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COURT OF APPEALS

STATE OF NEW YORK

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THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

No. 155

JOHN G. GLYNN,

Appellant.

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20 Eagle Street  
Albany, New York 12207  
September 9, 2013

Before:

CHIEF JUDGE JONATHAN LIPPMAN  
ASSOCIATE JUDGE VICTORIA A. GRAFFEO  
ASSOCIATE JUDGE SUSAN PHILLIPS READ  
ASSOCIATE JUDGE ROBERT S. SMITH  
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM

Appearances:

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Sharona Shapiro  
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: 155, People v. Glynn.  
2 Counselor, you want any rebuttal time?

3 MR. MULLIN: One minute would be fine, Your  
4 Honor.

5 CHIEF JUDGE LIPPMAN: Okay. Go ahead.

6 MR. MULLIN: Paul Mullin from the Sugarman  
7 Law Firm in Syracuse, New York, on behalf of the  
8 appellant.

9 CHIEF JUDGE LIPPMAN: Counselor, do you  
10 agree that the fact that the judge may have  
11 represented defendant in the past, or even prosecuted  
12 him, does not, in and of itself, disqualify the  
13 judge?

14 MR. MULLIN: I think it starts the process,  
15 Your Honor, for you to evaluate the behavior of the  
16 court in addressing - - -

17 JUDGE SMITH: Is that a yes to the Chief's  
18 question? You do agree - - -

19 MR. MULLIN: I - - -

20 JUDGE SMITH: - - - that, in and of itself,  
21 it's not enough?

22 MR. MULLIN: Each one, in and of  
23 themselves, I agree, does not.

24 CHIEF JUDGE LIPPMAN: So what would  
25 disqualify him? What is the - - - what do we have to

1 see, in this process that you're talking about, that  
2 would - - - in light of his past representation, what  
3 kind of conduct would he have to - - - a judge, he or  
4 she, what would they have to do that would disqualify  
5 them? What's the test?

6 MR. MULLIN: Well, I think the test - - -

7 CHIEF JUDGE LIPPMAN: That they show actual  
8 prejudice? What is it?

9 MR. MULLIN: I think the test has to be the  
10 totality of the record and an analysis of what the  
11 behavior or the activity of the trial court is.

12 JUDGE READ: And what would that be here?

13 MR. MULLIN: In - - -

14 JUDGE READ: What - - - how did he show  
15 himself to be biased in any way?

16 MR. MULLIN: Biased may be - - - may be a  
17 little strong, Your Honor. I think we're looking at  
18 a total picture of fairness for the judicial system.

19 CHIEF JUDGE LIPPMAN: What was unfair?

20 MR. MULLIN: The unfairness begins early on  
21 when the - - - it starts at the arraignment, it  
22 continues at - - - at the - - - the omnibus motion  
23 period and then at the Huntley hearing and then at  
24 the trial.

25 CHIEF JUDGE LIPPMAN: How so? If you had

1 to characterize the conduct of the judge, how so?

2 MR. MULLIN: I think it was best described  
3 by the defendant himself in the area of the  
4 discussion at the Huntley hearing when the trial  
5 court brings to the record the fact that he has  
6 outstanding support, the number of mothers that may  
7 be involved, and the fact that he still has one child  
8 that is receiving support.

9 CHIEF JUDGE LIPPMAN: How is that - - - how  
10 is that unfair, that he says that?

11 MR. MULLIN: Well, as the defendant - - -

12 CHIEF JUDGE LIPPMAN: The judge says that?

13 MR. MULLIN: As the defendant himself said,  
14 what does that have to do with my case before me?

15 JUDGE GRAFFEO: It was in the pre-sentence  
16 report, though. It wasn't from extraneous documents,  
17 right?

18 MR. MULLIN: It was not extraneous  
19 documents. It was from the - - - from the record, I  
20 agree, but - - -

21 CHIEF JUDGE LIPPMAN: You're not saying  
22 that the judge can't refer to the pre-sentence  
23 report?

24 MR. MULLIN: Not at all, Your Honor, but I  
25 think when - - -

1 CHIEF JUDGE LIPPMAN: You're basically  
2 saying tonal? Is that what you're saying, that - - -

3 MR. MULLIN: Well, if you want to talk - -  
4 -

5 CHIEF JUDGE LIPPMAN: - - - that by  
6 referring to it that, tonally, that's off in terms of  
7 fairness? In other words, what specifically is it  
8 here - - -

9 MR. MULLIN: Judge - - -

10 CHIEF JUDGE LIPPMAN: - - - that should  
11 make us overthrow this - - - overrule the - - -

12 MR. MULLIN: Judge, if you want to look at  
13 tonal - - -

14 CHIEF JUDGE LIPPMAN: Go ahead - - -

15 MR. MULLIN: - - - attitude - - -

16 CHIEF JUDGE LIPPMAN: - - - let's talk  
17 about tonal.

18 MR. MULLIN: It is - - - it is when he was  
19 discussing his - - - the trial court's prosecution -  
20 - - or strike that; let me start again - - - with the  
21 trial court's defense of the defendant. It was the  
22 discussion of the trial court's prosecution of the  
23 defendant, and the commentary that perhaps half the  
24 bar has represented you. You - - -

25 JUDGE ABDUS-SALAAM: Counsel, do you think

1           that either of your client's counsel had anything to  
2           do with the way he was treated?

3                       MR. MULLIN: Well, that - - - that occurred  
4           - - - that issue clearly comes to a head right before  
5           the trial begins, where the second counsel was  
6           attempting to assess what the plea offer was, what  
7           the plea was on the table. And I would suggest to  
8           you, at that time, there is more discussion about  
9           where the defendant may have been living at the time  
10          and whether assigned counsel was going to pay for it,  
11          than whether a disposition was on the table and  
12          whether the - - - the defendant would have an  
13          opportunity to offer a plea.

14                      JUDGE SMITH: When was the recusal motion  
15          made?

16                      MR. MULLIN: The recusal motion was made on  
17          the February 27th appearance, which was the  
18          appearance after the Huntley hearing, when there had  
19          been some discussion regarding the court's  
20          representation - - -

21                      JUDGE SMITH: It was - - - was that when  
22          the first lawyer was still in the case?

23                      MR. MULLIN: The first lawyer was still in  
24          the case, and when the first time that issue came  
25          out, clearly without - - -

1 JUDGE SMITH: Just stick with me for a  
2 minute.

3 MR. MULLIN: Sure.

4 JUDGE SMITH: Was the recusal motion ever  
5 renewed after that?

6 MR. MULLIN: It was - - - it was raised at  
7 that hearing, and then it was again brought up at the  
8 time the attorney was requesting to withdraw from the  
9 case.

10 JUDGE SMITH: So there were two - - -  
11 essentially, the client, or the attorney, rather - -  
12 - rather gently passing on the client's wishes, said,  
13 judge, you ought to step down. Did - - - although  
14 the second lawyer, who didn't seem to get along  
15 terribly well with the judge, does he ever say,  
16 judge, you ought to recuse yourself?

17 MR. MULLIN: I don't - - - in all candor,  
18 Your Honor, I don't think he did. But I don't think  
19 he had - - -

20 JUDGE SMITH: Okay. Then - - -

21 MR. MULLIN: - - - time - - -

22 JUDGE SMITH: - - - then my question is the  
23 obvious one, how can you rely on anything that  
24 happened after the new lawyer came in to support the  
25 recusal motion? If it was properly denied when it

1 was denied, don't you have to renew it, if you want  
2 to - - -

3 MR. MULLIN: I - - -

4 JUDGE SMITH: - - - get the guy recused?

5 MR. MULLIN: I think the - - - I think the  
6 trial court prevented a plea from being entered prior  
7 to trial.

8 JUDGE GRAFFEO: Well, he suppressed the  
9 statements after the Huntley hearing, correct?

10 MR. MULLIN: Some.

11 JUDGE GRAFFEO: So that - - - that had - -  
12 -

13 MR. MULLIN: And the - - -

14 JUDGE GRAFFEO: - - - that had to somewhat  
15 assist the defendant in his negotiating - - -

16 MR. MULLIN: And - - -

17 JUDGE GRAFFEO: - - - the plea bargain.

18 MR. MULLIN: - - - to stay with the  
19 football analogies that we started at the beginning  
20 of the day, the - - - the trial court even said, when  
21 they were discussing recusal, well, I - - - I did  
22 some good things for you. And I would suggest to  
23 you, Your Honor, that much like a referee, we  
24 shouldn't have an impartial judge being able to say,  
25 well, I helped you a little bit, so therefore I'm not

1           being unfair to you. I don't think that's  
2           appropriate, Your Honor.

3                         JUDGE SMITH: You may be right that that  
4           wasn't a very good argument against the recusal  
5           motion, but what's the argument in favor of it?

6                         MR. MULLIN: I'm sorry, Your Honor?

7                         JUDGE SMITH: Well, I understand your point  
8           that it doesn't defeat recusal for the judge to say,  
9           oh, I ruled - - - I've ruled in your favor once.  
10          Fair enough. But what's the - - - but why should he  
11          have recused himself? What shows that he was unfit  
12          to preside?

13                        MR. MULLIN: Your Honor, I think the  
14          repeated badgering of the defendant, all the way  
15          through to sentencing - - -

16                        JUDGE READ: And the badgering is - - -  
17          what do you call badgering? The - - - the mark in  
18          the CSR?

19                        MR. MULLIN: The discussion about how many  
20          kids he has by different mothers - - -

21                        JUDGE READ: There was - - - okay.

22                        MR. MULLIN: That even came out at  
23          sentencing.

24                        JUDGE READ: Okay. Anything else?

25                        MR. MULLIN: The - - - when second attorney

1 appears in the case, he appears on March 16th. The  
2 first appearance, all they discuss is the location or  
3 the lack of location of the defendant, not the  
4 representation, not the offer that's on the table,  
5 not whether the defendant is interested in - - -

6 JUDGE PIGOTT: Well, they did discuss it,  
7 because didn't the second attorney ask for a one-year  
8 sentence?

9 MR. MULLIN: There was a discussion - - -  
10 he didn't even have the right - - - at that time, I  
11 don't think he had the right offer that was on the  
12 table. And so at that point, there - - - there was  
13 no discussion - - - and I think when you review the  
14 record, I don't even think there's a situation where  
15 he said - - - the trial court said do you want to  
16 take the offer - - -

17 JUDGE PIGOTT: Look - - -

18 MR. MULLIN: - - - or not?

19 JUDGE PIGOTT: - - - it's hard to sort this  
20 out because, as I think you pointed out in your  
21 brief, the first lawyer actually criticizes his  
22 client in front of the judge - - -

23 MR. MULLIN: Absolutely, Your Honor.

24 JUDGE PIGOTT: - - - you know, and says he  
25 doesn't show up at my office and you're being

1 abundantly fair, judge. And that's what - - - of  
2 course, when the defendant then says he wants a new  
3 lawyer and he wants a new judge, and then things just  
4 seem to go on from there. But what's a judge - - - I  
5 mean, what's the system supposed to do? I mean - - -

6 MR. MULLIN: Well, there's a better  
7 practice. There's - - - there is - - - there is just  
8 an opportunity for this judge to take a better view  
9 of the case.

10 JUDGE GRAFFEO: Was he - - - are you saying  
11 that he had to propose a better plea bargain than  
12 what the - - -

13 MR. MULLIN: Absolutely not, Your - - -

14 JUDGE GRAFFEO: - - - the ADA offered  
15 initially?

16 MR. MULLIN: Absolutely - - -

17 JUDGE GRAFFEO: Because the second defense  
18 attorney wanted Willard or some drug treatment  
19 program. Yeah, this is a fairly extensive criminal  
20 record here.

21 MR. MULLIN: And drug involvement was  
22 begging out for him, and drug and treatment was  
23 begging out for him. I think what the court - - -

24 JUDGE GRAFFEO: But the prosecutor didn't  
25 have to agree to that.

1 MR. MULLIN: Absolutely not, Your Honor,  
2 but - - -

3 JUDGE GRAFFEO: So - - -

4 MR. MULLIN: - - - I think what happened -  
5 - -

6 JUDGE GRAFFEO: - - - why is the judge at  
7 fault, then, for not offering a better plea bargain?  
8 I mean - - -

9 MR. MULLIN: That's not - - -

10 JUDGE GRAFFEO: - - - the defense attorney  
11 keeps blaming the judge for the offer that's on the  
12 table.

13 MR. MULLIN: That's not - - - that's not  
14 clearly what I'm trying to say. I think another  
15 example that from a judicial fairness or a - - - you  
16 know, a review of the judicial system here is that at  
17 the time there's really a decision to be made - - -  
18 are we going to trial or are we going to have a plea  
19 - - - the trial court is - - - all their concerned  
20 and badgering at that time was, it will be a wasted  
21 week if he pleads. We don't - - -

22 JUDGE ABDUS-SALAAM: Counsel?

23 MR. MULLIN: - - - in - - -

24 JUDGE ABDUS-SALAAM: I'm sorry. Don't you  
25 have another argument? I tried to introduce this

1 before, but don't you have an ineffective assistance  
2 of counsel argument - - -

3 MR. MULLIN: Ab - - -

4 JUDGE ABDUS-SALAAM: - - - if I'm not  
5 mistaken?

6 MR. MULLIN: Absolutely, Your Honor. We  
7 raised that. It's outlined in the brief. And I  
8 think - - -

9 JUDGE ABDUS-SALAAM: Do you think that the  
10 other argument is your better argument, about the  
11 judge?

12 MR. MULLIN: Well, I think it's a  
13 combination of the two, that element that leaves you  
14 with a conclusion, a fair trial merits a new trial.

15 JUDGE SMITH: Which lawyer do you say was  
16 ineffective?

17 MR. MULLIN: I think both were, Your Honor.

18 JUDGE SMITH: One - - - yeah, one was too  
19 much of something; the other - - -

20 MR. MULLIN: Well - - -

21 JUDGE SMITH: - - - was too little of  
22 something?

23 MR. MULLIN: - - - Your Honor, what the  
24 icing on the cake was, at the time the trial was to  
25 begin, there was no way this court was going to

1 accept a plea. And in the end, he - - - you know,  
2 and clearly there's case law that you're not - - -  
3 you know, you have to show more that you were  
4 punished for going to trial. But the court had all  
5 the information in front of it, and at the end of  
6 this case, the sentence, we feel, is excessive, and  
7 it was excessive because he went to trial.

8 CHIEF JUDGE LIPPMAN: Okay, counselor.

9 MR. MULLIN: Thank you, Your Honor.

10 CHIEF JUDGE LIPPMAN: You'll have your  
11 rebuttal.

12 MR. MOODY: Mark Moody, Chief Assistant DA  
13 for Oswego County.

14 CHIEF JUDGE LIPPMAN: Counsel, is there a -  
15 - - in its totality, a problem here that the judge  
16 opens up by saying he may have defended or he may  
17 have prosecuted the defendant, immediately goes into  
18 the pre-sentence report? There's certainly a lot of  
19 tension going back and forth between the defendant,  
20 the lawyer, but certainly the second lawyer, and the  
21 judge. The judge seems to be indicating that, you  
22 know, he doesn't really want a plea. Is there a  
23 problem here, in looking at this whole thing in terms  
24 of a fairness issue, if we accept as a premise that  
25 the fact that he represented him in the past is not

1           dispositive here - - - or may have represented him -  
2           - - is there any kind of issue here?

3                       MR. MOODY: Well, I think what that gets to  
4           is what was discussed earlier, is the tone of the  
5           entire proceeding. And if - - -

6                       CHIEF JUDGE LIPPMAN: Yeah, but how much of  
7           that is the judge's fault?

8                       MR. MOODY: Well, I think the - - - I don't  
9           think - - - I don't think we can parse percentages.  
10          What I think we're left with is - - -

11                      CHIEF JUDGE LIPPMAN: Did the judge do  
12          anything, in setting the ambiance of this trial, and  
13          in light of his possible representation of the  
14          defendant, that - - - that makes this a - - - a - - -

15                      MR. MOODY: I don't think - - -

16                      CHIEF JUDGE LIPPMAN: - - - that makes this  
17          trial unfair?

18                      MR. MOODY: I don't think he did anything  
19          that made it unfair. If you look at the - - -

20                      CHIEF JUDGE LIPPMAN: Did he do a good job?

21                      MR. MOODY: Did he do a good job presiding  
22          over the trial?

23                      CHIEF JUDGE LIPPMAN: In terms of running a  
24          fair trial that's - - -

25                      MR. MOODY: Well - - -

1 CHIEF JUDGE LIPPMAN: - - - supposed to  
2 have justice - - -

3 MR. MOODY: I mean, I think - - -

4 CHIEF JUDGE LIPPMAN: - - - as the end  
5 result.

6 MR. MOODY: I don't mean to interrupt, but  
7 I think he did a fair trial, because if you look - -  
8 - and one of the things I reference in the brief is  
9 that - - - that he was not - - - it was not just he  
10 was attacking the defense. There were - - - and I  
11 happen to be the trial assistant who tried the case -  
12 - - there were incidents where he was - - - was  
13 acerbic and could have been - - - you know, however,  
14 if you wanted to perceive it, he could have been  
15 biased against me. The entire discussion that  
16 happens before closing related to a separate case  
17 with a separate - - -

18 CHIEF JUDGE LIPPMAN: Was there a nastiness  
19 here beyond the norm, and particularly as it related  
20 to the defendant rather than the prosecution?

21 MR. MOODY: I don't - - - I think that gets  
22 into the judge's - - - the judge's demeanor, as a  
23 whole, as presiding over all cases.

24 JUDGE SMITH: It's not the first time that  
25 you ever tried a case before a judge who was a little

1 crotchety?

2 MR. MOODY: No, it's not the first time I  
3 tried a case before a judge that was a little  
4 crotchety.

5 JUDGE SMITH: Was there anything more than  
6 that going on?

7 MR. MOODY: I don't - - - one of the  
8 things, and I don't want to seem like I'm criticizing  
9 a particular judge, but this judge, there is a  
10 certain element to this judge, and I think if you  
11 look at the proceeding as a whole, there's a certain  
12 element about the same thing that Henry Jordan once  
13 said about Vince Lombardi, "He treats us all the  
14 same, like dogs." And he is - - - I think he is  
15 being very fair to - - - in terms of he's treating  
16 everyone the same.

17 CHIEF JUDGE LIPPMAN: Equal opportunity  
18 employer here, or whatever you want to say?

19 MR. MOODY: There is some element of that,  
20 yes.

21 CHIEF JUDGE LIPPMAN: Yeah.

22 MR. MOODY: And I think - - -

23 CHIEF JUDGE LIPPMAN: But was it fair? I  
24 mean, that's the point that your - - - your adversary  
25 is basically saying, putting aside - - - look, judges

1 are human beings, like everyone else.

2 MR. MOODY: Absolutely.

3 CHIEF JUDGE LIPPMAN: And some have more -  
4 - - softer demeanors, some have tougher demeanors,  
5 some are harder on lawyers, some are easier on  
6 lawyers. But the basic premise of your adversary's  
7 case really doesn't have to do with whether the judge  
8 was nice or tough; it really has to do with whether  
9 the judge was fair.

10 MR. MOODY: Well, certainly, and I don't  
11 think that the - - - the defendant can't point to a  
12 single ruling or issue or objection that - - - that  
13 points to the judge being unfair. He did - - -

14 JUDGE RIVERA: What about when the judge  
15 admits that perhaps some of what he's considering is  
16 not really relevant?

17 MR. MOODY: And I - - -

18 JUDGE RIVERA: Shouldn't he, at that point,  
19 have reconsidered - - -

20 MR. MOODY: Well - - -

21 JUDGE RIVERA: - - - recusing himself?

22 MR. MOODY: And I think what the  
23 "irrelevant" was related to, and I think in the  
24 context of that entire discussion, because he starts  
25 - - - that's related to the thirty-nine - - - or the

1 children - - - the child support issue. That comes  
2 up when the judge is trying to decide sentencing,  
3 because this judge makes his decisions based upon the  
4 PSI before a sentence offer is made. And he reads  
5 that. He also references it in that entire  
6 paragraph, the defendant's record, the - - - he calls  
7 it - - - there's not a scintilla of pos - - -

8 CHIEF JUDGE LIPPMAN: It wasn't necessary  
9 to go into all of it, was it, at that point?

10 MR. MOODY: I certainly agree it wasn't - -  
11 -

12 CHIEF JUDGE LIPPMAN: I mean, apropos - - -

13 MR. MOODY: - - - necessary - - -

14 CHIEF JUDGE LIPPMAN: - - - our earlier  
15 discussion.

16 MR. MOODY: But I think the "irrelevant"  
17 comment was directed towards whether the defendant  
18 was guilty or not guilty. The "irrelevant" comment -  
19 - - and I can't speak - - - crawl into the judge's  
20 mind, but I think that when he says, well, I guess it  
21 really is irrelevant, he is referring to whether or  
22 not the defendant is guilty or not guilty of the  
23 crime charged.

24 JUDGE RIVERA: Is it indicating, perhaps, a  
25 closed mind, on his part?

1 MR. MOODY: If - - - if that had been - - -

2 JUDGE RIVERA: As opposed to the better  
3 practice of simply perhaps now I really should recuse  
4 myself just for appearance sake?

5 MR. MOODY: Well, I think if - - - if there  
6 had been - - - if that was all you had, you could say  
7 that. But I think you also have the fact that he - -  
8 - you know, the defense - - - the defense says now  
9 that the sentence is excessive. It was less than  
10 what was asked for. It was less than the maximum.  
11 It was, essentially, two years over for an extra - -  
12 - for another felony. It - - -

13 JUDGE SMITH: Because, of course, he was  
14 acquitted of the top count.

15 MR. MOODY: That is correct, yes.

16 JUDGE ABDUS-SALAAM: But the judge ran  
17 these two sentences consecutively.

18 MR. MOODY: That is true.

19 JUDGE ABDUS-SALAAM: He could have done it  
20 concurrently, right?

21 MR. MOODY: He could have done it  
22 concurrently.

23 JUDGE ABDUS-SALAAM: And did that show,  
24 maybe, a little bit of, you know, disap - - -  
25 something against this defendant?

1                   MR. MOODY: I don't - - - I don't think so,  
2                   judge, because if he had something against this  
3                   defendant, he could have gone - - - because they were  
4                   both Ds. Their maximum sentence was four, for the  
5                   sale on the - - - the second sale, which I'm  
6                   forgetting the dates of the sale. And then the  
7                   possession of the two pounds could have been eight,  
8                   and he ran it only to six. He promised him four to  
9                   begin with.

10                   JUDGE ABDUS-SALAAM: Do you think Mr.  
11                   Lanza's conduct, the second lawyer, had anything to  
12                   do with the way this turned out for his client?

13                   MR. MOODY: You mean as far as the sentence  
14                   - - -

15                   JUDGE ABDUS-SALAAM: The sentence - - -

16                   MR. MOODY: - - - or as far as the entire  
17                   trial?

18                   JUDGE ABDUS-SALAAM: Well, either one.

19                   MR. MOODY: Well, I think - - - I think - -  
20                   - you have to remember, this was - - - this was a  
21                   sale to an undercover, three different sales to an  
22                   undercover. It was a very difficult case to defend.  
23                   And I think, as far as what happened with the actual  
24                   verdict, I think Mr. Lanza did a remarkable job. I  
25                   think getting rid of the C, which would have - - -

1 CHIEF JUDGE LIPPMAN: He didn't endear  
2 himself to the judge, did he?

3 MR. MOODY: I would absolutely agree that  
4 he did not endear himself to the judge.

5 JUDGE ABDUS-SALAAM: But I think - - -

6 JUDGE RIVERA: But did he actually question  
7 his role? I think he said why are you even a judge -  
8 - -

9 MR. MOODY: I - - -

10 JUDGE RIVERA: - - - you already know what  
11 you're going to do. Doesn't that really suggest that  
12 the judge is - - - that you're calling him, to his  
13 face, biased, that you have a closed mind, that  
14 you're not objective?

15 MR. MOODY: Well, certainly, I think the  
16 relationship between - - - between Mr. Lanza, the  
17 defense attorney, and the judge, is certainly open to  
18 scrutiny in this case. But I don't think - - - if  
19 you look at the judge's conduct throughout the trial,  
20 there is no evidence that what he did was punish the  
21 defendant, either for having this child support ratio  
22 or for having Mr. Lanza representing him.

23 JUDGE SMITH: Well, what about Mr. Lanza's  
24 effectiveness? Doesn't it make him - - - he  
25 basically went to war with the judge, which isn't

1 really a good thing to do when the judge is going to  
2 - - - when you have a case that's very likely to  
3 result in a conviction and the judge has discretion  
4 in sentencing. Was that ineffective?

5 MR. MOODY: I don't think it was, because I  
6 think you run into that situation. And I have not  
7 spent a tremendous amount of time on the defense bar,  
8 but in my experience as a prosecutor, there are cases  
9 where the defense has to make a decision: Do you go  
10 for the whole ball of wax, a complete acquittal, or  
11 do you attempt to mollify what you have? And I think  
12 - - -

13 JUDGE SMITH: Yeah, but at least when you  
14 get to sentencing, shouldn't you say, anything other  
15 than, you know, it was, you idiot, what are you doing  
16 there on the bench? He didn't quite say "you idiot",  
17 but that was the tone.

18 MR. MOODY: I think - - - I think, at that  
19 point, in time, the defense, Mr. Lanza, had decided  
20 that he had to continue with the strategy that he had  
21 taken throughout the trial, which was to attack  
22 everybody. He attacked the police for the wrong  
23 dates and the photographs and the other things like  
24 that, and not mentioning - - - I know there was a  
25 long discussion - - -

1 JUDGE ABDUS-SALAAM: That's an effective  
2 strategy to, as Judge Smith said, go to war with the  
3 judge over a case that wasn't even this case but some  
4 prior case that the - - -

5 MR. MOODY: Well - - -

6 JUDGE ABDUS-SALAAM: - - - that counsel  
7 had?

8 MR. MOODY: - - - the prior case - - - I  
9 will say the prior case, and the history of it - - -  
10 of that is that there was a very contentious homicide  
11 case involving Alan Jones, which is mentioned, that  
12 Mr. Lanza represented the defendant on. And in that  
13 case, you know, there is - - - again, I don't think  
14 you can look - - - you're - - - I think what - - - in  
15 order for you - - -

16 JUDGE GRAFFEO: It seemed like - - -

17 MR. MOODY: - - - to say that - - -

18 JUDGE GRAFFEO: It seemed like there's a  
19 fair amount of animosity in that Jones case that  
20 spilled into this case.

21 MR. MOODY: That would be a fair  
22 representation, I'd say, yes.

23 CHIEF JUDGE LIPPMAN: And does that cause  
24 problems in this case?

25 MR. MOODY: I don't think so, because I

1 don't think you have - - - what you have is a  
2 feeling; you don't have - - - you don't have any  
3 evidence.

4 CHIEF JUDGE LIPPMAN: Okay.

5 MR. MOODY: You don't have any facts.

6 CHIEF JUDGE LIPPMAN: Okay, counselor.

7 Thanks, counselor.

8 Counselor, rebuttal?

9 MR. MULLIN: Your Honor, I think one of the  
10 important points is the war occurred the first day of  
11 trial when they started fighting over what the legal  
12 - - -

13 CHIEF JUDGE LIPPMAN: And was it an abuse  
14 of discretion, at that point, for the judge not to  
15 recuse himself?

16 MR. MULLIN: It's - - - it's where we  
17 started at the beginning of oral argument, as to what  
18 factors consider that abuse of discretion. In People  
19 v. Best, which was decided about a year ago by this  
20 court, it was a question of the trial court judge  
21 shackling the defendant in court, and the court was  
22 concerned about the public perception of the criminal  
23 justice system. It also found - - - it also had  
24 language that judges are humans, not dogs, but the  
25 point being the perception of the court. And in this

1 case, from anyone observing this matter, I think that  
2 the defendant is entitled to a new trial because the  
3 tribunal was not free of any potential bias, and this  
4 potential bias was shown by his comments, from the  
5 beginning, about representation, prosecution,  
6 everyone in the defense bar has defended him, and  
7 then the behavior through the trial with the  
8 attorneys involved, Your Honors.

9 CHIEF JUDGE LIPPMAN: Okay.

10 MR. MULLIN: Thank you.

11 CHIEF JUDGE LIPPMAN: Thank you both.

12 MR. MOODY: Thank you.

13 (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. John G. Glynn, No. 155 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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