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COURT OF APPEALS

STATE OF NEW YORK

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PEOPLE,

Respondent,

-against-

No. 87

PERRY C. GRIGGS,

Appellant.

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20 Eagle Street  
Albany, New York 12207  
May 03, 2016

Before:

CHIEF JUDGE JANET DIFIORE  
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM  
ASSOCIATE JUDGE LESLIE E. STEIN  
ASSOCIATE JUDGE MICHAEL J. GARCIA

Appearances:

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Official Court Transcriber

1 CHIEF JUDGE DIFIORE: Next on the calendar  
2 is number 87, People v. Perry C. Griggs.

3 MR. WILLIAMS: Good afternoon, Your Honors,  
4 Alan Williams of Legal Aid for Mr. Griggs. May I  
5 please reserve two minutes for rebuttal, Your Honor?

6 CHIEF JUDGE DIFIORE: You may.

7 MR. WILLIAMS: Chief Judge DiFiore, thank  
8 you, and may it please the court.

9 What happened in the proceedings below should  
10 not be tolerated. First, the prosecution, having done so  
11 much to deny Mr. Griggs fair process, the prosecution  
12 should not be permitted to prevail. And second, defense  
13 counsel, having done so little for his client, at an  
14 important stage in the proceedings, he should not be given  
15 even the mildest compliment of a ruling that his  
16 performance met professional expectations.

17 The prosecutor - - -

18 JUDGE STEIN: Why - - - why shouldn't the  
19 defendant have to preserve these claims? I mean, you  
20 know, they are - - - they are significant claims.

21 MR. WILLIAMS: Well, with respect to the  
22 ineffective assistance claim - - -

23 JUDGE STEIN: Well, let's - - - no, let's  
24 talk about the substantive claims first.

25 MR. WILLIAMS: Certainly, Your Honor.

1                   JUDGE STEIN: That was the direction of my  
2 question.

3                   MR. WILLIAMS: Oh, certainly, Your Honor.

4                   With respect to the issue regarding Jasmine  
5 Greer (ph.), the prosecution misrepresented to the  
6 defense that the person, the defense had requested to  
7 have testify - - -

8                   JUDGE STEIN: I mean, it appears that  
9 defense counsel had some inkling or some knowledge  
10 about that, and that there was some discussion being  
11 had, and then - - - and then counsel was relieved.

12                  MR. WILLIAMS: There - - - there was some  
13 discussion about the issue. I would note, Your  
14 Honor, that in the first place, the record does not  
15 indicate that the prosecution ever in fact got back  
16 to the defense, with respect to this, when Mr. Griggs  
17 elected his rights to represent himself.

18                  The issue that he raised was specifically  
19 regarding the grand jury instructions, one of those  
20 two issues, and not the other. In the prosecution  
21 statement that was taken from Greer, there was - - -  
22 and given to the defense on the first day of jury  
23 selection, there was no discussion whatsoever about  
24 this grand jury matter, the prosecution having  
25 misrepresented to the defense that this person

1 testified before the grand jury.

2 CHIEF JUDGE DIFIORE: And what - - - once  
3 counsel was relieved, what prevented the bringing of  
4 that motion?

5 MR. WILLIAMS: Well, for one thing, the  
6 motion - - - there isn't any indication that the  
7 defense was in fact aware of that issue, because the  
8 defense was not told, as far as the record indicates,  
9 that - - -

10 CHIEF JUDGE DIFIORE: Was the defendant  
11 present at the discussions?

12 MR. WILLIAMS: Well, he was party to  
13 discussions of the contents of which the record does  
14 not disclose. It was mentioned on pages 84 and 85 of  
15 the appendix that defense counsel, the prosecutor,  
16 and Mr. Griggs were present for discussions regarding  
17 the testimony of Jasmine Greer and the cautionary  
18 instruction, if any.

19 Now, it's possible that the phrase of the  
20 testimony of Jasmine Greer indicates counsel may have  
21 still thought, in fact she testified, maybe not, it does  
22 seem that at least this issue is at least arguably flagged  
23 in some way, which certainly is why defense counsel should  
24 have raised it.

25 But specifically with regard to preservation.

1 If the People, having violated the requirement that they  
2 notified the grand jury of the request to have this person  
3 testify, and then compounding that problem - - -

4 JUDGE ABDUS-SALAAM: Well, is there  
5 anything in the statute that says how that should be  
6 communicated, or by whom?

7 MR. WILLIAMS: The statute says that the  
8 defendant may request either orally in wri - - - or  
9 in writing. But it cannot be that because the  
10 statute provides for that, therefore it was, as has  
11 been suggested in the People's brief, Mr. Griggs'  
12 burden, when he made his appearance before the grand  
13 jury to say, by the way, grand jurors, I'm repeating  
14 the request that was made in writing.

15 And the reason is that there is no way to  
16 apply the statute such that the means of notifying  
17 the - - - of the req - - - of submitting the request  
18 to have someone testify, varies depending on whether  
19 or not the defendant exercises the statutory right to  
20 testify. And the People have conceded, both at the  
21 Appellate Division and in this court, that the  
22 prosecution erred by failing to convey to the grand  
23 jury the request to have Greer testify.

24 JUDGE STEIN: Have we ever dispensed that  
25 the requirement of preservation in a grand jury - - -

1 MR. WILLIAMS: I am not aware - - -

2 JUDGE STEIN: - - - affect the matter?

3 MR. WILLIAMS: I am not aware that this  
4 court ever has done so, however, because of the very  
5 unique and fundamentally serious aspects of this  
6 particular issue, this should not be treated as any  
7 ordinary case. It is so important to a defendant to  
8 be able to have somebody considered to testify before  
9 the grand jury on his or her beha - - -

10 JUDGE STEIN: Well, but didn't we recently  
11 say that the defendant, him or herself, doesn't have  
12 the right to testify before the grand jury, that  
13 that's a decision that can be made by counsel?

14 MR. WILLIAMS: Yes, in People v. Hogan - -  
15 -

16 JUDGE STEIN: So if - - - so if we held  
17 that, why - - - why would this be a greater right  
18 than that?

19 MR. WILLIAMS: Because the importance of  
20 having somebody who is not the interested party is  
21 something that is considerably more valuable than the  
22 defendant saying to the grand jury, I, who may go to  
23 prison - - -

24 JUDGE STEIN: But here, Greer was mentioned  
25 in the grand jury proceedings. So certainly, if the

1 grand jury had wanted to hear her testimony, they  
2 could have requested that themselves.

3 MR. WILLIAMS: Absolutely. But I would  
4 make a couple of points about that. The first is  
5 that I am not aware that grand juries are  
6 particularly activists in trying to say, okay, this  
7 other person, let's hear from this person.

8 But regardless of that, the prosecution is  
9 required, absolutely required to notify the grand  
10 jury of that request. And as the People conceded,  
11 they erred by not engaging, by not conveying that  
12 request to the grand jury. And then - - -

13 JUDGE GARCIA: And is that a - - - is that  
14 a per se error? I mean, do we look at what she - - -  
15 on the record it indicates she would have said?

16 MR. WILLIAMS: It is per se error, I  
17 believe, with regard to the issue of whether it is  
18 per se, whether a per se - - -

19 JUDGE GARCIA: Right.

20 MR. WILLIAMS: - - - warrants dismissal of  
21 the indictment. I would say a couple of things about  
22 that. The first, yes, and in the alternative, even  
23 if not, it is a cumulative impropriety issue.  
24 Because it's not just, in the first place, you know,  
25 the Appellate Division said, well, what was her

1 value, she wasn't there. That's the point, Hulett  
2 said she is right there when the gun is pulled. So  
3 this would be something that would affect the grand  
4 jury's determination of the credibility of the  
5 witness.

6 JUDGE GARCIA: As I understand that, and we  
7 put it aside, she says I got out of the car and I  
8 didn't see anything, twice, but putting that aside,  
9 yeah - - - so you want us to look at that in  
10 conjunction with the other two errors, which are  
11 clearly unreserved. I mean, he has defense counsel  
12 in the room with him when he is testifying in the  
13 grand jury, and he's shackled, and his questioning is  
14 going on, right?

15 MR. WILLIAMS: Yes. Which, all the more  
16 makes it incredibly inexcusable that counsel did not  
17 raise any of these issues.

18 JUDGE GARCIA: How do we look at the  
19 ineffective assistance claim through kind of the lens  
20 of the fact that he, one, then says, I want to go pro  
21 se, he gets another lawyer first, and he does go pro  
22 se, so which counsel are we considering as  
23 ineffective in that sequence?

24 MR. WILLIAMS: In particular, the attorney  
25 who represented him at the omnibus motion stage, it

1 really would not make all that much of a difference  
2 whether or not the second attorney is added, having  
3 served so briefly.

4 But the point is that, the indictment would  
5 have been dismissed before he even exercises the  
6 right to go pro se, if only counsel had made this - -  
7 - counsel took eight and a half months to file this  
8 short, boilerplate, lousy omnibus motion, that raises  
9 none of the good issues, raises an issue that is  
10 absurd, a Wade issue, in a case where the defendant's  
11 testimony already took Wade out of the case  
12 completely.

13 How did it take - - - how did it take eight  
14 and a half months to file a motion of this sort? The  
15 indictment would have been dismissed had counsel made  
16 that motion, and if it hadn't been, it would at least  
17 have guaranteed Mr. Griggs appellate review of the  
18 issue. There would have been - - - he would not have  
19 had to go to trial with this horrific defense that he  
20 performed on his own behalf, and aside from that, he  
21 would have at least been able to obtain review of the  
22 problems in the grand jury proceeding.

23 JUDGE GARCIA: Do you know - - - is it  
24 anywhere in the record, was there a security officer  
25 in the grand jury?

1 MR. WILLIAMS: I - - - I don't recall, Your  
2 Honor, but the record does indicate that Mr. Griggs  
3 was shackled when he testified, and that the  
4 cautionary instruction indicated that his condition  
5 was relevant to the credibility assessment.

6 JUDGE GARCIA: That was - - - the  
7 cautionary instruction said it was relevant to the  
8 credibility?

9 MR. WILLIAMS: Because what the cautionary  
10 instruction said was that the custodial status should  
11 not be considered for propensity or anything else  
12 beyond the fact that he testified, and it's your duty  
13 to evaluate his credibility.

14 Not only - - - I apologize, Your Honor, not  
15 only does that not cure the taint of having him  
16 appear in a robbery case, in shackles before the  
17 grand jury, it actually suggests to the grand jury  
18 affirmatively, this affects whether you should  
19 believe that he is telling the truth.

20 CHIEF JUDGE DIFIORE: Thank you, counsel.

21 MR. WILLIAMS: Thank you.

22 CHIEF JUDGE DIFIORE: Counsel, what's the  
23 procedure that's to be followed when a defendant is  
24 required to be shackled before a grand jury?

25 MR. HILLERY: The People are required, Your

1 Honor - - - I'm sorry, may it please the court,  
2 Michael Hillery for the People.

3 The People are required to set forth a rational  
4 basis on the record to justify a defendant's shackled  
5 appearance before the grand jury. And we would concede  
6 that there is no indication in this record that that  
7 occurred. So defendant was improperly - - -

8 JUDGE ABDUS-SALAAM: How often does it  
9 occur - - - how often do defendants or witnesses who  
10 are potential defendants appear shackled before grand  
11 juries in your part of the - - -

12 MR. HILLERY: I'm sorry, Your Honor's  
13 question how often do they appear shackled?

14 JUDGE ABDUS-SALAAM: Yeah, is this a - - -  
15 is this a common occurrence?

16 MR. HILLERY: I really don't know how to  
17 answer that question, Your Honor. I know that we've  
18 had cases in Erie County, I mean this is certainly  
19 nothing that appears in the record, but we have that  
20 - - -

21 JUDGE ABDUS-SALAAM: I ask because the  
22 grand jurors didn't seem to react to his shackling,  
23 as if this might be a regular kind of occurrence.

24 MR. HILLERY: Well, and I think, Your  
25 Honor, that may be a testament, at least partially,

1 to the cautionary instruction that was delivered to  
2 the grand jurors as to how they were to approach the  
3 issue of his being shackled before it.

4 CHIEF JUDGE DIFIORE: Was the supervising  
5 judge, the judge who supervised the grand jury, was  
6 he or she consulted?

7 MR. HILLERY: Concerning the shackled  
8 appearance?

9 CHIEF JUDGE DIFIORE: Um-hum.

10 MR. HILLERY: I believe it was after the  
11 fact, Your Honor. I don't believe it was done as it  
12 was supposed to have been done here.

13 CHIEF JUDGE DIFIORE: So who made that  
14 determination that this defendant needed to be  
15 shackled before that grand jury panel?

16 MR. HILLERY: Well, I believe that would  
17 have been - - - I know that he had a pending charge.  
18 So it would have been made by authorities in  
19 conjunction, or with the knowledge of our office, and  
20 nothing was done to establish why on the record for a  
21 judge.

22 JUDGE PIGOTT: As I think we discussed when  
23 this leave of application came up, this is - - - this  
24 - - - when you look at the facts of this, when Mr.  
25 Hulett - - - I mean, the defendant paid him to be a

1 cabdriver and to drive a certain distance. Hulett  
2 decides he is seven minutes short or something, and  
3 now, the defendant's girlfriend has got a problem,  
4 and that leads to this thing.

5 The idea that this was a robbery, and the  
6 only one who says he had a gun was the cabby, raised  
7 questions in my mind. I thought there's a real  
8 question of fact here as to whether or not the guy  
9 just said I want my money back and took it. Which  
10 would make it kind of a breach of contract I suppose.

11 But given that, and I appreciate your  
12 candor in the fact that the cross-examination was  
13 inappropriate, he was shackled, he wanted his  
14 girlfriend to come and testify, which I thought would  
15 have been fairly significant in terms of exactly what  
16 happened; none of that happened, you concede that but  
17 you say it's unpreserved.

18 And I wondered, what - - - what do we then  
19 do? Does that mean that we can - - - a 440 would  
20 seem to be logical, but you've already conceded it  
21 all. And so I don't know where this goes. But it  
22 just seems to me at some point, you know, this  
23 gentleman didn't seem to get a pretty - - - get a  
24 fair shake.

25 MR. HILLERY: Your Honor, that actually

1 takes me to the prefatory remarks that I struggled to  
2 come up with in preparation for this oral argument,  
3 because I want to make it clear. I in no way intend  
4 to be an apologist for the errors, in particular the  
5 omission that Mr. Williams very artfully presented to  
6 this court, concerning the prosecution's failure to  
7 rightly handle the request by a defendant that a  
8 witness testify on his behalf before the grand jury.

9 These are omissions that I can't defend.

10 I would like to address the merits of these  
11 arguments, as the Appellate Division did with respect  
12 to two of those issues. Namely, the shackling of  
13 defendant before the grand jury, and the omission,  
14 with respect to the request by defendant to have a  
15 witness testify.

16 I don't want to hide from the merits of this.  
17 And with respect to those, I would say, and in particular  
18 Your Honors' concern about Ms. Greer's testimony and how  
19 that may have helped the defense at the grand jury stage.  
20 I think the circumstantial evidence is overwhelming that  
21 it would not have helped the defense.

22 I would note the fact that at trial, defendant  
23 did not call Ms. Greer to testify. So one questions the  
24 utility or value of her testimony in light of that fact  
25 alone.

1           But secondly, as Your Honor indicated earlier,  
2 she had given two statements. One in June of 2010, one in  
3 September of 2011. In both of those statements, she  
4 indicated that she departed the scene as the argument  
5 intensified between Mr. Hulett and defendant,  
6 demonstrating, acknowledging that she was not there for  
7 the entire encounter.

8           JUDGE ABDUS-SALAAM: So your position is,  
9 had she appeared in the grand jury, she would have  
10 been confronted with this material to impeach her,  
11 and it wouldn't have helped defendant.

12           MR. HILLERY: That is correct, Your Honor,  
13 yes.

14           So I think on the merits, I think it wouldn't  
15 have changed the result, had Greer testified; she could  
16 have hurt herself. Had she testified, I was there the  
17 whole time, she undercuts herself and, by extension,  
18 defendant, by virtue of her prior two statements.

19           If she said - - -

20           JUDGE PIGOTT: Well, I - - - I looked at  
21 some of that and thought, you know, we don't know  
22 what she heard and what was said. We don't, you  
23 know, she was - - - when she was there. In other  
24 words, did Greer just say - - - or Griggs just say,  
25 give me my money back, she's not - - - you didn't do

1           it, and that was it or - - - anyway, I did a lot of  
2           speculating.

3                       MR. HILLERY: Well, Your Honor, just taking  
4           these errors in totality, I would say that it's  
5           important, as this court indicated in People v.  
6           Thompson, to recognize the fundamental distinctions  
7           between grand jury proceedings and trials.

8                       Grand jury proceedings are not adversarial in  
9           nature; they are accusative. It's an investigatory body  
10          designed to establish preliminarily whether there is  
11          sufficient proof to justify the case going forward.

12                      That is the case here, it would have taken much  
13          more than this, I believe, given the instructions and  
14          given the balance of the prosecutions worked before the  
15          grand jury, to have overturned this result, especially  
16          post-conviction at this case.

17                      JUDGE RIVERA: Can I ask - - - I'd like to  
18          ask about the instruction. "Also when you observe  
19          the defendant, you did see that he was in custody.  
20          The same caution applies that should not go to any  
21          kind of propensity to commit any crime, or any kind  
22          of concern above and beyond the fact that he was  
23          testifying it. It's your duty to evaluate his  
24          testimony's credibility."

25                      What's - - - what's the point of that last

1 part, "Or any kind of concern above and beyond," and  
2 linking that to credibility?

3 MR. HILLERY: I think the concern that the  
4 prosecutor is trying to convey, and maybe it's  
5 unartful, Your Honor, but I think the general concern  
6 is, look, you see that he is shackled, don't allow  
7 this to weigh in your determinations, don't allow it  
8 to affect your calculus here. He is here to testify  
9 - - -

10 JUDGE RIVERA: But that second part seems  
11 to connect it directly to his credibility. And isn't  
12 before the grand jury, since Greer is not testifying,  
13 the whole issue turning on whether or not they  
14 believe his version or Hulett's version.

15 MR. HILLERY: And I think that's why - - -

16 JUDGE RIVERA: And when you're saying,  
17 okay, so maybe you don't have to look at the fact  
18 that he is shackled to show propensity, but then you  
19 have got this second part that says, above and beyond  
20 the fact that he is testifying, and you have to  
21 figure out credibility.

22 I don't understand the point of that, other  
23 than perhaps to undercut his credibility, which is  
24 what - - - what really is - - - the whole case  
25 depends on before the grand jury anyway.

1 MR. HILLERY: And I think that's an example  
2 of how I guess a cautionary instruction can be  
3 interpreted as detrimental if it's not properly  
4 worded. I think that the jury got it here, and I  
5 think that can be seen by virtue of the questions  
6 that the jurors asked.

7 JUDGE RIVERA: Um-hum.

8 MR. HILLERY: Especially during Mr.  
9 Hulett's testimony, they asked, for example, about  
10 whether or not Ms. Greer was present the whole time,  
11 they asked elsewhere about the 9-1-1 tape, whether  
12 the gun was found.

13 JUDGE RIVERA: But isn't the point that  
14 seeing someone shackled has a significant impact on  
15 the observer, that perhaps is not so obvious in these  
16 questions that they're asking, but it has immediate  
17 impact, and this - - - this particular instruction is  
18 connecting it to credibility, which is of course the  
19 obvious type of impact; you just can't trust this  
20 person, they are dangerous, and so forth.

21 MR. HILLERY: Well, she's - - - I - - -

22 JUDGE RIVERA: Let me ask this. When - - -  
23 when would it be error when someone comes in  
24 shackled?

25 MR. HILLERY: Well, if there is no

1 instruction. No rational basis, no instruction, I  
2 think that's a problem, I think that's - - - I think  
3 the result there - - -

4 JUDGE RIVERA: So no instruction versus a -  
5 - - perhaps instruction that points to credibility is  
6 really what's the error.

7 MR. HILLERY: There is no - - - I don't  
8 believe there is particular litany that the  
9 prosecutor is supposed to deliver in a case where  
10 there is a, you know, a shackled defendant. But the  
11 general purpose of it is, is to ensure as much as  
12 possible that the juror will not be swayed by his  
13 appearance, and will not view it as a propensity they  
14 committed a particular crime, and indict before  
15 they've heard any proof.

16 JUDGE RIVERA: And what would dis - - -  
17 disincentivize an ADA from doing this again, if all  
18 they have to do is get up and give an instruction,  
19 and this one is not a very good one.

20 MR. HILLERY: Oh, I agree, Your Honor, that  
21 the disincentive here is not what it ought to be if,  
22 you know, if a defendant can appear shackled and  
23 there is no rational basis. I think, however, that  
24 the court has to look at the impact of the error.

25 JUDGE PIGOTT: Well, you look at that with

1 the - - - the question that she said, you are under  
2 indictment already, aren't you? Isn't that what the  
3 prosecutor asked when he was testifying?

4 MR. HILLERY: I'm sorry, Your Honor.

5 JUDGE PIGOTT: Didn't the - - - didn't the  
6 prosecutor ask if he was already under indictment  
7 when he was testifying in front of the grand jury?

8 MR. HILLERY: I don't think I'm  
9 understanding your question. He was - - - he had a  
10 pending case when he was testifying - - - testifying  
11 before the grand jury, that was - - -

12 JUDGE PIGOTT: And didn't she bring that  
13 out, that you are already under indictment?

14 MR. HILLERY: Oh, I'm sorry, the cross-  
15 examination, yes, Your Honor. That was a breach of  
16 the attorney-client relationship, however, as we  
17 argue in our brief, it didn't go to the substance of  
18 the crime, it didn't mention the crime, and certainly  
19 wasn't intended or didn't appear intended to illicit  
20 facts that could have been used in a subsequent  
21 prosecution for another crime.

22 So, yes, it was improper; we acknowledge  
23 that it shouldn't have happened. But, you know, it  
24 wasn't a preserved argument, number one, and number  
25 two, the impact of it, given the proceedings as a

1 whole, I think is marginal, if there was one.

2 JUDGE RIVERA: What else would the lawyer  
3 have had to have done for this to be ineffective? I  
4 mean, these are three significant errors. It might  
5 very well have resulted in the - - - in no  
6 indictment. So what - - - what else, in your mind,  
7 would this lawyer have had to have done? What gets  
8 you passed the hump that this is actually  
9 infectiveness?

10 MR. HILLERY: Well, I think, again, taken  
11 as a whole, for example, the shackled appearance. No  
12 cautionary instruction, I mean, there is some dispute  
13 - - - legitimate dispute about whether that was the  
14 best possible instruction to give, by taking away the  
15 instruction, clearly there's a problem.

16 With respect to the breaching of the  
17 attorney-client relationship, had there been  
18 questioning concerning the substance of the crime,  
19 and had the questioning been prolonged, it wasn't  
20 here, it was brief.

21 JUDGE RIVERA: But aren't you doing exactly  
22 what our precedent says you don't do, which is  
23 caveating each of these particular errors, as opposed  
24 to looking at the totality of the representation.  
25 You've got these kinds of significant errors in their

1           totality; isn't that ineffectiveness?

2                   MR. HILLERY:   Totality meaning the totality  
3           of the grand jury proceedings, whether or not viewed  
4           as a whole, there is a pervasive - - -

5                   JUDGE RIVERA:   Representation with respect  
6           to the grand jury proceedings, I agree with you  
7           there.

8                   MR. HILLERY:   Right, I don't think, Your  
9           Honor, and I think the standard here is with respect  
10          to the misconduct, whether it shows willful bias as  
11          pervasive, it clouds the entire proceedings.   Now  
12          there were three errors, I don't - - - I can't give a  
13          number as to how many errors would be the tipping  
14          point, but when you look at these errors, in  
15          combination with the fact that defendant testified,  
16          the prosecutor really let defendant go on at length,  
17          showed due respect in regard for the defendant's  
18          right to testify and present his case, gave a  
19          cautionary instruction with regard to the shackling.

20                   The prosecutor here expressed or indicated  
21          a concern for the integrity of the proceedings.   Not  
22          reflected in those particular errors perhaps, but as  
23          a whole, the prosecutor I think did well enough here.

24                   CHIEF JUDGE DIFIORE:   Thank you, counsel.

25                   MR. HILLERY:   Thank you.

1 CHIEF JUDGE DIFIORE: Counsel.

2 MR. WILLIAMS: Thank you, Your Honor.

3 A few quick points in rebuttal. It's up to the  
4 grand jury to decide what the weight of the various  
5 credibility issues with the witnesses would have been.  
6 Yes, it is necessary for us to discuss what the grand jury  
7 could have rationally decided based on this, that, and the  
8 other aspects of the witness's testimony. It's up to them  
9 ultimately to decide whether or not it's credible.

10 We cannot say that the combined errors, the  
11 multiple errors in their totality, did not even pose a  
12 risk of prejudice to the defense. And that's all that  
13 need be shown, that there be a risk of prejudice in order  
14 to warrant dismissal.

15 With regards to the shackling issue and the  
16 Greer issue, I would have to say that a 440 would not be  
17 possible at this stage because, under CPL 440., I think  
18 it's 10 (2a), if it's decided on the merits by the - - -  
19 on appeal against the defendant, then it becomes barred  
20 from that. I really think that for my client, this is it.

21 With regard to - - - the grand jury asked Mr.  
22 Hulett questions that, it is submitted, did indicate some  
23 question about his credibility. They were asking - - -  
24 the grand - - - the prosecutor conveyed questions saying,  
25 "The only time that you discussed that there wasn't enough

1 time left, that there was going to be an additional  
2 charge, when it was just you and her on the return to  
3 where she wanted to go? Correct." And that's two  
4 questions on page 28 of the appendix.

5 They are understanding that this is not - - -  
6 apart from the burglary conviction, this is somebody who  
7 is of questionable honesty.

8 With regard to the question about the pending  
9 indictment - - - oh, with regard to Mr. Griggs not calling  
10 Greer to testify at trial, a couple of points about that.

11 The issue is whether she in fact would have  
12 helped the defense, and furthermore, he couldn't de-infect  
13 the grand - - - disinfect the grand jury proceeding's  
14 taint by not calling her at trial. We have statements;  
15 they indicate that she would have in fact provided some  
16 value to the defense. If he did not accept that, he was  
17 wrong.

18 Now, it may very well have been that the later  
19 of the two statements dissuaded him, thinking maybe he was  
20 thinking that's, well, she turns out not to be so good, in  
21 a statement fourteen months and change, after her original  
22 statement.

23 JUDGE PIGOTT: Was he pro se the whole time  
24 during the trial?

25 MR. WILLIAMS: No, he was pro se starting

1 August 2011. At the time that the omnibus motion was  
2 submitted in April of 2011 - - -

3 JUDGE PIGOTT: No, I mean at the trial.

4 MR. WILLIAMS: Oh, I'm sorry, at trial, I  
5 apologize. He was pro se; he had a legal adviser  
6 only.

7 CHIEF JUDGE DIFIORE: Thank you, counsel.

8 MR. WILLIAMS: Thank you, Your Honor.

9 (Court is adjourned)

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I, Meir Sabbah, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Perry C. Griggs, No. 87 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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