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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. 44

MARSHA SIBBLIES,

Appellant.

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20 Eagle Street  
Albany, New York 12207  
February 13, 2014

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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1 CHIEF JUDGE LIPPMAN: Number 44, People v.  
2 Sibblies.

3 MR. GARELICK: Good afternoon. I'd request  
4 two minutes' rebuttal, please.

5 CHIEF JUDGE LIPPMAN: Sure. Go ahead,  
6 counsel.

7 MR. GARELICK: The prosecutor in this case  
8 provided the surest possible indicator that they were  
9 not ready for trial; they stated they weren't ready  
10 for trial - - -

11 CHIEF JUDGE LIPPMAN: Was it - - -

12 MR. GARELICK: - - - without the medical  
13 records.

14 CHIEF JUDGE LIPPMAN: - - - an illusory  
15 certificate of readiness?

16 MR. GARELICK: It was illusory, Judge,  
17 because - - -

18 CHIEF JUDGE LIPPMAN: In what sense was it  
19 illusory? What's real here and what's illusory?

20 MR. GARELICK: What was illusory is because  
21 when they - - - when they came to court after their  
22 off - - - off-calendar statement of readiness, they  
23 told the court they were not ready for trial.

24 CHIEF JUDGE LIPPMAN: Wait, wait, wait, but  
25 if - - - if I - - - if I put in a certificate of

1           readiness and then there's - - - there's one or two  
2           other things that I have to do; I have to investigate  
3           something or get some materials or look into some  
4           avenue. That's it? Anything I want to look into  
5           once I do the certificate of readiness is - - - you  
6           know, that makes the certificate illusory?

7                       MR. GARELICK: I think there's two  
8           responses to that, Judge. One - - -

9                       CHIEF JUDGE LIPPMAN: Where do - - - I'm  
10          trying to ask you, where do you draw the line here?

11                      MR. GARELICK: In this case, the prosecutor  
12          didn't just say that she wasn't ready; she said the  
13          reason she wasn't ready was because she didn't have  
14          medical records in hand. She, likewise, did not have  
15          those medical records in hand - - -

16                      CHIEF JUDGE LIPPMAN: But - - -

17                      MR. GARELICK: - - - a month earlier.

18                      CHIEF JUDGE LIPPMAN: - - - let's go with  
19          that set of facts; she doesn't have certain medical  
20          records. Illusory, by definition, when she says  
21          that?

22                      MR. GARELICK: In a case where the  
23          prosecutor themselves state on the record they are  
24          not ready for trial without this evidence, and they  
25          didn't have that evidence a month earlier - - -

1                   JUDGE SMITH: Well, they changed their mind  
2 about the way they try - - - they had a change of  
3 trial strategy; that's their theory. And the - - -  
4 and the lower - - - yeah, you can be cynical, I can  
5 be cynical, but the lower courts believed him. They  
6 said they're in good faith; they changed their trial  
7 strategy. Can we review that?

8                   MR. GARELICK: Yes, because a change of a  
9 trial strategy is far too amorphous a concept to - -  
10 - to excuse a shift from readiness to unreadiness.

11                  JUDGE GRAFFEO: What about the concept of  
12 prima facie case?

13                  MR. GARELICK: If the legislature wanted to  
14 define readiness - - -

15                  JUDGE GRAFFEO: The court held they - - -  
16 that they could have proceeded and they had  
17 sufficient evidence to present a prima facie case.  
18 Why shouldn't that be the test?

19                  MR. GARELICK: It shouldn't be the test for  
20 two reasons. First, because - - -

21                  JUDGE GRAFFEO: It's a lot more concrete  
22 than - - -

23                  MR. GARELICK: It is more concrete, Judge.

24                  JUDGE GRAFFEO: - - - than a change of  
25 strategy, isn't it?

1 MR. GARELICK: And I think it's important  
2 to note that we're not requesting that a court, in  
3 every instance, look behind a prosecutor's - - - a  
4 prosecutor's statement of readiness.

5 CHIEF JUDGE LIPPMAN: So what's - - -

6 MR. GARELICK: But - - -

7 CHIEF JUDGE LIPPMAN: What's the rule?  
8 What is the rule? Once you file the certificate of  
9 readiness, what's the rule? When are you - - -

10 MR. GARELICK: If you are - - -

11 CHIEF JUDGE LIPPMAN: When are you  
12 violating that certificate and opening yourself up to  
13 a speedy trial?

14 MR. GARELICK: You know - - - you know,  
15 there's a specific fact pattern in this case, you  
16 know, whether there are other analogous fact patterns  
17 is a - - - would be hard to say, but - - -

18 CHIEF JUDGE LIPPMAN: But there has to be -  
19 - -

20 MR. GARELICK: - - - let me get the facts  
21 in this case - - -

22 CHIEF JUDGE LIPPMAN: Our decision affects  
23 more than this case.

24 MR. GARELICK: Right. But - - -

25 CHIEF JUDGE LIPPMAN: What's the general -

1 - -

2 MR. GARELICK: Right.

3 CHIEF JUDGE LIPPMAN: What's the general  
4 rule? There's got to be a way for us to - - -

5 MR. GARELICK: It's - - -

6 CHIEF JUDGE LIPPMAN: - - - parse these  
7 different situations.

8 MR. GARELICK: I mean, it's the rule that  
9 the court has stated - - - it's the definition the  
10 court has stated of readiness. Readiness is not  
11 defined in the statute. But this court has used  
12 phrases like "actually ready", "truly ready", "in  
13 fact ready to go to trial".

14 JUDGE SMITH: But taking the word "ready"  
15 and adding "actually" and "truly" to it doesn't  
16 really give you a very clear bright line.

17 MR. GARELICK: Judge, that's - - - those -  
18 - - okay.

19 JUDGE SMITH: Let me try one.

20 MR. GARELICK: Fair enough, but - - -

21 JUDGE SMITH: Let me try this one.

22 MR. GARELICK: Yeah.

23 JUDGE SMITH: Suppose - - - yeah, we've  
24 said that off-calendar statements of readiness are  
25 okay.

1 MR. GARELICK: Right.

2 JUDGE SMITH: But suppose we make a rule  
3 that if you have an off-calendar statement of  
4 readiness, and then at the next calendar appearance  
5 you show up not ready, you better have a good,  
6 convincing reason for why you - - - for that off-  
7 calendar statement of readiness.

8 MR. GARELICK: I think that would be a  
9 legitimate rule, or at least some - - - there should  
10 be some indication, some indicia that there's been a  
11 change of circumstance such that you've shifted, in  
12 some way, from ready to unready. In other words - -  
13 -

14 CHIEF JUDGE LIPPMAN: But how does that  
15 apply to this case? If that's the rule, how does it  
16 apply to this case?

17 MR. GARELICK: There wasn't a shift in  
18 circumstance in this case, Judge.

19 CHIEF JUDGE LIPPMAN: What about - - -

20 MR. GARELICK: A change - - -

21 CHIEF JUDGE LIPPMAN: What about like what  
22 Judge Smith said before that maybe I - - - I didn't  
23 know I needed the medical record, that I changed my -  
24 - - I wasn't going to use the medical records; now I  
25 need them. Why isn't that enough?

1 MR. GARELICK: Excusing that is completely  
2 inconsistent with the purpose of 30.30. The purpose  
3 of 30.30 is to encourage the prop - - - pro - - -

4 CHIEF JUDGE LIPPMAN: So when do you excuse  
5 it? What's an example when you excuse it?

6 MR. GARELICK: The statute provides for a  
7 variety of circumstances in which it's - - - which  
8 it's excused.

9 CHIEF JUDGE LIPPMAN: Tell us some of them.

10 MR. GARELICK: If a defendant becomes  
11 unavailable, if there are exceptional circumstances.  
12 There's also this concept of post-readiness delay. A  
13 post-readiness delay is a more lenient standard  
14 that's applied if you're in fact ready and then  
15 something happens and you become unready. But that  
16 shouldn't apply when you weren't - - - when - - -  
17 when the thing that makes you unready, the lack of  
18 the medical records, which again, the prosecutor said  
19 they were unready because they didn't have these  
20 records. If that was also the case when you declared  
21 ready, well, there hasn't been a change of  
22 circumstances.

23 JUDGE SMITH: Is it clear to you from our  
24 cases, and I guess especially Anderson, that if the  
25 People announce ready on day forty-five so that they



1 have forty-five extra days - - -

2 MR. GARELICK: Right.

3 JUDGE SMITH: - - - they can put those  
4 forty-five days in the bank and then later become  
5 unready and use up their forty-five?

6 MR. GARELICK: If - - - if the reason that  
7 they state on the record they are unready - - -

8 JUDGE SMITH: No, I mean, assume - - -  
9 assume there's no playing around here. Assuming - -  
10 - yeah, just assuming there's - - -

11 MR. GARELICK: Okay. Two things. Well, I  
12 mean, as a fundamental - - - as a fundamental  
13 principle, when they make their initial declaration  
14 of ready, for them to get the benefit of post-  
15 readiness delay analysis, they have to have been  
16 truly ready at the time they made their first  
17 declaration of ready.

18 JUDGE SMITH: I understand, okay; assume  
19 they are.

20 MR. GARELICK: So assuming they are, and  
21 then if there are no - - - if - - - and then if  
22 you're also assuming a scenario where nothing happens  
23 on the record, there's no further indication that  
24 they weren't ready at that time, then sure, that's -  
25 - - that's classic - - -

1 JUDGE SMITH: Okay.

2 MR. GARELICK: - - - post-readiness delay.

3 JUDGE SMITH: Let me to suggest to you - -  
4 - I mean, I think you may be reading our cases  
5 correctly - - - you don't absolutely have to read the  
6 statute that way. The statute can mean you've got to  
7 be ready on the ninetieth day, subtracting  
8 exclusions, and I'm not interested in your saying I  
9 was ready for forty-five days and then I got unready  
10 again. But I - - -

11 MR. GARELICK: I understand that, Judge,  
12 and if I - - - if it was up to me whether or not to  
13 create a concept of post-readiness delay, I might not  
14 do it. But that - - - that concept exists, and it  
15 presumes a complete state of readiness at the time  
16 the initial declaration is made.

17 So in this case - - - and - - - and I do  
18 want to, you know, go back to the facts of this case.  
19 In this case, the prosecutor said off calendar they  
20 were ready. Then they showed up in court and said  
21 we're not ready, and here's why: we don't have the  
22 medical records. Well, they also didn't have the  
23 medical records when they made their initial  
24 declaration of readiness.

25 CHIEF JUDGE LIPPMAN: What happens at that

1 second when they say that? And let's say that's not  
2 a good excuse.

3 MR. GARELICK: It establishes that the  
4 initial declaration of readiness is illusory. And I  
5 also - - - I also want to emphasize that - - -

6 JUDGE SMITH: Is illusory the same thing as  
7 in bad faith?

8 MR. GARELICK: No, it's not, and that's  
9 exactly the point I was about to make, Judge.  
10 Certainly, good faith is a necessary but, in this  
11 case, not sufficient requirement. If the prosecutor  
12 believes, in good faith, we are ready to go to trial  
13 because we have all the evidence they need, and then  
14 two weeks later they realize, you know what, we were  
15 wrong; we're not ready to go to trial, because we  
16 need these medical records to go to trial, that  
17 establishes their first declaration of readiness was  
18 illusory. It wasn't in bad faith, but it was  
19 illusory; they were wrong - - -

20 CHIEF JUDGE LIPPMAN: So what's the  
21 consequence?

22 MR. GARELICK: - - - about their readiness.

23 CHIEF JUDGE LIPPMAN: What's the  
24 consequence?

25 MR. GARELICK: Consequence is dismissal.

1 The consequence would be - - - well, the consequence  
2 is that the - - - they do not get, you know - - - the  
3 time from their illusory declaration of readiness  
4 until their eventual legitimate declaration of  
5 readiness is - - -

6 CHIEF JUDGE LIPPMAN: They just lose - - -

7 MR. GARELICK: - - - is includible. It's  
8 includable.

9 CHIEF JUDGE LIPPMAN: - - - lose that time.  
10 It counts against them for speedy trial.

11 MR. GARELICK: That time gets burnt up, you  
12 know, it's - - - the time is used. Well, I think  
13 it's important to - - - to also note in this case  
14 that - - - I mean, the suggestion has been made this  
15 would be sort of unfair to the prosecutor, an unfair  
16 burden on the system. I think that is absolutely not  
17 the case. In this case, in fact, the prosecutor had  
18 ample time to get ready within the amount of time  
19 provided. All they had to do was wait to declare  
20 ready. If they needed the medical records to proceed  
21 to trial, all they had to do was wait to declare  
22 ready until they had them. For that matter, once  
23 they had them, they could have declared ready in a -  
24 - - in a sufficient amount of time after that to  
25 avoid dismissal. And at the end of the day, if a - -

1 - if applying 30.30 places burdens on the prosecutor,  
2 well, that's not this court's, you know, obligation  
3 to relieve them of that.

4 CHIEF JUDGE LIPPMAN: Okay, counselor.  
5 Thanks.

6 MS. WHETSTONE: May it please the court and  
7 good afternoon. Kayonia Whetstone for the People of  
8 Bronx County.

9 CHIEF JUDGE LIPPMAN: Counselor, what's  
10 your answer? Your adversary says you filed the  
11 certificate and then you basically said, well, you  
12 know, we're not ready, we don't have - - - we don't  
13 have the medical records. Why is that okay?

14 MS. WHETSTONE: Because at the time that we  
15 stated ready on February 22nd, we were in a position  
16 to move forward with our case.

17 CHIEF JUDGE LIPPMAN: But you weren't  
18 really ready. You're saying - - -

19 MS. WHETSTONE: We were ready.

20 CHIEF JUDGE LIPPMAN: Why - - - why isn't  
21 he right when he characterizes that state of  
22 readiness as being illusory? You really weren't  
23 ready; you needed these medical records.

24 MS. WHETSTONE: Well, we did not need  
25 medical records to prove assault. We just decided

1 later on that we would like them to strengthen our  
2 case.

3 JUDGE SMITH: Isn't it unusual, in an  
4 assault case, not to at least try to get some medical  
5 rec - - - when you had to prove what, physical  
6 injury?

7 MS. WHETSTONE: Yes, this is a misdemeanor.

8 JUDGE SMITH: And I understand you can  
9 prove it with the victim's testimony, but isn't the  
10 usua - - - isn't the - - - the orthodox way to  
11 prosecute those cases to get medical records, if you  
12 can get them?

13 MS. WHETSTONE: Sometimes we do, and  
14 sometimes we don't.

15 JUDGE SMITH: And what - - - and this was  
16 both times, I gather. First you decided you don't  
17 and then you decided you do. What - - - what was the  
18 reason for that?

19 MS. WHETSTONE: Because the prosecutor who  
20 was assigned to the case believed that she wanted to  
21 use them to strengthen her ca - - -

22 JUDGE SMITH: But what changed her mind?

23 MS. WHETSTONE: What changed her mind? I  
24 am not sure exactly what changed her mind. I'm not -  
25 - -

1 JUDGE PIGOTT: Well, one of the concerns -  
2 - -

3 JUDGE SMITH: Doesn't it look - - - doesn't  
4 it look bad? I mean, doesn't it look a little  
5 disconcerting that she files an off-calendar  
6 statement of readiness on - - - then a few weeks  
7 later shows up in court and says I changed my mind;  
8 I'm not ready. And the only consequ - - - the only  
9 consequence of her off-calendar statement of  
10 readiness is she got those weeks of - - - those weeks  
11 added on to her time.

12 MS. WHETSTONE: No - - -

13 JUDGE SMITH: Doesn't it look like she's  
14 fooling around?

15 MS. WHETSTONE: No, I - - - I don't believe  
16 so. She actually asserted in her reply to the motion  
17 for dismissal exactly - - - she - - - that she had  
18 changed her mind. And the defense attorney - - -

19 CHIEF JUDGE LIPPMAN: Why is that fair?  
20 Does only one side determine everything in - - - in  
21 our criminal justice process as to, well, I'm ready,  
22 and gee, you know, I'm not really ready, but let's  
23 just continue on. Why - - - why should it be to the  
24 defendant's disadvantage when you have a statute as  
25 to how quickly you have to proceed?

1 MS. WHETSTONE: Right, and the - - - the  
2 People actually did not go beyond the time that - - -

3 CHIEF JUDGE LIPPMAN: Yeah, but I'm asking  
4 you, in that situation, why is that fair? Why do you  
5 determine that I'm ready, I'm not ready, oh, I  
6 changed my mind? Why shouldn't you comply with the  
7 statutory requirements as to how quickly you have to  
8 be ready? Why is that okay?

9 MS. WHETSTONE: If - - - if we went with my  
10 opponent's rule - - - proposed rule, then that would  
11 mean that prosecutors would wait till the nineteenth  
12 hour until the - - - until 30.30 time was almost  
13 over, until they stated ready. And that would  
14 promote laxity, but I - - -

15 CHIEF JUDGE LIPPMAN: Why should you state  
16 ready if you're not ready? Yeah, it's - - - yeah - -  
17 - yeah, it's too late if you - - - if you're not  
18 ready by a certain date. Why is that not a good  
19 rule? If you're ready, you're ready, and if you're  
20 not, don't say that you're ready.

21 MS. WHETSTONE: Right, but in this case the  
22 People were ready, and counsel is just trying to use  
23 the nomenclature of - - -

24 CHIEF JUDGE LIPPMAN: But I - - - my  
25 question to you is - - -



1 MS. WHETSTONE: Um-hum.

2 CHIEF JUDGE LIPPMAN: - - - I understand  
3 your reasoning where you're saying, no, we really  
4 were ready but then we changed our mind. Why is that  
5 fair in a criminal justice system that's supposed to  
6 be balanced? That's my question. Why is it okay  
7 that you said, you know what, I thought I was ready  
8 but I think I need those medical records? Why, from  
9 a policy perspective, is that okay? Shouldn't we all  
10 meet the time standards that are required, whether  
11 it's the defendant, the prosecutor, or whatever is  
12 involved in a criminal justice case, why - - - I  
13 guess what I'm saying to you, in the most, you know,  
14 objective fashion, the prosecutor can't determine all  
15 the rules; when the statutes already have the rules,  
16 you have to comply by them. And why is it not, in  
17 the - - - in the real meaning of that word, illusory,  
18 when you file a certificate and you're really not  
19 ready?

20 MS. WHETSTONE: Because I - - - I think  
21 it's assuming we're really not ready. The fact is  
22 that this court has stated what ready means, and it's  
23 when you're - - -

24 JUDGE PIGOTT: Well, can I put it another  
25 way?

1 MS. WHETSTONE: Yes.

2 JUDGE PIGOTT: Because you - - - you raised  
3 a point, a valid one, that she change - - - she  
4 changed her strategy. Shouldn't we be saying you  
5 can't do that? In other words, if - - - if you say  
6 you're ready for trial and - - - and you've got your  
7 witnesses and everything and you're ready to go, why  
8 should it inure to the detriment of the defendant  
9 that on day eighty-nine or something you say, oh, you  
10 know, we decided now that we're going to call a  
11 doctor and he's not available for six weeks, so we  
12 need an adjournment when he's, you know, ready for  
13 his defense, et cetera, just because the People  
14 decide they - - - they want to - - - they want to go  
15 in a different direction in terms of prosecuting the  
16 case? Shouldn't that - - - shouldn't that all be  
17 decided before anybody says the case is ready?

18 MS. WHETSTONE: Well, the statute allows  
19 for pre - - - tack - - - for - - - for tacking pre-  
20 readiness and post-readiness, and it gives us a  
21 certain amount of time in which to proceed to trial.  
22 And when that time has elapsed, then dismissal is the  
23 remedy.

24 JUDGE PIGOTT: Of course.

25 MS. WHETSTONE: But in the case where - - -

1 where we have time to continue to investigate or to -  
2 - -

3 JUDGE PIGOTT: Well, I was drawing a  
4 distinction, and tell me - - - maybe I'm wrong, but  
5 you get there on day ninety and you've either got to  
6 go or you're going to get it dismissed - - -

7 MS. WHETSTONE: Yes.

8 JUDGE PIGOTT: - - - and you say the  
9 prosecutor who was supposed to be trying this case is  
10 busy on another case that went longer than we  
11 thought; we need an adjournment. I would think the  
12 judge would understand that and there would be an  
13 adjournment. If, on the other hand, the prosecutor  
14 who's supposed to try the case is standing there and  
15 says, I've decided I'm going to use a different  
16 strategy than what I was prepared to do, so I need  
17 another ninety days, do you think the judge should  
18 grant that?

19 MS. WHETSTONE: The judge has the ability  
20 to grant or say, you know what, People, you're going  
21 to go - - - you're going to have to go forward. The  
22 judge in this case did not have to grant the request.  
23 If you look at Hynes v. George, you know, there is an  
24 opportunity for the - - - for the court to say,  
25 People, I don't care that you think you want the

1 medical records and you - - -

2 JUDGE RIVERA: I - - -

3 MS. WHETSTONE: - - - would prefer to wait

4 - - -

5 JUDGE RIVERA: I took your argument a  
6 little bit different. I took your argument - - -  
7 correct me if I'm wrong. I understood your argument  
8 not to be we've come up with a different approach to  
9 the case; I took your argument to be, oh, the ADA  
10 figured out that it might be a stronger case if we  
11 got the records.

12 MS. WHETSTONE: Yes.

13 JUDGE RIVERA: And that strikes me as  
14 different from saying we've got a whole different  
15 approach. So why do you get the benefit when - - -  
16 let's assume that - - - that you've got the colorable  
17 argument that on day X, when you said you were ready,  
18 you really were ready. But then it's adjourned and  
19 you say, you know, I want to work a little bit  
20 harder; I want to make it an even stronger case.  
21 You're not changing your approach to the case, in  
22 that sense - - -

23 MS. WHETSTONE: Um-hum.

24 JUDGE RIVERA: - - - of the strategy or a  
25 theory. It's just, oh, I've got some more time; I'm

1 going to make it ready. Why - - - why should you get  
2 the benefit of that? Why should the defendant pay  
3 the price for you wanting to make it an even better  
4 case?

5 MS. WHETSTONE: Why should they pay the  
6 price for our strengthening - - -

7 JUDGE RIVERA: Yeah, the price is, of  
8 course - - -

9 MS. WHETSTONE: - - - our case?

10 JUDGE RIVERA: - - - the ninety days;  
11 you're exceeding the ninety days.

12 MS. WHETSTONE: Well, I think the People  
13 have the ability to present the evidence that they  
14 believe is important. And - - -

15 JUDGE RIVERA: Well, within the time frame.

16 MS. WHETSTONE: Within the time frame.

17 JUDGE RIVERA: Um-hum.

18 MS. WHETSTONE: And here, within the time  
19 frame, we did have more time to continue to  
20 strengthen our case.

21 JUDGE GRAFFEO: That's what - - -

22 JUDGE RIVERA: Well, up to day ninety, but  
23 then you - - -

24 MS. WHETSTONE: Up to day ninety.

25 JUDGE RIVERA: But then you went beyond day

1           ninety.

2                         Can I just ask you one more question? Is  
3           there anything that the ADA or your office could have  
4           done - - - because you're waiting around for the  
5           records - - - I assume when you asked for the records  
6           you were still within your ninety days?

7                         MS. WHETSTONE: Yes.

8                         JUDGE RIVERA: Okay. Is there anything you  
9           could have done? Once - - - once the ADA says, you  
10          know what, I want to make it a stronger case; I want  
11          these records. Is there anything you could have done  
12          to expedite getting the records so that you would  
13          come within the ninety-day time frame? It sounds to  
14          me like you sat and waited around for the records.

15                        MS. WHETSTONE: Well, no, I believe that  
16          the prosecutor who was assigned to the case, when she  
17          got it and determined that she needed the records,  
18          she went and she got them. She actually got them in  
19          the time that she informed the court that she would  
20          be getting them. She ordered them on March 2nd; she  
21          got them on March 30th. They were certified.

22                        CHIEF JUDGE LIPPMAN: So why isn't that all  
23          on your tab? Fine. You needed the records? Go get  
24          them. You said you're ready? You're ready. You  
25          have your ninety days. On your - - - on your

1 account, no?

2 MS. WHETSTONE: It - - - we - - - Your  
3 Honors, we did argue that even if - - - even if we  
4 were charged with the time from March 28th, 2007 to  
5 May 23rd, the total time that we ate was only seventy  
6 days. So we were within our time period. Here we  
7 were - - - we were ready with a prima facie case when  
8 we initially stated ready. We did not need the  
9 medical records. We decided to strengthen our case  
10 by requesting the medical records. Then we asked for  
11 an adjournment so that we could have time to review  
12 it. We only asked for the time that we needed.

13 CHIEF JUDGE LIPPMAN: So the adjournment -  
14 - -

15 MS. WHETSTONE: We asked - - -

16 CHIEF JUDGE LIPPMAN: The adjournment  
17 doesn't count; that's what you're saying? The  
18 adjournment time?

19 MS. WHETSTONE: The adjournment time - - -

20 CHIEF JUDGE LIPPMAN: Yeah, what - - -

21 MS. WHETSTONE: We should be charged with  
22 the time - - -

23 JUDGE SMITH: You say only - - -

24 MS. WHETSTONE: - - - that we requested.

25 JUDGE SMITH: - - - the seven days you

1 asked for, not the longer time that you got?

2 MS. WHETSTONE: Yes, but even if we - - -  
3 even if we got the longer time, still only a total of  
4 seventy days were used, and so we fit well within the  
5 statutory - - -

6 CHIEF JUDGE LIPPMAN: Assuming you're not  
7 charged for those additional days.

8 MS. WHETSTONE: Yes.

9 JUDGE SMITH: How long - - -

10 JUDGE RIVERA: I'm sorry, just to clarify -  
11 - -

12 CHIEF JUDGE LIPPMAN: Judge - - -

13 JUDGE RIVERA: What are the days you're - -  
14 - under this approach to this case, what are the days  
15 you're saying don't get charged to you? What period  
16 of time are you saying that should not be charged to  
17 us, that gets us to, I think you said, seventy days  
18 instead of the ninety days.

19 MS. WHETSTONE: Yes. We - - - we agree  
20 that we should be charged for February 8th through  
21 the 22nd, when we filed the initial statement of  
22 readiness, and then again, if, in the court's view,  
23 we needed to be charged with from March 28th to the  
24 time we - - - we filed an additional statement of  
25 readiness, which is May 23rd, then that is the time



1           that we should be charged. But here we - - - we  
2           complied with the statute. Strengthening our case  
3           was within our discretion. We got charged with the  
4           time we requested. And if you make a rule that says  
5           we can never continue to investigate, then it would  
6           really go against what the statutory - - - what - - -  
7           what the statute was enacted for.

8                         CHIEF JUDGE LIPPMAN: Okay. Judge Smith,  
9           do you have another question?

10                        JUDGE SMITH: Yeah. The - - - the off-  
11           calendar statement of readiness, I mean, if - - -  
12           when you - - - we know that off-calendar statements  
13           of readiness are allowed, and we all - - - and you're  
14           telling us that a sufficient reason for post-  
15           readiness delay is I've changed my mind about how to  
16           try the case. Doesn't that really open the door to  
17           abuse? You can file - - - I'm not saying it happened  
18           in this case, but you say I'd like a little more time  
19           so I'll file an off-calendar statement of readiness,  
20           and then the next court appearance, I show up and  
21           say, oh, I changed my mind; I'm not ready anymore.  
22           What good did your readiness do anyone and what - - -  
23           you know, what - - - is there a rule we can make that  
24           will prevent - - - prevent prosecutors from gaming  
25           the system in that way?

1 MS. WHETSTONE: I think the current rule  
2 helps - - - I think the current rule does just that;  
3 it prevents us from gaming the system, because here,  
4 if you look at the record, the People said, Your  
5 Honor, we are requesting, you know, seven days; we're  
6 continuing to investigate. And the judge says, you  
7 know, why? We - - - we were asked why and - - -

8 JUDGE SMITH: Yeah, but I'm - - -

9 MS. WHETSTONE: - - - and we - - -

10 JUDGE SMITH: - - - I'm asking more - - -  
11 I'm not sure that's my question. My question is  
12 what's to stop a prosecutor who thinks he would like  
13 to get a - - - just to put some time in the bank that  
14 he might want to use later, to file a post-readiness  
15 - - - an off-calendar statement of readiness and then  
16 just withdraw it before - - - before the - - - before  
17 anyone can tell him to go to trial?

18 MS. WHETSTONE: Because there is the  
19 presumption that the statement is valid, and then - -  
20 -

21 JUDGE SMITH: Well, then you're say - - -

22 MS. WHETSTONE: - - - it's up to - - -

23 JUDGE SMITH: That's a way of - - -

24 MS. WHETSTONE: It's - - -

25 JUDGE SMITH: - - - saying nothing prevents

1 him.

2 MS. WHETSTONE: No, then it's - - - then it  
3 can go to a hearing and these - - - these judges - -  
4 - the motion courts are in the best position to  
5 observe the demeanor and credibility and determine  
6 whether or not a statement was actually - - -

7 CHIEF JUDGE LIPPMAN: Okay, counselor.

8 MS. WHETSTONE: - - - illusory.

9 CHIEF JUDGE LIPPMAN: Thanks, counselor.

10 MS. WHETSTONE: Thank you.

11 CHIEF JUDGE LIPPMAN: Counselor, rebuttal?

12 MR. GARELICK: A couple of comments. You  
13 know, I think it's pretty clear that a decision to  
14 get medical records in a case like this is - - - is  
15 not a change of theory. So even assuming, for the  
16 sake of argument, that a change of theory would  
17 justify this, it just isn't. They - - - they - - -  
18 they want to prove an assault, they have certain  
19 evidence of injury - - -

20 CHIEF JUDGE LIPPMAN: Well, assume it's a -  
21 - - they wanted to make a better case.

22 MR. GARELICK: A better case isn't - - - is  
23 not a change of theory, A, and B, doesn't fall within  
24 any exception to the 30.30 requirements. And it's up  
25 to the DA. The whole point of 30.30 is to encourage

1 speedy trial. Now, it's done through the mechanism  
2 of a prosecutorial readiness rule, but the underlying  
3 reason is to encour - - - is to encourage speedy  
4 trials. So if the DA can just change their mind  
5 about how much evidence they need to go forward - - -

6 JUDGE PIGOTT: Well, what's wrong - - -

7 MR. GARELICK: - - - when they are "ready"  
8 then - - -

9 JUDGE PIGOTT: What's wrong the theory  
10 where, let's assume they had the victim in, you know,  
11 at some point - - -

12 MR. GARELICK: Right.

13 JUDGE PIGOTT: - - - and they think they're  
14 ready, and the victim then tells them, for the first  
15 time, that he's been to a - - - a hospital or a  
16 clinic and there is medical records that they were  
17 not aware of before. What, in your view, could - - -  
18 could a DA do in terms of saying I need those records  
19 in order to go to trial?

20 MR. GARELICK: I think that they could make  
21 an application. There's a section - - - a section  
22 under 30.30 which provides for - - - I'm not  
23 remembering the exact wording, but for, you know,  
24 exceptional circumstances. Or if there's material  
25 evidence which they had made due diligence to get and



1           It's for the protection of the defendant.  A speedy  
2           trial is for his or her benefit, right?

3                       MR. GARELICK:  And the entire system,  
4           Judge, not just the defendant.  It's - - - it's meant  
5           - - - it's - - - the whole entire system has an  
6           interest - - - society has an interest in speedy  
7           trials.

8                       CHIEF JUDGE LIPPMAN:  Thank you, counselor.  
9                       Thank you both.

10                      (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. Marsha Sibblies, No. 44, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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