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COURT OF APPEALS

STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

No. 109

TRAVIS AUGUSTINE,

Appellant.

20 Eagle Street
Albany, New York 12207
April 30, 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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Sharona Shapiro
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: 109, People v.
2 Augustine.

3 Counselor, would you like any rebuttal
4 time?

5 MR. HUG: Could I have four minutes, Your
6 Honor?

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

9 MR. HUG: Good afternoon, Your Honors. My
10 name is Matthew Hug. I represent the appellant,
11 Travis Augustine.

12 Your Honors, this issue really calls upon
13 this court to again delineate the indelible right to
14 counsel. This time, in a fairly odd situation,
15 nevertheless, it - - - it demarks - - -

16 CHIEF JUDGE LIPPMAN: You're saying Rogers
17 applies?

18 MR. HUG: Yes, Your Honor.

19 JUDGE GRAFFEO: Why isn't the judge's
20 testimony sufficient to explain the use of the form?
21 Why is just the fact there was a form establish the
22 entry of counsel?

23 MR. HUG: Well, I think that the form
24 speaks for itself. If you look at the form and you
25 look at the status of the procedure when the judge

1 assigned counsel on that form, and that my client was
2 brought in in the midnight hour.

3 JUDGE GRAFFEO: But he never met with any
4 attorney, correct? He never - - -

5 MR. HUG: He - - -

6 JUDGE GRAFFEO: - - - asked for an
7 attorney?

8 MR. HUG: Well, the - - - the judge - - -
9 Judge Baldwin, in the town court, gave testimony that
10 Mr. Augustine was equivocal as to whether or not he
11 wanted counsel. It's our position that by remanding
12 him on the - - - on the petition, he was required to
13 - - - to assign counsel, and he did so.

14 JUDGE GRAFFEO: So then - - -

15 CHIEF JUDGE LIPPMAN: When does counsel
16 atta - - - when do you have to have counsel, in our
17 state?

18 MR. HUG: In our state? At - - -

19 CHIEF JUDGE LIPPMAN: Yeah.

20 MR. HUG: At the moment - - - certainly at
21 the moment of arraignment, he was entitled to
22 counsel.

23 CHIEF JUDGE LIPPMAN: Is the first critical
24 stage - - -

25 MR. HUG: Yes.

1 CHIEF JUDGE LIPPMAN: - - - of the case,
2 arraignment?

3 MR. HUG: Yes.

4 CHIEF JUDGE LIPPMAN: Have to have counsel?

5 MR. HUG: Yes, and in this case, if you
6 look at the form - - - and I submit that the form
7 speaks for itself. The judge's later testimony,
8 months and months later, on behalf of the
9 prosecution, should strike this court as a potential
10 - - -

11 JUDGE SMITH: You're essentially - - -

12 MR. HUG: - - - ripe for error.

13 JUDGE SMITH: - - - saying the form's
14 conclusive?

15 MR. HUG: I'm sorry?

16 JUDGE SMITH: You're essentially saying the
17 form's conclusive?

18 MR. HUG: I certainly am, and if you look
19 at the rest of the record, the Public Defender's
20 Office dutifully appeared on behalf of Mr. Augustine
21 the next time he appeared before Judge Baldwin in
22 town court - - -

23 CHIEF JUDGE LIPPMAN: Why is it important
24 that he had counsel at the arraignment?

25 MR. HUG: Why is it important?

1 CHIEF JUDGE LIPPMAN: Yeah.

2 MR. HUG: Well, he was - - -

3 CHIEF JUDGE LIPPMAN: From a policy
4 perspective, why is it important?

5 MR. HUG: Well, because he is - - - his
6 liberty is at stake. He's on - - - there is a
7 violation of probation petition. He can be sentenced
8 to up to a year in jail because it's a misdemeanor.
9 He could - - - his probation could be extended. He
10 was - - - he was immediately detained and left in a
11 county jail for upwards of three weeks while the - -
12 - waiting for the next appearance.

13 CHIEF JUDGE LIPPMAN: What does bail have
14 to do with it all?

15 MR. HUG: Well, bail - - -

16 CHIEF JUDGE LIPPMAN: With the right to
17 counsel.

18 MR. HUG: Because if you look at the court
19 rules, you know, the judge elected to set bail. I
20 believe he set bail, or may not have; my recollection
21 on that is unclear. In any event, my client couldn't
22 make bail, even if bail had been set, and he was
23 remanded. It was at that stage, pursuant to the
24 court rules that - - - that the judge was duty bound
25 to assign - - - to assign him an attorney or, you

1 know, if he was - - - if he qualified - - -

2 JUDGE SMITH: Well, suppose you had a
3 transcript - - - it may be hard to visual - - - a
4 transcript which says exact - - - which matches Judge
5 Hawkins' testimony completely. The judge says, do
6 you want counsel. The defendant says, I'm not sure.
7 The judge - - - the judge says: Well, you've got
8 time to decide. I'm just going to check this box on
9 the form, but I don't mean to be assigning counsel
10 when I do that. I'm going to let you - - - Legal Aid
11 will come over and see you and you can make up your
12 mind then.

13 Suppose you had that on the record - - -

14 MR. HUG: Well - - -

15 JUDGE SMITH: - - - would there - - - would
16 the right - - - an indelible right have attached?

17 MR. HUG: It certainly would be a different
18 case. I'd still think that - - -

19 JUDGE SMITH: Why?

20 MR. HUG: Why?

21 JUDGE SMITH: What's different about it?

22 MR. HUG: Because you would have - - -

23 JUDGE SMITH: Because the quality of the
24 proof?

25 MR. HUG: The quality of the proof, yes,

1 but I would still - - - I would still - - -

2 JUDGE SMITH: You're saying a transcript is
3 better than Judge Hawkins' (sic) word?

4 MR. HUG: Well, I'm not saying that it's
5 his word. I'm saying - - -

6 JUDGE SMITH: I apologize; or Judge
7 Baldwin, whatever judge it is.

8 MR. HUG: Or Judge Baldwin. I'm saying
9 (sic) that he - - - that he was being untruthful.
10 What I'm saying is that it's deeply disconcerting
11 that you could - - - you could, on the one hand, fill
12 out a form assigning counsel, and then when there are
13 problems because the police interrogate that
14 individual - - -

15 CHIEF JUDGE LIPPMAN: Are you saying it
16 really doesn't matter what the judge said?

17 MR. HUG: Yes, I am saying that - - - that
18 the testimony shouldn't have even been allowed
19 because - - -

20 JUDGE SMITH: You're saying - - -

21 JUDGE GRAFFEO: Does the record tell us if
22 anyone from the PD's office was in court at this
23 time?

24 MR. HUG: Yes, I believe Judge Baldwin's
25 testimon - - - testified that when - - - when Mr.

1 Augustine returned to the town court for his next
2 appearance on the probation violation petition - - -

3 JUDGE GRAFFEO: No, I'm saying on the first
4 time when this form was filled out.

5 MR. HUG: No, it would be - - -

6 JUDGE GRAFFEO: Was there - - - was there
7 anyone - - -

8 MR. HUG: - - - it was after hours.

9 JUDGE GRAFFEO: - - - there?

10 MR. HUG: No, the only people that were
11 there was the state police officers that apprehended
12 Mr. Augustine, Mr. Augustine, the judge, and I think
13 that's it, maybe a court officer or some other - - -

14 CHIEF JUDGE LIPPMAN: So - - -

15 JUDGE RIVERA: So then what's the process?
16 So the form gets filled out. Now, what is, exactly,
17 the public defender supposed to understand about this
18 form and what it says?

19 MR. HUG: Well, it's my understanding that
20 in this town the form is filled out and the public
21 defender is notified you've been assigned. What the
22 - - - what the Appellate Division in the lower - - -
23 in the trial court has suggested is that the public
24 defender still yet has to do something else, thereby
25 leaving Mr. Augustine, or any defendant that is

1 arraigned in the midnight hour, who is assigned a
2 public defender - - -

3 CHIEF JUDGE LIPPMAN: Let's stay on that -
4 - -

5 MR. HUG: Yes.

6 CHIEF JUDGE LIPPMAN: What's the
7 significance of the fact that this happens at, like,
8 2 a.m. in Greene County?

9 MR. HUG: It's extremely significant
10 because it is - - -

11 CHIEF JUDGE LIPPMAN: There's an argument
12 that's made that gee, you know, it's tough to get - -
13 - get someone there and then, you know, it's the
14 middle of the night in a rural location. How do we -
15 - - how do we look at that?

16 MR. HUG: Well - - -

17 CHIEF JUDGE LIPPMAN: What's the importance
18 of that?

19 MR. HUG: The importance is - - - and I
20 don't think it's - - - it's, you know, solely
21 applicable to Greene County. I know up here where I
22 practice, you know, the public defenders are not
23 available throughout the night for arraignments every
24 time that there's a - - -

25 CHIEF JUDGE LIPPMAN: So how do we - - - so

1 how do you deal with that?

2 MR. HUG: Well, I think the way that you
3 deal with it is simple. If the court, who is
4 obligated to determine whether a person that appears
5 before them qualifies for an assignment of counsel -
6 - - it is their decision, in the first instance. If
7 they have decided that this person, number one,
8 qualifies for assigned counsel, should have counsel
9 because of the status - - - because of their status
10 in the case, and they assign counsel, they have put
11 themselves in the position, the judge in this case,
12 that this person needs counsel, qualifies for counsel
13 and has counsel.

14 JUDGE PIGOTT: Well, let's assume for a
15 minute that the arraignment happens, and instead of
16 him saying I can't afford a lawyer or whatever, he
17 says my lawyer is Joe Smith, and the judge does
18 exactly what he did here, he remands him because he
19 can't meet - - - he sets bail, he can't make it, and
20 he remands him. Is he represented by counsel at that
21 point?

22 MR. HUG: I think so, but I think what
23 you're steering at, Judge, is when we get to the
24 entry portion of the - - - of the analysis. And you
25 know, would he have an entry problem in that

1 situation? Potentially, but I would - - - I would
2 suggest to this court that in a situation where a
3 defendant says I have an attorney and makes that
4 known to the court, that, you know, interrogation
5 when he returns to the jail, that doesn't simply wash
6 away, especially if it's in the middle of the night,
7 when the likelihood of him being able to contact an
8 attorney of his choosing that he claims that he has
9 retained, would be impossible.

10 JUDGE GRAFFEO: How is what you're
11 proposing - - - how does it square with Grice?

12 MR. HUG: With Grice? Well, Grice, first
13 and foremost, was not an assigned counsel type of
14 case, you know, and I think that there is - - - there
15 should be a real differential, if there is going to
16 be a split between the two, on behalf of people that
17 are assigned counsel, especially the public
18 defender's office, where an entry really is
19 superfluous. What is a public defender to do when
20 they are told by - - - by a judge you have to take
21 this person; this person is assigned by - - - by me
22 to your office. There is nothing more that they can
23 do. And I submit that given, you know, the ever
24 expanding case load that the public defenders'
25 offices of this state have, you know, it renders it

1 just completely unpragmatic to expect them to every
2 time they're assigned to go running around, you know,
3 before - - - before they're actually entered into a
4 proceeding, to go to the court and say, okay, we
5 accept, or we're appearing, or we're going to call
6 every jail and we're going to call every police
7 department every time we have an arraignment.

8 CHIEF JUDGE LIPPMAN: Is this contrary to
9 the whole idea of having counsel?

10 MR. HUG: Yes. Yes, it is. And in Gri - -
11 -

12 CHIEF JUDGE LIPPMAN: Well, there is an
13 indelible right at whatever point we're saying. I
14 mean - - -

15 MR. HUG: Yes, if there's an - - -

16 CHIEF JUDGE LIPPMAN: - - - the right
17 attaches; that's the end of the story, right?

18 MR. HUG: Yes, and - - - and to require an
19 additional entry, when there is an order from a court
20 assigning a particular attorney, I don't understand
21 what the purpose would be to that. But as far as I
22 can tell, my reading of Grice is is that the court
23 was trying to say, you know, entry of a private
24 attorney is really a good measuring stick, an
25 objective measure to - - -

1 JUDGE GRAFFEO: And what if in the process
2 of then interviewing him it's determined that this
3 individual is not eligible for representation by a
4 public defender?

5 MR. HUG: Then that is his counsel's
6 decision.

7 JUDGE GRAFFEO: And then what happens now?

8 MR. HUG: Well, then if he is not eligible
9 for - - - for an attorney and then he is, you know,
10 required to secure his own, I would submit that the -
11 - -

12 JUDGE GRAFFEO: So did he - - -

13 MR. HUG: - - - indelible right to counsel
14 would - - -

15 JUDGE GRAFFEO: - - - did he still have a
16 violation of his right to counsel?

17 MR. HUG: Until the public defender decides
18 that he is no longer going to represent that
19 individual. Anything - - - which would be no
20 different than if I were to - - -

21 JUDGE SMITH: So the indelible right is not
22 so indelible if the lawyer withdraws?

23 MR. HUG: Yes, if the attorney properly
24 withdraws - - - withdraws from representation, then
25 that doesn't affect what happened while the attorney

1 was - - - was representing the individual. But if
2 the person now has no counsel, and it's appropriate
3 that they don't have any counsel, then they wouldn't

4 - - -

5 CHIEF JUDGE LIPPMAN: So if they can afford

6 - - -

7 MR. HUG: - - - be protected.

8 CHIEF JUDGE LIPPMAN: If they can afford
9 counsel in this context, is that kind of a - - - a
10 technical thing, that the right attaches, whether
11 it's this counsel or, if they can afford it, a new
12 counsel comes in, the right is attached?

13 MR. HUG: I'm sorry, I - - -

14 CHIEF JUDGE LIPPMAN: It doesn't go
15 backwards. If you have counsel, you have counsel,
16 and the fact that ultimately that counsel changes,
17 becomes a paid counsel or whatever - - -

18 MR. HUG: Yeah - - -

19 CHIEF JUDGE LIPPMAN: - - - doesn't affect
20 it, is your argument - - -

21 MR. HUG: Exactly, Judge, because what
22 we're trying to do is protect the individual who has
23 an attorney who is trying to protect their rights, in
24 a separate unrelated proceeding; nevertheless, the
25 person is in custody. You know, the rule, you know,

1 that we jealously guard, should not fall upon whether
2 or not a judge in a town decides, well, when I - - -
3 what I did when I was following the rule and I
4 followed my own arraignment memorandum wasn't really
5 what I meant.

6 JUDGE PIGOTT: It seems odd, though, you
7 know, you get a guy who's on a violation of probation
8 - - - let's assume it's for malicious mischief - - -
9 and the judge does what he does here and all of a
10 sudden here's this major murderer and the police
11 can't touch him and they - - - and they have no
12 knowledge of what was going on, and the judge says,
13 you know, I didn't assign a lawyer.

14 MR. HUG: Well, that's when you get into
15 the - - - I believe it's the Lopez situation, of
16 whether or not the police engaged in a proper
17 inquiry. I suggest that they didn't. One, the
18 knowledge was imputed to them because the state
19 police were present at his arraignment when counsel
20 was assigned.

21 JUDGE SMITH: Did they - - - they called up
22 the judge in the middle of the night, basically, and
23 said did you assign counsel. Was there some
24 emergency requiring them to do that, or could they
25 have waited the next morning to check the record?

1 MR. HUG: Well, the police never called the
2 judge; the police called the District Attorney and -
3 - -

4 JUDGE SMITH: Oh, so the DA - - - the
5 police called the DA - - -

6 MR. HUG: - - - then the District Attorney
7 - - -

8 JUDGE SMITH: - - - the DA called the
9 judge.

10 MR. HUG: - - - and the District Attorney
11 did not offer his testimony.

12 JUDGE SMITH: But my question is what was
13 the big hurry?

14 MR. HUG: I don't know what the big hurry
15 was. I mean, there was a missing person; the person
16 had been missing for about a month by the time that
17 the police decided to question Mr. Augustine. I
18 don't know why they - - -

19 JUDGE SMITH: Well - - -

20 MR. HUG: - - - acted in this way.

21 JUDGE SMITH: I mean - - -

22 MR. HUG: - - - when they could have called
23 the public defender.

24 JUDGE SMITH: - - - at that point hadn't
25 the body been found?

1 MR. HUG: At the 27th? I - - -

2 JUDGE SMITH: Oh, they called on the - - -
3 oh, I'm sorry, they called on the 27th?

4 MR. HUG: They spoke to - - - they
5 initially interrogated him on the 27th - - -

6 JUDGE SMITH: Okay, I'm sorry. Yeah,
7 you're right.

8 MR. HUG: - - - and then they interrogated
9 him again on the 29th.

10 CHIEF JUDGE LIPPMAN: Okay, counselor.

11 MR. HUG: Okay, thank you.

12 CHIEF JUDGE LIPPMAN: You'll have your
13 rebuttal.

14 Counselor?

15 MS. MOORE: Good afternoon. May it please
16 the court. Hannah Moore, New York Prosecutors
17 Training Institute for respondent.

18 CHIEF JUDGE LIPPMAN: Counselor, why
19 doesn't Rogers apply here very clearly?

20 MS. MOORE: Well, because this defendant
21 did not have counsel. That's the - - - my adv - - -

22 CHIEF JUDGE LIPPMAN: Did the right to
23 counsel attach, is the question.

24 MS. MOORE: The right to counsel - - - the
25 indelible right to counsel had not attached here

1 because - - -

2 CHIEF JUDGE LIPPMAN: Why?

3 MS. MOORE: - - - this defendant did not
4 have an attorney. He was incarcerated on - - -

5 JUDGE PIGOTT: Would he have been surprised
6 to find out he didn't have a lawyer while he was
7 sitting in jail?

8 MS. MOORE: No, he knew he didn't have a
9 lawyer. That's - - - everybody here knew he didn't
10 have a lawyer. In fact, at the hearing - - -

11 JUDGE SMITH: Well, everybody except
12 somebody who looked at a document that says
13 "arrestment memorandum, counsel assigned", box
14 checked yes, Greene County Public Defender's Office.
15 Doesn't it look bad for - - - for us now to be saying
16 oh, that - - - that doesn't mean that?

17 MS. MOORE: I don't think it can look bad
18 now if it didn't look bad at the time. Everybody
19 that looked at that memo at the Huntley hearing, the
20 judge came in and said this was my practice. The
21 defendant - - -

22 JUDGE PIGOTT: What does it mean when you
23 check the box? As your counsel points out, your
24 opponent, this is not unusual, and probably, let me
25 guess, fifty-eight counties out of sixty-two, maybe a

1 few less, but quite often the judge has gotten out of
2 bed to do an arraignment so they can get the guy
3 home. Usually they're trying to set bail and get him
4 out. Obviously, they didn't get him out, but they do
5 tell him he's got a right to a lawyer because you
6 can't - - - you can't arraign somebody without an
7 attorney, right?

8 MS. MOORE: Right, the judge says that
9 there's no question that he was told, this defendant,
10 that he had a right to an attorney, and the defendant
11 said I'm not sure if I want one, I don't know if I
12 need one, according to the judge who testified at the
13 Huntley hearing. And the judge said I'm going to
14 mark this box - - - well, he didn't say that, excuse
15 me, that comes out afterwards. We don't know what
16 was said other than what the judge - - -

17 CHIEF JUDGE LIPPMAN: But isn't - - -

18 MS. MOORE: - - - tells us - - -

19 CHIEF JUDGE LIPPMAN: - - - it important
20 that he had the - - -

21 MS. MOORE: - - - which is - - - it's an
22 intake process.

23 CHIEF JUDGE LIPPMAN: Is it important that
24 he have an attorney at that stage of the proceeding
25 when you're thrown in jail and - - -

1 MS. MOORE: If he wanted one. There's no
2 obligation that he have an attorney here. I mean,
3 the defendant has the right to proceed pro se if he
4 wanted to. This is a defendant who is very familiar
5 with these courts. One of the officers says I know
6 this guy, I've talked to him before. And he wasn't
7 sure if he wanted an attorney.

8 JUDGE SMITH: So on your theory, after the
9 proceeding in - - - after the proceeding in the
10 middle of the night and after this form is checked,
11 the police could have gone the next morning and said
12 will you - - - and given a Miranda warning and said,
13 will you talk to us about your violation of
14 probation.

15 MS. MOORE: There was no - - - right,
16 because no attorney had entered. He had no attorney.
17 And again, it's important to keep in mind we're
18 talking about the violation occurring on - - -

19 JUDGE SMITH: I mean, isn't - - -

20 MS. MOORE: - - - a probation violation.

21 JUDGE SMITH: - - - aren't we going to open
22 the door to a certain amount of abuse if we have a -
23 - - you know, we have a routine of almost
24 automatically assigning counsel at arraignment, and
25 then when it suddenly becomes very convenient, we can

1 find that counsel wasn't assigned?

2 MS. MOORE: Well, I think that, as this
3 court has said previously, for example, in Cawley,
4 there's a superficial - - - it's ludicrous to think
5 that the superficial relationship that stems from one
6 quick appearance of an attorney at an arraignment,
7 from that - - -

8 JUDGE SMITH: But that's what Rogers does,
9 isn't it? I mean, I wasn't too impressed with the
10 relationship in Lopez, but it was enough to - - -

11 MS. MOORE: Well, in Rogers it says, you
12 know, the indelible right to question bars
13 questioning on unrelated matters when subject is in
14 custody and the attorney has actually entered. So
15 here, again, there was no entrance of an attorney.
16 The public defender - - - there were nine days that
17 passed from - - -

18 CHIEF JUDGE LIPPMAN: Do you ever infer
19 that there's an attorney? Don't our cases say that
20 at some point everyone knows there's an attorney?

21 MS. MOORE: When there is an attorney.
22 There has to be some kind of notification - - -

23 JUDGE PIGOTT: Well, if the PD had showed
24 up the day after - - - after the box was checked and
25 showed up, and he talked to the jailer - - -

1 MS. MOORE: Um-hum.

2 JUDGE PIGOTT: - - - would he be allowed
3 in?

4 MS. MOORE: Would he - - - I'm sorry, would
5 he have been allowed in?

6 JUDGE PIGOTT: Yeah.

7 MS. MOORE: Absolutely, yeah, the PD - - -

8 JUDGE PIGOTT: Well, there's a policy that
9 says they only - - - you know, they won't let them in
10 unless they're representing somebody. So if the box
11 is checked and the PD gets there immediately,
12 apparently he has a lawyer. If for some reason the
13 PD doesn't get around to it for a week, he doesn't
14 have a lawyer.

15 MS. MOORE: They could call the court, they
16 could call the jail, they could - - -

17 JUDGE PIGOTT: You're putting all this - - -
18 -

19 MS. MOORE: - - - talk to - - -

20 JUDGE PIGOTT: You're putting all this onus
21 on the public defender's office, and it seems to me
22 that, you know - - -

23 MS. MOORE: I don't - - -

24 JUDGE PIGOTT: - - - if you check a box, I
25 mean, can't the - - - why wouldn't the police buy

1 that? I mean, you say he's got the - - - the box is
2 checked, we're stuck.

3 MS. MOORE: Because it's the relationship
4 that is the important thing here. All of your case
5 law is com - - -

6 JUDGE SMITH: Well, let's focus on entry
7 for a minute.

8 MS. MOORE: Um-hum.

9 JUDGE SMITH: This is an alternative
10 argument. You're saying he didn't have a lawyer.

11 MS. MOORE: He didn't have a lawyer.

12 JUDGE SMITH: But even if he - - - even if
13 a lawyer had been assigned, he hadn't entered yet.

14 MS. MOORE: That's correct, Your Honor.

15 JUDGE SMITH: On that - - - let's take that
16 hypothesis. You're saying that he's assigned counsel
17 but Legal Aid happens not to be in the room. The
18 police can follow him out of the room, this guy whose
19 counsel has just been assigned, and say, hey, will
20 you waive your Miranda rights and talk to us about
21 the crime you were just arraigned on, and he can do
22 it?

23 MS. MOORE: I'm not saying that here,
24 because that's absolutely not what happened here.

25 JUDGE SMITH: It's not what happened here,

1 but doesn't your logic lead there?

2 MS. MOORE: Our - - - my logic, which is
3 following the ruling of this court that there has to
4 be entry, and that's because - - -

5 JUDGE SMITH: No, no, what - - - what would
6 the logic of - - - would the argument you're now
7 making lead to the conclusion I just suggested?

8 MS. MOORE: No, I don't think so. I - - -

9 JUDGE SMITH: Why not?

10 MS. MOORE: Well, I think that the
11 relationship is what's sacrosanct - - - sacrosanct
12 there, is between the counsel - - -

13 JUDGE SMITH: But there is no - - - on your
14 si - - - you're showing there is no relationship.
15 It's just - - -

16 MS. MOORE: Exactly. And there needs to
17 be; that's why entry is important.

18 JUDGE SMITH: Okay. Okay. But then why -
19 - - then why is the case, the hypothetical case I put
20 any different, where the policeman follows the
21 defendant out of the room after he's just been
22 assigned counsel and interviews him?

23 MS. MOORE: I mean, in that case, if there
24 hasn't been entry, I suppose that could happen. But
25 again, that's not the case here.

1 JUDGE SMITH: Yeah - - -

2 MS. MOORE: Here - - -

3 JUDGE SMITH: - - - but it does lead that
4 way, doesn't it?

5 MS. MOORE: And again, but the - - - that's
6 why entry is so important, though. You know, there
7 has to be some kind of relationship. And this isn't
8 - - - this is - - - keep in mind, this is a defendant
9 who wanted to - - -

10 CHIEF JUDGE LIPPMAN: You mean - - -

11 MS. MOORE: - - - speak to the police.

12 CHIEF JUDGE LIPPMAN: But how do you
13 answer, though, Judge Smith's question, assuming
14 he's assigned counsel, the lawyer hasn't entered - -
15 -

16 MS. MOORE: Okay.

17 CHIEF JUDGE LIPPMAN: - - - and the police,
18 two seconds later, come and follow him and ask him to
19 waive Miranda and to enter court. Your answer is
20 that's okay because there's no entry?

21 MS. MOORE: Under this court's ruling,
22 following Grice, even looking at Lopez and looking as
23 far back as Burdo and Bing, yes, I think that's okay.

24 JUDGE PIGOTT: It's troubling. I can tell
25 you in Buffalo City Court - - -

1 MS. MOORE: Um-hum.

2 JUDGE PIGOTT: - - - back in my days, there
3 were - - - on weekends PDs aren't around, but there
4 would be - - - there would be a group, you know, who
5 would appear for purposes of arraignment only - - -

6 MS. MOORE: Um-hum.

7 JUDGE PIGOTT: - - - and represent the
8 defendant and try to get bail or contact the family
9 or whatever. Your argument, though, is that is
10 essentially meaningless because the - - - the police
11 could be standing there, and the minute he hits the -
12 - - the hall or the jail, say, let's talk about this
13 case and maybe we can get it disposed of.

14 MS. MOORE: I - - - I mean - - - I really -
15 - - I don't think that that's what's going to happen
16 here. I think under - - -

17 JUDGE PIGOTT: Well, no - - - but the
18 second problem is that when you get into big counties
19 or you get into rural counties, PD isn't going to be
20 around that following Monday; they may not get there
21 for a week.

22 MS. MOORE: But I do think that the issue
23 here is we can't have, as my opponent has suggested,
24 these two dueling systems in an already complicated
25 area of law for public defenders and private

1 defenders. I mean, a defendant can, in certain
2 situations - - - you know, there's nothing that says
3 a defendant can't talk to the police.

4 JUDGE PIGOTT: Can't we - - - can't we say
5 that unless waived, he has counsel from arraignment
6 on?

7 MS. MOORE: I don't think that that would
8 serve the public interest at all here. I think - - -

9 JUDGE PIGOTT: Why not?

10 MS. MOORE: Because the defendant has a
11 right, first of all - - -

12 JUDGE PIGOTT: Let's assume - - -

13 MS. MOORE: - - - he may want to talk.

14 JUDGE PIGOTT: I'm saying he can waive it.

15 MS. MOORE: Um-hum.

16 JUDGE PIGOTT: Let's assume he does not
17 waive it. There's an arraignment, just as it
18 happened here. Why can't we say that at arraignment,
19 you know, he had counsel, and the police can't talk
20 to him again unless counsel's present.

21 MS. MOORE: I don't think that that would
22 make sense logistically.

23 JUDGE PIGOTT: What would it hurt?

24 MS. MOORE: I think it would hurt the - - -
25 the police - - - the police work, the prosecution

1 office.

2 JUDGE PIGOTT: Why?

3 MS. MOORE: Because there's an ongoing
4 investigation. Again, here - - - keep in mind, the
5 issue that we're talking about here is his right to
6 counsel on the probation violation - - -

7 JUDGE PIGOTT: Right.

8 MS. MOORE: - - - not on the murder,
9 ironically, which - - -

10 JUDGE PIGOTT: Right, but if - - - but if
11 his lawyer - - -

12 MS. MOORE: You know, he was never - - -

13 JUDGE PIGOTT: If his lawyer was in the
14 courtroom, they couldn't have done what they did.

15 MS. MOORE: You know what would have
16 happened? Exactly what happened later. This
17 defendant would have said, please call the police,
18 I'd like to make a statement. This is a defendant
19 who spoke to the police on four occasions.

20 JUDGE PIGOTT: But assuming - - - assuming
21 that he had a lawyer who said are you out of your
22 mind, the next time you open your mouth it ought to
23 be to brush your teeth and nothing else.

24 MS. MOORE: That's not his choice; that's
25 the defendant's choice.

1 JUDGE PIGOTT: No, but it's - - - but the
2 advice is rather important before the defendant
3 decides, you know, maybe the lawyer's right here.

4 MS. MOORE: The record shows this is a
5 defendant who would have spoken. I mean he spoke - -
6 -

7 CHIEF JUDGE LIPPMAN: Counsel, aren't you
8 diminishing the right to counsel and its importance?
9 This is such a fundamental part of our system of
10 justice. Doesn't your position diminish it, that
11 gee, it's not that important, if you get to him
12 before the attorney tells him what to do, hey,
13 doesn't matter.

14 MS. MOORE: Respect - - -

15 CHIEF JUDGE LIPPMAN: Isn't that what
16 you're doing?

17 MS. MOORE: Respectfully, not at all.
18 We're saying that that relation - - -

19 CHIEF JUDGE LIPPMAN: That's exactly what
20 you're saying.

21 MS. MOORE: No, we're saying there has to
22 be a relationship there to protect. We're, in fact,
23 saying - - -

24 JUDGE RIVERA: How is he going to set up
25 that relationship if the cops get to him before he

1 even meets his attorney?

2 MS. MOORE: Well - - -

3 JUDGE RIVERA: Which is, I think, what
4 you're saying.

5 MS. MOORE: All he has to do for entry
6 under this court's ruling is - - - it could be a
7 phone call. And we know for a - - -

8 JUDGE RIVERA: I thought they didn't allow
9 him to get those phone calls.

10 MS. MOORE: There was testimony that in the
11 normal course of business, due to jail staffing, they
12 couldn't always bring a defendant to the phone - - -

13 JUDGE RIVERA: So he's not going to be able
14 to do that, okay.

15 MS. MOORE: Oh, no, abs - - - no.

16 JUDGE RIVERA: What else can he do?

17 MS. MOORE: Oh, respectfully, I disagree.

18 He absolutely could have called the - - - could have
19 called the jail and spoken to any of the officers who
20 were on duty, whether or not the defendant could have
21 come to the phone. But all that would have been
22 necessary was one phone call. There were nine days
23 that elapsed between when this defendant was
24 arraigned and the first statement.

25 JUDGE RIVERA: So can I ask you - - -

1 MS. MOORE: There was never - - -

2 JUDGE RIVERA: - - - I think I may have
3 misunderstood part of your argument.

4 MS. MOORE: Sure.

5 JUDGE RIVERA: I thought, in part, you were
6 saying that the defendant himself said I don't want a
7 lawyer; is that what you're saying?

8 MS. MOORE: The defendant himself,
9 according to the testimony at the Huntley hearing - -
10 -

11 JUDGE SMITH: Yeah.

12 MS. MOORE: - - - and keep in mind,
13 defendant had the burden of showing that he had
14 counsel, which he put on no evidence.

15 JUDGE RIVERA: Yes, yes.

16 MS. MOORE: The judge said this defendant
17 said I don't know if I want a lawyer, I don't know if
18 I need a lawyer.

19 JUDGE RIVERA: Okay. How is that the same
20 as I don't want a lawyer?

21 MS. MOORE: I apologize if I said - - -

22 JUDGE RIVERA: How about - - - so the judge
23 fills out the form - - -

24 MS. MOORE: Right - - -

25 JUDGE RIVERA: - - - and now he's got the -

1 - -

2 MS. MOORE: - - - for an intake process.

3 JUDGE RIVERA: - - - they send a lawyer.

4 Because I thought - - - I may have misunderstood your
5 argument. I thought part of your argument was this
6 defendant turned down the offer of a lawyer.

7 MS. MOORE: This defendant did not - - -
8 said I do not know if I want a lawyer; I do not know
9 if I need a lawyer.

10 JUDGE RIVERA: Right.

11 MS. MOORE: So the judge said I will - - -
12 you can decide later. And he started - - - checked
13 off this box, which started - - -

14 JUDGE RIVERA: What if he decided - - -

15 MS. MOORE: - - - an intake process.

16 JUDGE RIVERA: - - - the moment the judge
17 said that?

18 MS. MOORE: Then he would have said that,
19 and counsel - - -

20 JUDGE RIVERA: What if he didn't feel he
21 needed to say that? The judge checked the box, now
22 I've got my public defender.

23 MS. MOORE: Well, he would have - - - the
24 intake process would have continued, and he would
25 have been evaluated. There the judge also testified

1 that, you know, there are times when a defendant goes
2 through the intake process, and it's found that he's
3 not eligible for a public defender. In this case he
4 was. However, nine days goes by and the defendant
5 then appears with public defender.

6 So again, we have no entry here. And
7 again, the police protected defendant's right to
8 counsel. The judge tried to protect defendant's
9 right to counsel. Everybody here was looking out for
10 this defendant's rights. The police, honestly, went
11 above and beyond in this case - - -

12 JUDGE SMITH: In common sense, isn't it the
13 normal routine, there's a guy with no money, he's
14 been arrested for a violation of probation, he's
15 brought to court in the middle of the night, you
16 assign counsel. It's practically automatic, isn't
17 it? Isn't it rather unusual for him to turn it down?

18 MS. MOORE: I don't think it is unusual. I
19 think that that is a right; that is the defendant's
20 right, and that is the defendant's right to decide
21 whether or not he wants that.

22 JUDGE SMITH: If you were going to turn it
23 down, wouldn't you want to make the biggest record
24 you could? Certainly you wouldn't check yes after
25 the "counsel assigned" box.

1 MS. MOORE: The judge was looking out - - -
2 the judge was worried about the defendant, because
3 the defendant, he feared, would turn down counsel.
4 And he - - -

5 JUDGE RIVERA: But isn't that my point that
6 he didn't say no, I don't want couns - - - no, I'm
7 just not sure, I'm not - - - and then the judge
8 checks the box and now - - -

9 MS. MOORE: He's - - -

10 JUDGE RIVERA: - - - is it poss - - - is it
11 possible that he would then say okay, I've got my
12 lawyer.

13 MS. MOORE: No, because he - - - the last
14 communication he had with a judge was he told the
15 judge I don't know if I want counsel.

16 CHIEF JUDGE LIPPMAN: You - - -

17 JUDGE RIVERA: That's not the same as
18 saying I don't want a lawyer.

19 MS. MOORE: Right. It's a statement that
20 he doesn't know.

21 JUDGE SMITH: Your argument depends on the
22 defendant's not knowing which box was checked, right?

23 MS. MOORE: No, because there's absolutely
24 - - -

25 JUDGE SMITH: Suppose after the colloquy

1 you've described: I don't know whether I want a
2 lawyer, you can decide later, then they give him a
3 copy of the form and he walks out of the courtroom
4 with a box checked yes. Could he reasonably think he
5 has a lawyer?

6 MS. MOORE: There's nothing on the record
7 to support that.

8 JUDGE SMITH: That's right. That's right.
9 He didn't - - - but your argument depends on that.
10 If he'd seen the form - - -

11 MS. MOORE: I don't think he - - - I don't
12 think that our argument depends on that because,
13 first and foremost, as we've talked about, there was
14 no entry. There was - - - nothing happened. This
15 defendant spoke to the police on numerous times after
16 this, and you know, the police, again, made - - -

17 JUDGE SMITH: No one, including your
18 adversary, is casting any aspersions on the judge or
19 the officers here.

20 MS. MOORE: Um-hum.

21 JUDGE SMITH: But doesn't - - - doesn't
22 your argument open up the possibility of the case
23 where the guy is assigned counsel and then all of a
24 sudd - - - and then people are sitting around saying,
25 oh, I wish that guy didn't have a lawyer. And all of

1 a sudden some testimony emerges, oh, well, I know - -
2 - I know the form says I assigned a lawyer, but we
3 didn't really. Isn't that the sort of thing that
4 could invite abuse or maybe undermine a little
5 confidence in the system?

6 MS. MOORE: I do not think that that is
7 what was happening here. And I - - -

8 JUDGE SMITH: No, I didn't suggest it was.
9 I'm saying, aren't we opening the door to that
10 possibility?

11 MS. MOORE: No, we're not. The case law is
12 clear on the right to counsel here. This court
13 doesn't even have to reach the entry point in this
14 case. Even assuming, arguendo, that there was error,
15 which I do not believe there was at all, it was
16 harmless, in light of all of the overwhelming - - -
17 very overwhelming evidence - - -

18 JUDGE SMITH: What's - - -

19 MS. MOORE: - - - in this case.

20 JUDGE SMITH: What's the most overwhelming
21 thing you've got?

22 MS. MOORE: Well, the defendant called up
23 his half-brother and said, how do you - - - what's
24 the best way to get rid of a dead body?

25 JUDGE SMITH: On the other hand, the half-

1 brother isn't - - - is perhaps not the most credible
2 witness I've ever read.

3 MS. MOORE: Yes, but when the advice that
4 is given is to bury a human body under an animal and
5 then the victim is discovered under a dead dog - - -

6 JUDGE SMITH: Does he have - - - do you
7 have - - -

8 MS. MOORE: - - - that's a - - -

9 JUDGE SMITH: I mean, you - - -

10 MS. MOORE: - - - very unusual - - -

11 JUDGE SMITH: - - - you have a lot, but all
12 you really have is - - - is a lot of conversations
13 out of the defendant's mouth. There's no eyewitness,
14 there's no forensics.

15 MS. MOORE: He killed the only eyewitness,
16 and then he drove around in her truck which was white
17 with a yellow eagle symbol on it.

18 JUDGE SMITH: Look, it's always true in
19 murder cases that the defendant - - - that the victim
20 is not available to testify. That doesn't make the -
21 - - that doesn't make harmless error. You have no
22 eyewitness, you have no forensics, you have no out-
23 and-out confession. You have plenty of, apparently,
24 false exculpatory statements. You do have one out-
25 and-out confession, but it's so weird that the jury

1 might doubt it. Is this really the kind of case for
2 harmless error?

3 MS. MOORE: I think it's absolutely the
4 kind of case for harmless error. There are multiple
5 witnesses who testify about defendant's multiply
6 conflicting statements that he gave at various
7 points. He's caught with the victim's truck, which
8 was very distinctive, using her credit cards. And
9 again, he killed her in a manner that was unusual and
10 had asked about how best to - - - to do that. So - -
11 -

12 CHIEF JUDGE LIPPMAN: Okay, counselor.

13 MS. MOORE: - - - I think the evidence - -
14 -

15 CHIEF JUDGE LIPPMAN: Thanks, counselor.

16 MS. MOORE: Thank you.

17 CHIEF JUDGE LIPPMAN: Counselor, rebuttal?

18 MR. HUG: Yes. Just as a first point of
19 opening, I found it slightly ironic that when counsel
20 was asked whether this was harmless error, reference
21 was made to the changing statements that my client
22 made, which are the source of what would be taken
23 out. And I think that - - -

24 JUDGE SMITH: So you'd have two fewer of
25 those if they'd been suppressed - - -

1 MR. HUG: Precisely.

2 JUDGE SMITH: - - - is what you're saying.

3 MR. HUG: And this isn't just - - -

4 JUDGE SMITH: Or at least one fewer; the
5 first one there's some doubt about.

6 MR. HUG: There's - - - yes, the first one
7 is a bit different than the 29th. But, you know,
8 when you look at the total, you know, not only was
9 the proof circumstantial and fairly weak, especially
10 the brother's testimony, but you had an alternate
11 theory at play that had, you know - - - it was a
12 strange situation with her other son who was back and
13 forth, who discovered the bodies, who - - - you know,
14 the pristine leaf that was in the grave, the fact
15 that the handwriting matched the son's wife. You
16 know, this isn't a situation where, you know, this
17 was just, you know, I didn't do it. They had a
18 theory that someone else was to blame, and it was a
19 plausible theory.

20 And I would also like to comment on Judge
21 Smith's question about, you know, in the middle of
22 the night is the public defender supposed to drive
23 behind the police car waving his hands, beeping his
24 horn, as they drive him to - - - as they drive
25 someone to the police station or to the jail,

1 interrogating him all along the way. And there is a
2 difference. And I think that when you look at entry
3 as an objective measuring stick as to when - - - when
4 the person is represented by counsel - - -

5 JUDGE PIGOTT: I hate - - -

6 MR. HUG: - - - when it's a - - - when it's
7 a - - -

8 JUDGE PIGOTT: I hate to bring this up, but
9 I think one of the arguments the People make is that
10 you didn't - - - you didn't appeal on those grounds;
11 you appealed only on your - - - on the Miranda
12 grounds. And so you hadn't preserved it, and because
13 they made their - - - they made their decision based
14 upon this, we can't get to it.

15 MR. HUG: I don't understand - - - I didn't
16 - - -

17 JUDGE PIGOTT: They - - -

18 MR. HUG: I argued the - - - I argued both
19 before the Appellate Division. There may have been
20 some - - -

21 JUDGE PIGOTT: Right, but before the
22 Supreme Court - - - before the trial court, you did
23 not argue the lack of counsel, you argued the Miranda
24 issue, and - - - but the Appellate Division then
25 decided it on a different ground.

1 MR. HUG: Yes.

2 JUDGE PIGOTT: Can we get to the different
3 ground? Because doesn't that mean that they must
4 have reached that in the interest of justice, which
5 is something we can't do?

6 MR. HUG: Yes, I believe so. And I believe
7 that counsel that preceded me argued that through the
8 Huntley hearing. I mean, the whole point of the
9 Huntley hearing related to whether or not Mr.
10 Augustine had counsel. And the judge's decision,
11 Judge Pulver's decision at the trial level, was
12 entirely about whether or not there had been an
13 assignment of counsel so that the interrogations
14 could have - - - could have went on.

15 With respect to the difference between
16 entry, I'm not suggesting that there should be a
17 difference in treatment for a poor person as opposed
18 to someone with means. What I'm suggesting is that
19 the - - - this case highlights why you require entry.
20 You require entry so that there isn't some kind of
21 Monday morning quarterback, oh, yeah, I had an
22 attorney back then. Well, where is the objective
23 standard? The objective standard where you can
24 measure when an attorney is assigned is the judge's
25 order. When a private attorney - - -

1 JUDGE GRAFFEO: What if the town justice
2 hadn't signed the order?

3 MR. HUG: If the town justice hadn't done
4 anything?

5 JUDGE GRAFFEO: Yeah, they just decide
6 we're not going to use this form anymore.

7 MR. HUG: Oh, I would arg - - - well, if -
8 - - so that it was just a matter of we don't have the
9 documentary proof to establish what had happened, or
10 that the judge did not assign - - - actually make the
11 assignment? If the judge hadn't actually made - - -

12 JUDGE GRAFFEO: Didn't make the - - - no
13 form, judge didn't make the assi - - -

14 MR. HUG: Just no assignment, I'm just
15 sending him to jail, I would say that that still - -
16 - that counsel should have attached at that point,
17 that the judge was in error for not assigning an
18 attorney or inquiring whether Mr. Augustine could
19 have afforded an attorney.

20 JUDGE GRAFFEO: So you want us to change
21 the rule. It's not entry, then.

22 MR. HUG: I don't think that you have to
23 change the rule with respect to that issue for this
24 case. What I'm suggesting is is that if - - - if the
25 issue for - - -

1 JUDGE GRAFFEO: No, I'm asking
2 hypothetically, you know, where does this go?

3 MR. HUG: Well - - -

4 JUDGE GRAFFEO: Not all the justice courts
5 use this form.

6 MR. HUG: No, not all justice courts use
7 this form. But now I believe - - -

8 JUDGE GRAFFEO: So - - -

9 MR. HUG: - - - that at the time - - -

10 JUDGE GRAFFEO: So you're saying entry's
11 not necessary, as long as the defendant's brought in
12 front of the court - - -

13 MR. HUG: Where - - -

14 JUDGE GRAFFEO: - - - it's presumed to be
15 entry?

16 MR. HUG: Where counsel is assigned, and I
17 think that you're not going to have this issue where
18 we're relying on a form, because I believe this case
19 pre-dated when all the town courts were using audio
20 recording. So I think that now there would be a
21 transcript or a record that could be gone to to
22 determine whether or not counsel had been assigned or
23 whether - - - whether the defendant had elected to
24 retain counsel or to - - - that he wanted to proceed
25 - - - proceed pro se. So I think that this may - - -

1 this form may be a creature of the past that we
2 aren't going to deal with anymore. The issue really
3 is more fundamental than that.

4 CHIEF JUDGE LIPPMAN: Okay.

5 MR. HUG: Thank you, Your Honor.

6 CHIEF JUDGE LIPPMAN: Thank you. Thank you
7 both.

8 (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. TRAVIS AUGUSTINE, No. 109 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Sharona Shapiro

Signature: _____

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