it matter whether the judge
2 was actually subjectively biased?

3 MS. RUSSELL: No. And here's where I think the
4 court below erred, because the analysis that they placed on
5 what happened during the trial was a subjective analysis,
6 just as I think the Nevada court did in Rippo. They looked
7 for particular factors to make a subjective analysis as to
8 whether or not you could actually say, aha, that's where he
9 was biased and that's where the bias came through.

10 But that's not what Rippo says; that's not what
11 the Supreme Court has says - - - said in Williams. And
12 it's not what this court has said is the appropriate
13 analysis in no - - - analysis in Novak. It's an objective
14 analysis. And it's not a wait-and-see.

15 Our position here is that the Constitutional
16 error took place at the time of the cooperation agreement,
17 and it's not a situation where you can say, oh, I really
18 messed up, but let's see how it plays out at trial, and you
19 know, I'll - - - I'll step back and I'll - - - I'll be
20 impartial and give you, you know, appropriate neutral
21 rulings.

22 JUDGE STEIN: So it doesn't matter whether the
23 jury knows about it or not? I mean, here there was
24 testimony about it. Does that make a difference?

25 MS. RUSSELL: No, it doesn't make a difference,



1 because the analysis should not rely on what happened at
2 the jury trial.

3 JUDGE FAHEY: Who - - - who - - - let me ask
4 this. If - - - not - - - this was a written cooperation
5 agreement?

6 MS. RUSSELL: No, this was - - - there was a
7 codefendant who did it in the standard fashion - - -

8 JUDGE FAHEY: Um-hum.

9 MS. RUSSELL: - - - and in what we would argue is
10 the appropriate fashion, where the prosecutor actually goes
11 to the wit - - -

12 JUDGE FAHEY: And in - - - and in that case, did
13 the prosecutor and the codefendant sign it?

14 MS. RUSSELL: Yes. In that - - -

15 JUDGE FAHEY: All right. So - - - so - - -

16 MS. RUSSELL: - - - case, yes.

17 JUDGE FAHEY: - - - there wasn't a signed
18 cooperation agreement, and then in this instance, as you
19 had with the other codefendant, between the People and the
20 codefendant, and there was - - -

21 MS. RUSSELL: No, and - - -

22 JUDGE FAHEY: - - - obviously no signed agreement
23 between - - -

24 MS. RUSSELL: And in fact - - -

25 JUDGE FAHEY: Let me just finish.



1 MS. RUSSELL: Sure, I'm sorry.

2 JUDGE FAHEY: - - - between the judge and the - -
3 - with Mr. Lamar or Ricigliano.

4 MS. RUSSELL: Tashmere Lamar, yes.

5 JUDGE FAHEY: Yeah. There was no signed
6 agreement between them?

7 MS. RUSSELL: No signed agreement.

8 JUDGE FAHEY: No. But there was an existence of
9 an agreement. So what's your understanding of what would
10 happen if the agreement was compromised; who would enforce
11 that agreement - - - the compromised agreement?

12 MS. RUSSELL: When - - - when - - -

13 JUDGE FAHEY: It would be the judge?

14 MS. RUSSELL: - - - when you say the agreement
15 was compromised, I'm not - - -

16 JUDGE FAHEY: Say the agreement was broken.

17 MS. RUSSELL: Okay. So in other words, the court
18 had actually told Mr. Lamar he - - - here's my sentence
19 promise to you as long as you testify against Mr. Towns.
20 However if something happens where you refuse to testify -
21 - -

22 JUDGE FAHEY: Um-hum.

23 MS. RUSSELL: - - - then, you know, I can give
24 you up to fifteen years.

25 JUDGE FAHEY: So - - - so - - -



1 MS. RUSSELL: And that's - - -

2 JUDGE FAHEY: - - - the core of your argument - -
3 -

4 MS. RUSSELL: - - - that's what would happen.

5 JUDGE FAHEY: - - - then is - - - is that the
6 judge put himself in the position of being both a party to
7 the agreement and the one who enforces the violation of the
8 agreement.

9 MS. RUSSELL: Absolutely, yes. And - - - and
10 it's - - - it's our position that when he did that, when he
11 made this cooperation agreement with a witness, that
12 required this witness to testify another - - - against, you
13 know, the defendant in the trial, that - - - that - - -

14 JUDGE STEIN: Well, it was more than that - - -

15 MS. RUSSELL: - - - was cons - - -

16 JUDGE STEIN: - - - wasn't it? Not only did he
17 require him to testify, but he specifically required him to
18 testify consistently with other statements he had made.

19 MS. RUSSELL: Yes. There was a videotaped
20 confession by this witness, and the - - - because the court
21 was in a position of being sup - - - you know, the judge
22 and not a district attorney, who would have normally sat
23 down during a - - - a proffer agreement with the witness;
24 the judge didn't know what the truth would be. But he
25 decided ahead of time that he would base his decision on



1 whether or not the witness testified truthfully on a - - -
2 a recorded - - - a video recorded statement that the
3 witness had given to the police, which - - -

4 JUDGE FEINMAN: Let - - -

5 MS. RUSSELL: - - - you know, had - - -

6 JUDGE FEINMAN: - - - let's say we agree that
7 there's error - - - Constitutional error. Is that subject
8 to any kind of harmless error analysis?

9 MS. RUSSELL: No, it's not.

10 JUDGE FEINMAN: All right. And do we have to
11 decide that to resolve this case?

12 MS. RUSSELL: Well, I think if you - - - do you
13 have to decide whether or not harmless error applies?

14 JUDGE FEINMAN: Um-hum.

15 MS. RUSSELL: I - - - I think that - - -

16 JUDGE FAHEY: It seems to me that that's like the
17 key question in this case.

18 MS. RUSSELL: And I think if - - -

19 JUDGE FAHEY: The Fourth Department - - -

20 MS. RUSSELL: - - - the language - - -

21 JUDGE FAHEY: - - - seemed to think that the
22 judge made a mistake here - - -

23 MS. RUSSELL: Right.

24 JUDGE FAHEY: - - - but that there was - - - the
25 error was harmless.



1 MS. RUSSELL: And - - - and - - - right. And my
2 - - - my argument is they applied the wrong standard.

3 JUDGE FAHEY: Um-hum.

4 MS. RUSSELL: If you read Rippo; if you read
5 Williams; if you read your own case in Novak, that is not
6 the right standard. They - - - and in fact, as I said
7 earlier, if you look - - -

8 JUDGE FAHEY: So how was the court - - - how did
9 the court - - - how was the jury influenced by the court's
10 actions in this case?

11 MS. RUSSELL: The court below said that - - -
12 essentially that the jury was not influenced. It's our - -
13 - without conceding that they were not influenced, it's our
14 position that it doesn't matter if they were influenced or
15 not.

16 JUDGE FAHEY: I see.

17 MS. RUSSELL: Now - - - because the error in
18 itself that occurred prior to trial, that the error in
19 itself was of such Constitutional magnitude, I mean, we're
20 talking about a judge who flips a witness and says you
21 testify against the defendant in my case - - - that that
22 error is of such magnitude that it - - -

23 JUDGE FAHEY: And is it - - -

24 MS. RUSSELL: - - - infects the entire - - -

25 JUDGE FAHEY: - - - is it - - - is it - - -



1 MS. RUSSELL: - - - process.

2 JUDGE FAHEY: - - - irrelevant because it's
3 outside the presence of the jury, because it has to do with
4 establishing proof in front of the jury?

5 MS. RUSSELL: I didn't get the first part.

6 JUDGE FAHEY: Yeah, is - - - are you saying to me
7 that it has to do with establishing proof to present to the
8 jury, which is different than an error in front of the
9 jury?

10 MS. RUSSELL: Well - - -

11 JUDGE FAHEY: Because it would still influence
12 the jury's decision.

13 MS. RUSSELL: It - - - it - - - it certainly
14 would. But it - - - if - - - you know, if Mr. Towns had
15 all - - - you know, decided, oops, my brother just flipped
16 on me, I better take a plea now, I think that - - - in that
17 case the error is still there and the Constitutional error
18 is still something that would have to be addressed.

19 It was the judge's action, his conduct, at the
20 moment that it happened - - -

21 JUDGE FEINMAN: All right.

22 MS. RUSSELL: - - - and it was - - - once it was
23 done it was done.

24 JUDGE FEINMAN: So if we agree with that, what -
25 - - what's the remedy that you are entitled to? Just a new



1 trial with no further instructions as to what's to be done
2 with Lamar's - - -

3 MS. RUSSELL: This is - - -

4 JUDGE FEINMAN: - - - testimony or - - -

5 MS. RUSSELL: Yeah, this is - - -

6 JUDGE FEINMAN: - - - where do we go?

7 MS. RUSSELL: - - - a difficult point because,
8 you know, certainly I think a new trial is - - - is
9 necessary here under - - - under Rippo, because the
10 Constitutional error is just so great that - - - you know,
11 the risk of bias is so great that it - - - it can't be
12 tolerated.

13 A new trial. I - - - I had asked for - - - that,
14 you know, obviously there be a - - - a different judge - -
15 - ordering a different judge.

16 I had also asked for some kind of order that
17 addresses the problem of Tashmere Lamar's prior testimony,
18 because I could imagine a situation where perhaps this
19 witness gets subpoenaed by the District Attorney again, and
20 makes himself unavailable, statutorily, under some - - -
21 you know, one of those rules. Do they then get to use the
22 - - - the testimony from the prior trial?

23 And - - -

24 JUDGE WILSON: If he's not unavailable, could he
25 be cross-examined on the basis of the prior testi - - - if



1 he's not unavailable and appears, could he - - -

2 MS. RUSSELL: If he's not unavailable - - -

3 JUDGE WILSON: - - - could he - - -

4 MS. RUSSELL: - - - and appears - - -

5 JUDGE WILSON: - - - would he be cross-examined
6 on the basis of his prior testimony?

7 MS. RUSSELL: I would argue that he can't,
8 although I do understand - - - I do understand that the
9 People were not part of this deal. And so by that kind of
10 narrowing order, may be unfair to the People, because they
11 really weren't to blame here, although they didn't step up
12 and say, you know, Judge, this really probably isn't
13 something you should be doing.

14 JUDGE RIVERA: Well, they called the witness.

15 MS. RUSSELL: I'm sorry?

16 JUDGE RIVERA: Right, they called the witness - -
17 -

18 MS. RUSSELL: Of course.

19 JUDGE RIVERA: - - - knowing that the deal
20 existed.

21 MS. RUSSELL: Right. No, and - - - and why
22 wouldn't they, at that point? It was a gift to them. This
23 was a - - - you know, very damaging testimony that they
24 weren't able to get to. He was - - - he was a defendant up
25 until the day of the plea.



1 JUDGE GARCIA: Counsel, I see - - - I see your
2 time is up but - - -

3 MS. RUSSELL: Oh.

4 JUDGE GARCIA: - - - one - - - I'd just like to
5 go back to harmless error for - - - for a moment, and
6 actually even back to what I had asked about earlier.

7 It seems like you're arguing for a per se rule.
8 But in this case, not only do you have the agreement, you
9 have these statements, to some extent, that you know, I'm
10 looking at your confession, essentially. And it seems
11 particularly hard - - - there's a very good argument that
12 it's particularly hard to look back and say there's no
13 error when you can't quantify how much of an effect that
14 statement had on the actual testimony that did get to the
15 jury.

16 MS. RUSSELL: Right.

17 JUDGE GARCIA: Right? So it doesn't necessarily
18 have to be per se error, or we don't have to decide that,
19 potentially, in this case, if it was. That coupled with
20 this reference to the confession would make it really
21 impossible to untangle any influence on the testimony.

22 MS. RUSSELL: Right. And - - - and I think - - -
23 going back to the old case of In re Murchison, I would
24 argue - - - taking some language from that - - - from that
25 case, that as part of the process in this trial, in this



1 case, that the trial judge, by the very nature of the
2 cooperation agreement, could not be wholly disinterested in
3 the conviction of Mr. Towns, and - - - and therefore we're
4 asking that the matter be - - - the judgment be vacated.

5 CHIEF JUDGE DIFIORE: Thank you, counsel.

6 MS. RUSSELL: Thank you.

7 MS. GRAY: May it please the court, Lisa Gray on
8 behalf of the People. Good afternoon.

9 CHIEF JUDGE DIFIORE: Good afternoon. Counsel,
10 why is the DA on the sidelines for a codefendant's
11 cooperation in a murder case?

12 MS. GRAY: It was a robbery case - - - case, Your
13 Honor, and - - -

14 CHIEF JUDGE DIFIORE: I'm sorry?

15 MS. GRAY: It was a robbery case, Your Honor, and
16 I believe that - - -

17 CHIEF JUDGE DIFIORE: Robbery, excuse me.

18 MS. GRAY: - - - yeah, but I think - - -

19 CHIEF JUDGE DIFIORE: Still a violent felony.

20 MS. GRAY: Certainly a violent felony.

21 The prosecutor - - - the trial Assistant District
22 Attorney in this case was in plea negotiations with the
23 codefendant, and there was some discussion about a top
24 count plea with twelve years in the Department of
25 Corrections. The trial judge stepped in and took over the



1 reins of that and crafted this sentencing arrangement that
2 we're now dealing with here.

3 JUDGE STEIN: Is this unusual?

4 MS. GRAY: It is unusual. It's very unusual.
5 And I - - - I think that to address any concern of future
6 abuse, the Fourth Department criticized as strongly as they
7 could, the actions of the trial court in this case.

8 JUDGE WILSON: So is it - - - is it an unfair
9 reading of the record here of what happened that the trial
10 judge was concerned or disturbed, maybe, that the
11 prosecutor was not offering a fair plea to a - - - I think
12 - - - twenty-year-old, who was not the maybe most guilty
13 party here, and that the person, Ricigliano, who was the
14 initial instigator of this had been offered and taken a
15 five-year plea, and sort of took his - - - took matters
16 into his own hands? Is that a fair reading of what
17 happened?

18 MS. GRAY: It - - - it's possible. I mean,
19 certainly the trial courts have and are endowed with the
20 authority to enter into plea bargain and plea negotiations
21 with the parties. And certainly - - -

22 JUDGE WILSON: So is there a better way the trial
23 judge should have accomplished that result if the trial
24 judge felt that was what was happening?

25 MS. GRAY: The trial judge could - - - could have



1 obviously taken any plea bargaining outside - - - out of
2 the hands of the prosecutor and asked the defendant to
3 plead to the indictment. In this particular case, the - -
4 - Mr. Lamar did plead to the indictment with this
5 sentencing agreement and this range based on the
6 cooperation.

7 JUDGE FAHEY: I have to say, though, I've never
8 seen anything like this.

9 MS. GRAY: No, no. You haven't and we haven't.
10 And I think, again, going back to what the Fourth
11 Department said - - -

12 JUDGE FAHEY: Um-hum.

13 MS. GRAY: - - - we're - - - we're not going to
14 see this again. This - - - they couldn't have criticized
15 the trial court - - -

16 JUDGE FAHEY: So - - -

17 MS. GRAY: - - - more strongly.

18 JUDGE FAHEY: - - - so - - - so would - - - would
19 you concede that this was error, and that the only question
20 for us is it harmless or not?

21 MS. GRAY: Yes, Your Honor. And I would submit
22 to you that this is harmless error.

23 JUDGE FAHEY: Okay. Why is that?

24 MS. GRAY: Because even under an analysis of
25 Constitutional harmless error or non-Constitutional



1 harmless error, we - - - we arrive at the same conclusion,
2 that again, what the trial court did in this particular
3 case was wrong, but - - -

4 JUDGE STEIN: But - - - but isn't there a
5 question first whether harmless error analysis applies at
6 all, and - - - and hasn't the Supreme Court and this court
7 both said that there are just certain errors of such a
8 fundamental nature that it - - - you just can't - - - it
9 doesn't matter whether it's harmless or not?

10 MS. GRAY: Yes.

11 JUDGE STEIN: It's always harmless, essentially.

12 JUDGE GARCIA: Harmful.

13 JUDGE STEIN: Harmful.

14 MS. GRAY: Yes, this is - - - harmful, yes.

15 JUDGE STEIN: Right.

16 MS. GRAY: Yes, this court in Crimmins said that.

17 JUDGE STEIN: Okay.

18 MS. GRAY: But in this particular case - - -

19 JUDGE STEIN: Why isn't this one of those cases?
20 Because it seems to me that - - - that this has to do with
21 - - - with the - - - the fundamental issue of having an
22 unbiased court.

23 MS. GRAY: Because I think also that this court
24 in Arnold fleshed that out a bit when it said that the
25 court's role is to protect the record and not to make it.



1 So in - - -

2 JUDGE FAHEY: But even in Arnold, that - - - that
3 was a nonjury trial, wasn't it?

4 MS. GRAY: It was, Your Honor. Yes. And in this
5 case we had a jury; we had a trial court that entered into
6 this agreement; and the agreement with the codefendants
7 took place completely outside the presence of the
8 appellant's jury or trial. And the trial counsel on behalf
9 of Mr. Towns was given the opportunity to fully flesh out
10 the terms of that agreement. And there was a curative
11 instruction that was crafted, in part, and certainly
12 condoned by trial counsel.

13 So - - -

14 JUDGE STEIN: Why wasn't - - - why wasn't the
15 error back when the cooperation agreement was made in the
16 first place, and you know - - - in view of the fact that
17 the court essentially stepped into the role of the
18 prosecutor?

19 MS. GRAY: Well, a couple things is - - - one is
20 if the error happened at that point, let's say, ten days
21 before the start of the appellant's jury trial, when the
22 agreement with the codefendant took place, then the trial
23 counsel for Mr. Towns was present. He could have moved for
24 - - - for recusal of the trial court and never did.

25 So I would submit that that particular issue is



1 almost not - - -

2 JUDGE STEIN: Well, he moved for - - -

3 MS. GRAY: - - - preserved for this court.

4 JUDGE STEIN: - - - instead he moved for
5 preclusion of the testimony. Why - - - why isn't that
6 enough to preserve the error?

7 MS. GRAY: Because it sh - - - because at the
8 point the trial court - - - the trial attorney was aware
9 that there was an agreement happening with the codefendant,
10 which happened about a week before the trial of the
11 appellant, then it was incumbent upon the trial - - - the
12 appellant's trial counsel to raise that issue immediately,
13 move for recusal, ask this judge to - - - to move this case
14 to a different judge.

15 JUDGE STEIN: Have we - - - have we ever said
16 that - - - that it has to be preserved in that way? Didn't
17 - - - didn't - - - did we require a recusal motion in - - -
18 in People v. Prado?

19 MS. GRAY: Your Honor, I'm not familiar with that
20 particular case. But I do think that as soon as the trial
21 counsel in this case knew about it, he should have moved
22 for recusal. He didn't. We've talked a little bit about
23 Rippo v. - - - Rippo and the Williams matters. Both of
24 those were recusal cases where the judge refused to step
25 aside.



1 And again, I would say that we might not even be
2 here if trial counsel had asked the trial court - - -

3 JUDGE STEIN: Well, it's - - - it's apparent that
4 the trial court didn't think that there was any problem
5 with it. And so why - - - why wouldn't that be a futile
6 motion anyway?

7 MS. GRAY: I - - - I don't know that it's
8 necessarily apparent that the trial court didn't have a
9 problem with this. I mean, the trial court entered into
10 the agreement - - -

11 JUDGE STEIN: Well - - -

12 MS. GRAY: - - - for sure. But we don't know - -
13 -

14 JUDGE STEIN: Well, he wouldn't - - - he wouldn't
15 preclude the testimony, and he obviously felt that the - -
16 - that the instructions - - - that the curative
17 instructions took care of it, and so why would the court
18 have felt it necessary to recuse?

19 MS. GRAY: We - - -

20 JUDGE RIVERA: Indeed - - -

21 MS. GRAY: - - - we don't know the answer to that
22 question.

23 JUDGE RIVERA: - - - he was going to - - - wasn't
24 the court going to limit the cross-examination?

25 MS. GRAY: The court entertained that.



1 JUDGE RIVERA: And didn't the ADA have to step in
2 with the supervisor to say we - - - we don't think you can
3 do that?

4 MS. GRAY: Yes. I think because, kind of going
5 back to a previous point, this was such an unusual
6 arrangement, I'm - - - I'm not sure anybody in the
7 courtroom knew how to effectively carry out this particular
8 arrangement.

9 JUDGE RIVERA: It - - - it does seem like the
10 judge is directing this arrangement: designing it, setting
11 the parameters for it, setting the guidelines at trial for
12 it, and that seems to be a denial of a fair trial, for this
13 defendant. And then Crimmins is very clear that harmless
14 error does not apply to that kind of error.

15 MS. GRAY: But the trial court, at the time of
16 the appellant's trial, didn't take on the function or the
17 appearance of the prosecutor at Mr. Towns' trial. The
18 agreement with the codefendant was - - -

19 JUDGE RIVERA: So - - - so if a judge - - -

20 MS. GRAY: - - - outside - - -

21 JUDGE RIVERA: - - - has set that all in the
22 works in advance, but then sits back and is silent at
23 trial, you - - - you don't think that that undermines - - -

24 MS. GRAY: If the trial court - - -

25 JUDGE RIVERA: - - - the defendant's



1 Constitutional rights?

2 MS. GRAY: If the trial court had sat back and
3 been silent, then yes. But in this case, the trial court
4 certainly gave, again, a curative instruction that was
5 crafted in part and condoned by defense - - -

6 JUDGE FEINMAN: But that also - - -

7 MS. GRAY: - - - by the defendant's attorney.

8 JUDGE FEINMAN: - - - that all goes to the effect
9 on the jury. Isn't the defendant entitled to believe that
10 he is being tried in front of an impartial judge?

11 MS. GRAY: Your Honor, yes, yeah. I mean, we are
12 all - - -

13 JUDGE FEINMAN: So - - - so if the answer to - -
14 -

15 MS. GRAY: - - - entitled to a fair trial.

16 JUDGE FEINMAN: - - - that is yes, how does the
17 defendant here maintain that belief, when essentially the
18 judge has told him you better testify this way, i.e., in
19 accordance with your confession?

20 MS. GRAY: I - - - I think that goes back to the
21 recusal issue. If the defendant, at the time, heard
22 through his attorney that, hey, listen your - - - your
23 half-brother, your codefendant has just pled guilty, then I
24 would imagine that there would have been some discussion
25 and there would have been some strategic - - -



1 JUDGE FAHEY: But - - - but see - - -

2 MS. GRAY: - - - motion to recuse.

3 JUDGE FAHEY: - - - Judge Feinman's point is
4 really well taken, because it really addresses the question
5 of by the court's actions you've affected the quantum of
6 proof that goes before the jury and the nature of the proof
7 that goes before the jury.

8 Quite often, as you know, working in the DA's
9 Office, you have people that come in that they - - - they
10 won't testify; they refuse to testify. They change - - -
11 and so it makes your case more difficult. And this, his
12 actions directly affected both the quantum and the nature
13 of the proof before the jury. So - - -

14 MS. GRAY: And also, there was overwhelming proof
15 put forth to the jury in Mr. Towns' case. This - - - this
16 was not a one-witness, codefendant flipped with the - - -
17 with the court's agreement, pointing the finger at Mr.
18 Towns.

19 JUDGE FEINMAN: But you had nobody telling who's
20 behind the mask.

21 MS. GRAY: I'm sorry, Your Honor?

22 JUDGE FEINMAN: Other than Mr. Lamar, you had
23 nobody saying who was behind the mask, the - - -

24 MS. GRAY: There were other - - - there was - - -

25 JUDGE FEINMAN: - - - that he was wearing.



1 MS. GRAY: - - - the - - - there was Mr.
2 Ricigliano, who was the People's cooperating witness, who
3 described the planning going into the particular robbery.
4 There was the girlfriend of the - - - of Mr. Towns - - -

5 JUDGE FEINMAN: There's circumstantial evidence,
6 certainly.

7 MS. GRAY: There certainly was. And - - -

8 JUDGE FEINMAN: But there's nobody saying this
9 man was the one wearing the mask.

10 MS. GRAY: There was overwhelming evidence to
11 support the conviction.

12 JUDGE WILSON: So what happens - - -

13 JUDGE RIVERA: But that doesn't matter, of
14 course, if harmless error analysis doesn't apply.

15 MS. GRAY: It does not matter, Your Honor. In
16 this - - -

17 JUDGE WILSON: So what hap - - - what happens to
18 Mr. Lamar's prior jury tri - - - jury testimony if we
19 reverse?

20 MS. GRAY: I see my red light is on.

21 JUDGE WILSON: To what use if any can it be put?

22 MS. GRAY: Well, I don't - - - I don't think that
23 pre - - - preclusion of Mr. Lamar's testimony is
24 appropriate if - - - if this court wants to find a remedy.
25 There's no - - - there was no indication that Mr. Lamar

1 didn't testify truthfully. The only - - - the only remedy,
2 if this court seeks to do that, would be a new trial, same
3 judge, and - - - you know, and however the prosecutor - - -
4 the DA's Office decides to present their evidence.

5 CHIEF JUDGE DIFIORE: Thank you, counsel.

6 MS. GRAY: Thank you.

7 CHIEF JUDGE DIFIORE: Counsel?

8 MS. RUSSELL: If I could just speak briefly to
9 the point about recusal, something that I've looked at over
10 and over and thought about.

11 If - - - if the defense counsel had moved for
12 recusal in this case, it would have made no difference
13 whatsoever as far as the Constitutional harm goes, because
14 a recusal would simply have put another person in the
15 courtroom, but it would not have remedied the problem that
16 was created by the court in the first place, which is this,
17 you know, inappropriate, essentially, aiding the
18 prosecution.

19 What - - - what the defense counsel did was, I
20 think, ask for the only remedy that would have mattered,
21 and that was: let's start over. I'm asking you to sua
22 sponte vacate Tashmere Lamar's plea or I'm asking you to
23 preclude his - - - his testimony.

24 And that's what he did when the time became ripe,
25 which was - - -



1 JUDGE FEINMAN: But what could we do now?

2 MS. RUSSELL: I'm sorry?

3 JUDGE FEINMAN: I mean, what could we do now as a
4 remedy? You know, he's already served his sentence, Mr.
5 Lamar. I'm not aware of any authority that goes - - - say,
6 now we can go back and have the People move to - - - to
7 vacate that plea.

8 MS. RUSSELL: Right. And I don't - - -

9 JUDGE FEINMAN: He's certainly not going to do
10 that.

11 MS. RUSSELL: Right, no - - -

12 JUDGE FEINMAN: So - - -so what do we do now?

13 MS. RUSSELL: I don't think - - - I wouldn't ask
14 this court to move to vacate Tashmere Lamar's plea. I
15 think that gets into a whole other area.

16 JUDGE FEINMAN: Right.

17 MS. RUSSELL: It's what to do with when this case
18 goes back to trial, what do we do - - -

19 JUDGE FEINMAN: Exactly, so - - -

20 MS. RUSSELL: - - - with his testimony.

21 Are the People entitled to call him as a witness,
22 if they so choose? Are they - - - you know, if he gets in
23 more trouble from here to then, can they make a deal with
24 him again - - - you know, can they make a personal deal
25 with him to testify?

1 I think they can. It's - - - it's problematic if
2 the prior testimony, however, is used as cross-examination.
3 Can this court preclude that? Can they - - - can this
4 court issue an order that restricts the District Attorney
5 in that manner?

6 I don't - - - I would ask that you do that,
7 because I think that's fair under all the circumstances
8 here.

9 I don't know if you can do that. So we may be in
10 a position where, you know - - -

11 JUDGE FEINMAN: We just have to wait and see - -
12 -

13 MS. RUSSELL: - - - here it goes again.

14 JUDGE FEINMAN: - - - what happens. Yeah.

15 MS. RUSSELL: Right.

16 CHIEF JUDGE DIFIORE: Thank you, counsel.

17 MS. RUSSELL: Thank you.

18 (Court is adjourned)

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

I, Penina Wolicki, certify that the foregoing transcript of proceedings in the Court of Appeals of The People of the State of New York v. Agape A. Towns, No. 30 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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