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COURT OF APPEALS

STATE OF NEW YORK

PEOPLE,

Appellant,

-against-

No. 46

ANTHONY GRIFFIN,

Respondent.

20 Eagle Street
Albany, New York 12207
February 13, 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

Appearances:

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Penina Wolicki
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: Let's do number 46,
2 People v. Griffin.

3 Counselor, would you like any rebuttal
4 time?

5 MS. O'SHEA: Yes, Your Honor, I would like
6 to reserve two minutes for rebuttal, please.

7 CHIEF JUDGE LIPPMAN: Two minutes, sure.
8 Go ahead.

9 MS. O'SHEA: May it please the court, my
10 name is Sheila O'Shea, and I represent the People on
11 this appeal.

12 Defendant's right to counsel of choice was
13 not violated. Three months after Justice Scherer
14 granted the Legal Aid Society's request to be
15 relieved, defendant pleaded guilty, as the parties
16 had always anticipated, before a different judge,
17 while ably represented by a lawyer.

18 CHIEF JUDGE LIPPMAN: What - - - what do
19 you think Judge Scherer - - - about her conduct in
20 this situation? Was it evenhanded? Was it - - -

21 MS. O'SHEA: Well, I think, Your Honor,
22 there was certainly fault on both sides. And I think
23 it's fair to say that there were delays occasioned by
24 the People as well as by - - -

25 CHIEF JUDGE LIPPMAN: So given that - - -

1 MS. O'SHEA: - - - by the defendants.

2 CHIEF JUDGE LIPPMAN: - - - what about her
3 conduct in relation to the Legal Aid Society - - -

4 MS. O'SHEA: Well, I think there were - - -

5 CHIEF JUDGE LIPPMAN: - - - taking them off
6 the case?

7 MS. O'SHEA: - - - I think there were a
8 couple of things that happened on July 10th - - -

9 CHIEF JUDGE LIPPMAN: Yes, tell us.

10 MS. O'SHEA: - - - in particular that were
11 particularly troublesome to the court. The first is
12 that Justice Scherer herself did nothing to interfere
13 with the relationship - - - with the defendant's
14 attorney-client relationship. In fact, it was Mr.
15 Cohen whose resignation brought about the rupture in
16 that relationship.

17 CHIEF JUDGE LIPPMAN: Yeah, but what about
18 the defendant?

19 MS. O'SHEA: Well, I think if Mr. Ives got
20 up to - - -

21 CHIEF JUDGE LIPPMAN: I mean, the Legal Aid
22 Society was intimately involved in this defense,
23 right?

24 MS. O'SHEA: Well, I think Mr. Cohen was
25 intimately involved. I think there's no other

1 indication in the record that any other judge - - -
2 excuse me, that any other Legal Aid lawyer had any
3 dealings with - - - in the case. That's all the
4 record supports.

5 CHIEF JUDGE LIPPMAN: Right. But what did
6 - - - but what did the defendant have to say, and
7 what was his - - - did he have any rights in this - -
8 -

9 MS. O'SHEA: Well, we don't know what - - -

10 CHIEF JUDGE LIPPMAN: - - - given in an
11 established lawyer-client relationship?

12 MS. O'SHEA: - - - the defendant had to
13 say. Because I think it's fair - - -

14 CHIEF JUDGE LIPPMAN: No, he wasn't asked,
15 right?

16 MS. O'SHEA: He wasn't asked. But I think
17 it's fair to say that if Mr. Ives got up and said to
18 the judge, we can't be ready, and if we can't be
19 ready you should relieve us, I think it was fair for
20 the judge to assume that Mr. Ives had in fact
21 communicated with the defendant.

22 JUDGE SMITH: But couldn't - - - assuming
23 she had discretion to do that, did the Appellate
24 Division have the power to review her exercise of
25 discretion?

1 MS. O'SHEA: Well, the Appellate Division
2 expressly reversed on the law.

3 JUDGE SMITH: My question was did they have
4 the power to review her exercise of discretion?

5 MS. O'SHEA: The Appellate Division?

6 JUDGE SMITH: Yes.

7 MS. O'SHEA: Yes, they did.

8 JUDGE SMITH: So if we - - - suppose we
9 agree with you completely, and we say they reversed
10 on the law and they were wrong, can we re - - -
11 should we remit it to them to see whether they agree
12 with her exercise of discretion? And if we do, can
13 you predict how that might come out?

14 MS. O'SHEA: I think what would happen is
15 that this - - - this case would reverse the decision
16 of the Appellate Division and reinstate the
17 conviction.

18 JUDGE SMITH: Why can't - - - I mean, you
19 say that they have the power to exercise their own
20 discretion to substitute it for hers. You say they
21 didn't do it, but you say - - -

22 MS. O'SHEA: Well, I - - -

23 JUDGE SMITH: - - - that they have the
24 power. How can we deprive them of that?

25 MS. O'SHEA: - - - I may have misspoken,

1 Your Honor. I didn't mean to say that the Appellate
2 Division substituted its discretion for that of the
3 trial judge.

4 JUDGE SMITH: No, I know. I didn't mean
5 you said that - - - you - - - I'm not suggesting that
6 they necessarily did substitute their discretion,
7 although maybe they did. But they have the power to,
8 don't they?

9 MS. O'SHEA: They have the power to
10 substitute; that's right.

11 JUDGE SMITH: And if they have not yet
12 decided whether to exercise that authority, should we
13 remit to them to see whether they will do it?

14 MS. O'SHEA: That's a good question, Your
15 Honor. Again, I think - - -

16 JUDGE SMITH: But - - - and that - - - but
17 doesn't that lead to the point, aren't we wasting our
18 time here? We know perfectly well what they thought
19 of her exercise of discretion.

20 MS. O'SHEA: Well, that is, indeed, true.
21 And furthermore, when and if the case were to go back
22 down to the trial court, the only remedy would be
23 that yet a third competent lawyer would represent - -
24 -

25 CHIEF JUDGE LIPPMAN: No, no. But in the

1 context of what Judge Smith is asking you about, you
2 know, given the comments about Judge Scherer's
3 conduct of the trial - - -

4 MS. O'SHEA: Well, Justice Scherer is
5 retired now, so certainly it could go back to - - -
6 would go back before a different judge, if that's
7 what you are saying.

8 CHIEF JUDGE LIPPMAN: No, no. But what
9 about going back to the AD, and assuming that they
10 did it on the basis of law, why wouldn't you send it
11 back and let them take a look at that when they've
12 expressed such strong feelings about the conduct of
13 the judge in the trial.

14 MS. O'SHEA: Well, I suppose the end result
15 would be the same, so - - -

16 JUDGE PIGOTT: That's kind of the defense's
17 argument. They're saying it's a mixed question. And
18 because they did say that it was an abuse of her
19 discretion, and they say because of the right to
20 counsel. But in any event, it sounds like if we
21 would send it back, they're not going to change.
22 They were pretty vocal in - - -

23 MS. O'SHEA: Oh, I think - - -

24 JUDGE PIGOTT: - - - their criticism.

25 MS. O'SHEA: - - - I think that's right.

1 And although the Appellate Division did suggest in
2 its decision that at one point there was an
3 improvident exercise of discretion, even the court
4 came around - - - and I think the court said that
5 with respect to the judge's refusal to grant the
6 Legal Aid Society's adjournment request - - - the
7 court eventually came around to say that that conduct
8 was the definition of arbitrary and capricious, which
9 is another way of saying it's an abuse of discretion.

10 JUDGE GRAFFEO: So you're asking us to do
11 what?

12 MS. O'SHEA: I'm asking you to reverse the
13 decision of the Appellate Division and reinstate the
14 defendant's conviction.

15 CHIEF JUDGE LIPPMAN: And on what basis are
16 you asking us to do that?

17 MS. O'SHEA: That there was no violation of
18 the right to counsel.

19 CHIEF JUDGE LIPPMAN: And they don't have
20 to ask the defendant? You're presuming that the
21 defendant said it's okay?

22 MS. O'SHEA: I think if Mr. Ives got up and
23 said relieve the Legal Aid Society, the judge had
24 every right to believe that he had consulted with the
25 defendant.

1 CHIEF JUDGE LIPPMAN: And even - - -

2 MS. O'SHEA: But I'd like to - - - Judge,
3 if I may, there's a couple things that I'd like to
4 add.

5 CHIEF JUDGE LIPPMAN: Yes, but even - - -
6 but let me ask you. Even in light of what happened
7 before Judge McLaughlin after that, where he got five
8 minutes to plead to a lower offer with a substitute -
9 - -

10 MS. O'SHEA: Well, he didn't have five
11 minutes, in fairness; he had overnight. And one of
12 the points that I wanted to make is that this case
13 had been on a track for disposition all along.

14 Just to return to your earlier point,
15 you're right. Defendant never said that he wanted
16 Legal Aid to continue to represent him. But he never
17 said that at any point. He could have just gotten up
18 during the proceedings and - - - you know, this is a
19 mandatory, persistent, violent felony offender. He
20 pleaded guilty to three prior felonies. He could
21 have made his objection to the court's decision - - -

22 CHIEF JUDGE LIPPMAN: But I guess - - -

23 MS. O'SHEA: - - - known.

24 CHIEF JUDGE LIPPMAN: - - - but let me give
25 you what's going through my mind. You have a

1 defendant that in some ways is a pawn in this back-
2 and-forth with a judge who was obviously very upset
3 with the Legal Aid Society, if not with the
4 prosecution, but certainly with the Legal Aid
5 Society. And the defendant's sort of there, and all
6 this stuff is happening around him. And the - - -
7 his attorney - - - the only relationship, obviously,
8 that he knows - - - the judge, assuming her conduct
9 in one fashion or another was arbitrary, yanks that
10 attorney away overnight, if not five minutes. He's
11 got to take a plea.

12 Isn't the - - - is it possible that the
13 defendant could be affected in a way that - - - that
14 as a matter of law, we just say that, gee, in this
15 circumstance, the defendant can't be like just a
16 piece of the scenery.

17 MS. O'SHEA: Well, Your Honor, I don't
18 think he was - - -

19 CHIEF JUDGE LIPPMAN: Do you follow what
20 I'm saying? Where - - -

21 MS. O'SHEA: I follow what you're saying.

22 CHIEF JUDGE LIPPMAN: - - - where does the
23 defendant come in? That's what - - -

24 MS. O'SHEA: But I don't - - -

25 CHIEF JUDGE LIPPMAN: - - - I'm concerned -

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MS. O'SHEA: - - - I don't think - - -

CHIEF JUDGE LIPPMAN: - - - about. Go ahead.

MS. O'SHEA: To the extent he wasn't consulted in the proceedings before Justice Scherer, there was no indication in the record, as I said, that he wanted the Legal Aid Society to continue to represent him, nor when he moved several months later to withdraw his plea, did he say anything about Justice Scherer or her - - - that her decision to relieve the Legal Aid Society had any bearing on his decision to plead guilty.

And thirdly, as I said, this case - - - there are numerous indications at the record that this case had always been on track for disposition.

JUDGE PIGOTT: Is there a - - -

MS. O'SHEA: And that in other - - - I'm sorry, Judge Pigott, for interrupting. But in other words, the case played out exactly as everyone had intended that it would from nearly the beginning.

JUDGE PIGOTT: In your view - - - in your view, was this handled - - - is this the way they normally get handled? I mean, there were nineteen appearances between February and October in one year.

1 MS. O'SHEA: Um - - -

2 JUDGE PIGOTT: It just looked like, you
3 know - - -

4 MS. O'SHEA: - - - I think it's fair to say
5 it was perhaps more drawn out than other proceedings.
6 And I'm not standing before the court, by any stretch
7 of the imagination, and arguing that this was a model
8 proceeding.

9 JUDGE SMITH: Could I just - - - before you
10 run out of time. Assume - - - assume that we reject
11 all your other arguments and we think there was error
12 here, was the error forfeited by the plea?

13 MS. O'SHEA: Your Honor, I'm glad that - -
14 - that was my first point, so I'm glad that you came
15 back to that. Yes, the error was forfeited, I think
16 under this court's decision in Petgen. And I think
17 Petgen controls for the important reason that it had
18 - - -

19 JUDGE SMITH: Doesn't it depend on whether
20 the error in some way affected or could have affected
21 the plea?

22 MS. O'SHEA: That is my position, indeed.
23 But as I said - - -

24 JUDGE SMITH: And you say there's no way
25 that this error could have affected the plea?

1 MS. O'SHEA: There's no way, because this
2 defendant was always - - -

3 JUDGE SMITH: How do we know he would have
4 made the same decision if he'd had the lawyer that,
5 by assumption for the moment, he rightly should have
6 had?

7 MS. O'SHEA: How do we know? Well, as I
8 said, there are numerous indications in the record
9 that this case was always on disposition. Mr. Cohen
10 and the various assistants who stood up on the case
11 talked about various attempts to approach the judge,
12 basically to tell her that the defendant had been
13 cooperating. I don't know if you want me to answer
14 the question.

15 JUDGE SMITH: I guess - - - I guess what
16 I'm - - - my problem with the forfeiture is this.
17 The error, if it is an error - - - I understand all
18 your arguments there was no error at all. But the
19 error, if it is an error, is that he had the wrong
20 lawyer. He was supposed to have a Legal Aid lawyer,
21 and he had an 18-B lawyer instead.

22 How - - - I mean, you can say, yeah, in all
23 probability he would have taken the same plea. But
24 how do you know?

25 MS. O'SHEA: Well, because one - - - for

1 one, the strength of the People - - - of the People's
2 case, the evidence was quite strong. We knew that,
3 for example, there was a fingerprint of the
4 defendant's that was recovered on a piece of the duct
5 tape - - -

6 JUDGE PIGOTT: Well, I think you probably
7 had a pretty - - - very strong case. I - - -

8 MS. O'SHEA: I think - - - in other words,
9 it's likely, given the strength of the People's case
10 and the defendant's status as a mandatory,
11 persistent, violent - - -

12 JUDGE SMITH: But does "likely" do it?

13 MS. O'SHEA: Pardon me?

14 JUDGE SMITH: Don't we have to know - - -
15 don't we have to have a basis for really being
16 confident? And how can you ever be confident that
17 your plea decision isn't affected by who your lawyer
18 is?

19 JUDGE PIGOTT: Particularly, he moved to
20 withdraw within - - -

21 MS. O'SHEA: Well, the thing is - - -

22 JUDGE PIGOTT: - - - a week.

23 MS. O'SHEA: - - - Mr. Cohen was the lawyer
24 with whom - - -

25 CHIEF JUDGE LIPPMAN: Counselor - - - Judge

1 Pigott's - - -

2 MS. O'SHEA: I beg your pardon. I'm sorry,
3 I didn't hear you.

4 JUDGE PIGOTT: Please, go ahead. Please,
5 I'm - - -

6 MS. O'SHEA: Mr. Cohen was the only lawyer
7 with whom - - - was the lawyer with whom the
8 defendant had his real substantive attorney-client
9 relationship. So once Mr. Cohen left, the defendant
10 was going to have to establish a new relationship
11 with trust with whichever lawyer he was assigned,
12 whether that lawyer be from the Legal Aid Society,
13 Shearman & Sterling, or somewhere else.

14 So the defendant was starting from scratch,
15 essentially, due to the fact that Mr. Cohen was
16 resigning. That was certainly his prerogative. But
17 that, I think - - - as I said there's - - -

18 CHIEF JUDGE LIPPMAN: So what's the answer
19 to Judge Smith's question about "likely"? Is
20 "likely" enough?

21 MS. O'SHEA: I think "likely" is enough
22 when looking at - - -

23 CHIEF JUDGE LIPPMAN: Yes? The answer is
24 yes?

25 MS. O'SHEA: I think yes, yes.

1 CHIEF JUDGE LIPPMAN: Okay, counselor.
2 You'll have rebuttal. Let's hear from your
3 adversary.

4 MS. O'SHEA: Thank you, Your Honor.

5 CHIEF JUDGE LIPPMAN: Okay.

6 MR. FERGUSON: Good afternoon, Your Honors.
7 Harold Ferguson for respondent, Anthony Griffin.

8 CHIEF JUDGE LIPPMAN: Counselor, what about
9 the Legal Aid Society's conduct itself here? They
10 really gave the judge an ultimatum, didn't they?

11 MR. FERGUSON: What you had here is they
12 were faced with a Hobson's choice. They recognized
13 that they could not prepare within two weeks. You
14 had a judge that was treating the Legal Aid Society
15 different than the prosecutor's office. And they
16 were trying to protect the defendant's interest at
17 that situation.

18 JUDGE SMITH: I mean, isn't the usual
19 approach of a lawyer who says I can't prepare within
20 two weeks, and the judge says, yes, you can, the
21 usual response is, "Yes, Your Honor," isn't it?

22 MR. FERGUSON: Well, Your Honor, you had an
23 ongoing series here of different treatments that were
24 being accorded the prosecution than the Legal Aid
25 Society. The Legal Aid Society, here, wasn't the one

1 requesting the adjournments, it was the prosecutor
2 who was requesting - - -

3 CHIEF JUDGE LIPPMAN: What do you think - -
4 - do you think the - - - what is your assessment of
5 all that? Did the judge have it in for the Legal Aid
6 Society?

7 MR. FERGUSON: I believe the judge was - -
8 -

9 CHIEF JUDGE LIPPMAN: Why? I mean this is
10 a judge of long service and stature. Why would she
11 just - - - just aggravation at the particular case or
12 whatever?

13 MR. FERGUSON: I don't know. I cannot
14 answer why Judge - - -

15 CHIEF JUDGE LIPPMAN: This is a well-
16 respected judge, this isn't - - -

17 MR. FERGUSON: - - - Justice Scherer had a
18 - - -

19 CHIEF JUDGE LIPPMAN: - - - I'm sure this
20 is not a judge who inherently has a bias one way or
21 the other. Why - - - why in this case - - -

22 MR. FERGUSON: But - - -

23 CHIEF JUDGE LIPPMAN: - - - do you perceive
24 this happened?

25 MR. FERGUSON: - - - but, Your Honor, if

1 you look at the statements that Justice Scherer made
2 during the proceedings and how she was castigating
3 the Legal Aid Society - - -

4 JUDGE SMITH: There's no doubt she was
5 annoyed. But can you reverse a judge every time she
6 gets annoyed?

7 MR. FERGUSON: Your Honor, it's more than
8 being annoyed. It's disparate treatment that we're
9 talking about here.

10 JUDGE SMITH: How can you - - - how can you
11 really measure that? I mean - - -

12 MR. FERGUSON: Well, but - - -

13 JUDGE SMITH: - - - one thing irritates her
14 more than another. I mean, maybe she was irritated
15 that he wanted to spend three days on his birthday.
16 Maybe that was unfair, but how can you really measure
17 disparate treatment?

18 MR. FERGUSON: Well, I can measure
19 disparate treatment when the first ADA who was
20 handling this as a trial prosecutor turned over the
21 case to the second ADA who was handling this as the
22 trial prosecutor. That trial prosecutor got more
23 than six weeks to prepare for it, and did not add - -
24 - did not even interview - - -

25 CHIEF JUDGE LIPPMAN: But let me ask you a

1 question, though.

2 MR. FERGUSON: - - - a single witness
3 during that time.

4 CHIEF JUDGE LIPPMAN: But is that unequal
5 treatment that you're talking about, was that the
6 basis of the AD's ruling?

7 MR. FERGUSON: It was. Part of it was the
8 disparate treatment.

9 CHIEF JUDGE LIPPMAN: Was it?

10 MR. FERGUSON: Yes.

11 CHIEF JUDGE LIPPMAN: Or is it - - - or is
12 it a legal issue of the - - -

13 MR. FERGUSON: It was - - -

14 CHIEF JUDGE LIPPMAN: - - - arbitrary
15 interference with the relationship?

16 MR. FERGUSON: It was a whole series of
17 different parts.

18 CHIEF JUDGE LIPPMAN: So you think it's - -
19 -

20 MR. FERGUSON: It was part of it.

21 CHIEF JUDGE LIPPMAN: - - - factual also?
22 It's - - -

23 MR. FERGUSON: And if you look at what
24 happens after the second trial prosecutor leaves, the
25 next trial prosecutor gets ten weeks to prepare.

1 The Legal Aid Society was asking for a less
2 period of time than - - -

3 JUDGE SMITH: Well, I guess my problem is,
4 isn't almost all litigation, if you want to look at
5 it that way, an endless - - - it could easily become
6 an endless succession of lawyers whining, oh, you let
7 him do that and you won't let me do that, and I - - -
8 and he was just as bad as I was, and now you're
9 yelling at me. Can you really expect appellate
10 courts to review that?

11 MR. FERGUSON: I believe you can, Your
12 Honor, under the unique set of circumstance of this
13 particular case.

14 JUDGE SMITH: Or may - - - maybe your
15 argument is it's an exercise of discretion and they -
16 - - and therefore we should leave it alone. We
17 should let the Appellate Division and Justice Scherer
18 - - -

19 MR. FERGUSON: I believe it was an exercise
20 of discretion in this case.

21 JUDGE GRAFFEO: Excuse me. Do you think -
22 - - is your view of the Appellate Division decision
23 that they acted in the interest of justice - - -

24 MR. FERGUSON: I - - -

25 JUDGE GRAFFEO: - - - or do you think they

1 determined an issue of law?

2 MR. FERGUSON: I believe they did - - -
3 that - - - I think it really is an interest of
4 justice here, because I don't think you can really
5 look at the statements that the Legal Aid Society
6 made at the time that they were being relieved, that
7 they were saying that they were making counsel choice
8 - - -

9 JUDGE GRAFFEO: If you're correct, where
10 does that leave us?

11 MR. FERGUSON: I believe that this should
12 not have been here. I believe - - -

13 CHIEF JUDGE LIPPMAN: What do you want us
14 to do? What do you want - - -

15 MR. FERGUSON: I believe that you should
16 either dismiss the appeal because leave was
17 improvidently granted by the dissenting justice, or
18 to affirm on the basis that this is a mixed question
19 of law, or even if we get to the - - -

20 JUDGE READ: What about sending it - - -

21 MR. FERGUSON: - - - merits - - -

22 JUDGE READ: - - - what about sending it
23 back for them to decide if they want to exercise
24 their interest or justice of jurisdiction if we agree
25 they - - - if we think they did it as an abuse of

1 discretion and a matter of law?

2 MR. FERGUSON: I believe what several of
3 the other judges indicated today, that that would
4 have - - - that would be a waste of judicial
5 resource, because it's clear from, I believe, the
6 Appellate Division's decision, that the decision
7 would not be any different if it was sent back for -
8 - - on - - -

9 JUDGE SMITH: They did decide - - - they
10 had to decide the legal issue of whether there was a
11 forfeiture, didn't they?

12 MR. FERGUSON: I believe they did, Your
13 Honor.

14 JUDGE SMITH: So we have jurisdiction at
15 least to review that?

16 MR. FERGUSON: That's - - - and I believe -
17 - -

18 JUDGE SMITH: If we think there was a
19 forfeiture, then it doesn't matter - - - then nothing
20 else matters.

21 MR. FERGUSON: And I believe that there was
22 not a forfeiture here, because as this court said in
23 Hansen, you're looking at things that go to the
24 integrity of the process. And I don't think anything
25 goes more to the integrity of the process than

1 different treatment of the primary institutional
2 defender in New York City against the Manhattan
3 District Attorney's Office.

4 JUDGE SMITH: You're not - - - you're not
5 really saying, though, that your client had a right
6 to retain Legal Aid. He might have had a right to -
7 - - you know, a qualified right to a particular
8 individual lawyer, but he didn't have a right to an
9 institutional provider, did he?

10 MR. FERGUSON: I believe he had the right.
11 The Legal Aid Society is a comprehensive law firm
12 here. And it involves far more than the individual
13 attorney. There is an entire support staff involved
14 - - -

15 CHIEF JUDGE LIPPMAN: What else were they
16 doing on this case?

17 MR. FERGUSON: Well, Your Honor, you - - -

18 CHIEF JUDGE LIPPMAN: What was the Legal
19 Aid Society - - -

20 MR. FERGUSON: We did see that - - -

21 CHIEF JUDGE LIPPMAN: - - - how involved
22 was the Society in this case?

23 MR. FERGUSON: - - - we see that the
24 supervisor was present on the final appearance. We
25 see at another occasion during one of the court

1 appearance, someone was second-seating Mr. Cohen.

2 And we had a whole series of paralegals - - -

3 CHIEF JUDGE LIPPMAN: Would it have been
4 all right if he asked - - - if the judge - - - Judge
5 Scherer asked the defendant if it was okay?

6 MR. FERGUSON: If he (sic) had asked the
7 defendant if it was okay - - -

8 CHIEF JUDGE LIPPMAN: And it would have
9 been all right if the defendant said okay, I don't
10 care?

11 MR. FERGUSON: - - - that would have been
12 the defendant's choice. And then we would not be
13 here.

14 JUDGE PIGOTT: After we - - - after the
15 case was transferred to a new judge, everything
16 seemed to flow fairly quickly. You know, you had the
17 Huntley hearing and then, you know, there were plea
18 negotiations resulting in a plea. I mean, doesn't
19 that, to some extent, take care of all of this
20 previous stuff that was going on?

21 MR. FERGUSON: No, Your Honor. What you
22 look at - - - and going back to what was said - - -
23 stated before, the original plea offer in this case
24 at arraignment was twenty to life. That was
25 unacceptable to the Legal Aid Society and Mr.

1 Griffin. The Legal Aid Society, through Mr. Cohen,
2 tried and tried again to get a more favorable
3 disposition for Mr. Griffin.

4 The People were not backing down from that
5 initial offer. And he ended up getting the exact
6 same offer eight months later that he did initially.
7 And that was with a different attorney. The Legal
8 Aid Society was not going to be pushing for that
9 twenty to life.

10 CHIEF JUDGE LIPPMAN: But was it - - - was
11 - - - is one of your complaints that he didn't have
12 enough time - - -

13 MR. FERGUSON: Oh.

14 CHIEF JUDGE LIPPMAN: - - - with the new
15 attorney to determine this - - - whether to take the
16 plea or not?

17 MR. FERGUSON: Well, that's a second - - -
18 that's a second issue that we have. It was an
19 alternative grounds here. I mean, what you had here
20 is there could be nothing more classic than what was
21 stated here when Judge McLaughlin is talking about
22 the difference between a functioning Anthony Griffin
23 in the future or a decrepit human being. And I'm
24 going to give you a one-time sentencing discount.

25 You've got five minutes. It's like "Minute

1 to Win It". You could see the clock counting down in
2 the background. And then it's like it's now or
3 never. And he takes it. He comes back to his cell.
4 He's immediately moving to withdraw it, because he
5 was forced into it.

6 And remember, Judge McLaughlin had said the
7 day before that he was going to allow Mr. Griffin the
8 opportunity to consult with his family on the
9 previous offer, and he was not able to have that
10 consultation. And then that was pulled from him by
11 Judge McLaughlin at that proceeding - - -

12 JUDGE RIVERA: But - - -

13 MR. FERGUSON: - - - and then given the
14 five minutes to choose.

15 JUDGE RIVERA: But as you said, it's the
16 same offer he started with.

17 MR. FERGUSON: It's the same - - -

18 JUDGE RIVERA: And he had a lot of time to
19 think about it. He talked - - - you've said he
20 talked to counsel, Legal Aid, about it.

21 MR. FERGUSON: He talked to Legal Aid and
22 he - - -

23 JUDGE RIVERA: How much time has he really
24 lost?

25 MR. FERGUSON: I believe that, yes, he did

1 lose here, because - - - going back to Legal Aid
2 would have been pushing more. And with the
3 relationship that he had with Legal Aid, remember, he
4 does move and claim and file an ineffectiveness claim
5 against his second attorney, the 18-B attorney.

6 CHIEF JUDGE LIPPMAN: So let me ask you a
7 question. With the Legal Aid Society, were they
8 really saying to the judge - - - giving him an
9 ultimatum? Or in your view, was that just the normal
10 posturing that you would be doing in that situation?

11 MR. FERGUSON: I - - -

12 CHIEF JUDGE LIPPMAN: Do you follow what
13 I'm saying?

14 MR. FERGUSON: Are you talking about with
15 Judge McLaughlin at the end? The - - -

16 CHIEF JUDGE LIPPMAN: No, no, no, no. I'm
17 going back to the - - - to the - - - to Scherer.

18 MR. FERGUSON: Your - - - he - - - the
19 Legal Aid - - -

20 CHIEF JUDGE LIPPMAN: I mean, would you
21 really say, look, let us out. If you're not going to
22 give us whatever it is, you - - -

23 MR. FERGUSON: I think what they were
24 attempting to do was protect the defendant's rights
25 at that point. They were trying to protect Mr.

1 Griffin's rights. And they said they could not - - -

2 CHIEF JUDGE LIPPMAN: But parts of your
3 argument, I gather, is they didn't really want to end
4 this attorney-client relationship?

5 MR. FERGUSON: They did not want - - -

6 CHIEF JUDGE LIPPMAN: They wanted to defend
7 the defendant in an appropriate way is - - - would be
8 your argument.

9 MR. FERGUSON: No, no. I believe what you
10 had here is that if - - - that the Legal Aid Society
11 would have taken this case to trial. That if they
12 couldn't - - - because they had gone for five months
13 trying to get a better plea offer than what was
14 offered. And I believe that they would have
15 proceeded this case to trial if a better plea offer
16 wasn't proffered by the People in this particular
17 case. And it all keeps going back to the same - - -

18 CHIEF JUDGE LIPPMAN: What about not coming
19 up to the bench and all of that stuff? What's that
20 about?

21 MR. FERGUSON: Again, if you take a look at
22 how this - - - again, when you get the new 18-B
23 attorney, it's as if there was a sea change in the
24 courtroom. Suddenly, then, counsel can approach
25 willingly. They can go whenever they want. And in

1 fact, Judge Scherer - - -

2 CHIEF JUDGE LIPPMAN: You think that - - -

3 MR. FERGUSON: - - - was inviting counsel
4 up for - - -

5 CHIEF JUDGE LIPPMAN: - - - so you think
6 that shows - - -

7 MR. FERGUSON: - - - for bench conferences.

8 CHIEF JUDGE LIPPMAN: - - - that in your -
9 - - in your mind, shows her animus to the - - -

10 MR. FERGUSON: Absolutely, Your Honor.

11 CHIEF JUDGE LIPPMAN: - - - to Legal Aid?

12 MR. FERGUSON: And if you look at the type
13 of statements - - - when the judge - - - when Judge
14 Scherer says there should be two Legal Aid attorneys
15 on every case, and this wouldn't happen, well, if
16 there had been two trial prosecutors, then when ADA
17 Clune left, it could have proceeded. And when ADA
18 Savur left, it could have proceeded, but it wasn't
19 that way. At no point - - -

20 JUDGE GRAFFEO: But in fairness to the - -
21 -

22 MR. FERGUSON: - - - was that suggested.

23 JUDGE GRAFFEO: - - - judge, I think she
24 meant when they knew he was going to be departing,
25 that they should have had somebody work with Mr.

1 Cohen until his departure. Isn't that - - - that was
2 my reading of it.

3 MR. FERGUSON: No, I don't believe that's
4 the - - - I don't believe that's the reading. We're
5 talking about ten days there.

6 And part - - - and one last thing is the
7 prosecutor's office is somewhat complicit here. On
8 that proceeding, ADA Savur knew for a fact that this
9 case was not going to trial in two weeks, because he
10 was going on paternity leave. He sat silent and
11 didn't offer a word to the court, saying, Your Honor,
12 with all due respect, it can't happen in two weeks;
13 I'm going on paternity leave and we're going to have
14 to assign a new prosecutor.

15 In fact, even when there's a subsequent
16 appearance on July 19th, the trial prosecutor does
17 not advise the court that he's leaving.

18 CHIEF JUDGE LIPPMAN: Okay, counselor.
19 Thank you.

20 MR. FERGUSON: Thank you, Your Honor.

21 MS. O'SHEA: Judge Lippman, to your point
22 about whether or not this is an ultimatum or just
23 normal posturing. No one said anything about
24 relieving the Legal Aid Society. It was Mr. Ives who
25 brought that up unilaterally. And he did - - - he

1 kind of dared the judge. He was trying to strong-arm
2 the judge into granting an adjournment.

3 JUDGE PIGOTT: It's a pretty tough
4 transcript, any way you want to look at it, in the
5 way this justice system was working in this case. I
6 mean, no - - - I'm not casting aspersions on the
7 People or on the defense. But my goodness, nineteen
8 times between February and October on one case, and
9 eighty percent of them are people spitting at each
10 other.

11 I'm just amazed. Somebody said, it's
12 almost as if the defendant didn't have to be there.

13 MS. O'SHEA: Well, as I said, Your Honor, I
14 agree that there was fault on both sides here. But -
15 - -

16 CHIEF JUDGE LIPPMAN: Yes, but I think my
17 point is similar to what Judge Pigott is saying. The
18 defendant is like just caught in the middle of this
19 nuttiness that's going on in this courtroom, and by
20 any looking at the transcript of what happened, it
21 seems to be disproportionate. And the defendant is
22 the one who suffers on this whole thing and is just
23 kind of - - -

24 MS. O'SHEA: Well, I don't think - - -

25 CHIEF JUDGE LIPPMAN: - - - like Judge

1 Pigott said, he - - -

2 MS. O'SHEA: - - - the position is - - -

3 CHIEF JUDGE LIPPMAN: - - - didn't have to
4 be there. He's like - - - it's just a game that's
5 going on.

6 MS. O'SHEA: - - - well my position is he
7 didn't suffer any prejudice as a result of any of it.

8 CHIEF JUDGE LIPPMAN: Say it again?

9 MS. O'SHEA: My position is that the
10 defendant did not suffer any prejudice - - -

11 JUDGE SMITH: Suppose - - - suppose you
12 could read this record as saying that both the judge
13 and the People thought this was a case where the
14 defendant should take a plea and he wasn't going to
15 take a plea unless you held his feet to the fire, and
16 they were pushing - - - you know, yeah - - - they
17 were pushing for a trial date, not really in the
18 expectation of going to trial, but in the thought
19 that that's the only way to get this guy to make up
20 his mind.

21 MS. O'SHEA: I don't think - - -

22 JUDGE SMITH: Anything wrong with that?

23 MS. O'SHEA: Well, I don't think that's
24 necessarily what the judge - - -

25 JUDGE SMITH: Okay.

1 MS. O'SHEA: - - - was doing.

2 JUDGE SMITH: Suppose it was. Anything
3 wrong with it?

4 MS. O'SHEA: Well, I don't think - - -

5 JUDGE SMITH: Have such things happened in
6 the world that the - - -

7 MS. O'SHEA: I think they certainly have.
8 I think - - -

9 JUDGE SMITH: I mean, don't judges say all
10 the time, you settle this case today or you're going
11 to trial tomorrow, and he shows up tomorrow; all of a
12 sudden it's off till January.

13 MS. O'SHEA: Right. You know, and I think
14 that's effectively what Judge McLaughlin did. He
15 said, you know, the defendant appeared - - - I'm
16 sorry, I may not be answering your question in
17 particular. But the judge did - - - the defendant,
18 rather, did appear to be kind of hemming and hawing
19 at that point. And I think it was, you know - - -

20 JUDGE PIGOTT: Happened to be what?

21 MS. O'SHEA: Hemming and hawing.

22 JUDGE PIGOTT: Hemming and hawing.

23 MS. O'SHEA: You know, he seemed a little
24 indecisive about what he wanted to do - - -

25 JUDGE SMITH: And a - - - I guess what I'm

1 really asking is a basically empty threat of being
2 forced to trial a legitimate arsenal - - - a
3 legitimate weapon in the arsenal - - -

4 MS. O'SHEA: I think it absolutely is, Your
5 Honor. And I think - - - I don't think it's likely
6 this case is going to trial on July 25th.

7 JUDGE RIVERA: So what - - - what about
8 opponent's point that the ADA didn't speak up,
9 knowing that they were going on leave?

10 MS. O'SHEA: I can understand the judge's
11 exasperation with that. But I think one of the
12 reasons he didn't or he didn't need to, was that he
13 knew full well that the case was going to be disposed
14 of. So whether he was there at the next court
15 appearance or not, or the next assistant who was
16 going to take over the case - - -

17 CHIEF JUDGE LIPPMAN: But your adversary
18 seems to say, though, they wanted to go to trial.

19 MS. O'SHEA: Well, I don't think it - - -

20 CHIEF JUDGE LIPPMAN: But what I'm saying
21 to you is sort of a variation on what Judge Smith was
22 saying. Can you get rid of them and then you know
23 you're going to get a plea? Does that work? If the
24 Legal Aid Society basically are not willing to take a
25 plea, or certainly that plea, can the judge just

1 remove the attorney and say, okay, now I'm going to
2 get a plea?

3 MS. O'SHEA: No, I - - -

4 CHIEF JUDGE LIPPMAN: And that's kind of
5 what happened. Is that a viable way that the justice
6 process should work?

7 MS. O'SHEA: I don't think that's what she
8 was doing, Your Honor. I think she was exasperated
9 with both sides. But I think she was particularly -
10 - -

11 CHIEF JUDGE LIPPMAN: She's clearly more
12 exasperated with them.

13 MS. O'SHEA: You know, it - - - well, let
14 me just say that the one thing that particularly
15 peeved her, I think, was when the Legal Aid Society
16 got up and said, you know, ten days ago Mr. Cohen
17 resigned, and we've done nothing - - - we haven't
18 taken steps - - - we haven't reassigned the case yet.
19 Ten days is a long time. The Legal Aid - - - I think
20 that really might have put her over the edge.

21 CHIEF JUDGE LIPPMAN: Let me ask you, did -
22 - -

23 MS. O'SHEA: And she knew, as
24 administrative judge, that was a systemic problem.

25 CHIEF JUDGE LIPPMAN: Let me ask - - - let

1 me ask you one more question, because your light is
2 on. Do you think in looking at this that the record
3 here is disproportionate? Putting aside the - - -
4 what constitutes the ultimate legal resolution of
5 this, doesn't it seem like the justice system - - -
6 that the scales are not evenly balanced here? I
7 mean, by any objective - - - by your reading of it,
8 it seems that boy, whatever the legal outcome is,
9 that the judge had it in for one side?

10 MS. O'SHEA: She was certainly testy with
11 the Legal Aid Society. But on other occasions, she
12 was equally testy with the People. She was perfectly
13 outraged when she discovered that ADA Savur had not
14 disclosed his paternity leave. She used words like
15 "poor judgment", he's an officer of the court, he
16 could - - - and on other occasions she dragged him to
17 the courtroom and insisted that he explain why the
18 People were not ready on that occasion.

19 JUDGE PIGOTT: My point exactly.

20 MS. O'SHEA: I think she was a tough judge.

21 JUDGE PIGOTT: Well, this is not the way
22 the justice system is supposed to work in - - -

23 MS. O'SHEA: As I said, not a model
24 proceeding. But it was her job, nevertheless, to see
25 that the case was - - - either went to trial or was

1 disposed of. And she felt, as Your Honor seems to
2 agree with, that the case had been dragging on for
3 too long. If it's not going to be disposed of, it's
4 got to go out for a hearing and trial.

5 CHIEF JUDGE LIPPMAN: Okay.

6 MS. O'SHEA: Thank you, Your Honors.

7 CHIEF JUDGE LIPPMAN: Thanks. Thank you
8 both. Appreciate it.

9 (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 People v. Anthony Griffin, No. 46 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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