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COURT OF APPEALS

STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

WILLIAM O'DANIEL,

No. 161
(papers sealed)

Appellant.

20 Eagle Street
Albany, New York 12207
September 16, 2014

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE VICTORIA A. GRAFFEO
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE ROBERT S. SMITH
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM

Appearances:

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Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: 161, People v.
2 O'Daniel.

3 Counsel, would you like some rebuttal time?

4 MR. BRYAN: Yes, Your Honor, may I have two
5 minutes, please?

6 CHIEF JUDGE LIPPMAN: Two minutes, sure, go
7 ahead. Proceed.

8 MR. BRYAN: This case raises the important
9 question of the right to choice of counsel in the
10 context of a severely disabled attorney. This court
11 in Arroyave said that courts must be vigilant in
12 protecting the rights to choice of counsel.

13 CHIEF JUDGE LIPPMAN: When is it then the
14 judge should have known that - - - that the
15 defendant's right to choice of counsel was being
16 violated?

17 MR. BRYAN: In fairness to the judge, I
18 would say that his initial letter, I don't think
19 would have - - - would have indicated the judge that
20 there was going to be a right to choice of counsel
21 violation. I do think that that letter demonstrates
22 that the judge was aware that the issue was there.
23 And - - -

24 CHIEF JUDGE LIPPMAN: And when - - - when
25 did it reach a peak? When - - - when should he have

1 stepped in?

2 MR. BRYAN: At - - - at the pre-trial
3 conference. At the pre-trial conference, several
4 things happened. There were a number of - - - of
5 facts, cumulatively, and some more important than
6 others, that should have raised the concern to the
7 judge that the defendant's right to choice of counsel
8 was being violated, that questions had to be asked.

9 JUDGE ABDUS-SALAAM: What - - - what - - -

10 JUDGE READ: So what should he have done?

11 MR. BRYAN: The judge - - -

12 JUDGE READ: What should the judge have
13 done?

14 MR. BRYAN: I submit the facts are strong,
15 but at a minimum here, what the judge should have
16 done, once the concern had been raised, it would have
17 been reasonable to conclude that this right was being
18 violated. The judge should have first asked - - -

19 JUDGE GRAFFEO: Which was at what point?
20 Because this went on for about nine, ten months,
21 here.

22 MR. BRYAN: Well, in terms of the - - -
23 yes, but there were - - -

24 JUDGE GRAFFEO: With constant requests for
25 adjournments.

1 MR. BRYAN: Yes.

2 JUDGE GRAFFEO: So I'm trying to pinpoint
3 when you say the judge should have done something
4 different. At what - - -

5 MR. BRYAN: Oh, I'm sorry.

6 JUDGE GRAFFEO: - - - point in this
7 chronology are you saying - - -

8 MR. BRYAN: On October 5th, at the pre-
9 trial conference, I would say that at that point,
10 there were facts that - - -

11 JUDGE GRAFFEO: But what - - -

12 MR. BRYAN: - - - should have triggered an
13 inquiry and concern that the defendant's rights were
14 being - - -

15 JUDGE ABDUS-SALAAM: What - - - what - - -

16 CHIEF JUDGE LIPPMAN: What was that fact;
17 that he was going to be hospitalized again?

18 MR. BRYAN: Well, at that point, he is
19 hospitalized. The - - - the trial attorney is
20 hospitalized.

21 JUDGE ABDUS-SALAAM: What should the judge
22 have asked if that's what was - - -

23 MR. BRYAN: The judge should have asked,
24 first - - - once the concern from the facts were
25 apparent that there was a problem here - - - the

1 judge should have asked the defendant, I submit,
2 directly here, who is your choice of counsel?

3 JUDGE PIGOTT: He didn't men - - - he
4 didn't - - - it sounded like the second chair was
5 saying, judge, you know, I'm ready, willing and able.

6 MR. BRYAN: True.

7 JUDGE PIGOTT: And let's - - - let's rock.
8 And - - -

9 MR. BRYAN: True.

10 JUDGE PIGOTT: And no one - - - no one was
11 pulling on his coat to say, sit down, son, because I
12 don't want you as my lawyer.

13 MR. BRYAN: Well, one - - - one thing in
14 particular in this case we have is it's apparent that
15 the defendant was - - - was not permitted to speak to
16 the court directly. The - - - all communications
17 were between Attorney Bruno and the court. So the
18 defendant here is - - -

19 CHIEF JUDGE LIPPMAN: Didn't the attorney
20 make a motion based on the CPLR?

21 MR. BRYAN: There was. In - - - there are
22 two points - - -

23 CHIEF JUDGE LIPPMAN: Should that have
24 triggered something to the judge?

25 MR. BRYAN: Likewise, because the - - -

1 there - - - the second renewed motion to adjourn - -
2 - and these motions are made by the defendant
3 directly through the attorney.

4 CHIEF JUDGE LIPPMAN: Right.

5 MR. BRYAN: The attorney is opposing the
6 motion, but the attorney at the second instance, on
7 the first day of trial - - -

8 JUDGE PIGOTT: He had a week to go, you
9 know, appeal that decision. I mean, he - - - he
10 could gotten an appellate judge to stop the trial,
11 couldn't he?

12 MR. BRYAN: Well, what we have here, and
13 it's a real problem, and I - - - it does arise in
14 issues involving counsel, and why an affirmative duty
15 often is - - - is required in these sort of
16 situations. The complaints are coming from the
17 defendants themselves. They're not lawyers.

18 JUDGE PIGOTT: But that's - - - that's kind
19 of what - - - you know, if you read this, it sounds
20 like the judge is trying to do everything he can to
21 accommodate everybody. I don't see a ju - - - you
22 know, a judge is particularly precipitous in what's
23 going on here.

24 Then when October 5th happens, every signal
25 seems to be, you know, I've got a client here who,

1 you know, is saying what he's saying, judge, but I'm
2 ready. I can do this. You know, I've studied
3 everything. I've got it all set; I'm - - - I'm ready
4 to go.

5 And what - - - what - - - you know, and now
6 we want to go to the step 3, and say, well, even
7 though the lawyer said it was okay, and even though
8 the judge gave him all these accommodations, because
9 this poor soul now decides that gee, I really wanted
10 somebody else, we've got to change all of this for -
11 - - you know, for him when he didn't make any opp - -
12 - didn't take any opportunity at that time to talk to
13 his lawyer and say, go back in there and say you're
14 not trying this case, or go to the Appellate Division
15 and say, you know, I needed a stay of this - - - of
16 this trial.

17 MR. BRYAN: Well, Judge Pigott, one thing
18 about this issue, and it's the right to choice of
19 counsel, it is a structural error. So therefore - -
20 -

21 JUDGE PIGOTT: It's a what?

22 MR. BRYAN: It's a structural error, and -
23 - - and so what that means is that just because
24 Attorney Bruno is saying I'm ready, it is - - - it's
25 actually an irrelevant fact that he is saying he is

1 ready. The issue - - - we're going to something
2 that's really - - -

3 JUDGE SMITH: But does - - - but doesn't
4 the judge have to have some reason to think that the
5 client is not happy with Bruno as his lawyer?

6 MR. BRYAN: Many things raised - - - raised
7 that. Now, again, the - - -

8 JUDGE SMITH: What's the first one?

9 JUDGE READ: Okay, but the constant - - -
10 the constant requests for postponement, is that - - -

11 MR. BRYAN: Well, no, I would - - - Your
12 Honor - - -

13 JUDGE READ: - - - should that have raised
14 it?

15 MR. BRYAN: I'm pointing to the pre-trial
16 conference, which is one week before the trial - - -

17 JUDGE SMITH: He says - - - where the law -
18 - - where Bruno himself says, my client thinks the
19 system's being unfair to him.

20 MR. BRYAN: That's certainly, I would say,
21 one of the most important things.

22 JUDGE SMITH: But isn't - - - isn't the - -
23 - isn't - - - in context, wouldn't that reasonably be
24 read as meaning - - - as being unfair to him, because
25 he's rushing me to trial before I've had a chance to

1 prepare, not because he doesn't like Bruno, he wants
2 somebody else in there?

3 MR. BRYAN: I would say not, in terms of
4 preparation. I would say yes, in terms of, I'm being
5 rushed to trial without my attorney whom I've chosen.

6 JUDGE SMITH: Well, he's not - - - he's
7 obviously - - - you know, he's not entitled to have
8 Martineau, obviously. Martineau's not available.

9 MR. BRYAN: Well, that's - - - and there we
10 get into a good question about what a judge is
11 supposed to do, and I - - - this case raises
12 something very important for the court, and - - - and
13 that is, when we're talking about something at the
14 core of our criminal justice system - - -

15 JUDGE GRAFFEO: Well, is there a difference
16 between assigned counsel and retained counsel?

17 MR. BRYAN: As I understand - - -

18 JUDGE GRAFFEO: Because an assigned
19 counsel, they substitute attorneys all the time.

20 MR. BRYAN: Yes. Well, as I understand
21 reading the case law of this court and - - - and in
22 New York State, there is actually a point at which
23 with assigned counsel where the right to choice of
24 counsel will actually attach. And that happens when
25 after a fair period of time, there is a trust

1 relationship that has been established between the
2 attorney and - - - and a defendant, even in an
3 assigned counsel situation.

4 JUDGE GRAFFEO: Well, let me ask you about
5 a hypothetical, because I'm - - - I'm still not at
6 all clear on what you are suggesting to us the judge
7 should have done here. Say you have a case with a
8 retained counsel who has now contracted a very
9 serious form of cancer, some kind of leukemia.
10 They're going to be hospitalized for a very long
11 period of time. The treatment plan is not definite.

12 MR. BRYAN: Yes.

13 JUDGE GRAFFEO: The judge asks the
14 defendant, who do you want for your attorney? I want
15 Ms. So-and-so who's in the hospital.

16 MR. BRYAN: Yes.

17 JUDGE GRAFFEO: How many times does the
18 judge have to go through that - - -

19 MR. BRYAN: Well, actually only once.

20 JUDGE GRAFFEO: - - - until you reach - - -
21 until you reach a point where it's just a dilatory -
22 - -

23 MR. BRYAN: Yes. Only once, Your Honor.
24 I'm sorry. And - - - and that's because there's a
25 second question that should be asked then. The first

1 is, what is your right to choice of counsel? I mean,
2 I think that's a baseline that needs to be
3 ascertained of what - - - who do you want? And - - -

4 JUDGE GRAFFEO: Okay, so in this case, if
5 he had asked Mr. O'Daniel, and he says, I want Mr.
6 Martineau - - -

7 MR. BRYAN: The second question - - -

8 JUDGE GRAFFEO: - - - then what happen - -
9 - then what does the judge do?

10 MR. BRYAN: The next question by the judge
11 is - - - is a factual determination to get as much
12 information as he can about the condition of the
13 disabled lawyer. And what that - - -

14 JUDGE GRAFFEO: And he's told - - - I - - -
15 and the disabled lawyer says, I have to undergo
16 surgery.

17 MR. BRYAN: Well, then, I would say that -
18 - - I think that it makes sense, what - - - what the
19 rule should be, that if - - - if it is temporary,
20 let's say, a reasonable time, whatever the condition
21 is, will resolve, then I think the duty of the - - -
22 of the judge in that instance is to grant an
23 adjournment, because it is a reasonable time, to
24 allow the attorney to recover and return, to give the
25 choice of counsel.

1 JUDGE ABDUS-SALAAM: What if the doctor is
2 - - - what if the prognosis for Judge Graffeo's
3 attorney is that he won't be able to get back to work
4 after the surgery or after the treatments for another
5 year and a half?

6 MR. BRYAN: Yes. I - - - I'm sorry. The -
7 - - the - - - I think if the answer then is that it's
8 not temporary, but either that it is permanent or its
9 end is unforeseeable, in either of those two
10 instances, I think at the first - - -

11 JUDGE PIGOTT: You're asking for an awful
12 lot from a judge.

13 MR. BRYAN: Well - - -

14 JUDGE PIGOTT: You know, this guy was
15 second chairing this thing. I - - - I'm just
16 mystified. You know, you say, well, you've got - - -
17 you know, the judge now is in the dock. He or she
18 has got to get the medical records. He or she has
19 got to get on the horn to the doctor.

20 He or she then has to make a medical
21 determination as to the extent of the - - - of the
22 disability and what it's going to - - - in the
23 meantime, in this - - - this is a particularly
24 gruesome case, I guess, but - - - but the simple fact
25 of the matter is, things have to got to move, and

1 you've got a lawyer sitting there, saying I'm ready,
2 I can to do it, and I'm making this - - - and I got
3 the clear impression he's making it because his - - -
4 his defendant wanted him to make it, but he had no
5 faith in that motion at all.

6 MR. BRYAN: Well, more than no - - - well,
7 we have - - - here we have - - - and I would say,
8 too, that what would trigger also a - - - a duty to
9 inquire here, at a minimum, is we have an attorney
10 and a defendant in conflict. They're in conflict
11 over the motion.

12 JUDGE PIGOTT: Well, that's their problem.
13 They've - - - they've got to work that out. It
14 doesn't seem to me - - - you now want to have the - -
15 - the judge then say, after I've made my medical
16 determination, now I want to find out if the two of
17 you are getting along.

18 I mean, at some point, it's just - - -
19 we've had - - - we've had appellate counsel that - -
20 - that can't make it to argue and they supply. Now
21 are we under some obligation - - - or the Appellate
22 Division to say, well, gee, you know, Mr. Martineau
23 still isn't around, and he wanted to do the appeal,
24 so we better put the appeal off until - - -

25 MR. BRYAN: No.

1 JUDGE PIGOTT: I mean, at what point do we
2 stop this? I mean - - -

3 MR. BRYAN: Well, first of all, I - - -
4 what this case raises is - - - is complete incap - -
5 - incapacitation. And I recognize that is an issue.
6 I argued in front of the Fourth Department last week
7 a case, and the case was an attorney who he's - - -
8 he's desperately ill, shows up for the first day of
9 trial, says, I can't think; I've lost twelve pounds;
10 I haven't been able to get ready for this case. And
11 it does raise the issue of disability, frankly. And
12 even - - - you have an attorney there in body but may
13 not be in mind.

14 So it does raise - - - I recognize it
15 raises - - -

16 JUDGE PIGOTT: That's a stronger case,
17 though, as opposed to this one where you have a
18 second chair who's been with him all along, right?

19 MR. BRYAN: Well - - -

20 JUDGE PIGOTT: I just don't know where you
21 draw that line.

22 MR. BRYAN: Well, the - - - and this is
23 what's so important here. And what is so important
24 we cannot forget. It's embodied in our Constitution
25 and is there for a very, very good reason. And that

1 is the choice of counsel.

2 JUDGE PIGOTT: But does the judge - - -

3 MR. BRYAN: It's not simply - - -

4 JUDGE PIGOTT: Does the judge have any

5 discretion in situations like this?

6 MR. BRYAN: Yes, I mean, for example, I do

7 not think a judge will have to go through some

8 extensive factual - - - you know, looking at medical

9 records - - -

10 JUDGE PIGOTT: So he - - - he - - -

11 MR. BRYAN: - - - or anything like that.

12 JUDGE PIGOTT: In your view, he - - - he

13 did not properly exercise his discretion here.

14 MR. BRYAN: There was - - - there was no

15 inquiry. I'm saying - - -

16 JUDGE GRAFFEO: Well, he - - - he granted

17 adjournments from January to October. It sounds like

18 you just want to discount all of those adjournments

19 that the judge granted.

20 MR. BRYAN: But I don't at all - - -

21 JUDGE GRAFFEO: The first time the attorney

22 was on the vacation, that's why someone else - - -

23 MR. BRYAN: I - - -

24 JUDGE GRAFFEO: - - - prepared. I mean, it

25 seemed to me this judge was rather accommodating, but

1 at a certain point - - -

2 MR. BRYAN: He was accommodating. In the
3 end - - -

4 JUDGE GRAFFEO: There has to be case
5 management, doesn't there?

6 MR. BRYAN: Yes, there - - - there does.
7 And - - - but I would say in the end here is that
8 when you get to the point - - - and it reached that
9 point - - - of this can't proceed forward with this
10 attorney, in the judge's mind, how that is handled is
11 critically important, because it can't be handled in
12 a way that violates the choice of counsel.

13 JUDGE ABDUS-SALAAM: Well, didn't the judge
14 write to Mr. Martineau in anticipation that his
15 illness would be a problem, and give Mr. Martineau
16 and his client an opportunity to decide what to do?
17 And he was - - - and the judge was informed by Mr.
18 Martineau that Mr. Martineau had made these
19 arrangements, and then the defendant shows up in
20 court with Mr. Bruno, and his request is not, I want
21 Mr. Martineau; I want more time for Mr. Bruno to
22 prepare. That's his request. So whose - - - whose
23 obligation is it, really, to put before the judge
24 that there's a problem here?

25 MR. BRYAN: Well, again, we have a conflict

1 between attorney and defendant as - - - and - - - and
2 defendant is not speaking directly, and there's no
3 inquiry here. If we look at the second time that
4 it's renewed, that attorney - - -

5 JUDGE ABDUS-SALAAM: But defendants speak
6 through their lawyers to say I don't want this lawyer
7 anymore. They, you know - - - lawyers, when they
8 have - - - hear from their clients that I don't want
9 you to be my lawyer, usually the - - - the lawyer
10 says that to the judge. This - - - this defendant
11 doesn't want me as a lawyer anymore.

12 MR. BRYAN: There are times, because the
13 right is so important, and it's been recognized that
14 it's so important by this court, that there's a - - -
15 there are times when there's an affirmative duty of
16 the court to ask and even ask directly of the
17 defendant.

18 JUDGE PIGOTT: But are you suggesting then
19 that there are times when the lawyer is not to be
20 believed? When - - - when - - - as - - - as Mr.
21 Bruno seemed to indicate, you know, he's - - - he's
22 ready to go, that the judge should say, I don't
23 believe you, and - - - and therefore, I'm going to go
24 beyond you, and I'm going to talk to your client
25 without your consent, and I'm going to find out

1 what's going on here.

2 MR. BRYAN: Well, let me give you an
3 illustration. Is - - - is - - - I mean, we have in -
4 - - in the case law, where - - - where there are
5 objections. Say, for example, a defendant is saying,
6 I am not happy with my assigned attorney; discharge
7 him. There is a duty - - - and this court has
8 imposed a duty - - - you have to ask questions. You
9 can't simply ignore that.

10 JUDGE PIGOTT: No question about it. It
11 happens all the time.

12 MR. BRYAN: And - - -

13 JUDGE PIGOTT: But that's not this case,
14 though, would you agree?

15 MR. BRYAN: Well, but they are - - - we - -
16 - I - - - what I submit these cases, and the cases in
17 this context represent, is a - - - is an
18 acknowledgement of just how important the right is.
19 We - - - if we really - - -

20 CHIEF JUDGE LIPPMAN: Okay, counsel, wrap
21 it up. Finish your thought. Go ahead.

22 MR. BRYAN: Yes. Well, the importance of
23 this, to our system, and we - - - it's an adversarial
24 system. The adversarial system, what does that mean?
25 It's adversaries; who are the adversaries? They are

1 the attorneys. And that - - - we have this belief,
2 this system going back into England, as to how we
3 believe truth is ascertained.

4 CHIEF JUDGE LIPPMAN: Okay, counsel, you'll
5 have some rebuttal time. Let's hear from your
6 adversary now.

7 MS. DOUTHAT: Thank you, good afternoon,
8 may it please the court, Jaime Douthat for the People
9 of the State of New York. Your Honors, county court
10 did not abuse its discretion when it did not - - -

11 CHIEF JUDGE LIPPMAN: Counsel, how much
12 clearer could it have been to the judge when - - -
13 when what's conveyed is that the system is - - - is
14 unfair to him, because of my counsel's health. What
15 would that convey to you if you were the judge?

16 MS. DOUTHAT: Well, Your Honor, I don't
17 think that there - - - in this case - - - that there
18 was a duty to inquire as far as - - - I - - - I think
19 that at that point - - -

20 CHIEF JUDGE LIPPMAN: How simple would it
21 have been to inquire and then to inquire about the -
22 - - the lawyer's health and when he could come back?

23 MS. DOUTHAT: Well, I think the record
24 establishes that Mr. Martineau had been facing
25 illness since February, and had been in and out of

1 the hospital - - -

2 CHIEF JUDGE LIPPMAN: I - - - I agree with
3 you and I think there are good arguments that this
4 has been going on a long time, but you don't disagree
5 with your counsel's argument that the right to
6 counsel is a very important structural right. So
7 what we're trying to get at - - - in the questions to
8 your adversary and now to you - - - is where do you
9 draw the line? What does the judge have to do, and
10 at what point does the judge have to do it?

11 So can you see a - - - a particular point,
12 the second time this is raised, where the judge was
13 obligated or by that point, it had gone far enough
14 that he didn't feel that there was an issue? What do
15 you think is going through or should have been going
16 through the judge's mind as to what the judge should
17 or shouldn't do at that point?

18 MS. DOUTHAT: Well, I don't think that
19 there was a duty for the judge to inquire, because
20 the defendant appeared with Mr. Bruno at the pre-
21 trial conference. He never indicated that he didn't
22 want Mr. Bruno to represent him. He - - -

23 CHIEF JUDGE LIPPMAN: What about when Bruno
24 made - - - made the motion under the CPLR whether it
25 applies in the criminal case or not? What about when

1 he makes the motion that says - - - that has to do
2 with, when the attorney has a health problem, you got
3 to, you know, wait X number of days, or whatever it
4 is?

5 MS. DOUTHAT: But at the time that he made
6 the motion, Your Honor, the only basis for that was
7 that he was - - - the defendant was of the position
8 that - - - that they needed more time to prepare.
9 There was nothing to indicate that the defendant was
10 not willing to proceed with Mr. Bruno as his
11 attorney.

12 CHIEF JUDGE LIPPMAN: Was there anything
13 that indicated or should have indicated to the judge
14 that the - - - the defendant was just trying to buy
15 time while he was still out, and that - - - was that
16 a fair conclusion to come to?

17 MS. DOUTHAT: That - - - that is a
18 conclusion, I believe so, Your Honor, that the People
19 came to, because the defendant was out on bail during
20 all of this while it was pending, and I think that it
21 is like - - -

22 CHIEF JUDGE LIPPMAN: But what is it - - -
23 what is it that tells you that - - - that leads to
24 that conclusion, this being an appropriate
25 conclusion?

1 MS. DOUTHAT: Well, the fact that it was
2 clear from the record that Mr. Martineau was not able
3 to proceed with the trial. That was not an option
4 for the trial court. And yet, he still continued to
5 request for an adjournment, and Mr. Bruno was
6 prepared and ready to proceed with trial.

7 CHIEF JUDGE LIPPMAN: Is that ever a
8 reason, though, to go forward? I mean, you say,
9 listen, we have to proceed because we have to move
10 cases along. I guess, what's the balance here is
11 this incredibly important right to choose your
12 counsel and the normal discretion of the judge to
13 move the calendar, and at some point, draw the line.

14 What's the rule? When - - - when does the
15 judge have to affirmatively, in your adversary's
16 words, affirmatively question, take some act, that -
17 - - that is in recognition of the right to counsel -
18 - - right to choose counsel? What's the rule? When
19 does that come into play?

20 MS. DOUTHAT: Well, I think in - - - I
21 think in this case, the court gave the defendant two
22 appreciable adjournments for Mr. Martineau to be able
23 to try the case, and it came to a point where this
24 case that involved a child - - - a victim of child
25 sexual assault - - - that had been prepared to go to

1 trial on a number of occasions. The trial had been
2 originally set for nine months earlier.

3 I don't think it was inappropriate for the
4 court to send the letter to Mr. Martineau indicating
5 that the trial was going to be proceeding on October
6 12th, and if he wasn't able to proceed with the
7 trial, that he needed to, you know, look into getting
8 a second chair, which is exactly what he did. He
9 advised Mr. O'Daniel of the arrangement. Mr.
10 O'Daniel met with Mr. Bruno before the pre-trial
11 conference. He met - - -

12 CHIEF JUDGE LIPPMAN: He never retained
13 him, but he did - - - right?

14 MS. DOUTHAT: The - - -

15 CHIEF JUDGE LIPPMAN: The defendant never
16 retained the second seater or whatever you want to
17 call Mr. Bruno.

18 MS. DOUTHAT: That's unclear from the
19 record, Your Honor. I mean, what did happen was that
20 Mr. Martineau made arrangements - - -

21 CHIEF JUDGE LIPPMAN: If he had retained
22 him, there would be no question to talk about, right?

23 MS. DOUTHAT: I - - - I don't know if I
24 would agree with that, Judge. I think that he
25 appeared at court with Mr. O'Daniel - - -

1 CHIEF JUDGE LIPPMAN: Well, if he retained
2 him, then you would expect him to be ready to go to
3 trial with him, wouldn't he? With Bruno?

4 MS. DOUTHAT: But I believe that he was
5 ready to go to trial with Bruno. He appeared with
6 him. He didn't give any indication to the trial
7 court that he wasn't ready to proceed with Mr. Bruno
8 as his attorney. There was nothing expressed to the
9 trial court that they weren't having - - - that they
10 didn't have a working relationship and that he wasn't
11 able to represent him at the trial.

12 JUDGE RIVERA: Let's - - - let's assume all
13 of that - - - let's assume we agree with you on all
14 of that. Absolutely agree with you. On October
15 12th, when the attorney files the CPLR motion, which
16 the only purpose of that motion is for appointment of
17 new counsel, is it not? In the civil context?

18 MS. DOUTHAT: Yes.

19 JUDGE RIVERA: Okay, so then - - - then the
20 judge can only interpret that as the reason you want
21 an adjournment is to get new counsel. What, if any,
22 grounds would the judge have to deny that request?

23 MS. DOUTHAT: But I - - - I don't agree
24 with that, I mean, because the actual statement from
25 Mr. Bruno was that they were looking for the

1 adjournment because the defendant was of the position
2 that they needed more time to prepare.

3 JUDGE RIVERA: Right, but the - - - the
4 whole point of that particular motion is to get new
5 counsel, otherwise you could just, yet again, request
6 an adjournment as they had several times in the past.
7 But now you've picked the particular motion that
8 deals with a particular problem and is resolved
9 through a particular way. So let's assume that the
10 judge understands that motion to mean, you want new
11 counsel. By what basis could the judge deny that on
12 the day of trial?

13 MS. DOUTHAT: I would - - - I would say
14 because it's the day of trial, Your Honor. And
15 that's within the trial court's discretion,
16 especially on the eve of trial, to deny that request.
17 But I would also note that the purpose of the statute
18 is for an unrepresented person to have a new attorney
19 as to - - - allow them an opportunity to get a new
20 attorney. But this defendant appeared with an
21 attorney, so there was no reason to grant an
22 adjournment for thirty days under the statute.

23 JUDGE SMITH: If - - - I mean, if - - - if
24 he - - - if O'Daniel had said, either personally or
25 through his lawyer, Judge, I - - - I've lost my

1 lawyer; I'm entitled to thirty days to look for a new
2 one. Does he get it?

3 MS. DOUTHAT: At the - - - at any point,
4 Your Honor? Or at - - - I mean, because I think it's
5 different - - -

6 JUDGE SMITH: At the - - - at the - - - let
7 us say, at the earliest point that he reasonably
8 could say that.

9 MS. DOUTHAT: If the defendant said to the
10 court that he - - -

11 JUDGE SMITH: I - - - yeah. Judge - - -
12 Judge, I want thirty days to look for a new lawyer.

13 MS. DOUTHAT: That - - - would the - - -
14 would there be a rea - - - I - - - I think it
15 depends, Your Honor. I think if - - - I mean, with
16 this case, it had been pending for so long, that it's
17 all within the trial court's discretion.

18 JUDGE PIGOTT: No, but in any case, the an
19 - - - the answer to that would seem to be yes. I
20 mean, he wants me to take a plea. I'm not taking the
21 damn plea, and I don't trust him anymore, because he
22 keeps wanting me to take a plea, and I want to go to
23 trial. I would think you - - - the easy answer to
24 that is, yeah, you get thirty days, but you don't,
25 you know - - - you don't get it on the eve of trial,

1 necessarily.

2 MS. DOUTHAT: Correct. That's - - - I
3 apologize. So - - -

4 CHIEF JUDGE LIPPMAN: You never get it on
5 the eve of trial?

6 MS. DOUTHAT: I - - - when it's at the eve
7 of trial, Your Honor, it's - - - well, requests for
8 adjournments are within the sole discretion of the
9 trial court, and when we are on the eve - - -

10 CHIEF JUDGE LIPPMAN: Yeah, but sometimes
11 we can abuse our discretion. So the question is, it
12 obviously depends upon the circumstance, right, that
13 - - -

14 MS. DOUTHAT: Yes.

15 CHIEF JUDGE LIPPMAN: - - - that - - - in
16 answer to Judge Smith's question.

17 JUDGE SMITH: Suppose - - - let me - - -
18 let me put it really - - - let me make it more stark.
19 It's the first day of trial. Everybody's ready for
20 trial. It's been adjourned a million times. There's
21 excellent reason to go ahead. Martineau and Bruno
22 walk into together to represent O'Daniel, and
23 Martineau falls over and can't continue. And the - -
24 - and O'Daniel says, wait a minute. I didn't hire
25 Bruno; I hired Martineau. You've got to give me time

1 for a new lawyer. Is he entitled to that?

2 MS. DOUTHAT: I think that that's in the
3 trial court's discretion. And I think - - -

4 JUDGE SMITH: The - - - the judge can say
5 no, even then?

6 MS. DOUTHAT: I would say so, yes, because
7 he - - -

8 JUDGE PIGOTT: Would you oppose - - -

9 MS. DOUTHAT: - - - appeared with Bruno.

10 JUDGE PIGOTT: Would you - - - would you
11 oppose the motion for the - - - or a continuance at
12 least until at least they can remove the body? I'm
13 kidding. But I mean, there are times when even a
14 district attorney would say, obviously, Judge, there
15 ought to be a postponement here. Don't you agree?

16 MS. DOUTHAT: Of course. But I don't think
17 one was warranted in this case, when the case had
18 been pending for so long. The trial court had
19 accommodated Mr. Bruno - - - or excuse me, Mr.
20 Martineau - - - on a number of occasions, and I just
21 - - - I don't think that that is the issue that we're
22 dealing with here.

23 CHIEF JUDGE LIPPMAN: But - - - but I
24 guess, not to belabor the point, but if it was clear,
25 however they were conveying it - - - a motion,

1 talking about his health, whatever it was - - - if it
2 was clear that he wanted a new counsel, on the day of
3 the trial, you would - - - you would say the judge
4 probably should grant that, right? I think your
5 argument - - - and correct me; I don't mean to put
6 words in your mouth - - - your argument is, it wasn't
7 clear and that there had been a lot of delay up until
8 that point.

9 MS. DOUTHAT: No, I think my argument is
10 that as far as the record is concerned, that it was
11 clear, because the defendant did not - - - he
12 appeared voluntarily at the pre-trial conference - -
13 -

14 CHIEF JUDGE LIPPMAN: Yeah, yeah, but if it
15 was clear, you wouldn't interfere with his right to
16 choose counsel. Again, isn't it your argument that
17 it wasn't clear, and there had been a long delay, and
18 in that case, the judge was entirely within his
19 discretion, in your - - - from your perspective?

20 MS. DOUTHAT: I guess my argument is that
21 it - - - it was clear that he appeared with Mr.
22 Bruno, that he wanted Mr. Martineau to be - - -

23 CHIEF JUDGE LIPPMAN: You're saying it was
24 clear the other way. But I'm saying if it was clear
25 that he wanted new counsel, he probably should get it

1 even on the day of trial. If it was not so clear, or
2 not clear at all in your mind, and there had been
3 delays up to that point, the judge is, obviously,
4 within his discretion.

5 MS. DOUTHAT: Yes.

6 JUDGE PIGOTT: Your only objection - - -
7 you would - - - your only objection at the time was
8 that you were ready. You - - - there - - - you
9 weren't claiming any prejudices if there was an
10 adjournment.

11 MS. DOUTHAT: We did, Your Honor, at the
12 pre-trial conference. We did indicate that this was
13 a chi - - - a case involving a victim of child sexual
14 abuse, who've been prepared on a number of occasions
15 - - -

16 JUDGE PIGOTT: Right.

17 MS. DOUTHAT: - - - and was ready, and it
18 would be grossly - - - to quote the People, grossly
19 unfair to not proceed with the trial.

20 JUDGE PIGOTT: Well, the crime was four
21 years prior to this, and this - - - and - - - and
22 there had been, I guess, some adjournments, but it's
23 been a long time from the crime to the testimony in
24 any event, right?

25 MS. DOUTHAT: Well, there had already been

1 a long time since - - - from what happened and when
2 the child disclosed and anybody knew about it, yes.

3 CHIEF JUDGE LIPPMAN: Okay.

4 MS. DOUTHAT: Thank you.

5 CHIEF JUDGE LIPPMAN: Thanks, counselor.

6 Counselor, anything you want to add?

7 MR. BRYAN: Yes, Your Honor. I think the
8 statute is important. There's only one purpose of
9 CPLR 321.2(c) (sic).

10 JUDGE ABDUS-SALAAM: Well, couldn't,
11 counsel, in this situation - - - I'd like to pose a
12 different hypothetical than - - -

13 MR. BRYAN: Yes, Your Honor.

14 JUDGE ABDUS-SALAAM: - - - Judge Rivera.
15 Since Mr. Bruno was looking for an adjournment,
16 couldn't he have invoked CPLR 321 to say, well, if my
17 client were looking for a new lawyer, he would get
18 thirty days, so I'm asking that you now give me
19 thirty days, because I can - - - you know, I should
20 be able to get an adjournment because I am a new
21 lawyer, not - - - not Mr. Martineau.

22 MR. BRYAN: I would say not, Your Honor. I
23 - - - I - - - number one, there's only one purpose to
24 the CPLR 321(c) and - - -

25 JUDGE GRAFFEO: Do we know if that even

1 applies in criminal proceedings?

2 MR. BRYAN: Well, in the - - -

3 JUDGE GRAFFEO: I thought CPLR doesn't - -
4 - I mean, isn't that what we have the CPL for?

5 MR. BRYAN: It does raise another
6 significant issue for this court. And that is, the
7 application of the New York Constitution and the
8 specific language of the Constitution.

9 JUDGE RIVERA: Well, well - - -

10 JUDGE GRAFFEO: Well, it may mean that it's
11 a reasonable - - -

12 JUDGE RIVERA: Regardless of that, it's the
13 intent, right? I'm sorry, Judge Graffeo.

14 MR. BRYAN: I'm sorry.

15 JUDGE GRAFFEO: Can I finish my question,
16 please?

17 JUDGE RIVERA: Yeah, no, go ahead.

18 JUDGE GRAFFEO: Couldn't it just be that
19 it's, you know, the legislature didn't want to set a
20 period of time? It's up to the judge's discretion to
21 pick a reasonable length of time, as opposed to in
22 the civil arena, where it's a different situation so
23 they have a particular time period.

24 MR. BRYAN: Well, I would say one issue - -
25 - even if we put aside the New York Constitution - -

1 - one issue does have to do with abuse of discretion.
2 And I would submit that it is an abuse of discretion
3 that if in the same context, in a civil case, a civil
4 party would be entitled to an adjournment of thirty
5 days - - - an automatic stay of the proceedings - - -
6 in the event of disabled counsel, and that a criminal
7 defendant would not have that same right.

8 JUDGE PIGOTT: Well, they're so different.
9 You know, the idea in the CPLR is you've got two
10 private lawyers in a cause of action and somebody
11 gets, you know, as they all say - - - and so you want
12 to stay your proceedings, and the judge will say,
13 fine.

14 But in - - - in the - - - you can't - - -
15 you can't say I want to postpone the grand jury
16 proceedings, because I want to get a new lawyer or I
17 want - - - you know, or I want - - - I want not
18 forty-five days, but I want seventy-five days for my
19 omnibus motions, because I want to get a new lawyer.
20 It's just not - - - it's not governed by the CPLR. I
21 mean, there's - - - there's just - - - and nor would
22 defendants want it to be, I think. I think, there's
23 a far more discretion - - -

24 MR. BRYAN: Well - - -

25 JUDGE PIGOTT: - - - in a judge without the

1 CPLR getting involved.

2 MR. BRYAN: Well, what we are dealing with
3 in 321(c) is dealing with a disabled lawyer. There -
4 - -

5 JUDGE PIGOTT: In a civil action, where
6 nobody knows what's going on, and - - - and the two
7 private lawyers come into court and say, one of us
8 just got hit by a car, and they want thirty days, and
9 I don't want give it to them. And the judge says,
10 fine, you get - - -

11 MR. BRYAN: I would respectfully submit
12 that the - - - is bound by statute. The judge must -
13 - -

14 JUDGE PIGOTT: If - - -

15 JUDGE SMITH: But what about - - - what
16 about - - - but you - - - you - - - a minute ago you
17 put aside the Constitution, but isn't your - - -
18 isn't your argument stronger if you stop putting it
19 aside and bring it back?

20 MR. BRYAN: Yes.

21 JUDGE SMITH: Can't you read the
22 Constitution to say that the crimi - - - when it
23 comes to the right to counsel, the criminal defendant
24 has to be treated at least as favorably as the civil
25 party?

1 MR. BRYAN: Absolutely, Your Honor. I - -
2 - I - - - I mean, I - - - it's - - - it's
3 interesting, amazing - - -

4 JUDGE GRAFFEO: Or maybe you get a longer
5 adjournment in the criminal context?

6 MR. BRYAN: Possible, possible, but I would
7 say it would set a minimum, Your Honor. If - - - the
8 New York Constitution - - - I mean, how many
9 constitutions, of either states or United States,
10 does not have this language saying, as in civil
11 actions? So what we really need to do - - - I mean,
12 what was it about the enactment of New York's
13 Constitution in 1821, what were they responding to?
14 And I will say, back then, if you really look at the
15 history of - - - there was no separate criminal
16 procedure law.

17 JUDGE RIVERA: But - - - but counsel, don't
18 we still have to resolve whether or not the judge
19 could understand based on what the attorney said that
20 this was indeed an effort to adjourn to appoint new
21 counsel? I take it that's - - - that's - - - the
22 People's argument is, it's not clear. The judge
23 would not understand this motion in that way.

24 MR. BRYAN: I would respectfully submit
25 that it is a very clear way to say that you want new

1 counsel. Let me give you an illustration. Supposing
2 counsel had said, in paraphrasing the statute, Judge,
3 I'm relying on or I want to cite to you CPLR 321(c)
4 which says that where there's a disabled attorney,
5 there is a - - - a right to a thirty-day automatic
6 stay for that person to obtain counsel. That's
7 paraphrasing. What it is even better, frankly, I
8 would submit is, you read the statute itself and - -
9 -

10 JUDGE PIGOTT: That's right.

11 MR. BRYAN: - - - the attorney read the
12 statute itself.

13 JUDGE PIGOTT: But let me ask you this. If
14 - - - if that's the case, could the judge have then
15 said, I gave you thirty days way back, because - - -
16 because you were having this affliction, and you had
17 thirty days to get new counsel. In shows Mr. Bruno
18 saying I'm ready, willing and able to try this case,
19 because Mr. Martineau isn't ready and I'm ready to
20 go.

21 MR. BRYAN: They're different instances.

22 JUDGE PIGOTT: Of course they are. But the
23 judge - - -

24 MR. BRYAN: And in - - - at least - - - I'm
25 sorry.

1 JUDGE PIGOTT: You want to say, I get an
2 adjournment, I get an adjournment, I get an
3 adjournment, and then I invoke 321(c) and all of this
4 doesn't count anymore; I get another thirty days.
5 And I would think that - - - that even in a civil - -
6 - on the civil side, they'll say, well, wait, you've
7 had nine months. Your opponent has given you all of
8 this time to do exactly what you're now asking for,
9 and now you're asking for another thirty days. That
10 motion's denied.

11 MR. BRYAN: The problem we have is then new
12 counsel stepping in.

13 JUDGE ABDUS-SALAAM: And - - -

14 MR. BRYAN: I'm sorry.

15 JUDGE ABDUS-SALAAM: I'd like to just
16 piggy-back on what Judge Pigott said. And the CPLR's
17 invoked to get an adjournment, not for new counsel,
18 but to prepare.

19 MR. BRYAN: Well - - -

20 JUDGE ABDUS-SALAAM: They say, well, if - -
21 - if this were a civil case, my client would be
22 entitled to a thirty-day adjournment, so I want a
23 thirty-day adjournment here.

24 MR. BRYAN: Your Honor, I - - - I go back
25 to my illustration in saying that when you're reading

1 the statute verbatim, you're asking for what that
2 statute says.

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

5 MR. BRYAN: Thank you.

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

8 (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. William O'Daniel, No. 161 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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