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COURT OF APPEALS  
STATE OF NEW YORK

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PEOPLE,

Respondent,

-against-

No. 95

JAMES L. CARR,

Appellant.

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20 Eagle Street  
Albany, New York  
September 6, 2017

Before:

CHIEF JUDGE JANET DIFIORE  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE LESLIE E. STEIN  
ASSOCIATE JUDGE MICHAEL J. GARCIA  
ASSOCIATE JUDGE ROWAN D. WILSON  
ASSOCIATE JUDGE PAUL FEINMAN3

Appearances:

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1 CHIEF JUDGE DIFIORE: The next matter is number  
2 95, People of the State of New York v. James Carr.

3 Good afternoon, counsel.

4 MR. LUMLEY: Good afternoon, Your Honors. May it  
5 please the court, my name is Evan Lumley. I'm here  
6 representing appellant. I would like to request two  
7 minutes for rebuttal.

8 CHIEF JUDGE DIFIORE: Two minutes. Counsel,  
9 before you get started, I have a question for you. Did  
10 either court below have access to the entire grand jury  
11 transcript?

12 MR. LUMLEY: I believe that they did, Your Honor.  
13 I did not have access to that.

14 CHIEF JUDGE DIFIORE: They did?

15 MR. LUMLEY: Yeah. I - - - I believe that they  
16 did.

17 CHIEF JUDGE DIFIORE: Both the nisi prius court  
18 and the Appellate Division.

19 MR. LUMLEY: I believe the requests were made by  
20 both. Yes, Judge.

21 CHIEF JUDGE DIFIORE: Thank you.

22 MR. LUMLEY: As you know, 190.75 requires that a  
23 prosecutor obtain leave before re-presenting a case to a  
24 second grand jury when those charges have already been  
25 presented. The court, when it decided Wilkins, stated that

1 when charges are withdrawn from a grand jury consideration,  
2 that that is the equivalent of a dismissal, depending up on  
3 how - - - the extent - - -

4 JUDGE GARCIA: Counsel, basic question on this  
5 grand jury. Are they investigating - - - and this is  
6 really a basic question. Are they investigating this  
7 crime, right? It's a burglary, it's a murder, they're  
8 looking at who can we charge? Or are they just  
9 investigating this defendant?

10 MR. LUMLEY: I believe, based on what I've seen  
11 from the record, that they are investigating this  
12 defendant, and I think that that's clear based upon the  
13 waiver of immunity that they - - - they execute with him.

14 JUDGE GARCIA: But you have a crime which  
15 involves a murder. You have potentially a number of  
16 suspects. Would you have to get separate grand juries for  
17 each of those suspects?

18 MR. LUMLEY: I guess it depends on when they're  
19 being presented. If - - - if they were being presented - -  
20 -

21 JUDGE GARCIA: So right now you go in and you  
22 don't have evidence that this person committed - - - let's  
23 say a different case - - - robbery and a couple of guys rob  
24 a number of people. They kill a few. You open a grand  
25 jury investigation into robbery and murder. You have

1 evidence of one shooter at the time you're going into this  
2 grand jury. You charge that shooter with murder and  
3 robbery. You charge two other people with just the  
4 robbery. Turns out one of the victims who is shot recovers  
5 and can testify and says, in fact, they handed the gun over  
6 to this other defendant during the robbery, and he shot  
7 victim two or victim three. Can't you go back in now and  
8 get a murder indictment, or do you have to get permission?

9 MR. LUMLEY: Your Honor, I - - - we're talking  
10 about specifically for different defendants? That - - -  
11 that - - -

12 JUDGE GARCIA: Yeah. So you've charged one of  
13 the defendants with being the shooter. Now you learn the  
14 gun was passed. Another defendant was a shooter of one of  
15 the victims. You now have enough to charge another  
16 defendant with a murder. You go back in and you get a  
17 murder indictment. Why can't you do that without  
18 permission?

19 MR. LUMLEY: Well, in - - - in that scenario, you  
20 would be - - - it would be with respect to a different  
21 defendant and a different proceeding.

22 JUDGE GARCIA: No. But let's say that defendant  
23 was charged with robbery as a result of the first grand  
24 jury, but he just wasn't charged with murder?

25 MR. LUMLEY: Judge, I - - - if that particular

1 defendant was not under - - - under investigation at that  
2 time, then I - - - I believe that the second - - -

3 JUDGE GARCIA: But how could he not be if he was  
4 charged with robbery?

5 MR. LUMLEY: Well, Judge, I - - - I think that  
6 goes to - - - to the core of my argument here is exactly  
7 that.

8 JUDGE GARCIA: Right. I think it does because  
9 here they got a burglary charge, right. And they didn't  
10 have the murder but later, I guess, they develop a  
11 jailhouse informant or something and then they come back in  
12 and they charge him with the murder. Why is that  
13 different?

14 MR. LUMLEY: Well, especially in this proceeding,  
15 this defendant was present before the grand jury and - - -  
16 and he testified. And he - - - he was not afforded that  
17 opportunity to come back and testify.

18 JUDGE GARCIA: Well, putting that issue aside,  
19 just on the issue of did they withdraw this so it's the  
20 equivalent of a dismissal, why isn't that so different than  
21 our earlier case saying you can go right to the end, put  
22 all your evidence in, and say, oh, wait a second, you know,  
23 we're not going to present a charge here? I mean here they  
24 had evidence he committed the burglary. They charged him  
25 with that. They asked for an indictment, the grand jury

1 returned an indictment on that.

2 MR. LUMLEY: I think that they - - - they were  
3 attempting to charge him with the murder, and in - - - in  
4 my opinion, that's specifically laid out and for whatever  
5 reason - - - I can't be in the mind of the prosecutor.

6 JUDGE GARCIA: And what leads you to think that?

7 MR. LUMLEY: The questioning, the line of  
8 questioning that - - - that the defendant was subjected to.

9 JUDGE STEIN: About the immunity waiver or - - -  
10 or what - - - what line - - -

11 MR. LUMLEY: Oh, there is specific portions in  
12 the record where he testifies that they specifically say  
13 isn't it true that you said that you killed Percy Blake  
14 Saunders? And he answers no. And it's peppered throughout  
15 the testimony that there's - - - there's certainly a strong  
16 inference that - - - that he's being investigated for this  
17 murder, and it gives the appearance to me, when I'm  
18 reviewing that testimony - - -

19 JUDGE FEINMAN: So you thought that - - -

20 CHIEF JUDGE DIFIORE: So based on what you've  
21 just described as the evidence, would the prosecutor have  
22 been faithful to his or her ethical obligations if he or  
23 she had asked the grand jury to indict on a murder on what  
24 you're describing as the evidence before that grand jury?

25 MR. LUMLEY: That's certainly a determination for

1 the prosecutor to make, and perhaps not. But that's what  
2 the evidence was showing.

3 CHIEF JUDGE DIFIORE: Would that mean because  
4 there's not a legally sufficient case at that point in  
5 time?

6 MR. LUMLEY: Of course. Perhaps. And with - - -  
7 with regard to that point, it was certainly something that  
8 was - - - was drawn to the attention of the grand jury.  
9 And I don't see why he shouldn't be required to obtain  
10 leave, if he is acting ethically, just to present - - -  
11 represent that to a second grand jury.

12 JUDGE WILSON: Well, what do you make of the  
13 language in 190.75 that says, "Or any other offense"? That  
14 is, to put it differently, in Wilkins, the grand jury  
15 returned nothing. Here, the grand jury returned the  
16 burglary charge, and the statute says if the evidence isn't  
17 legally sufficient to establish that the person commits  
18 such crime or any other offense, then you have to go back  
19 to court. But here, the grand jury returned a charge.

20 MR. LUMLEY: Well, what I'm asking the court to  
21 consider is that the - - - the equivalent of what happened  
22 in Wilkins where the prosecutor withdrew those charges.  
23 The court did not state that they had to be specifically  
24 charged on those offenses for that to be considered a  
25 withdraw. This grand jury heard testimony from seventeen

1 witnesses over seventeen days. They presented everything.  
2 I don't know - - -

3 JUDGE STEIN: But is - - - was any of that  
4 testimony unrelated to the burglary?

5 MR. LUMLEY: I don't know that answer because I  
6 haven't had the opportunity to review the grand jury  
7 minutes. What I have seen - - -

8 JUDGE STEIN: If it - - - if it was all related  
9 to the burglary, would that make a difference even if some  
10 of that may have led to an inference that he might have  
11 been, also, involved in the murder?

12 MR. LUMLEY: I think that there's - - - there's -  
13 - - it seems foolish to say that this defendant was not  
14 being considered for that murder charge while he is a  
15 suspect of a burglary - - -

16 JUDGE STEIN: Well, but isn't there a difference  
17 between, okay, you know, we're - - - we're thinking about  
18 this and - - - you know, but we don't have enough proof  
19 yet, and so we're looking not to indict him on this now but  
20 because of the interrelation between the burglary and the  
21 murder, there may be some things that - - - that come out  
22 that have to do with a possible connection to the murder.  
23 But I - - - I mean in what you've presented, I don't see a  
24 whole lot of proof that would suggest that he's guilty of  
25 murder. So it doesn't seem to me that that charge was

1 actually presented to the grand jury.

2 MR. LUMLEY: I - - - I understand your point.

3 And - - -

4 CHIEF JUDGE DIFIORE: Following up a little bit  
5 on Judge Stein's point, if - - - let's assume, for the sake  
6 of the argument, that he was a suspect and they very  
7 clearly knew he was a suspect in the murder. Are you  
8 suggesting that in order to protect the murder case, even  
9 though they had solid evidence of the burglary, that they  
10 shouldn't go in and present the burglary? Is that what you  
11 are saying in order - - -

12 MR. LUMLEY: No. I believe that from - - - from  
13 looking at the circumstances in this particular case, that  
14 this defendant was subject to an investigation for murder.  
15 I believe that that's very clear based on the questioning.

16 CHIEF JUDGE DIFIORE: Okay.

17 MR. LUMLEY: I believe that he was held on a  
18 criminal complaint that was charging him with murder at  
19 that time.

20 CHIEF JUDGE DIFIORE: No. Actually, I think the  
21 complaint charged the burglary in the first degree.

22 MR. LUMLEY: Your Honor, the - - - again, that's  
23 nothing that would impede the prosecutor from going and  
24 obtaining leave in - - - in presenting whatever it is that  
25 he believes that now - - -

1                   JUDGE GARCIA: Let's say, following up on the  
2 Chief Judge's question, the prosecutor doesn't want to lay  
3 his case out for - - - for a judge at this point, but he  
4 has very strong evidence that there's been a robbery,  
5 there's been a burglary, it's a very serious crime, and  
6 there's been a murder committed. So, of course, whoever  
7 committed the burglary or robbery would be a suspect in  
8 that. But are - - - is this - - - would this rule chill  
9 the prosecutor from going in and getting an indictment on a  
10 burglary or robbery charge because they don't want to be  
11 considered to have dis- - - - the grand jury dismiss the  
12 murder charge?

13                   MR. LUMLEY: No. Certainly not. But what I'm  
14 asking the court to consider - - - and there's certainly a  
15 disadvantage here because we haven't had the opportunity to  
16 review those minutes.

17                   JUDGE GARCIA: Would you agree - - - would you  
18 agree - - -

19                   JUDGE FEINMAN: Well, let's talk about this went  
20 to trial. You - - - you have access to the grand jury  
21 testimony of all of those witnesses who testified at trial  
22 because that would have been turned over to the defense as  
23 either Rosario or - - - well, typically Rosario.

24                   MR. LUMLEY: We did not have that opportunity on  
25 this particular appeal. And that - - - that was the result

1 of time, unfortunately, for us. We didn't learn of the  
2 issue where leave was not sought by the prosecutor until  
3 the request was made for that years later. The record that  
4 we were able to obtain was at the clerk's office. It was  
5 very limited in scope and respect. We didn't have an  
6 opportunity - - -

7 JUDGE FEINMAN: So - - - so your record is  
8 limited to what was in front of the 440 judge is what  
9 you're saying?

10 MR. LUMLEY: That's correct, Your Honor.

11 JUDGE FEINMAN: Okay.

12 CHIEF JUDGE DIFIORE: Thank you, counsel.  
13 Counsel.

14 MR. TEXIDO: Good afternoon, Your Honors. May it  
15 please the court, Nicholas Texido for the People. The  
16 permission requirement in CPL 190.75(3) is not triggered  
17 unless there is a dismissal by a grand jury. That's by the  
18 clear language of - - - of that statute. Now Wilkins  
19 expanded that a little bit, but only where there's a  
20 complete withdrawal of a case prior to any grand jury  
21 action. And the reason for that was because CPL 190.60 - -  
22 - and this is the language of this court: "Does not  
23 contemplate the termination of deliberations without some  
24 action by the grand jury." Now here, this is different.  
25 This isn't Wilkins. Here, we have - - - we had action by

1 the grand jury. They - - -

2 JUDGE GARCIA: Did the complaint charge murder?

3 MR. TEXIDO: I'm sorry?

4 JUDGE GARCIA: Did the complaint in this case  
5 charge murder?

6 JUDGE FEINMAN: The felony complaint.

7 MR. TEXIDO: As far as I know, it did not. I - -  
8 - I was looking while you were discussing it with my  
9 colleague, but I didn't - - - I don't believe it did.

10 JUDGE STEIN: So - - - so are you saying that if  
11 - - - if you had gone in and presented all of your proof on  
12 the murder charge and - - - but didn't instruct the jury  
13 and they returned an indictment of burglary only because it  
14 was the only count formally submitted, that the - - - that  
15 the people would still not need leave to represent the  
16 murder charge?

17 MR. TEXIDO: Yes. I don't think you have to get  
18 there in this case to rule in my favor, but I do think yes.  
19 That's - - -

20 JUDGE STEIN: But that would be the impact of  
21 what you're suggesting under - - -

22 MR. TEXIDO: Yes. It would. That particular  
23 part of my argument. Yes. And the reason for that - - -  
24 and it's right from - - -

25 JUDGE STEIN: Doesn't that go contrary to the

1 whole policy?

2 MR. TEXIDO: Well, no. Because I think the  
3 policy reasons in Wilkins were very fact specific, and they  
4 were limited to the unique circumstances of that case. In  
5 that case - - -

6 JUDGE STEIN: Is that the policy reasons of CPL  
7 190.75?

8 MR. TEXIDO: Right. And I don't see how the  
9 People presenting a murder case after only asking to  
10 consider a burglary in any way goes against the policy in  
11 the CPL - - -

12 JUDGE STEIN: No. No. That's not what I'm - - -  
13 I'm suggesting that if you had put in all of your proof of  
14 murder but never charged the grand jury with - - - with the  
15 murder, only charged them with the burglary. That's my  
16 question.

17 MR. TEXIDO: Yes. I still think even under  
18 190.75(3), the plain language, and under Wilkins, that the  
19 People would be allowed to do that without permission. And  
20 - - -

21 JUDGE WILSON: So is the policy behind the  
22 statute to prevent grand jury shopping? Is that fair?

23 MR. TEXIDO: Yes. It is, I believe.

24 JUDGE WILSON: Okay.

25 MR. TEXIDO: And when - - - there is a lot less

1 of a risk of that when the prosecutor actually asks the  
2 grand jury to vote on a charge. And here, parenthetically,  
3 the grand jury unanimously voted to indict on the burglary  
4 count. There was no indication that the first grand jury  
5 was in any way looking at the People's case in - with any  
6 form of skepticism. And in Wilkins, the record was replete  
7 with that, and this court said under these unique  
8 circumstances, it was tantamount to a dismissal. The court  
9 also said in Wilkins, and this is a quote, "Where a  
10 particular charge has not been presented to a grand jury  
11 considering another charge, the first charge could not be  
12 considered dismissed. So even under Wilkins own plain  
13 language where - - - in your hypothetical, Your Honor,  
14 where the court was not presented with the - - - the law  
15 surrounding the murder charge and asked to consider that,  
16 the People would later be able to go in and present that.

17 JUDGE RIVERA: But that's not forum shopping  
18 because what? You're presenting the evidence. It's not  
19 going the way you want so you don't submit the charge?

20 MR. TEXIDO: Well, the - - - in the hypothetical,  
21 the People have submitted a charge, and it's the burglary  
22 charge.

23 JUDGE RIVERA: You submit a different charge.

24 MR. TEXIDO: Right. I think - - -

25 JUDGE RIVERA: This is what I'm saying.

1 MR. TEXIDO: Right. I think it's a lot less of a  
2 - - -

3 JUDGE RIVERA: You're presenting the evidence.

4 MR. TEXIDO: Right.

5 JUDGE RIVERA: But something - - - the prosecutor  
6 determines this may not go as I had hoped and then doesn't  
7 submit the charge. Why isn't that - - - why isn't that  
8 grand jury shopping?

9 MR. TEXIDO: Well, it's a lot less of a risk of  
10 grand jury shopping when you're not talking about the  
11 complete withdrawal of a case because it would take quite a  
12 bit of, I guess, planning and quite a bit of manipulation  
13 for a prosecutor to say, okay, well, I'm going to present  
14 this charge because I think they might indict on this one.  
15 But they're not going to indict on this other charge. The  
16 - - - if the grand jury is a noncompliant grand jury or - -  
17 - or whatever the language was from Wilkins, I don't think  
18 they're going to indict on any charge. And so I think  
19 there's a lot lower of a risk of grand jury shopping. And  
20 the other reason, in Wilkins the whole reason - - -

21 JUDGE RIVERA: Well, the defendant testifies and  
22 - - - and seems quite believable and persuasive. He says,  
23 yeah. I may have - - - maybe says something that  
24 inculcates him, in this case him, on one charge but not on  
25 the murder.

1 MR. TEXIDO: Right. Well - - -

2 JUDGE RIVERA: There's nothing else to connect  
3 him.

4 MR. TEXIDO: Requiring permission in that  
5 situation doesn't in any way protect the defendant's right  
6 to - - - to testify again in a future grand jury  
7 proceeding. It's - - - it's a policy that's not - - - it  
8 doesn't fit the harm that the court would looking to  
9 prevent because the People could go gather some more  
10 additional evidence, make an ex parte application, and  
11 that's what 190.75 applications are.

12 JUDGE FEINMAN: But let me give you this  
13 hypothetical. Suppose you have an incident that occurs and  
14 it involves an incident of domestic violence but there are  
15 other charges that are also uncovered in the course of the  
16 processing of - - - of this arrest such as he has drugs on  
17 him. I'm making the defendant a male and let's assume the  
18 victim is female for this hypothetical. And, you know,  
19 they are serious enough injuries that it's felony level so  
20 it's being presented to the grand jury. And you know what?  
21 They never - - - the victim never tells you that she's  
22 going to end up recanting in front of the grand jury. And  
23 then recants in front of the grand jury and says, you know,  
24 he didn't hit me. He didn't swing a knife at me, or  
25 whatever, you know, it may be. You know, you have enough

1 evidence of - - - in front because you put your police  
2 officer who recovered the drugs and you vote out the drug  
3 charge and you chose not to present the DV charges at that  
4 point to the grand jury because now you have a witness who  
5 went and flipped on you. What happens then?

6 MR. TEXIDO: I think in that case it - - - under  
7 Wilkins and under the other cases, which hopefully I'll get  
8 to, that would not be considered a dismissal of those  
9 counts. Wilkins was very limited, and it was when the - -  
10 - the grand jury doesn't dispose of a manner - - - of a  
11 case in a manner consistent with CPL 190.60, then it can be  
12 considered a dismissal. But in the case - - - in the  
13 hypothetical that I'm being presented with, the grand jury  
14 is disposing of the case in a manner consistent with CPL  
15 190.60 by - - - by voting to indict on the only count  
16 they're being asked to decide on.

17 JUDGE FEINMAN: So in - - - in other words it  
18 comes back to as long as they vote out one charge, that's  
19 enough and - - -

20 MR. TEXIDO: I think that's true.

21 JUDGE FEINMAN: - - - that's the ironclad rule.  
22 It doesn't matter how much evidence you were intending to  
23 put in or you could have put in or you did put in?

24 MR. TEXIDO: I think - - - I think that's  
25 correct, Your Honor, and I think this court in Cantwell

1 held as much. And I want to talk about Cantwell for a  
2 second. In that case, the trial court - - - the grand jury  
3 no-billed the charges. And the - - - the trial court  
4 ordered the People to submit the lesser included offenses.  
5 And - - - and that's under 190.75(3), too, and it's the  
6 same standard for whether the trial court can order it or  
7 whether the People need to seek permission.

8 And what this court said is: "Because the grand  
9 jury disposed of the case in a manner authorized by CPL  
10 190.60, that 190.75(3) only applies to counts that were  
11 actually considered by the grand jury." So not the lesser  
12 included offenses. So in that case, clearly, the grand  
13 jury heard evidence of the lesser included offenses because  
14 they heard evidence of the greater offenses, but this court  
15 held that 190.75(3) doesn't apply because the grand jury  
16 wasn't actually instructed on the law surrounding those  
17 counts and didn't actually consider it.

18 JUDGE STEIN: But there - - - in that situation  
19 there would be no reason to think that the DA was holding  
20 something back or not - - - you know, not presenting a  
21 charge because he or she didn't think that that grand jury  
22 was going to indict because it was subsumed completely  
23 within the greater charges. So as far as the policy is  
24 concerned, that case is just, it seems to me, to be  
25 completely distinguishable.

1 MR. TEXIDO: Well, I do - - - I would - - - if  
2 we're talking policy I'd like to talk quickly about  
3 superseding indictments because it's clear that if the  
4 grand jury considers a certain charge, the People can go in  
5 before plea or trial and supersede that indictment, and  
6 there's no requirement that they get permission. This  
7 court has held that explicitly. Now - - -

8 JUDGE GARCIA: Do you have to go to a different  
9 grand jury?

10 MR. TEXIDO: You can. This court in Cade said -  
11 - -

12 JUDGE GARCIA: I mean if this grand jury expired  
13 you can go to a different one?

14 MR. TEXIDO: Right. In Cade this court said:  
15 "If the grand jury has voted favorably on the charges, the  
16 district attorney is at liberty to resubmit to the same  
17 grand jury" or, quote, "To an entirely brand new grand jury  
18 without court approval." And it's - - -

19 JUDGE GARCIA: But in that case, as I recall the  
20 grand jury practice in federal, you have to resubmit  
21 everything you put in the first grand jury.

22 MR. TEXIDO: If it's a new grand jury. Yes.

23 JUDGE GARCIA: Right.

24 MR. TEXIDO: The People do.

25 JUDGE GARCIA: So that's a little bit different.

1 MR. TEXIDO: Right. And I think that - - -  
2 that's also a reason why when you have the grand jury vote  
3 on - - - on one count that it's less of a concern of forum  
4 shopping by the prosecutor because prosecutors don't want  
5 to present full cases to multiple grand juries. I think  
6 that prevents the harm in and of itself.

7 CHIEF JUDGE DIFIORE: Mr. Texido, when I inquired  
8 of your colleague as to whether or not he knew if the  
9 courts below had the grand jury - - - full grand jury  
10 transcript, he said he believed so. Do you know for  
11 certain on that?

12 MR. TEXIDO: I know for certain that the  
13 Appellate Division did, and I believe also that the trial  
14 court did, as well.

15 CHIEF JUDGE DIFIORE: Thank you.

16 MR. TEXIDO: And just briefly, I see my time is  
17 up, but I would say even if the court does not rule in my  
18 favor on - - - on the arguments, the legal arguments, I was  
19 making, looking at the facts and circumstances of this  
20 case, the grand jury was not presented sufficient evidence  
21 of a murder. There was no ME, medical examiner; no cause  
22 of death; nothing to link this defendant to a murder. So  
23 it can't be said that the grand jury considered under  
24 Wilkins the robbery or murder counts. Thank you, Your  
25 Honors.

1 CHIEF JUDGE DIFIORE: Thank you, counsel.

2 Counsel.

3 MR. LUMLEY: Thank you, Your Honor.

4 CHIEF JUDGE DIFIORE: You're welcome.

5 MR. LUMLEY: What I'd just like to point out is  
6 that it's clear throughout all the case law that - - - that  
7 is directed towards this issue that it - - - it depends on  
8 the facts and circumstances of the underlying case. It's a  
9 - - - it's a very strong indication that it can go one way  
10 or the other.

11 JUDGE GARCIA: But doesn't that point out a  
12 problem here which is Wilkins says this is the equivalent  
13 of a dismissal essentially by getting inside a prosecutor's  
14 head. In that case, it's fairly straightforward because no  
15 charge is presented. It gets harder to do that as the  
16 facts and circumstances change but that's what the court's  
17 really being asked to do. Why wasn't a murder charge  
18 presented and a burglary charge? That's a lot harder than  
19 you made your whole presentation, you got up to the point  
20 where you would submit a proposed indictment and then you  
21 say never mind. And is that really the role of any court  
22 to be doing that?

23 MR. LUMLEY: The biggest concern I - - - I  
24 believe that exists in this case is the fact that the  
25 defendant did testify in his own. For whatever reason, he

1 - - - he was questioned with - - - as I stated numerous  
2 times. He - - - he was questioned directly with respect to  
3 this murder. That grand jury heard that evidence. It - -  
4 - the DA, for whatever reason, decided not to ask them to  
5 consider that charge. I believe that something happened,  
6 maybe they - - - he felt that that defendant was  
7 believable, but when he re-presented that - - - that same  
8 issue to the second grand jury, the defendant wasn't  
9 afforded an opportunity to be present. There was different  
10 evidence that was presented in a very limited scope with  
11 respect to - - -

12 CHIEF JUDGE DIFIORE: Did he have a right to be  
13 present at that second grand - - - to - - - to notice of  
14 present the grand jury proceedings at - - - on that second  
15 grand jury?

16 MR. LUMLEY: He wasn't held on a criminal  
17 complaint at that time. However, I believe that he should  
18 have had an inherent right to be present, Your Honor.

19 CHIEF JUDGE DIFIORE: But is there any statutory  
20 authority for that?

21 MR. LUMLEY: There - - - there is lower case law  
22 on that. That's at - - - that issue's never specifically  
23 been decided as far as on where - - - but there - - - there  
24 is a case that suggests that a defendant who has previously  
25 testified should be afforded that opportunity again. And I

1           - - - I believe that that was fundamentally fair for him to  
2           be able to do that, especially given the circumstance that  
3           this is being re-presented a second time to another grand  
4           jury that - - - that's not hearing his testimony. And - -  
5           - and there's this issue of a - - - of another witness that  
6           comes out of nowhere, and that's the only additional  
7           evidence as far as I'm aware.

8                           CHIEF JUDGE DIFIORE: Thank you, counsel.

9                           MR. LUMLEY: Thank you.

10                           (Court is adjourned)

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