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COURT OF APPEALS
STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

NO. 58

BRADFORD SHANKS,

Appellant.

20 Eagle Street
Albany, New York
September 2, 2021

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE MADELINE SINGAS
ASSOCIATE JUDGE ANTHONY CANNATARO

Appearances:

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1 CHIEF JUDGE DIFIORE: Appeal number 58, the
2 People of the State of New York v. Bradford L. Shanks.
3 We'll wait one moment, counsel, until your colleagues have
4 an opportunity to leave or stay.

5 MS. MANLEY: Good afternoon. May it please the
6 court, my name's Kathy Manley, representing appellant,
7 Bradford Shanks. And I'd like to reserve two minutes for
8 rebuttal.

9 CHIEF JUDGE DIFIORE: You have two minutes.

10 MS. MANLEY: Thank you.

11 This court should hold that the fundamental issue
12 of right to counsel survives even - - - a forfeiture of
13 counsel survives even a valid waiver of appeal.

14 JUDGE GARCIA: Counsel, can I - - - can we - - -

15 MS. MANLEY: Yes.

16 JUDGE GARCIA: - - - stop there because I know
17 we're going to probably get into some of the merits. And -
18 - - and I just want to talk about the waiver for a second.

19 So at that proceeding, as I see it, there's new
20 counsel at the plea. That counsel says I've met with this
21 defendant nineteen times to discuss this resolution. The
22 People want a waiver of a right to appeal. There are some
23 other charges, I think, relatively minor, right, that are
24 also disposed of?

25 MS. MANLEY: Very minor that were not - - -



1 JUDGE GARCIA: But let's say we agree with you,
2 and it survives a waiver. And now the next case comes - -
3 - a hypothetical - - - next case comes and there's a
4 serious assault charge out there, separate. Same facts,
5 though, as here, this trial happened, we get to a plea.
6 The People offer a deal. You get what you would have
7 gotten in this trial, same sentence, you plead to the
8 assault, you waive your right to appeal.

9 Can you make that deal?

10 MS. MANLEY: That - - - I think the - - - you
11 just have to look at this court's decision in Thomas, and
12 look at the colloquy on the waiver, regardless of the
13 amount of consideration for - - -

14 JUDGE GARCIA: But is there any way you could
15 waive the right to appeal in my hypothetical scenario?

16 MS. MANLEY: Including the forfeiture of counsel?

17 JUDGE GARCIA: Yes.

18 MS. MANLEY: No. I think that forfeiture of
19 counsel - - -

20 JUDGE GARCIA: So you would preclude your client
21 from ever being able to make that deal, which is I'll plead
22 to the separate assault case with the plea I - - - with the
23 verdict I have here, I'll get the same sentence I would
24 have got for the verdict alone if I waive my right to
25 appeal, but I can't do that?



1 MS. MANLEY: If he did a valid waiver of appeal,
2 he could do that. And he could do that deal. It's a
3 totally different situation than we have, but - - -

4 JUDGE GARCIA: So you could - - -

5 MS. MANLEY: - - - he could do that, but I think
6 it - - -

7 JUDGE GARCIA: - - - waive?

8 MS. MANLEY: - - - still should not include the
9 wholesale deprivation of the right to counsel.

10 JUDGE GARCIA: So my point is - - -

11 MS. MANLEY: But you could - - -

12 JUDGE GARCIA: - - - no matter what you allocuted
13 to in that plea, the right - - - this forfeiture issue
14 would survive on appeal?

15 MS. MANLEY: Yes. The - - - the forfeiture issue
16 should survive on appeal. There's somewhat of an appellate
17 division split, although I think the trend is going in the
18 direction of saying that it survives a valid waiver of
19 appeal. We have a new case in People v. Best in the Second
20 Department that said that, kind of undermining the former
21 case of People v. Whitfield. And then in the Third
22 Department in 2008, there was People v. Trapani that said
23 outright deprivation of the right to counsel goes to the
24 heart of the process and survives both the waiver of appeal
25 and a plea. And in - - - in my case, they actually said



1 assuming without deciding that it does survive. In the
2 First Department, they said it survives a plea. And then
3 the Third Department cited the - - - in Trapani, for - - -
4 support for it surviving a - - - a waiver also.

5 The Fourth Department's the one that said it
6 doesn't, in People v. Richardson in 2019. But and - - -
7 and it said that it does survive a plea, but not a waiver
8 of appeal. But that was a very different situation. We
9 weren't dealing with wholesale deprivation of the right to
10 counsel at trial. We were just dealing with the
11 deprivation of counsel's assistance and - - -

12 JUDGE RIVERA: Do - - - do - - -

13 MS. MANLEY: - - - testifying at the grand jury -
14 - -

15 JUDGE RIVERA: - - - do we - - - do we have to
16 answer this question if we decide the waiver's invalid
17 anyway?

18 MS. MANLEY: I think it - - - it's important to
19 decide that question. And I also think the waiver is
20 invalid and maybe it's important - - -

21 JUDGE RIVERA: But if we said the waiver's
22 invalid, then - - -

23 MS. MANLEY: I guess you could - - -

24 JUDGE RIVERA: - - - that question is moot.
25 Okay. So it - - -



1 MS. MANLEY: I guess - - -

2 JUDGE RIVERA: Let's get to the - - - whether the
3 waiver's invalid.

4 MS. MANLEY: Okay. So - - -

5 JUDGE RIVERA: Because of course the appellate
6 division's decided, I believe, pre-Thomas.

7 MS. MANLEY: Right. And that Thomas should apply
8 because - - -

9 JUDGE RIVERA: Correct.

10 MS. MANLEY: - - - this is on direct appeal. So
11 under Thomas, the waiver was invalid because there was no
12 indication that any appellate rights remained at all.

13 The written waiver was even worse because it said
14 you - - - you're waiving any and all rights to appeal, and
15 then it listed some of the rights waived, which included
16 the right to poor person status and assigned counsel on
17 appeal. And that's clearly overbroad and mis - - -
18 misrepresents the law.

19 And in - - - in Thomas also the - - - the
20 majority said waivers of appeal only cover a narrow class
21 of issues not forfeited by the plea. And here, there was
22 no plea, so it covers - - - purports to cover a lot more
23 and including the review of the entire trial where he was
24 forced to represent himself. And I - - - but there was
25 insufficient evidence.



1 CHIEF JUDGE DIFIORE: Counsel, let's move along
2 to did the trial court properly conclude that this
3 defendant forfeited his right.

4 MS. MANLEY: No. The - - - there was no record
5 support for the kind of extreme - - - it's an extreme last
6 resort according to this case in People v. Smith. There
7 was no way that it even came close to that.

8 The Third Department quoted - - - quoted People
9 v. Sloan in saying there was a persistent pattern of
10 threatening abusive, obstreperous, and uncooperative
11 behavior with successive assigned counsel - - -

12 JUDGE RIVERA: Is that - - - can I - - -

13 MS. MANLEY: - - - well - - -

14 JUDGE RIVERA: - - - is that as a matter of law,
15 or because of the facts in the record?

16 MS. MANLEY: Well, there was no record support
17 for what should be the standard here for - - - to go to
18 that extreme, you know, last resort of taking away
19 somebody's - - -

20 JUDGE RIVERA: So - - - so - - - so did the judge
21 mischaracterize the record; is that your position?

22 MS. MANLEY: The judge did mischaracterize the
23 record, yes, because he was saying that Mr. Shanks - - -
24 that there was a long series of attorneys that Mr. Shanks
25 was disrespectful to or abused or whatever he was saying.



1 And that's not the case.

2 The record shows that the first four attorneys
3 left for completely different reasons, like, clear reasons,
4 like having a conflict with representing his wife in the
5 past. There was another one, David Taylor (ph.), who did a
6 lot of work in the case, who was in the hospital at the
7 time trial was supposed to happen. And then there was
8 another one who moved to Atlanta. And then there was
9 another one who had a conflict also. So there was no
10 indication that Mr. Shanks did anything to cause problems
11 with those relationships, with those attorneys.

12 It was just the last two - - -

13 JUDGE FAHEY: So - - - so let - - -

14 MS. MANLEY: - - - and they didn't rise to the
15 level - - -

16 JUDGE FAHEY: Can I - - - can I ask you a
17 question?

18 MS. MANLEY: Um-hum.

19 JUDGE FAHEY: It - - - it - - - assuming that the
20 waiver of appeal was invalid, do we need to reach the
21 counsel question?

22 MS. MANLEY: Well yes because it would be - - -

23 JUDGE FAHEY: Why?

24 MS. MANLEY: Because the Third Department - - -

25 JUDGE FAHEY: Couldn't we just sent it back



1 without reaching it?

2 MS. MANLEY: I mean, the Third Department did - -
3 - did uphold the forfeiture.

4 JUDGE FAHEY: Um-hum.

5 MS. MANLEY: So I - - - I - - - you can reach
6 that issue and - - - and it needs to be made clear that if
7 you have problems communicating with two attorneys, and - -
8 - and with - - -

9 JUDGE FAHEY: Let me - - - let me take you a step
10 further. I understand what you're saying. Thank you. I -
11 - - I just wanted to ask you just - - - just another area.

12 There was also a motion to ask the judge to
13 recuse himself; is that correct?

14 MS. MANLEY: Yeah, there were two motions for
15 that.

16 JUDGE FAHEY: Okay. Was - - - was there an
17 unrecorded conference in this case?

18 MS. MANLEY: Yes. So that goes to the judicial
19 bias. Attorney David Taylor submitted an affidavit in
20 support of his motion for recusal, which he filed.

21 JUDGE FAHEY: Um-hum.

22 MS. MANLEY: And that might have been why he
23 didn't want to come back in the case because that was
24 denied and anyway - - -

25 JUDGE FAHEY: Um-hum.



1 MS. MANLEY: So he said - - -

2 JUDGE FAHEY: That's understandable, but okay.

3 So - - -

4 MS. MANLEY: In December 2015, there was this
5 unrecorded conference where the district attorney had said
6 he was preparing to move to dismiss the case. There wasn't
7 enough evidence. And that's something that Mr. Taylor had
8 pointed out to him with information from the IRS, that
9 there were two tax returns filed and the taxes on that.

10 JUDGE FAHEY: Right. And - - - and what did the
11 judge - - -

12 MS. MANLEY: So he said he was going to dismiss.
13 And the judge gave him arguments for continuing to
14 prosecute the case.

15 JUDGE FAHEY: All right. Now - - - now when you
16 say this, what's the basis for the substance of the
17 unrecorded conference, your information?

18 MS. MANLEY: It was David Taylor's affidavit.
19 And the judge when he - - -

20 JUDGE FAHEY: But let me - - - all right. And
21 let me ask the next question then.

22 Was the defendant present for this unrecorded
23 conference?

24 MS. MANLEY: I don't believe he was. I - - - I
25 don't know.



1 JUDGE FAHEY: What's the basis for your belief
2 there?

3 MS. MANLEY: Well just because defendants aren't
4 usually present in conferences. I think it was in
5 chambers.

6 JUDGE FAHEY: So it wasn't in the - - - it wasn't
7 - - - quite often in criminal cases, you know, I was a city
8 court judge, you'd have conferences and sidebars, and you'd
9 ask the defendant to step up, it would be quite common.

10 MS. MANLEY: I - - - I mean, I don't know - - -

11 JUDGE FAHEY: You just don't know. All right.

12 MS. MANLEY: - - - for sure whether he was there
13 or not.

14 JUDGE FAHEY: All right. And at - - - at what
15 point in the case's history, did the unrecorded conference
16 take place?

17 MS. MANLEY: Well, it was the - - - David Taylor
18 - - - it was - - - it was December 2015, David Taylor - - -

19 JUDGE FAHEY: When did the trial start?

20 MS. MANLEY: The trial started quite a while
21 later.

22 JUDGE FAHEY: Yeah, I thought it was in the
23 spring, but you know better than - - -

24 MS. MANLEY: 2017, right, so - - -

25 JUDGE FAHEY: Oh, that much further?



1 MS. MANLEY: - - - so I understand that the judge
2 was frustrated that so much time had passed, but that
3 wasn't the defendant's fault. These two attorneys that
4 came in, that was towards the end of the process, shortly
5 before trial.

6 JUDGE FAHEY: Um-hum.

7 MS. MANLEY: And it just - - - he - - - when the
8 last attorney, Herschen (ph.), wrote a letter listing some
9 issues he had. And he included the word threats, but then
10 the judge had a - - - appearance where he said the
11 prosecutor has to leave the room, and we're going to talk
12 about this, I want to learn more about these issues. There
13 was no mention - - -

14 JUDGE FAHEY: So - - -

15 MS. MANLEY: - - - of threats. It was nothing
16 serious. It was - - -

17 JUDGE FAHEY: Let - - - let me ask this. If the
18 waiver of appeal is invalid, what are you asking this court
19 to do on defendant's bias claim?

20 MS. MANLEY: Well, I think that just as with the
21 right to counsel, the issue of judicial bias, as it
22 occurred here and in maybe other cases, should also survive
23 - - - well, a waiver of appeal. But you're saying if the
24 waiver of appeal is invalid, you don't necessarily have to
25 reach that but - - -



1 JUDGE FAHEY: Yeah, wouldn't it all just go back?

2 MS. MANLEY: So I think the issue of judicial
3 bias could go back to the Third Department because they
4 didn't rule on that, they didn't reach that. But they did
5 reach the forfeiture of counsel issue.

6 JUDGE FAHEY: I see. Thank you.

7 CHIEF JUDGE DIFIORE: Thank you, Counsel.

8 MS. MANLEY: Thank you.

9 CHIEF JUDGE DIFIORE: Counsel?

10 MR. DI DONNA: Good afternoon. May it please the
11 court, my name is Christopher James Di Donna, and I'm
12 appearing on behalf of the People.

13 It's the People's position that this matter that
14 the Third Department correctly affirmed that the waiver of
15 appeal here was proper, that the defendant executed it
16 voluntarily, knowingly, and intelligently. Further, it's
17 also the People's position that there was no judicial bias.
18 If you look at - - -

19 JUDGE WILSON: Counsel - - - counsel, can I stop
20 you there for a second?

21 MR. DI DONNA: Yes.

22 JUDGE WILSON: I think you submitted a brief that
23 - - - that only rested on waiver.

24 MR. DI DONNA: Yes.

25 JUDGE WILSON: So why haven't you forfeited your



1 other arguments here?

2 MR. DI DONNA: Because it's the - - -

3 JUDGE WILSON: If the shoe was on the other foot,
4 wouldn't you be sitting here arguing that the defendant,
5 having failed to raise something in a brief, had forfeited
6 it?

7 MR. DI DONNA: Well, Your Honor, it - - - it's
8 the People's position that the - - - yes, we - - - we did
9 in our brief to this court note that - - - or chiefly argue
10 that the waiver of appeal was valid. But then we're also
11 saying that the - - - the decision rendered by the Third
12 Department, which covered these other issues, also should
13 be affirmed. So we indirectly were - - - were supporting
14 that belief that the - - - that the - - - the other issues
15 here, the judicial bias, and then the forfeiture of the
16 right to assigned counsel, were properly decided.

17 JUDGE FAHEY: You know it's - - - it's unusual to
18 get such a short brief on these issues.

19 MR. DI DONNA: I - - - I understand that, Your
20 Honor.

21 JUDGE FAHEY: How would - - - how would you - - -

22 MR. DI DONNA: I wish I had written it myself.

23 JUDGE FAHEY: I'm sorry?

24 MR. DI DONNA: I wish I had written it myself. I
25 was not in the office at the time - - - well, I was in the



1 office, but it was not my duty to write it at that time.
2 So I understand your position.

3 JUDGE FAHEY: Yeah, I see. It - - - it's
4 difficult to give the People's arguments substance if they
5 don't put substance to them when they present it to us.

6 MR. DI DONNA: I - - - I can't disagree with you,
7 Your Honor.

8 JUDGE FAHEY: Okay. Thank you.

9 MR. DI DONNA: If I can continue, just to address
10 some of the points that were raised by, I believe, Judge
11 Garcia early on in the appellant's appearance. It was
12 noted in the record that Mr. Shanks retained counsel post-
13 verdict and that that counsel, Randall Charf (ph.), set - -
14 - met with him nineteen separate times and he discussed
15 this potential resolution in the case, which also included
16 the resolution of the post-verdict motions that were filed.
17 And it's the People's position that that conversation that
18 took - - - those conversations that retained counsel, that
19 Mr. Shanks obtained, that he had an opportunity to
20 understand what he was going to be given.

21 Now, I wasn't privy, nobody's privy to what
22 exactly happened during those nineteen separate engagements
23 between retained counsel and Mr. Shanks. But it's People's
24 position that when you take that in consideration plus the
25 discussion that's on the record, I believe it was in April



1 of 2017, post-jury trial, post-verdict, and then the
2 discussions that were had on the record concerning what's
3 being given up, and the - - - the benefit that was being
4 received, it's People's position that Mr. - - - that Mr.
5 Shanks voluntarily, knowingly, and intelligently waived
6 whatever particular rights, including this right, one of
7 the rights here that's been contested about his right to -
8 - -

9 JUDGE WILSON: So - - - so is it - - -

10 MR. DI DONNA: - - - assigned counsel - - -

11 JUDGE WILSON: - - - is it your understanding
12 that an ineffective assistance of counsel claim survives an
13 otherwise valid waiver or no?

14 MR. DI DONNA: No. That - - - that would - - -
15 that would survive.

16 JUDGE WILSON: An ineffective assistance would.
17 So why then wouldn't total deprivation of counsel also
18 survive?

19 MR. DI DONNA: Well, because here, Your Honor, I
20 think there's a public policy issue that exists. If we
21 have a situation where an individual like Mr. Shanks here
22 is provided with six assigned counsel, people from - - -
23 from the local area bar - - -

24 JUDGE WILSON: That's a different issue. I'm
25 asking you to assume for a moment - - - let me give you a



1 hypothetical instead of using the facts here.

2 MR. DI DONNA: Okay.

3 JUDGE WILSON: Suppose the trial judge had said,
4 I'm refusing to appoint you counsel at all ever, you're
5 just going to have to try this case yourself. And then
6 after that, he goes ahead and executes a - - - a valid
7 waiver. He's been deprived trial counsel. There's no
8 record basis for doing that at all. Does that survive?

9 MR. DI DONNA: Well, I - - - I think that's kind
10 of an apples and oranges situation be - - -

11 JUDGE WILSON: I'm - - - I'm just asking about
12 that hypothetical. Let's assume it's a pineapple.

13 MR. DI DONNA: Okay. So you're saying that he is
14 not provided any counsel whatsoever - - -

15 JUDGE WILSON: Until he gets to the plea and - -
16 - and the waiver. So he's got counsel for the waiver and
17 plea, but he does not have counsel for the trial, he's
18 represented himself over his objection. Never had counsel,
19 never been offered it. Asked for it, told he can't have
20 it. Does that survive?

21 MR. DI DONNA: I would say in - - - in that
22 situation, yes.

23 JUDGE WILSON: Okay. And so what's different
24 then, why is this a pineapple instead of an apple?

25 MR. DI DONNA: So what's different here is that



1 there's record basis to show that Mr. Shanks engaged in
2 behavior that rendered a breakdown in the relationship, the
3 attorney-client relationship, that prevented his assigned -
4 - -

5 JUDGE WILSON: So then you're not really - - -

6 MR. DI DONNA: - - - counsel - - -

7 JUDGE WILSON: - - - you're not really resting on
8 the waiver then, you're just arguing he was appropriately
9 denied counsel because of the record? The waiver has
10 nothing to do with it.

11 MR. DI DONNA: Well okay, so to go - - - so - - -
12 so to go back to the issue of the waiver. Here, if he's
13 going - - - he had retained counsel at the time that the
14 waiver - - - yeah, he had retained counsel at the time that
15 he executed the written wavier of appeal. It's the
16 People's position that if he's going to execute that
17 written waiver of appeal, he's being advised by his
18 retained counsel of what he's going to give up, what issues
19 he's going to lose - - - or - - - or - - - or rights he's
20 going to be able to lose in exchange for the favorable plea
21 that he received.

22 JUDGE WILSON: Right. But I think I - - - I
23 think you agreed with me - - - and stop me if I'm wrong - -
24 - that if that waiver was valid, and was counseled, it
25 still wouldn't reach a total deprivation of counsel in my



1 pineapple example. Just as it wouldn't reach ineffective
2 assistance.

3 MR. DI DONNA: So - - - I - - - I - - - I don't
4 know how to respond to that, I'm sorry.

5 JUDGE WILSON: Well, let me - - - go ahead and
6 move on then.

7 MR. DI DONNA: Okay. So - - -

8 JUDGE FAHEY: Well, so - - - so let me ask this
9 then.

10 MR. DI DONNA: Yes.

11 JUDGE FAHEY: The way I understand your argument
12 is, first off, the waiver of appeal was - - - was valid,
13 right?

14 MR. DI DONNA: Yes.

15 JUDGE FAHEY: And secondly, even though it's not
16 briefed, you're saying that his conduct was so egregious
17 that he in essence forfeited the right to counsel; is that
18 an accurate characterization?

19 MR. DI DONNA: Correct, Your Honor.

20 JUDGE FAHEY: The cases that I look at it on
21 right to counsel, when it's forfeited, usually involve
22 assaults, sometimes assault on the attorney, a witness,
23 something like that, spitting, threatening behavior,
24 attacking the attorneys in - - - in a physical or almost
25 always in some form of a - - - physically threatening



1 behavior. Disagreeing with counsel is not that. And
2 hasn't been that.

3 How - - - how does this fall within those
4 spectrum of cases?

5 MR. DI DONNA: I think it falls into the spectrum
6 of cases because two of the attorneys, in particular,
7 towards the end of and just before - - -

8 JUDGE FAHEY: Right. The - - - the last two.

9 MR. DI DONNA: Yeah, the - - - the last two.

10 JUDGE FAHEY: I think we'll agree that the last
11 two - - -

12 MR. DI DONNA: So - - -

13 JUDGE FAHEY: - - - they weren't - - - they - - -
14 they left, they didn't want to represent him.

15 MR. DI DONNA: Well, he - - - he made threats of
16 malpractice. I think that's far worse than being spit upon
17 in this profession. I - - - I think that's - - - that
18 causes serious concerns for an attorney, and a great deal
19 of discomfort. And causes an attorney - - - starts to
20 divide the attorney's loyalty between him or herself and
21 then his or her client.

22 JUDGE FAHEY: So you're saying the two that were
23 identified are enough?

24 MR. DI DONNA: I - - - yes. In - - - in
25 conjunction with everything else that took place here.



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JUDGE FAHEY: Um-hum.

MR. DI DONNA: There were two additional attorneys, though, it's kind of buried in the - - - in the record. The first attorney, Ryan Meyersack (ph.), he not only left because there was a conflict of interest, but because he didn't - - - he could not work with the - - - the appellant here, Mr. Shanks. And that was noted in the record. And the - - - the appellant agreed with the judge, the trial court judge, that he couldn't communicate with him. So that was noted, I believe, on January 17th of 2017.

JUDGE FAHEY: I thought they relieved the Public Defender's Office for a conflict of interest?

MR. DI DONNA: Yeah, it was also that. But if - - if you also look in the record, Your Honor, and to the court, it's also noted that Mr. Shanks agreed with the judge that he said he could not get along with Mr. Meyersack.

Additionally, the other attorney referenced here, David Taylor, who was the second attorney who entered into this - - - entered into this representation - - -

CHIEF JUDGE DIFIORE: So Counsel, let me interrupt. When - - -

MR. DI DONNA: Yes.

CHIEF JUDGE DIFIORE: - - - when - - - when a

1 defendant offers to the judge, who's presiding, that he
2 can't get along with the lawyer, what's the trial judge's
3 obligation to probe that a little bit and figure - - - try
4 to figure that out and maybe even help that along? I don't
5 know, you tell me.

6 MR. DI DONNA: I - - - I think the judge is
7 supposed to - - - the trial judge is supposed to say, you
8 know, you - - - you need to work with your - - - your
9 assigned counsel or your retained counsel. It's in your
10 best interest to do so. If you don't, you may end up like
11 Mr. Shanks did in this situation, representing yourself - -
12 - representing yourself if you don't work with the - - -
13 with the professional in this situation and defer to his or
14 her - - -

15 JUDGE RIVERA: But the colloquy you're referring
16 to occurred after that office had withdrawn, right? I
17 mean, this is not contemporaneous with the representation.
18 Or did I misunderstand you?

19 MR. DI DONNA: No. No. So initially - - -

20 JUDGE RIVERA: This is years later, is it not?

21 MR. DI DONNA: This - - - this is - - - so a - -
22 - a record of the breakdown - - - of - - - of - - - of the
23 issues between Mr. Shanks and his attorneys is noted on, I
24 believe, January 17th, 2017. It was during that hearing,
25 closed hearing, between Mr. Shanks, his current attorney at

1 that time, Lee Herschen, and the defendant, where the judge
2 breaks down the - - - all the different lawyers that Mr.
3 Shanks had had, and why those attorneys were no longer
4 representing him. And it was noted there, Your Honor,
5 where Mr. Meyersack was saying that he couldn't - - - or
6 the - - - the defendant couldn't communicate with the - - -
7 with Mr. Meyersack.

8 JUDGE RIVERA: So that's the first one. Let - -
9 - I'm not so sure couldn't communicate gets you there. But
10 let - - - let's say that's the first one. There's several
11 others in between.

12 MR. DI DONNA: Yes.

13 JUDGE RIVERA: And he seems to be communicating
14 just fine, right?

15 MR. DI DONNA: Well, to - - - to a degree. It's
16 also noted at that same hearing in January of 2017 that
17 even David Taylor, who worked a lot with Mr. Shanks, when
18 he was asked a second time to represent him, he refused to.
19 He said, I don't want to work with him based on his
20 behavior. It's a small legal community, Knox Eagle County
21 (ph.), and the word spread like a wildfire that - - - that
22 he wasn't someone that anybody could work with.

23 CHIEF JUDGE DIFIORE: Thank you, counsel.

24 MR. DI DONNA: Thank you, Your Honor.

25 CHIEF JUDGE DIFIORE: Counsel, your rebuttal?



1 MS. MANLEY: Thank you.

2 First, I - - - I agree with amnesty that the
3 prosecution did waive all of the arguments that weren't
4 raised in their brief. And all that they raised in their
5 brief was the issue of forfeiture of counsel surviving a
6 valid waiver of appeal. So I think that's the only issue
7 they should be able to go forward with.

8 But in any event, the forfeiture, there was no
9 way that it rose to that level here. And - - - and the
10 idea that threats of - - - of malpractice or filing I think
11 it was a complaint to the committee, the idea that that
12 should result in forfeiture of the right to counsel is - -
13 - is not something this court should endorse at all. That
14 - - - that's a very - - -

15 JUDGE FAHEY: Well, we all - - - we all have
16 different experiences. You're practicing attorneys who
17 work in cases where you're arraigning people and you go
18 through it. Quite often, people would come in and scream
19 at you at one point in a proceeding. The next time,
20 they've calmed down and you - - - you could - - - that - -
21 - that's a common occurrence I think that all of us who've
22 dealt in the criminal law, on both sides of the V between
23 you, has - - - has experience.

24 I guess the question is what the pattern of
25 behavior is over time.



1 MS. MANLEY: Right. And this really, I don't
2 think you can rely on what the judge said about what - - -
3 I think the judge mis - - - misrepresented this record as
4 far as these attorneys. And there's nothing from Mr.
5 Meyersack saying he had problems with Mr. Shanks, and
6 nothing really from Mr. Shanks saying that. There was just
7 the judge kind of maybe remembering that wrong a couple
8 years later. So I don't think we can really rely on that.

9 And I - - - Mr. Taylor never said that he wasn't
10 coming back based on Mr. Shanks' behavior.

11 JUDGE FAHEY: One thing on - - -

12 MS. MANLEY: That's just not in the record and
13 that's not the case - - -

14 JUDGE FAHEY: - - - one thing I'd asked you
15 before.

16 MS. MANLEY: - - - and Mr. Shanks was surprised.
17 He liked him.

18 JUDGE FAHEY: Not - - - no. One thing I'd asked
19 you before is if we say that the waiver of appeal was
20 invalid, then is there any reason for us to address at all
21 the counsel question?

22 MS. MANLEY: Well, yes because it - - - the - - -
23 you mean, the - - - the forfeiture issue?

24 JUDGE FAHEY: Right.

25 MS. MANLEY: Yes. Because the Third Department



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decided it wrongly.

JUDGE FAHEY: I see.

MS. MANLEY: And so - - - yeah.

JUDGE FAHEY: I see.

JUDGE RIVERA: Because they reached the issue?

MS. MANLEY: They did reach the issue.

JUDGE FAHEY: Right. I - - - I understand - - -

MS. MANLEY: In that one sentence, but yes.

JUDGE FAHEY: Yeah. Okay. Thank you.

CHIEF JUDGE DIFIORE: Thank you, Counsel.

MS. MANLEY: Thank you.

(Court is adjourned)



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

I, Amanda M. Oliver, certify that the foregoing transcript of proceedings in the Court of Appeals of The People of the State of New York v. Bradford Shanks, No. 58 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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