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COURT OF APPEALS

STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

No. 47

KEITH A. ADAMS,

Appellant.

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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Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: 47, People v. Adams.

2 MR. JUERGENS: Good afternoon. David

3 Juergens for Mr. Adams. We request - - -

4 CHIEF JUDGE LIPPMAN: Go ahead, counselor.

5 MR. JUERGENS: - - - we were requesting - -

6 -

7 CHIEF JUDGE LIPPMAN: Rebuttal?

8 MR. JUERGENS: Pardon?

9 CHIEF JUDGE LIPPMAN: Rebuttal time?

10 MR. JUERGENS: Oh, I'm sorry. Two minutes,
11 please.

12 CHIEF JUDGE LIPPMAN: Two minutes, sure.
13 Go ahead.

14 MR. JUERGENS: We're asking the court to
15 rule as a matter of law that the mandatory legal
16 relationship between the county prosecutor and a
17 county criminal court judge with criminal court
18 jurisdiction is a disqualifying conflict of interest
19 - - -

20 CHIEF JUDGE LIPPMAN: Are you saying you
21 want a per se rule?

22 MR. JUERGENS: A per se rule - - -

23 CHIEF JUDGE LIPPMAN: What does the rule
24 look like?

25 MR. JUERGENS: The rule is that if the

1 district attorney - - - if there's a complaint filed
2 by a same county judge with criminal court
3 jurisdiction that either the prosecutor or the
4 defense attorney, if they so choose, should be able
5 to move to disqualify the district attorney and have
6 a special prosecutor. If - - -

7 CHIEF JUDGE LIPPMAN: Does that - - - does
8 that conflict with any of our case law as it exists
9 now?

10 MR. JUERGENS: I would say that it follows
11 with People v. Zimmer. In that case the prosecutor
12 was - - - had a legal relationship with the victim
13 corporation. He was counsel for the corporation and
14 he also had a financial interest in that he was a
15 stockholder. It's the same type of a - - -

16 JUDGE SMITH: So you're saying, then, the
17 result would be the same if there were no indication
18 in this record that the People had treated this any
19 differently from any other case. I mean, to me, the
20 - - - one of the troubling - - - the most troubling
21 thing in the record is the claim, at least, that
22 there'd never been a case in history in this county
23 in which they'd been so tough on a petty harassment.
24 Isn't that really indispensable to your argument?

25 MR. JUERGENS: Well, that - - - that

1 definitely helps the argument. The request for the
2 broader rule is based upon a public perception that
3 there's a substantial possibility of undue influence,
4 conscious or unconscious, by the judge over the
5 prosecutor's exercise of his discretion.

6 CHIEF JUDGE LIPPMAN: You can win in this
7 case without a per se rule?

8 MR. JUERGENS: Yes. Yes.

9 CHIEF JUDGE LIPPMAN: Based on what? What
10 - - -

11 MR. JUERGENS: Based upon - - -

12 CHIEF JUDGE LIPPMAN: - - - what would the
13 basis of finding be?

14 MR. JUERGENS: Based upon Mr. Adams alleged
15 that he was being treated differently than similarly
16 situated defendants. And we had a defense attorney
17 who alleged that he had never seen - - -

18 JUDGE PIGOTT: Suppose he was. Suppose, in
19 this case the victim said, you know, I really want to
20 get rid of this. And the DA says we're not - - -
21 we're not going to plead down on a case involving a
22 high public official. Sorry, but that's what we're
23 not going to do.

24 MR. JUERGENS: Well, the DA - - - I need to
25 emphasize that this involved private communications.

1 I mean - - -

2 JUDGE PIGOTT: It's a long way of my
3 saying, if you get a special prosecutor and the
4 prosecutor says I'm going to try this case, I'm not
5 here to plead it out, so let's go pick a jury; would
6 you be in any better shape than you ultimately were
7 in this case?

8 MR. JUERGENS: Well, we would have a
9 disinterested prosecutor. And that's what - - -

10 JUDGE PIGOTT: The appearance would be
11 better?

12 MR. JUERGENS: The appearance would be
13 better. I mean, he has a due process right. And we
14 look at - - - the reason prosecutors had - - -

15 JUDGE GRAFFEO: What do you mean by a "due
16 process right"? Because there's not a right to be
17 presented with a plea bargain, is there?

18 MR. JUERGENS: No, it's a due process - - -

19 JUDGE GRAFFEO: I mean - - -

20 MR. JUERGENS: - - - right to - - -

21 JUDGE GRAFFEO: - - - it's not unknown for
22 prosecutors to say we're not discussing a negotiated
23 plea in a certain case.

24 MR. JUERGENS: Absolutely. But if the
25 prosecutor is doing so because they're trying to

1 curry favor or avoid disfavor - - -

2 CHIEF JUDGE LIPPMAN: But let's take that
3 exact case. And I think this is the thing I'm trying
4 to figure out in my own mind. Let's say that that is
5 to some degree what happened. But let me put it in a
6 little different light. What if you just have a
7 difficult complainant and the complainant happens to
8 be a judge. And I get you on the appearance issues
9 and all of that. And the complainant says I don't
10 care. I don't want you to, you know, to take a plea
11 in this case. And they - - - they're just doing what
12 they probably would do with any really difficult
13 complainant, and they just happen to be a judge.

14 What is driving this? Is it that this is
15 an unusual case that - - - and we know there's never
16 been a case where you can't just get an ACD or
17 whatever it is - - - it's an unusual case, and the
18 complainant just happens to be a judge. Is it the
19 appearance that makes us rule in your favor, or is
20 there something wrong where you just have a difficult
21 complainant who says, listen, I know you ultimately
22 make the decision, but you are guided to some degree,
23 you know, by the complainant.

24 You don't even - - - what's driving this?
25 What do we hang our hats on?

1 MR. JUERGENS: Well, there's no problem
2 with the prosecutor taking into consideration what
3 the - - -

4 CHIEF JUDGE LIPPMAN: Right.

5 MR. JUERGENS: - - - wishes are of the
6 complainant. But the prosecutor is representing the
7 People of the State of New York. It's not - - - the
8 prosecutor's not being a partisan - - -

9 CHIEF JUDGE LIPPMAN: So what you - - - is
10 what you're saying - - - I guess this is what I'm
11 driving at - - - that this is so outside the norm
12 that it goes beyond just the complainant who you're
13 accommodating, let's say, if you were or were not a
14 judge - - - but it's so outside the norm that it
15 demonstrates that this is all about this conflict or
16 appearance or whatever you want - - - the
17 relationship that they have with the judge? Is that
18 it - - -

19 MR. JUERGENS: It is so - - -

20 CHIEF JUDGE LIPPMAN: - - - is that the
21 conclusion that we must draw? Is that what you're
22 saying?

23 MR. JUERGENS: It is so outside the norm
24 that the motion for the special prosecutor was
25 brought, I think, when - - -

1 CHIEF JUDGE LIPPMAN: What about their
2 argument that well, you know, he wouldn't have taken
3 the plea anyway - - -

4 MR. JUERGENS: Well, that - - -

5 CHIEF JUDGE LIPPMAN: - - - he put in a
6 defense? What's wrong with that?

7 MR. JUERGENS: - - - that argument doesn't
8 hold water, because I think we can fairly assume that
9 if the defense attorney makes a specific request, my
10 client, how about a disorderly conduct; forty hours
11 of community service; maybe some mental health
12 counseling. And the prosecutor turns around and
13 says, no, we're not going to ex - - - you know, we're
14 not making a plea offer. And yet - - -

15 JUDGE SMITH: You say your guy wanted to
16 avoid a misdemeanor conviction?

17 MR. JUERGENS: That's exactly what it was.
18 This is an educated man, forty-seven years old, no
19 prior criminal record whatsoever, a - - - you know,
20 volunteer in the community. Every indication that in
21 a normal case, there would have been a disorderly
22 conduct or an ACD but for the fact that the - - -

23 JUDGE SMITH: But for the fact that it's a
24 well-connected defendant, is that the - - - well-
25 connected complainant?

1 MR. JUERGENS: That's - - - that's - - -
2 yes.

3 JUDGE SMITH: And you're saying that even
4 if that's not the fact, when the appearance is strong
5 enough as to make it uncomfortable.

6 MR. JUERGENS: Yes. And the appearance, I
7 think it's - - - I think it's - - -

8 JUDGE SMITH: Does appearance count when
9 you're talking about disqualifying the prosecutor for
10 the county? Didn't we say in a couple of cases that
11 you have to have the reality, not just the
12 appearance?

13 MR. JUERGENS: I think the appearance
14 alone, as a special exception, can be applied in this
15 case. And - - -

16 JUDGE READ: So there has to be, or doesn't
17 have to be, actual prejudice shown?

18 MR. JUERGENS: Well, the general rule is
19 that there has to be actual prejudice or substantial
20 risk of - - -

21 JUDGE READ: Right.

22 MR. JUERGENS: - - - actual prejudice. And
23 - - -

24 JUDGE READ: And you say you have it here
25 because?

1 MR. JUERGENS: Because - - - well, we have
2 it even on the papers that were submitted by the
3 prosecutor in response to the motion saying that we
4 are basing our decision on the strength of the case
5 and the complainant's wishes, and that the
6 defendant's background is irrelevant.

7 CHIEF JUDGE LIPPMAN: Yeah, but the judge
8 is asking you - - - let me see - - - Judge Read, I
9 think, is saying appearance is only enough - - -
10 you're saying if we go for the pro se rule - - - per
11 se rule?

12 MR. JUERGENS: Right.

13 CHIEF JUDGE LIPPMAN: Okay.

14 MR. JUERGENS: Right.

15 CHIEF JUDGE LIPPMAN: So then it's
16 appearance. If it's not a per se rule, then it's
17 actual prejudice.

18 MR. JUERGENS: Then it's actual prejudice
19 or substantial risk - - -

20 JUDGE PIGOTT: Do you draw the line just at
21 judges? Because, I mean, what happens with police,
22 you know, when they're the victims, when they're the
23 - - -

24 MR. JUERGENS: There's not a mandatory
25 legal relationship between the head DA who has, you

1 know, final discretion and the - - - and the
2 complainant judge in this case. I mean, this is a
3 situation where you have a - - - you know, day in and
4 day out, the prosecutor has to appear before the
5 judge, negotiate cases. As noted, the Public
6 Defender's Office conflicted out because we were
7 being put in an adversarial position. But this is a
8 similar prejudice that I would say the general public
9 - - - you know, it undermines the confidence of the
10 general public and the impartiality of the system.

11 CHIEF JUDGE LIPPMAN: But that's - - - but
12 that's a good point. Does it matter that everybody
13 else has opted out: the judge, the defense; and then
14 the prosecutor is the only one standing? How does
15 that relate to - - -

16 MR. JUERGENS: I think it helps. I think
17 it helps. I think - - - I think with a per se rule,
18 you would have one general standard for New York
19 State, rather than having sixty-two different
20 suggested - - -

21 CHIEF JUDGE LIPPMAN: Is the per se rule
22 that everybody has to get out? Or is it just the
23 judge?

24 MR. JUERGENS: The per - - - the per se
25 rule is if the judge complainant in the same county

1 as the prosecutor, if either side - - -

2 CHIEF JUDGE LIPPMAN: Just the prosecutor.

3 Yeah.

4 JUDGE SMITH: So - - -

5 JUDGE GRAFFEO: Would your posture be the
6 same if this was a supreme court judge in civil - - -

7 MR. JUERGENS: No - - -

8 JUDGE GRAFFEO: - - - term?

9 MR. JUERGENS: - - - no. Because you're
10 not in the - - - in the trial arena of plea
11 bargaining where you have the prosecutor - - -

12 CHIEF JUDGE LIPPMAN: But - - - yeah, I'm
13 sorry. Go ahead, finish.

14 MR. JUERGENS: Well, you have the
15 prosecutor involved with daily - - - you know, the
16 pros - - -

17 JUDGE GRAFFEO: What if it's the town
18 justice?

19 MR. JUERGENS: If it's criminal - - - if he
20 has criminal court jurisdiction, then I would say
21 yes. It relates - - - it relates to criminal court
22 judges, because that's the district attorney's
23 livelihood, prosecuting criminal court cases.

24 JUDGE RIVERA: Counsel, can I just ask,
25 what is your understanding of this alternative

1 standard on disqualification: substantial risk of an
2 abuse of confidence?

3 MR. JUERGENS: That wouldn't apply here. I
4 think that applies primarily to when you have
5 attorneys switching sides, and you have an attorney
6 that was, you know, a defense attorney becoming a
7 prosecutor or prosecutor becoming a defense attorney.

8 JUDGE SMITH: Why wouldn't - - -

9 JUDGE RIVERA: Why wouldn't it apply?

10 JUDGE SMITH: Yeah.

11 JUDGE RIVERA: Why couldn't we read that
12 differently?

13 MR. JUERGENS: Um - - -

14 JUDGE RIVERA: Let's say we've held that
15 way in the past, does that mean we can't look at this
16 in your case and say this section might actually
17 apply or this approach might be the better approach?

18 MR. JUERGENS: I guess I'm looking - - -
19 I'm trying to see what would be - - - what would be
20 the - - -

21 JUDGE SMITH: I think the question's good
22 for you.

23 MR. JUERGENS: Okay.

24 JUDGE SMITH: Yes.

25 MR. JUERGENS: Well, if it's good for me, I

1 - - -

2 JUDGE RIVERA: Think about it since your
3 light is red.

4 CHIEF JUDGE LIPPMAN: Go ahead. You'll
5 have rebuttal time.

6 MR. JUERGENS: Thank you.

7 MS. WOLFORD: Good afternoon, Your Honors.
8 Kelly Wolford on behalf of the People of the State of
9 New York.

10 CHIEF JUDGE LIPPMAN: Counselor, why
11 wouldn't it better to get the prosecutor out of
12 there? The judge - - - the judge felt that - - - the
13 other judges felt they had to get out; the defense
14 people felt they had to get out. Why wouldn't it
15 have been better, at the very least, for appearance
16 purposes and people to have confidence in the
17 judicial process, why wouldn't it have been better
18 for them to - - -

19 MS. WOLFORD: Well, I think - - -

20 CHIEF JUDGE LIPPMAN: - - - to get out?

21 MS. WOLFORD: - - - it's not - - - it's
22 never better for the county prosecutor to step out
23 without an actual prejudice to the defendant, because
24 the people of this - - - of our county elected the
25 district attorney. It is a constitutional officer.

1 And absent actual prejudice or substantial risk
2 thereof - - -

3 CHIEF JUDGE LIPPMAN: Yeah, yeah, but if -
4 - -

5 MS. WOLFORD: - - - it's never better for a
6 - - -

7 CHIEF JUDGE LIPPMAN: - - - would you
8 agree, if there was an inherent conflict, he's
9 advocating - - - your adversary is advocating for a
10 per se rule - - - if there was inherent conflict, it
11 can't be that it's always better for the prosecutor
12 to stay. You would agree, if there's a conflict, the
13 prosecutor has to get out.

14 MS. WOLFORD: And there are cases where
15 this court has held such. And without a doubt - - -
16 and there are many times that we have asked in our
17 office for a special prosecutor, because we recognize
18 that there is an inherent - - -

19 CHIEF JUDGE LIPPMAN: Right.

20 MS. WOLFORD: - - - conflict.

21 CHIEF JUDGE LIPPMAN: So it's not always
22 better. That's my only point.

23 MS. WOLFORD: No. But it's always bad if
24 the - - - if the district attorney does not feel that
25 there's a con - - - that there's a conflict, and

1 there's no actual conflict shown.

2 JUDGE SMITH: What about the indication, at
3 least in the record, that this case was handled
4 differently from any other case of the kind, ever.

5 MS. WOLFORD: I - - - I would direct your
6 attention to both respo - - - both the defendant's
7 motion and the People's response. There's a lot of
8 hyperbole and a lot of "I've never seen this in all
9 my days in the courthouse" - - -

10 JUDGE SMITH: Well, but - - -

11 MS. WOLFORD: - - - from both sides.

12 JUDGE SMITH: - - - but it's - - - isn't it
13 - - - yeah. But it's easy to say, I mean, if it's
14 true, oh, yeah, we do this all the time. I had one
15 the week before last where we insisted on going to
16 trial because the complaint - - - I mean, was this
17 judge the first hard-line complainant you'd ever had?

18 MS. WOLFORD: Absolutely not. And this - -
19 -

20 JUDGE SMITH: And how many - - -

21 MS. WOLFORD: - - - to say that this is
22 different - - -

23 JUDGE SMITH: - - - how many times did you
24 - - - I mean, you have one - - - the lawyer stands up
25 and is very specific, I've been doing this thirteen

1 years; never had one where I didn't get an offer.
2 You - - - it's easy to produce a counter-example,
3 right?

4 MS. WOLFORD: Quite frankly, that, to me,
5 is patently unbelievable. As the defen - - - from
6 the defense perspective. I've practiced with that
7 attorney. I know for certain that that is not, in
8 fact, the case, as I've stood in court with him and
9 made offers that involve no reduction in cases - - -

10 JUDGE SMITH: Okay, but we - - -

11 MS. WOLFORD: - - - so - - -

12 JUDGE SMITH: - - - don't have your
13 advantage. We're sitting here looking at this
14 record. He makes this assertion. Nobody
15 contradicted it. Should there at least - - -

16 MS. WOLFORD: Well - - -

17 JUDGE SMITH: - - - have been a hearing?

18 MS. WOLFORD: - - - it was contradicted by
19 the People - - -

20 JUDGE SMITH: Well - - -

21 MS. WOLFORD: - - - who said - - -

22 JUDGE SMITH: - - - it was contradicted - -
23 - it was kind of in the general way, oh, no, we're
24 handling this the way we handle every one. It's
25 never - - - nobody ever said, oh, come on; you were

1 counsel last May when the same thing happened.

2 MS. WOLFORD: Well, and if I could, I think
3 that may be a good segue to a regrettable thing that
4 I need to bring to the court's attention. And I
5 apologize for having to do this at oral argument, but
6 in reviewing the brief - - - which was not written by
7 myself - - - it became very clear to me that this
8 whole case was briefed on the - - - on a direct
9 appeal from Rochester City Court, where it is very
10 clear from the record that the Rochester City Court
11 judge who was presiding over this case, denied the
12 motion based on his belief that he did not have the
13 jurisdiction to even hear the motion, and that the
14 motion needed to be made in superior court.

15 The motion being made in superior court, it
16 would not have - - - it would have been a collateral
17 proceeding, and not part of the direct appeal.

18 JUDGE SMITH: Why - - - I mean, I thought
19 of that, too. They told me I was wrong. Wasn't
20 Justice Marks just essentially substituting at a
21 stage of the criminal case, just filling in because
22 only she had the power to do it? I mean - - -

23 MS. WOLFORD: Not at all.

24 JUDGE SMITH: - - - isn't that the way the
25 parties treated it?

1 MS. WOLFORD: Well, it appears that it was
2 treated that way in some respects. But it was made
3 very clear in Rochester City Court - - - everybody
4 seemed to understand that the city court did not have
5 the power to decide this.

6 JUDGE SMITH: Yes, well, certainly the city
7 court judge didn't. But I mean, you're saying that -
8 - - you're saying that the defendant could have
9 appealed directly to the Fourth Department from
10 Justice Marks' ruling?

11 MS. WOLFORD: It's not an appeal. It's an
12 Article 78 writ of mandamus.

13 JUDGE SMITH: Why is it not - - - well,
14 wait a minute. You said it's a collateral
15 proceeding. Why is it not an appeal?

16 MS. WOLFORD: It would have been - - - it
17 would have had to have been an original proceeding to
18 force her to - - -

19 JUDGE SMITH: You're saying it's a whole
20 new proceeding before Justice Marks.

21 MS. WOLFORD: Right.

22 JUDGE SMITH: A civil - - - a civil
23 proceeding, presumably, right?

24 MS. WOLFORD: This was a civil - - -

25 JUDGE SMITH: Why not appeal to the Fourth

1 Department, just like you do in any other civil
2 proceeding?

3 MS. WOLFORD: It's possible - - - and I
4 apologize. My lack of civil background may be
5 interfering here. But from our perspective, if it
6 was flipped on its head and we would be bringing an
7 Article 78 against the judge if they had - - - if
8 they had brought us out of the case. So I would have
9 assumed that it would go both - - - it would go - - -

10 CHIEF JUDGE LIPPMAN: Counsel - - -

11 MS. WOLFORD: - - - that way to the
12 defense.

13 CHIEF JUDGE LIPPMAN: - - - counsel, let me
14 - - - let me ask you another question. Would there
15 be any purpose to holding a hearing now about not
16 offering the plea and get into this whole issue that
17 you're saying that's an incredible accusation and
18 that's not the fact, and yet we have an uncontested
19 record? Would it make any sense to send it back to
20 really see what happened here?

21 MS. WOLFORD: Absolutely not.

22 CHIEF JUDGE LIPPMAN: Why not?

23 MS. WOLFORD: Because on the papers
24 themselves, there is no showing of actual prejudice.
25 There is - - - as we stand here today, there is no

1 per se rule that - - -

2 JUDGE RIVERA: But that's not the only
3 standard.

4 MS. WOLFORD: I'm sorry?

5 JUDGE RIVERA: Are you saying that the
6 substantial risk of an abuse of confidence doesn't
7 apply? My question to - - -

8 MS. WOLFORD: They never argued that, so
9 it's not preserved for this court's review. But to
10 the extent that it's something that the court wishes
11 to hear about today, neither standard is met by the
12 defendants - - -

13 JUDGE RIVERA: Why not? The second one?

14 MS. WOLFORD: There's - - - first of all,
15 we'd have to start with what would prejudice be to
16 the defense. Since the defendant has no right to a
17 plea bargain whatsoever in the - - -

18 JUDGE SMITH: Well, wait a minute. Wait a
19 minute. If it's - - - if it's true - - - if it's
20 true that the prosecutor is taking a whole different
21 approach to this case because there's a well-
22 connected complainant, you're telling me that there's
23 no prejudice to the defendant?

24 MS. WOLFORD: Well, I think the motion
25 would have to be for selective prosecution or for a

1 due process violation. It wouldn't be to disqualify
2 the district attorney in a collateral proceeding
3 under County Law 701. If - - - and there is no
4 motion to dismiss the case for selective prosecution
5 or - - -

6 JUDGE SMITH: You're saying - - - you're
7 saying that well, okay, suppose there is either a
8 selective prosecution or something that looks so much
9 like a selective prosecution that it's a serious
10 embarrassment to the justice system. I grant you - -
11 - I understand, you say nothing of that kind
12 happened. But suppose there were. You're saying
13 that that's not a ground for disqualifying the
14 prosecutor?

15 MS. WOLFORD: It could be, if it was set
16 out correctly. But it wasn't in this case, based on
17 the record that we have. And we're talking about - -
18 -

19 CHIEF JUDGE LIPPMAN: So why shouldn't we
20 find out what happened here?

21 MS. WOLFORD: I'm sorry?

22 CHIEF JUDGE LIPPMAN: Why shouldn't we - -
23 - we direct a hearing to find out about the not
24 offering a plea. Why isn't - - - given what we have,
25 why isn't that something we should - - -

1 MS. WOLFORD: Well, defendant has - - -

2 CHIEF JUDGE LIPPMAN: - - - try to
3 straighten out, because maybe this is an absolute
4 travesty of the justice system?

5 MS. WOLFORD: Well, defendant has - - -

6 CHIEF JUDGE LIPPMAN: Why would that be a
7 mistake to do that?

8 MS. WOLFORD: The defendant - - -

9 CHIEF JUDGE LIPPMAN: How can we go wrong
10 if we're - - - if at least it appears that - - - from
11 the uncontested record that this is something that
12 never happens?

13 MS. WOLFORD: So I just wanted - - - I just
14 want to make very clear that we - - - defendant has
15 only ever asked for a special prosecutor claiming
16 actual prejudice. So in this case, the actual
17 prejudice would be, I guess, that he was not offered
18 a plea that he found to be favorable. This court has
19 long held that a defendant does not have a right to a
20 plea bargain in a case. The prosecutor put on the
21 record that this is often the occasion where we have
22 the elements of the offense that we can prove and we
23 have a complainant that wants to go forward and we do
24 a trial. That is the way the criminal justice system
25 works, on every day in every courtroom in the state.

1 CHIEF JUDGE LIPPMAN: But you agree, if he
2 wasn't offered a plea because of the judge, because
3 we were skewing the justice to satisfy the judge,
4 that that would be actual prejudice, right?

5 MS. WOLFORD: Well, I think he has to go
6 way beyond saying that because we appear in front of
7 the judge - - -

8 JUDGE PIGOTT: Well - - -

9 MS. WOLFORD: - - - that that presupposes
10 that - - -

11 JUDGE PIGOTT: - - - let me - - -

12 MS. WOLFORD: - - - we would be favorable
13 to her.

14 JUDGE PIGOTT: - - - let me give you two
15 examples. Let's assume you've got a father, you
16 know, who comes in - - - and this happened only to
17 his daughter. And he says, look, we've been trying
18 to get rid of this clown forever. We don't like the
19 way he's texting our daughter. We want a trial on
20 this, and hopefully the guy will get the electric
21 chair. Now, you won't go that far, but you'll say
22 fine. You know, the point wants to be made, we'll
23 make it.

24 Now, you've got this case. The problem
25 with this case is that other people see it. They see

1 an elected official who appears to be getting her way
2 as opposed to somebody else. And I just don't know
3 why the DA would want to - - - would want to do it,
4 let alone stand here - - - not you personally, but
5 say, you know, look, we have the right to do this and
6 the fact that the judges - - - the entire judiciary
7 in the city said they couldn't do it, and the whole
8 public defender's office said they wouldn't do it,
9 but we're going to stand tall and say we're taking
10 this to the fullest extent of the law.

11 MS. WOLFORD: Well - - -

12 JUDGE PIGOTT: It just makes it seems like
13 our justice system is in cahoots.

14 MS. WOLFORD: Well, I think what you have
15 to realize is that that presupposes that the district
16 attorney is doing it to curry favor with the judge.

17 JUDGE PIGOTT: No, it's the appearance that
18 I'm worried about. I don't doubt for a minute - - -
19 I mean, I used to complain when the same DA's
20 assigned to the same judge day in and day out that
21 somehow there was favoritism. That's something you
22 just deal with. But the appearance is what - - -
23 even if it's not true - - - is what concerns me,
24 anyway.

25 MS. WOLFORD: Well, I think, going back to

1 the question that you asked of my opponent here
2 today, what if it was a police officer? Because
3 every day we deal with cases in which police officers
4 - - - more frequently than is truly believable - - -
5 we deal with police officers as victims; as victims
6 of crimes where they're assaulted during the course
7 of an arrest, they're assaulted during the course of
8 their duties in some way. And they're often - - -

9 JUDGE SMITH: Well, but that's a little
10 different. If this judge had been threatened as a
11 result of something she did on the bench, we'd expect
12 your office to treat it differently. It should be
13 treated very seriously.

14 MS. WOLFORD: But why?

15 JUDGE SMITH: But this - - - she's - - -
16 her judicial position here is a coincidence.

17 MS. WOLFORD: But why is it different if
18 she is a victim in her official capacity as opposed
19 to her - - -

20 JUDGE SMITH: Well, because - - -

21 MS. WOLFORD: - - - in a personal - - -

22 JUDGE SMITH: - - - because judges - - -
23 because judges are exposed to a special kind of risk,
24 and a threat to a judge based on a decision - - -

25 MS. WOLFORD: But the - - -

1 JUDGE SMITH: - - - or a nasty remark to a
2 judge based on a decision she made, should be taken
3 very, very seriously. I'm not saying this sort of
4 harassment shouldn't be taken seriously. But it's no
5 different - - - because - - - I mean, are you saying
6 that her - - - that it was legitimate to consider the
7 fact that she was a judge in dealing with this case?

8 MS. WOLFORD: No.

9 JUDGE SMITH: With an ex-boyfriend?

10 MS. WOLFORD: No. And it was - - - and
11 there's nothing in the record to say that she was
12 treated differently because of that.

13 CHIEF JUDGE LIPPMAN: Counselor, but if the
14 reality here is that, you know, just it's clear as,
15 you know - - - you know, the day is clear, that
16 nobody gets a conviction for this. I mean, really,
17 nobody gets a conviction for this, and in this case
18 somebody got a conviction, doesn't that say something
19 when - - - that there is a kind of skewed justice
20 going on here? There's something wrong when - - -
21 putting aside the legal niceties, this isn't someone
22 that's - - - something that someone gets a conviction
23 for.

24 MS. WOLFORD: It is absolutely.

25 CHIEF JUDGE LIPPMAN: In your particular

1 jurisdiction?

2 MS. WOLFORD: It absolutely - - - we have
3 aggravated harassment convictions as a misdemeanor
4 conviction. It happens every day in our
5 jurisdiction.

6 CHIEF JUDGE LIPPMAN: In a circumstance
7 like this, and you don't get a plea and you don't get
8 an ACD?

9 MS. WOLFORD: Absolutely. Because there
10 are very many victims out there, this is the first
11 time they've been victimized, that aggravated
12 harassment is one of those crimes where we often deal
13 with first-time victims who are very, very upset
14 about what happened to them and very, very much want
15 their day in court.

16 And if that happens, and a victim walks
17 into your office or we have a phone call - - -

18 CHIEF JUDGE LIPPMAN: You don't think
19 there's any - - - you don't think there's any
20 appearance problem here?

21 MS. WOLFORD: Absolutely not, any more so
22 than the prosecutor standing in there and
23 representing the People - - -

24 JUDGE RIVERA: Well, counsel - - -

25 MS. WOLFORD: - - - in the recent - - -

1 JUDGE RIVERA: - - - why not have the
2 hearing on it?

3 MS. WOLFORD: I'm sorry?

4 JUDGE RIVERA: Since your - - - why not
5 have the hearing on it? You're so certain that you
6 can show that there's no impropriety - - -

7 MS. WOLFORD: Well - - -

8 JUDGE RIVERA: - - - there's not even the
9 appearance?

10 MS. WOLFORD: - - - for two reasons. One
11 is that they never met their burden on the papers.
12 So factual dispute or not, assume all the facts were
13 true that he put in there, we still don't have actual
14 prejudice. And I don't think he showed even the
15 second prong which he didn't argue before. So - - -

16 JUDGE SMITH: Why couldn't you - - - why
17 couldn't you just put in an affidavit that said here
18 are the last twelve cases where we went to trial on
19 an aggravated harassment in the second degree case,
20 or we insisted on a plea to the top count?

21 MS. WOLFORD: I guess we could have. We
22 could have supplemented the record with that. I
23 think that what the district attorney who responded
24 said was that it - - - that is not, in fact, true;
25 that in fact, when we have a victim plus evidence and

1 they want to go forward, that we go forward. That
2 was very clear.

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

5 MS. WOLFORD: Thank you.

6 CHIEF JUDGE LIPPMAN: Rebuttal, counsel.

7 MR. JUERGENS: If that's the only two
8 criteria that they use for plea bargaining in Monroe
9 County, the whole system would collapse. I mean,
10 they're saying that their total reliance was on what
11 the victim wanted and the strength of the case. And
12 that's - - - that's clearly - - - that's clearly
13 improper.

14 I mean, on the papers, we should get
15 summary judgment on the papers, because you have the
16 DA handling the case who says that the defendant's
17 background and all that stuff's totally irrelevant.
18 It's - - -

19 JUDGE PIGOTT: Well, no.

20 MR. JUERGENS: - - - clearly not. I mean,
21 it clearly - - -

22 JUDGE PIGOTT: You - - - the example I used
23 where you've got an irate father who's upset about
24 the way his daughter's being treated, I would expect
25 that to go to trial. I wouldn't - - -

1 MR. JUERGENS: Well - - - well - - -

2 JUDGE PIGOTT: - - - wouldn't care if it
3 was a first time or the last time.

4 MR. JUERGENS: - - - I think when the
5 prosecutor is representing the People of the State of
6 New York, which includes the defendant, and the
7 defendant's entitled to a full measure of fairness,
8 that the prosecutor can't become a partisan, you
9 know, and can't become, you know, the champion of the
10 complainant's private interests. You've got to look
11 at the public interest. Let's look at the public
12 interest involved in the cost that was involved in
13 not plea bargaining this case.

14 JUDGE PIGOTT: Well, there's a risk - - -

15 JUDGE GRAFFEO: Well, I'm sure that - - -

16 JUDGE PIGOTT: - - - to the other side.

17 JUDGE GRAFFEO: - - - I'm sorry.

18 MR. JUERGENS: Well, normally - - -
19 normally, this case would have been handled - - -
20 because I practiced in Rochester City Court for a
21 number of years, and I'll tell you. This doesn't
22 happen. It just doesn't happen.

23 JUDGE GRAFFEO: Well, I'm sure there could
24 be some bullying charges that would have harassment
25 that would end up with harassment charges like this.

1 I'm not so sure all of those, considering the extent
2 of public attention put on bullying, would be
3 negotiated.

4 MR. JUERGENS: Well, I don't think the
5 People in this case - - - we allege in our papers
6 that they didn't look at all the plea bargaining
7 factors that they should have. And when we're - - -

8 JUDGE GRAFFEO: It just seems to me to be
9 overly broad that this is never done. I - - - that's
10 hard - - -

11 MR. JUERGENS: Well, that's - - -

12 JUDGE GRAFFEO: - - - that's hard to
13 believe. Also a public defender wouldn't necessarily
14 be representing someone who's employed and educated
15 in this kind of situation. So - - -

16 MR. JUERGENS: And I guess - - - I'm having
17 a senior moment here.

18 JUDGE GRAFFEO: It's - - - my concern is
19 saying that this type of crime is never - - - is
20 always subjected to a - - -

21 MR. JUERGENS: They - - -

22 JUDGE GRAFFEO: - - - the offer of a plea
23 bargain, and I'm not so sure that that's correct in
24 any county. It always - - -

25 MR. JUERGENS: - - - they took the position

1 - - -

2 JUDGE GRAFFEO: - - - depends on the facts
3 of the case.

4 MR. JUERGENS: - - - they - - - absolutely.
5 And they took the position that the defendant was not
6 being treated any differently. I think we allege
7 that he was. They had some burden - - - they have
8 all the facts and information - - - to come forward
9 with some - - - some indication that they're correct.

10 CHIEF JUDGE LIPPMAN: Counselor, would it
11 serve any purpose to hold a hearing?

12 MR. JUERGENS: It would. Because if we win
13 the hearing, then we would have a special prosecutor,
14 and Mr. Adams would have a chance to avoid the
15 criminal conviction.

16 CHIEF JUDGE LIPPMAN: Okay, counselor.
17 Thanks. Thank you both. Appreciate it.

18 (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. Keith A. Adams, No. 47 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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Date: February 20, 2013