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COURT OF APPEALS

STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

No. 92

GRADY HAMPTON,

Appellant.

20 Eagle Street
Albany, New York 12207
April 23, 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:

JOSEPH A. GENTILE, ESQ.
FRANKIE AND GENTILE, P.C.
Attorneys for Appellant
1527 Franklin Avenue
Suite 104
Mineola, NY 11501

BARBARA KORNBLAU, ADA
NASSAU COUNTY DISTRICT ATTORNEY'S OFFICE
Attorneys for Respondent
County Court House
262 Old Country Road
Mineola, NY 11501

Karen Schiffmiller
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: 92, People v.
2 Hampton.

3 You want any rebuttal time, counsel?

4 MR. GENTILE: I would request one minute of
5 rebuttal time, Your Honor.

6 CHIEF JUDGE LIPPMAN: One minute, sure. Go
7 ahead, you could start now.

8 MR. GENTILE: May it please the court, my
9 name is Joseph Gentile, and I represent the appellant
10 Grady Hap - - - Hampton on this particular appeal.

11 The issue before this court is the
12 interpretation of Judiciary Law Section 21.

13 CHIEF JUDGE LIPPMAN: Counsel, what - - -
14 why - - - what's unreasonable about Judge Palmieri
15 deciding the motion here, when - - - when - - -
16 couldn't you make a good argument he's not
17 determining credibility, he's just reviewing the
18 record? What's wrong with that?

19 MR. GENTILE: What happened in this case is
20 synonymous with what is the problem when we engage in
21 this type of conduct - - -

22 JUDGE LIPPMAN: What - - -

23 MR. GENTILE: - - - in the sense of - - -

24 CHIEF JUDGE LIPPMAN: Tell us; what is the
25 problem?

1 MR. GENTILE: Motive. Judge Carter, in the
2 trial order of dismissal argument that occurred in
3 this case - - -

4 CHIEF JUDGE LIPPMAN: Right.

5 MR. GENTILE: - - - clearly said to the
6 Assistant District Attorney at the end of their case,
7 you have not established motive. You didn't prove
8 motive by showing that there was pre-shooting
9 knowledge by defendant Hampton of a sexual
10 relationship between his - - - Nikki Gray and the
11 deceased in this case.

12 JUDGE PIGOTT: Does your argument, though,
13 come down - - -

14 MR. GENTILE: The prob - - -

15 JUDGE PIGOTT: - - - come down to whether
16 or not he - - - he - - - he read the transcript of
17 the oral argument or whether he had to have another -
18 - - or had - - - had to have live oral argument in
19 front of him?

20 MR. GENTILE: My point is that at a trial
21 order of dismissal procedure, Your Honor, a factual
22 assessment is supposed to be conducted by the trial
23 court.

24 JUDGE SMITH: Well, suppose - - - suppose -
25 - - wouldn't the statute still apply if - - - if it

1 had been a pure legal issue?

2 MR. GENTILE: The statute applies to legal
3 issues as well, Your Honor, as it does to factual
4 questions. The Cameron case, for example, in the
5 First Department was a motion to suppress physical
6 evidence. That's a legal question. The - - -

7 JUDGE SMITH: The - - - no, there's another
8 one that's a motion to strike a jury demand.

9 MR. GENTILE: That's true. And there's the
10 motion to strike the case from the calendar out of
11 the Fourth Department. Those are legal questions
12 where Section 21 applies.

13 JUDGE READ: You're saying this - - - this
14 is not. A trial order of dismissal is not a purely
15 legal - - - whether there's a sufficient evidence is
16 not purely a legal issue.

17 MR. GENTILE: No, I am saying that legally
18 sufficient evidence is purely a legal issue. However
19 - - -

20 CHIEF JUDGE LIPPMAN: So why isn't that - -
21 - why isn't that dispositive of this case, then?

22 MR. GENTILE: It's not dispositive, Your
23 Honor, because - - -

24 CHIEF JUDGE LIPPMAN: Why?

25 MR. GENTILE: - - - it's the factual

1 assessment, as Your Honors indicated - - -

2 JUDGE SMITH: What - - - if it - - - I mean

3 - - -

4 MR. GENTILE: - - - you indicated - - -

5 JUDGE SMITH: I'm - - - I'm - - - I'm

6 confused. Are you conceding that if there were no

7 factual assessment involved you would lose?

8 MR. GENTILE: No, I'm not, Your Honor, not

9 in any way - - -

10 JUDGE SMITH: Because - - - yes, I mean,

11 you're - - - you're making two alternative arguments?

12 One is you're saying I don't care if this is an

13 argument about the rule against perpetuities; I'm

14 entitled to an oral argument. And then al - - -

15 you're also saying there's some factual issues here.

16 MR. GENTILE: Yeah, I'm saying that they're

17 the underlying - - - getting back to the first

18 question Your Honor asked - - -

19 CHIEF JUDGE LIPPMAN: Yeah, go ahead,

20 counsel.

21 MR. GENTILE: Motive. Judge Palmieri reads

22 the same cold record and concludes, you know what,

23 the District Attorney did prove motive in this case,

24 because the rumors that were out on the street and

25 the glancing looks. So the problem that you have - -

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JUDGE GRAFFEO: Aren't - - - aren't - - -
isn't the Appellate Division allowed to do that?

MR. GENTILE: I don't question that the
Appellate Division can review it after - - -

CHIEF JUDGE LIPPMAN: You're saying - - -

MR. GENTILE: - - - there's been a full
trial assessment by the initial trial judge.

CHIEF JUDGE LIPPMAN: Yeah, but you're
saying the judge can't look at a cold record. You
got to see the - - - the - - - the - - - the what?
The testimony or the argument? What are you saying?

MR. GENTILE: There is no question that a
trial judge is allowed to evaluate a witness'
demeanor, the approach of the witness, the way that a
witness answers his question in also evaluating the
factual assessment. In fact, Judge, even in this
case, would any of us had known that the
investigative detective had such a problem answering
questions, unless Judge Carter mentioned in the
record that he spins, that he doesn't answer
questions directly, that - - -

JUDGE SMITH: Can - - - can - - - can a
witness' - - - can a - - -

JUDGE PIGOTT: To go back to my - - - to go

1 back to what I was saying is, are you saying if Judge
2 Palmieri had had oral argument - - -

3 MR. GENTILE: Yes.

4 JUDGE PIGOTT: - - - that would have been
5 okay?

6 MR. GENTILE: If Judge Palmieri was present
7 when the oral argument occurred - - -

8 JUDGE PIGOTT: No, no, no. Carter dies - -
9 - I don't want to kill the man, but - - -

10 MR. GENTILE: No, let's not do that.

11 JUDGE PIGOTT: - - - passes away. But, so
12 now - - - now you're saying if that happens - - -

13 MR. GENTILE: Right.

14 JUDGE PIGOTT: - - - if Judge Carter as in
15 this case recuses himself, it's got to be a mistrial.
16 It cannot be oral argument on the legal sufficiency
17 of the evidence.

18 MR. GENTILE: Let me say why, because - - -

19 JUDGE PIGOTT: But that's - - - your
20 answer's yes.

21 MR. GENTILE: Yes.

22 JUDGE PIGOTT: Okay.

23 MR. GENTILE: Because of the following
24 reasons: the Smith case which came before this
25 court, the Evans case in the Third Department. When

1 the violation of Section 21 occurs during the trial
2 process, this court - - - I recognize that it's an
3 old case, but it's still good law; it's an old case
4 from this court - - - and the Evans case and the
5 Morris-Imhoppe out of the Court of Claims, all
6 indicate that you register a new trial. In other
7 words, the procedural status of the case dictates the
8 remedy. When you have a Section 21 violation that
9 occurs from an order - - -

10 CHIEF JUDGE LIPPMAN: Are you relying - - -
11 is your argument basically relying on the literal
12 language of the statute?

13 MR. GENTILE: To a degree, but the - - -

14 CHIEF JUDGE LIPPMAN: Is that the issue
15 here?

16 MR. GENTILE: The que - - - well, one of
17 the things - - - it's not a question of my argument,
18 Judge.

19 CHIEF JUDGE LIPPMAN: Fine, because I'm
20 seeing two different things. Why it is un - - - why
21 is it unfair that Judge Palmieri makes a determine
22 (sic) on the legal sufficiency as an issue, and - - -
23 and assuming it is fair, then your argument comes
24 back to, well, you - - - you can't do it, because the
25 statute just says you can't do it.

1 MR. GENTILE: Well, we have - - -

2 CHIEF JUDGE LIPPMAN: Is that right?

3 MR. GENTILE: We have a statute that's been
4 interpreted to apply both to factual questions and
5 both to legal questions. And the trigger for the
6 statute, Your Honor, is the transfer of the case.
7 It's not - - - the District Attorney is trying to
8 argue it doesn't appl - - - it only applies to legal
9 questions; it doesn't apply to factual questions.
10 But that's not what the court said. In the Smith
11 case, it was findings of fact and conclusions of law.
12 In the Evans case, it was a factual determination but
13 at the end of a trial. What this - - -

14 JUDGE SMITH: But isn't it - - -

15 JUDGE RIVERA: What's the purpose behind
16 the statute?

17 MR. GENTILE: It seems to me, Your Honor,
18 the purpose behind the statute is to prevent
19 precisely what occurred in this case, that a litigant
20 is entitled to have a judge who has heard the oral
21 argument, whether it be on a legal question or
22 whether it's on the factual findings, to have that
23 judge rule on that determination.

24 JUDGE RIVERA: But that gets you right - -

25 -

1 JUDGE GRAFFEO: It is, however - - -

2 JUDGE RIVERA: - - - back to the problem
3 we're having. So if it's purely a le - - - let's
4 just stay with that one. If it's purely a legal
5 question, what - - - why would it matter?

6 MR. GENTILE: It's not - - - as Your Honors
7 are well aware, there's no such thing as the "pure
8 legal question". Somebody has to do a factual
9 analysis - - -

10 JUDGE PIGOTT: No, take a statute of
11 limitations. Let's assume - - - let's assume that
12 the - - - the only argument before Judge Cor - - -
13 Carter at the end was, well, he - - - he was charged
14 with murder, but they convicted him of, manslaughter.
15 Manslaughter's a five-year statute of limitations,
16 and this happened before that. Therefore, he - - -
17 I'm entitled to a dismissal.

18 MR. GENTILE: Right.

19 JUDGE PIGOTT: Carter then recuses himself
20 and somebody else comes in, and the question is
21 whether or not there's a five-year statute of
22 limitations on manslaughter.

23 MR. GENTILE: If it was such a purely
24 distinct legal issue of that type, post verdict - - -
25 I recognize that post-verdict decisions dealing with

1 that question. But the problem that you have, Your
2 Honor, is - - -

3 JUDGE SMITH: But what - - - I mean - - -

4 MR. GENTILE: - - - is the Bachler case.

5 JUDGE SMITH: What the - - - if - - - if
6 then, then what? Then you lose the case?

7 MR. GENTILE: No, if - - - if not - - -

8 JUDGE SMITH: Or would a - - - or if then,
9 then it could be cured by reargument before Judge
10 Palmieri?

11 MR. GENTILE: I don't believe that
12 reargument is sufficiently, a satisfactory remedy.

13 JUDGE SMITH: In your - - - in your ca - -
14 - I understand that - - - I understand that you're
15 saying in your case, reargument doesn't do it. Take
16 Judge Pigott's statute of limitation case. Is it
17 good - - - if - - - if you have exactly the same
18 situation, except that all we're hearing is a statute
19 of limitations argument, wouldn't it be enough to
20 have reargument before the new judge?

21 MR. GENTILE: Yeah, the only problem I have
22 with the hypothetical is I would assume that a judge
23 that has litigation before them on a statute of
24 limitations question - - -

25 JUDGE SMITH: Okay, but take - - -

1 MR. GENTILE: - - - would address the
2 question in some - - -

3 JUDGE SMITH: - - - take - - - take - - -
4 try - - - try to answer yes or no. Would it be cured
5 on the hypothetical case that he put, would it be
6 cured by reargument before the new judge?

7 MR. GENTILE: I don't believe it would be
8 cured, but I would recognize the line of cases that
9 say, after a verdict is reached, this case the
10 defendant was not sentenced, there is a line of cases
11 that says the following: if you're reviewing purely
12 a legal issue, and if you review the record, and if
13 there's no other issue, and if the perspective of the
14 trial judge is not critical to the determination,
15 then that issue - - -

16 JUDGE SMITH: Oh, but I think - - -

17 MR. GENTILE: - - - can be reviewed. The
18 problem here - - -

19 JUDGE SMITH: I think - - - I think - - - I
20 think we're blending two things. There are - - -
21 there's a line of cases that says, this just a - - -
22 this statute doesn't count for purely legal issues.
23 I assume you're saying those are wrong. Even if
24 you're right about that, even if the statute does
25 apply to purely legal issues, my question is why

1 isn't any statutory violation avoided by having a
2 second argument before a new judge?

3 MR. GENTILE: Because - - -

4 JUDGE SMITH: Oral argument.

5 MR. GENTILE: Because of the procedural
6 status of the case, Judge. Trial order of dismissal,
7 this court's - - -

8 JUDGE SMITH: Okay, but you're - - - but
9 implicit in that is what - - -

10 MR. GENTILE: In this - - -

11 JUDGE SMITH: If this were not a trial
12 order of dismissal, if this were some dis - - - or if
13 this were an argument in a civil case about the - - -
14 the rule against perpetuities - - -

15 MR. GENTILE: Correct.

16 JUDGE SMITH: - - - then you say that new
17 argument before the new judge is good enough.

18 MR. GENTILE: That could conceivably be
19 correct, but that's not what we have here. In this
20 case, this court said in Hines, a trial order of
21 dismissal requires an evaluation at two distinct
22 portions of the case. At the end of the People's
23 case, the trial judge is supposed to evaluate the
24 DA's case. And just before verdict, when the second
25 trial order of dismissal is, this court has said,

1 very clearly, defense counsel beware, because if you
2 put on a defense case, you can replace a legal
3 element in a component in that case.

4 CHIEF JUDGE LIPPMAN: Counsel, that's a - -
5 - that's a - - -

6 JUDGE PIGOTT: That - - - that being true -
7 - - that being true, Mr. Gentile, if - - - if - - -
8 if you're supposed to construe all of the evidence
9 most favorably to the people - - -

10 MR. GENTILE: Correct.

11 JUDGE PIGOTT: - - - at the end of their
12 case - - -

13 MR. GENTILE: Yes.

14 JUDGE PIGOTT: - - - I want us to stick
15 with that one for a minute - - - how can the - - -
16 how can the judge - - - the second judge make a
17 mistake that's not simply appealable on the face of
18 the record? Because he - - - he or she is going to
19 construe it favorably to the People, you're either
20 going to win or lose. If you lose, you can say he -
21 - - he - - - he or she construed it this way, and
22 it's legally incorrect.

23 MR. GENTILE: I can only point to what
24 happened here, Judge. How could Judge Palmieri
25 conclude there was evidence of motive when Judge

1 Carter looked at the same record and says, you did
2 not prove motive?

3 JUDGE SMITH: Can a - - - can a - - -

4 JUDGE RIVERA: But he never - - -

5 MR. GENTILE: And that's the reason - - -

6 JUDGE RIVERA: Yeah, but he never - - - but
7 he didn't - - -

8 MR. GENTILE: - - - why we have the basis
9 for - - -

10 JUDGE RIVERA: - - - render a decision.

11 MR. GENTILE: He was - - -

12 JUDGE GRAFFEO: He could have come back the
13 next day and changed his mind, no? You don't think
14 so.

15 MR. GENTILE: Oh, but at that trial order
16 of dismissal, your argument - - - Your Honor, I'd ask
17 you to look at that record very carefully. He was
18 very clear - - -

19 JUDGE RIVERA: I understand, but he
20 reserved decision.

21 MR. GENTILE: He reserved decision, but on
22 the question of motive, he was crystal clear.

23 CHIEF JUDGE LIPPMAN: Counsel - - -

24 MR. GENTILE: It had not been established.

25 CHIEF JUDGE LIPPMAN: Counsel, I - - - I

1 know you want to win, but isn't there - - - isn't - -
2 - isn't judicial economy at all an issue here?
3 Doesn't it make sense to - - - to - - - you had
4 whatever you had, you know, with Carter. He
5 expressed a view, maybe he could change it, maybe he
6 couldn't. Why - - - why doesn't that just make sense
7 to - - - to allow the judge to look at the record and
8 - - -

9 MR. GENTILE: Two reasons.

10 CHIEF JUDGE LIPPMAN: - - - make a
11 determination and then you have your options?

12 MR. GENTILE: Two reasons. Number one,
13 because the case law under Evans and the case law
14 under Smith say when a trial order of dis - - - trial
15 issue motion is litigated, you're entitled to a new
16 trial, and that's the procedural remedy.

17 CHIEF JUDGE LIPPMAN: Why isn't it fair
18 here - - -

19 MR. GENTILE: - - - and secondly, more
20 importantly - - -

21 CHIEF JUDGE LIPPMAN: - - - to do it this
22 way?

23 MR. GENTILE: - - - in this case, Judge - -
24 -

25 CHIEF JUDGE LIPPMAN: Yeah.

1 MR. GENTILE: - - - we have a case with DNA
2 evidence that did not match this particular
3 defendant; we have no physical evidence that attaches
4 to this defendant. We have absolutely nothing that
5 ties him, except this spectacular and unstable
6 testimony of one witness who fabricated a third party
7 at a crime scene. That is the only evidence that
8 attaches Grady Hampton to this particular case.

9 CHIEF JUDGE LIPPMAN: Okay, counsel.

10 MR. GENTILE: Thank you, Judge.

11 CHIEF JUDGE LIPPMAN: You'll have rebuttal
12 time.

13 MR. GENTILE: Thank you.

14 CHIEF JUDGE LIPPMAN: Let's hear from your
15 adversary.

16 MS. KORNBLAU: Good afternoon. My name is
17 Barbara Kornblau, and I represent the People of the
18 State of New York - - -

19 CHIEF JUDGE LIPPMAN: Counsel, can - - -

20 MS. KORNBLAU: - - - the respondent, in
21 this matter.

22 CHIEF JUDGE LIPPMAN: Can Judge Palmieri
23 determine motive? Your ar - - - your adversary
24 argues that basically Judge Carter had cast doubt on
25 that, and then Judge Palmieri says, you know, they -

1 - - they demonstrated motive. Is - - - is that fair
2 that that - - -

3 MS. KORNBLAU: Well, let - - - let - - -
4 let me say two things, uh, with respect to that.
5 First of all, and perhaps most importantly, motive is
6 not an element of a criminal charge and in
7 particular, in this case, it is not an element of the
8 offense. And in - - -

9 JUDGE SMITH: So you're - - - you're - - -
10 you're saying that in this case, with no proof of
11 motive, you would still have had sufficient evidence
12 to convict?

13 MS. KORNBLAU: Well, I'm not going to say
14 that there was no evidence of motive. I - - -

15 JUDGE SMITH: I'm saying, hypothetically,
16 if all the evidence of motive were stricken from the
17 record, would you say this was a legally sufficient
18 case?

19 MS. KORNBLAU: I would say this was a
20 legally sufficient case. I would not say it was the
21 strongest case in the world, but I certainly would
22 say that it was legally sufficient. I - - -

23 JUDGE PIGOTT: And when you get to that
24 point, Mr. Gentile, I don't know if he plays the
25 piano or not, what he wants to say is, you know, I

1 can have Cliburn play this piece or I can. And I
2 want to have Cliburn play it. I want the lawyer that
3 was there to make the argument to the judge that was
4 there. That didn't happen here, because Judge Carter
5 recused himself, so we got to go back. There - - -
6 there - - - there's some resonance to that argument,
7 isn't there?

8 MS. KORNBLAU: Well, I think that - - -
9 that certainly counsel would rather have Judge Carter
10 decide the issue, because, of course, he's not
11 pleased with Judge Palmieri's decision, and there was
12 some indication that Judge Carter had some issues.

13 With regard to motive, however, his issue
14 was whether or not the evidence in the case
15 established that this defendant knew that his
16 girlfriend had had a sexual relationship with the
17 victim, Kareem Sapp at some time prior to the murder.
18 And the judge had expressed his concern that perhaps
19 the defendant had only learned of that after the fact
20 and not before the murder.

21 And that was his concern, and I think that
22 the record is crystal clear, and I think that, in
23 fact, Judge Palmieri, when reviewing the record, saw
24 that the record was clear, that in fact, this
25 defendant had heard of the rumors of the sexual

1 relationship between Sapp and his girlfriend prior.

2 CHIEF JUDGE LIPPMAN: What about the
3 statute? Is that clear?

4 MS. KORNBLAU: I'm sorry?

5 CHIEF JUDGE LIPPMAN: What about the
6 statute? Is that clear? The language of the
7 statute?

8 MS. KORNBLAU: I think that this statute is
9 quite clear. I think the question that's before this
10 court is, what constitutes a question insofar as this
11 statute is concerned as - - -

12 JUDGE PIGOTT: I think that - - -

13 JUDGE RIVERA: And why doesn't that mean
14 the statute has some ambiguity?

15 MS. KORNBLAU: Well, the statute does have
16 some ambiguity - - -

17 JUDGE RIVERA: So it's not clear.

18 MS. KORNBLAU: - - - because it doesn't
19 specify what a question is. And I would - - -

20 JUDGE SMITH: But - - - but how can - - -
21 how can the words "question which was argued orally"
22 - - - it doesn't say question which was tried; it
23 says question which was argued orally. How can that
24 not include legal questions?

25 MS. KORNBLAU: Well, I don't think it

1 includes legal questions, because legal - - -

2 JUDGE SMITH: I mean, the - - - the - - -
3 the legislature could have said question of fact, if
4 it meant question of fact. We all - - - it's not - -
5 -

6 MS. KORNBLAU: Yes, and it also could have
7 said - - -

8 JUDGE SMITH: - - - the - - - the questions
9 - - - the existence of questions of law is not
10 something unknown to the legislature.

11 MS. KORNBLAU: Yes. I think it could have
12 gone either way and said either thing. You know, the
13 - - - it - - - it's very difficult in this particular
14 case to determine what the intent of the legislature
15 was. I did attempt to get copies of - - - of the
16 bill jacket and so on, which were destroyed in a
17 fire.

18 JUDGE SMITH: How far back - - -

19 JUDGE GRAFFEO: It's a pretty old statute,
20 isn't it?

21 MS. KORNBLAU: Yes, it is. Yes, it is.
22 But I was in touch with the - - - the law librarian
23 at the government law office, and I was advised that
24 that - - -

25 JUDGE SMITH: How far back does it go?

1 MS. KORNBLAU: Well, it goes back to 18 - -
2 - I think it's 1867, when it was first codified under
3 Section 46 of the Code of Civil Procedure, and then
4 became Judiciary Law 22 in 1909, and subsequently was
5 renumbered in 1945. So it does go back quite a way.

6 However, in - - - in trying to determine
7 what the intent was, I - - - I think, being that we
8 don't have that information at our disposal, that
9 it's important to go back to some of the earlier
10 cases that did look at intent. And one of those
11 cases was, in fact, a case that was decided by this
12 court, and that is Smith v. State of New York,
13 decided in 1915, only six years after Judiciary Law
14 22 was adopted. And in that particular - - -

15 JUDGE SMITH: And only fifty years after
16 the statute was originally written.

17 MS. KORNBLAU: Correct, correct. But
18 again, it was - - - it was readopted, if you will, as
19 Judiciary Law number 22 in 1909.

20 JUDGE PIGOTT: Can "argued orally" be
21 defined to include a transcript of oral argument?

22 MS. KORNBLAU: Can oral - - - I'm sorry.
23 Would you repeat the question?

24 JUDGE PIGOTT: I - - - I - - - what I was
25 focused on was, it says that the judge, other than

1 the judge - - - you know, can take part in a decision
2 which was "argued orally in the court."

3 MS. KORNBLAU: Can that include a trans - -
4 - a transcription of the argument?

5 JUDGE PIGOTT: And I - - - I assume you're
6 going to say yes, but I - - -

7 MS. KORNBLAU: Well, I believe that it can
8 when the issue is a purely legal issue, because if
9 we're trying to determine what the legislature
10 intended with the word "question" - - -

11 JUDGE SMITH: Do - - - do we know whether
12 Judge Palmieri read a transcript of this oral
13 argument?

14 MS. KORNBLAU: Yes, he did. He said - - -

15 JUDGE SMITH: Oh, I see, because it was
16 part of the trial transcript.

17 MS. KORNBLAU: Yes, Judge Palmieri
18 indicated that he had read the entire trial
19 transcript including all of the motions and including
20 all of - - -

21 CHIEF JUDGE LIPPMAN: Could you argue that
22 legal sufficiency can't be looked at in a vacuum? I
23 think that's what your adversary is arguing.

24 MS. KORNBLAU: I think that legal
25 sufficiency has to be looked at in the light, as the

1 law says, most favorable to the People, which might
2 necessarily be a - - -

3 CHIEF JUDGE LIPPMAN: That's critical here,
4 that - - - that you read it - - -

5 MS. KORNBLAU: I think that that's very
6 critical here, simply because - - -

7 CHIEF JUDGE LIPPMAN: Otherwise - - -
8 otherwise, maybe you couldn't do it just in a vacuum?

9 MS. KORNBLAU: I - - - I would agree; I
10 would agree with that, because there are no issues of
11 credibility. There are no issues with respect to
12 weighing the potential of conflicting evidence.

13 CHIEF JUDGE LIPPMAN: Because you view it
14 in the light most favorable to the People.

15 MS. KORNBLAU: Because you do it in the
16 light most favorable to the People.

17 I think that this court has really already
18 spoken to this case when it decided *People v.*
19 *Thompson*, because by allowing the mid-trial
20 substitution, which this court did, of a judge - - -

21 JUDGE SMITH: But didn't we rely on the
22 fact that it wasn't - - - that there were - - - that
23 there were no motions pending and that the jury, not
24 the judge, was going to decide the case?

25 MS. KORNBLAU: Yes, but in that particular

1 case, the People had presented their entire case;
2 they had already presented their seven witnesses.
3 They had not yet made a trial order of dismissal
4 prior to the time that the judge passed away. The
5 judge passed away and a new judge came in, having not
6 heard any of those witnesses.

7 And so by implication, by allowing that,
8 this court necessarily did determine that that new
9 judge, who had not heard any of those witnesses,
10 would be able to rule on a trial order of dismissal
11 or on a motion to set aside the verdict - - -

12 JUDGE SMITH: I mean, the - - - the - - -

13 MS. KORNBLAU: - - - at the conclusion - -
14 -

15 JUDGE SMITH: I guess the - - - I - - - I
16 understand the common sense of - - - of what you're
17 saying, and the - - - but I just have trouble
18 reconciling it with the statute. I mean, how can - -
19 - when a statute says, "a judge shall not decide or
20 take part in the decision of a question which was
21 argued orally in the court, when he was not present
22 and sitting therein as a judge", tell me again how
23 that isn't exactly what happened here?

24 MS. KORNBLAU: Well, I would submit that
25 the word "question" refers to a question of law, and

1 not - - -

2 JUDGE SMITH: You mean - - - you mean - - -
3 you mean a question of fact.

4 MS. KORNBLAU: I'm sorry, a question of
5 fact, and not a question of law, because when we're
6 talking about factual determinations, we are talking
7 about issues where the perspective of the judge that
8 heard the evidence is critical.

9 JUDGE SMITH: If we - - - if we should
10 disagree with you on that, does he get his mistrial?

11 MS. KORNBLAU: Absolutely not. The remedy
12 here would be - - - would be either to have this
13 court, who has all of the information that it needs
14 before it to decide the issue of legal sufficiency,
15 because that is the issue that we're talking about
16 here - - -

17 JUDGE SMITH: Even though - - - even though
18 no court below has - - - well, even though it was not
19 validly decided below, we can decide it?

20 MS. KORNBLAU: Absolutely.

21 JUDGE SMITH: Is that really fair? I mean,
22 the - - - yeah, he - - - you have a statute by - - -
23 by assumption, which you dispute, but our assumption
24 for the moment, the statute was violated. He was
25 entitled to have a judge who heard his argument

1 decide, he didn't get it, and we're going to say, oh,
2 well, okay, we're going to dec - - - we're - - -
3 we're going to do exactly what we would do if the
4 statute had not been violated?

5 MS. KORNBLAU: Well, I think that the - - -
6 the - - - you know, all of the information that this
7 court needs, the argument itself, is in counsel's
8 papers, it's contained in the record of the trial - -
9 -

10 JUDGE SMITH: Yeah, that's the - - - we - -
11 - well, why do we - - - why do we bother with lower
12 court decisions anyway? Why don't - - - they could
13 just come directly to us.

14 MS. KORNBLAU: Well, certainly if this
15 court were not inclined to decide that issue, then I
16 think the remedy here would be to return this case to
17 the lower court for argument before the judge - - -

18 JUDGE READ: But the Appellate - - -

19 MS. KORNBLAU: - - - who would decide the
20 motion on legal sufficiency.

21 JUDGE READ: But the Appellate Division's
22 already decided it.

23 MS. KORNBLAU: Yes, the Appellate Division
24 has determined - - -

25 JUDGE READ: That seems like an exercise in

1 futility; doesn't it?

2 MS. KORNBLAU: Yes, it certainly does. It
3 certainly does. That decision has already been made.

4 JUDGE SMITH: But would - - - if - - - if
5 we were to reverse here and order a new argument on
6 the motion, could - - - would it not be the Appellate
7 Division's duty to address it de novo on a new
8 appeal?

9 MS. KORNBLAU: I - - - I believe since they
10 have already decided the issue that indeed it would
11 be.

12 JUDGE SMITH: Since they have decided the
13 issue, that it would be - - -

14 MS. KORNBLAU: They have already decided
15 the issue of legal sufficiency.

16 JUDGE SMITH: I understand they've already
17 decided. Are they bound by that?

18 MS. KORNBLAU: I think they are bound by
19 that.

20 JUDGE SMITH: On the hypothesis that we
21 reverse, they're still bound by it?

22 MS. KORNBLAU: If you reverse the judgment?

23 JUDGE SMITH: Yes.

24 MS. KORNBLAU: Well, I - - - I - - - again,
25 that's not our position that this court would - - -

1 JUDGE SMITH: I understand, but we're
2 talking about the remedy if you should, God forbid,
3 lose the case.

4 MS. KORNBLAU: Well, I think the remedy if
5 we, God forbid, should lose the case would be merely
6 to return the case for oral argument before - - -

7 JUDGE SMITH: And on that scenario, am I
8 right in thinking that the Appellate Division,
9 although they have indeed decided the question, would
10 not be bound by its previous decision?

11 MS. KORNBLAU: I think the judge - - - the
12 Appellate Division would be bound by their ori - - -
13 their original decision because it is the same facts
14 and cases - - -

15 JUDGE SMITH: How can they be bound by a
16 decision that we have reversed?

17 JUDGE READ: Well, whether they're bound or
18 not, it's not likely that they're going to change
19 their minds, is it, now?

20 MS. KORNBLAU: It is not likely that they
21 will change their mind.

22 JUDGE SMITH: You might get five different
23 judges.

24 MS. KORNBLAU: That's true.

25 JUDGE PIGOTT: Before you go - - - sorry -

1 - - sorry, Judge. But on the - - - the statute, it
2 says that - - - says, "a judge, other than a judge of
3 the Court of Appeals or an Appellate Division judge."
4 Since we're a law court, why would we be included in
5 the statute if it didn't also apply to questions of
6 law?

7 MS. KORNBLAU: Well, I think that it
8 excludes you from the statute, and essentially says
9 that - - - that a judge other than - - -

10 JUDGE SMITH: Well, why is the exclusion
11 necessary?

12 JUDGE PIGOTT: Right, it says - - - yeah.

13 MS. KORNBLAU: The only thing I can think
14 of is because these arguments are not maintained on
15 the record, and therefore, you know, when decisions
16 are - - - are decided before this court, it is
17 imperative that whoever decide those cases be
18 present.

19 CHIEF JUDGE LIPPMAN: Okay, counsel, thank
20 you.

21 MS. KORNBLAU: Thank you.

22 CHIEF JUDGE LIPPMAN: Counsel, rebuttal?

23 MR. GENTILE: I would ask this court to
24 take a careful look at the Section 21 case law, and
25 if Your Honors do that, I believe you'll see a

1 certain trend. If the remedy involves an order and
2 it's a Section 21 violation, the remedy is to vacate
3 the order. In cases where there have been hearings,
4 such as the Cameron case in the First Department or
5 the Hopper case in the Fourth Department, the remedy
6 is to have a new hearing.

7 Where the Section 21 violation occurs
8 during the trial process or involved the process, as
9 in the Smith case or the Evans case, the appropriate
10 remedy that the courts have indicated, including this
11 court in the Smith case, has been to order a new
12 trial. And that is the appropriate remedy under the
13 circumstances here, not merely remitting the case
14 back.

15 And regarding the question of legal
16 sufficiency, you have before you a very, very unique
17 fact pattern in this case which I won't belabor. But
18 you can see the - - - what the cases - - -

19 CHIEF JUDGE LIPPMAN: Counsel, but what
20 about the issue that we talked about? If you view it
21 in a light most favorable to the People, what - - -
22 what's the problem?

23 MR. GENTILE: Here's the problem, Judge.
24 The only evidence that tied the appellant in this
25 case to this crime, no physical evidence,

1 contradictory DNA, et cetera, was Shamiqua Nelson.
2 Shamiqua Nelson is somebody who fabricated a - - -

3 JUDGE PIGOTT: Well, it happened in his
4 neighborhood involving his girlfriend as she's going
5 to - - - as she's going to work with her paramour. I
6 - - - I - - - I mean, you - - - you - - - you've - -
7 - I - - - I get your point on - - - on - - - on
8 motive. But this happened in a very closed area and
9 - - -

10 MR. GENTILE: No, but, Your Honor, my point
11 is, she fabricated a third person screaming at the
12 scene saying he did it, he did it. That person
13 doesn't exist, because the girlfriend at the scene,
14 and Nikki Gray at the scene - - -

15 JUDGE SMITH: She - - - she - - -

16 MR. GENTILE: - - - and Joel didn't see it
17 that person.

18 JUDGE SMITH: How do you know she doesn't
19 exist, because you - - - she doesn't exist because no
20 one else remembers her? Isn't that a bit of a leap?

21 MR. GENTILE: Those people would have been
22 right next to her, Judge. Joel Delacruz was in the
23 car.

24 JUDGE SMITH: Well, what about - - - they
25 say - - - since we're rearguing, what about all - - -

1 what about your client's false exculpatory statements
2 about where he was? Isn't - - - doesn't that give
3 some support to the verdict here?

4 MR. GENTILE: As Your Honor has known from
5 the case law on consciousness of guilt, first of all,
6 whether it's a false exculpatory statement is
7 debatable to the extent that this detective - - -

8 JUDGE SMITH: It's inconsistent with his
9 cell phone records.

10 MR. GENTILE: - - - that this detective for
11 four hours was playing a cat and mouse game. I don't
12 question that the defendant was completely candid at
13 all moments, but at the same time, this detective had
14 no interest in finding the truth. He had the
15 interest in con - - - having a conviction.

16 CHIEF JUDGE LIPPMAN: Okay, counsel.
17 Thanks, counsel.

18 MR. GENTILE: Thank you.

19 CHIEF JUDGE LIPPMAN: Appreciate it.

20 Thank you both.

21 (Court is adjourned)

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C E R T I F I C A T I O N

I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Grady Hampton, No. 92 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



Signature: _____

Agency Name: eScribers

Address of Agency: 700 West 192nd Street
Suite # 607
New York, NY 10040

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