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COURT OF APPEALS

STATE OF NEW YORK

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PEOPLE,

Appellant,

-against-

No. 19

LAWRENCE WATSON,

Respondent.

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20 Eagle Street  
Albany, New York 12207  
January 14, 2016

Before:

ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM  
ASSOCIATE JUDGE LESLIE E. STEIN  
ASSOCIATE JUDGE EUGENE M. FAHEY

Appearances:

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Karen Schiffmiller  
Official Court Transcriber

1                   JUDGE PIGOTT: Our first case for oral  
2 argument this afternoon is number 19, People v.  
3 Lawrence Watson.

4                   Ms. Poole, good afternoon.

5                   MS. POOLE: Good afternoon, Your Honors.  
6 Dana Poole for the People, the appellant in this  
7 case. The - - -

8                   JUDGE PIGOTT: Would you like some rebuttal  
9 time?

10                  MS. POOLE: Oh, yes, please, Your Honor.  
11 If I could reserve three minutes, please?

12                  JUDGE PIGOTT: Three?

13                  MS. POOLE: Thank you.

14                  The issue before this court is whether  
15 Justice Carruthers abused his discretion as a matter  
16 of law when he relieved New York County Defender  
17 Services' attorney Lawrence Fisher as the defendant's  
18 counsel. And in ruling that he did, the Appellate  
19 Division found no error in the judge's balancing of  
20 defendant's rights to counsel of his choosing against  
21 his right to the effective assistance of counsel.

22                  Instead, the Appellate Division determined  
23 that Justice Carruthers had incorrectly found that  
24 there was a potential or actual conflict of interest  
25 in this situation. But given the facts presented to

1 Justice Carruthers, there can be no doubt that he  
2 correctly and properly realized that such a conflict  
3 did, in fact, exist.

4 First and foremost, Mr. Fisher himself  
5 reported that he and his New York County Defender  
6 Services supervisors had reviewed the situation and  
7 determined that a conflict existed. And Justice  
8 Carruthers had no reason to second guess that  
9 evaluation.

10 JUDGE PIGOTT: Well, what about the  
11 defendant? What was his position with respect to  
12 this?

13 MS. POOLE: Colloquially, he wanted to have  
14 his cake and eat it too. He did want to keep Mr.  
15 Fisher as his counsel. They did seem to get along.  
16 Both of them wanted to continue their working  
17 relationship. However, defendant also informed the  
18 judge that he wanted Mr. Stephens called as a witness  
19 in this case. So - - -

20 JUDGE STEIN: Was there ever, sort of, a  
21 conclusion reached on that before the judge stepped  
22 in and said, you know, well, this is what we're going  
23 to do here?

24 MS. POOLE: The - - -

25 JUDGE STEIN: In other words, do we know

1           whether in - - - in - - - he would have actually  
2           waived the conflict? And does it matter?

3                       MS. POOLE: Ultimately, I - - - I don't  
4           think it matters, given that - - - given the  
5           situation. But what - - - what we do know is that  
6           Mr. Fisher had reviewed the situation with his client  
7           before they - - - they went into court. And - - -  
8           and he did not come in and say, my client fully  
9           understands and he would like to waive this conflict.  
10          The result of defendant's conversation with his  
11          attorney was that he still had questions about the  
12          matter.

13                       And - - - so after counsel presented the  
14          situation to the judge, the judge began what appears  
15          to be a Gomberg inquiry to see if defendant did wish  
16          to waive this - - - this possible conflict. And - -  
17          - and as he began to explain the situation to  
18          defendant, he asked if he understood, and that's when  
19          - - - and defendant said he understood, but he  
20          immediately informed the judge that, in fact, he did  
21          want Stephens called as a witness.

22                       JUDGE ABDUS-SALAAM: In response to that,  
23          defense counsel essentially said, I have no problem  
24          with that, if the prosecution is unable to call  
25          Stephens too, because I won't be able to cross-

1           examine him. So what was wrong with that?

2                       MS. POOLE: Well, what - - - what counsel  
3           said is, I can't call Stephens as a witness. So - -  
4           - so there was this conflict between what defendant  
5           wanted, which was to have Stephens called as a  
6           witness, and his ab - - - his counsel's ability to  
7           carry that out, or at least to investigate whether  
8           that was a viable defense strategy, because what - -  
9           - what he and his supervisors had determined was that  
10          he could not search for - - - for Stephens, he could  
11          not talk to Stephens, he could not call Stephens as a  
12          witness, and were the People to call Stephens as a  
13          witness, he couldn't cross-examine him.

14                      So - - - so there - - - there were, in  
15          essence, sort of two conflicts happening here. The -  
16          - - the - - - one was between defendant and - - -  
17          between defendant's wishes and - - - and his  
18          counsel's abilities, and the second was that the - -  
19          - the People then informed the judge that if the  
20          defense didn't call Mr. Stephens, they would consider  
21          calling Stephens as a rebuttal witness.

22                      JUDGE ABDUS-SALAAM: So is it your  
23          position, counsel, that the waiver, or - - - or not  
24          waiver, but keeping Mr. Fisher on was conditional;  
25          that as long as he could call - - - as long as

1           defendant could call Stephens as a witness, he would  
2           like to keep Mr. Fisher, but if not, then Fisher  
3           would be relieved?

4                       MS. POOLE: I - - - I'm - - - I'm - - - the  
5           inquiry did not go quite that far, because once - - -  
6           once it was established that - - - that defendant did  
7           want to call Stephens - - - and he was very clear  
8           about that fact. And - - - and we know that Justice  
9           Carruthers properly understood that defendant, even  
10          in that moment, wanted to call Stephens, because  
11          after the trial, when Stephens, in fact, was not  
12          called as a witness, de - - - defendant still  
13          complained about that fact.

14                       He filed a pro se 330.30 motion, in which  
15          he complained that Stephens had not been called as a  
16          witness. Even at sentencing, he complained that  
17          Stephens had not been called as a witness, and - - -  
18          and posited that perhaps a verdict would have been  
19          different.

20                       So we know that - - - that defendant was  
21          very sincere in - - - in his desire to have Stephens  
22          called as a witness. He wanted to talk about  
23          Stephens at his trial, based, apparently, on  
24          something he had said at the station house when they  
25          had both been arrested together.

1                   And so - - - so what - - - what the judge  
2                   is faced with is - - - is this very real conflict.  
3                   And - - - and the judge, you know - - - this is a  
4                   very experienced judge and he is well aware that once  
5                   a defendant says, I want him called as a witness, and  
6                   his attorney says I can't do that, and I can't even  
7                   cross-examine him if - - - if the People call him,  
8                   the writing on the wall is clear that should this  
9                   attorney remain on the case, there's going to be an  
10                  ineffective assistance of counsel claim.

11                  JUDGE PIGOTT:   What I - - - I don't recall,  
12                  was - - - was the defendant given that choice of  
13                  saying - - - you know, in other words, you can - - -  
14                  you can call Stephens, in which case, you're going to  
15                  have to get a new lawyer, or you could go with your  
16                  lawyer, but you're not going to be able to call  
17                  Stephens?   Which - - - which cup do you want to drink  
18                  from?

19                  MS. POOLE:   I - - - I - - - it didn't - - -  
20                  he - - - he did not get posed with that particular  
21                  question.   That - - - that's true.   The inquiry did  
22                  not go that far, because I - - - I - - - at that  
23                  point, this very experienced judge realized what was  
24                  happening in this case.

25                  JUDGE STEIN:   Is it within the judge's

1 discretion to make that determination regardless of  
2 what the defendant - - -

3 MS. POOLE: Absolutely.

4 JUDGE STEIN: - - - does or doesn't want?

5 MS. POOLE: Absolutely. Because at - - -  
6 at that point, on - - - he - - - once he had said, in  
7 - - - in the face of all of this information, I - - -  
8 I want Stephens called as - - - as a witness, even if  
9 - - - if the inquiry had gone on and he had said,  
10 well, okay, I'll waive the - - - the conflict that's  
11 presented here, the fact remain - - - Justice  
12 Carruthers knows full well that should that happen,  
13 should defendant then be convicted, the ineffective  
14 assistance of counsel claim - - -

15 JUDGE PIGOTT: How serious was the  
16 conflict? Because - - - because he - - - Stephens  
17 had already pled out. I - - -

18 MS. POOLE: Stephens had pled out, but the  
19 - - - these were related cases - - -

20 JUDGE PIGOTT: Right.

21 MS. POOLE: - - - and that puts this case  
22 in - - - in a very different position than many of  
23 the other cases - - -

24 JUDGE STEIN: Or - - - or is it - - - is  
25 the conflict created because of what Fisher's



1 supervisors forbade him from doing?

2 MS. POOLE: Yes - - -

3 JUDGE STEIN: I mean, if they hadn't said  
4 all that, would it possibly be a different question  
5 here?

6 MS. POOLE: Well, one of the things that  
7 the Appellate Division faulted the judge for was find  
8 - - - was relying on what defense - - - on - - - on  
9 what defense - - - on what the attorneys had said.  
10 But even if - - - even if the judge had determined,  
11 oh, I don't - - - you know, there - - - there's no  
12 actual conflict here, your supervisors are wrong,  
13 there's still a conflict, because defense counsel is  
14 now inhibited.

15 If he does what the - - - what the  
16 Appellate Division suggests and goes ahead and calls  
17 - - - calls the witness or cross-examines him, he's -  
18 - - he's acting in direct contravention of what his  
19 supervisors have - - - have told him, which creates  
20 its own conflict, because he's looking at being  
21 disciplined or per - - - perhaps fired for - - - for  
22 taking those actions. So - - -

23 JUDGE PIGOTT: But is - - - is there a  
24 motion to that effect or I - - - I just - - - you  
25 know, the judge is the one that seems to have made

1 this decision and - - - and I just don't know why it  
2 wouldn't have waited for a motion, in which the - - -  
3 maybe the lawyer would have said exactly what you  
4 just said, you know, my job's on the line if I - - -  
5 if I call this guy, and so I can't - - -- I can't do  
6 this. You know, I want to be relieved.

7 MS. POOLE: Well, Fisher - - - Fisher was  
8 walking into court say - - - you know, he didn't  
9 specifically say I - - - I have to be relieved. He  
10 sort of relied on the judge to say that, and then  
11 agreed with him. I mean, I - - - I think he didn't  
12 want to be - - -

13 JUDGE PIGOTT: Yeah.

14 MS. POOLE: - - - the guy in the courtroom  
15 saying he had to be - - - he could no longer  
16 represent his client. But he's made - - - he made  
17 very clear that - - - that he was in agreement with  
18 what his - - - his supervisors were telling him to  
19 do.

20 JUDGE STEIN: If he had said he could no  
21 longer represent his client, and then the - - - and  
22 then the judge refused to let him go, that would have  
23 put him in a much worse situation.

24 MS. POOLE: He - - - dire straights, and  
25 then - - - and the - - - and the - - - the

1           ineffective assistance of counsel claim writes itself  
2           at that point. So - - - so the judge is - - - is  
3           between a rock and a hard place in - - - in this  
4           scenario.

5                        There - - - there's no question that there  
6           is at - - - at the very least a potential conflict  
7           and probably an actual conflict, and - - - and  
8           probably both, if you - - - if you look at what's  
9           happening with the People and what's happening with  
10          the defense.

11                       And - - - and the judge properly realized  
12          that he had to make this balancing determination  
13          between the defendant's rights and he properly opted  
14          - - - deter - - - he properly determined that the  
15          safest course of action here was to - - - to appoint  
16          unconflicted counsel to represent defendant during  
17          this trial.

18                       JUDGE PIGOTT: Thank you. Thank you, Ms.  
19          Poole.

20                       MS. POOLE: Thank you.

21                       JUDGE PIGOTT: Ms. Zaytsev, am I  
22          pronouncing your name correctly?

23                       MS. ZAYTSEV: Yes, you did.

24                       JUDGE PIGOTT: Miracles of miracles.  
25          Thanks.

1 MS. ZAYTSEV: Good afternoon, Your Honors.

2 JUDGE PIGOTT: Good afternoon.

3 MS. ZAYTSEV: The Appellate Division here  
4 correctly concluded that there was no conflict, and  
5 that Mr. Fisher's disqualification was therefore  
6 improper. There - - - the Appellate Division - - -

7 JUDGE ABDUS-SALAAM: Counsel, how was there  
8 not a conflict if - - - if the lawyer's essentially  
9 saying, my supervisors have told me to stop  
10 everything I'm doing on this case. Stop  
11 investigating, stop looking for Mr. - - - Mr.  
12 Stephens, because we represented him pre - - -  
13 previously, and I can't look at the file that we have  
14 so that even if I don't find Stephens, I might be  
15 able to find something if the prosecution calls him.

16 And if I don't do that, then, you know,  
17 essentially, I have to get my client to waive any  
18 conflict that there might be and not - - - and - - -  
19 and allow me not to call Stephens or not to cross-  
20 examine him. And defendant is saying no, no, I don't  
21 want that. I want you and I want Stephens. So what  
22 - - - where is that not a conflict?

23 MS. ZAYTSEV: Well, Your Honor, the - - -  
24 any attorney that would have been assigned to  
25 represent Mr. Watson would not have been able to

1 access New York County Defender's confidential file  
2 on Mr. Stephens. So the fact that - - -

3 JUDGE STEIN: Is that the only thing that  
4 could create a conflict here?

5 MS. ZAYTSEV: No, clearly if Mr. Fisher had  
6 out - - - for example, worked on Mr. Stephens' case  
7 or accessed any confidential information about Mr.  
8 Stephens, he would have been conflicted. In the - -  
9 -

10 JUDGE PIGOTT: But nobody can get the  
11 confidential file. You're right. So, I mean, why is  
12 that a problem?

13 MS. ZAYTSEV: It's - - - it's not a  
14 problem.

15 JUDGE RIVERA: But someone else could  
16 investigate and follow up on Stephens, correct? Put  
17 aside the question of the file.

18 MS. ZAYTSEV: Well, Mr. Fisher likewise  
19 could have followed up to investigate on Stephens.  
20 The only thing he couldn't have done was access New  
21 York County Defender's confidential file and use that  
22 confidential information to locate or question Mr.  
23 Stephens. So he was in the same shoes - - -

24 JUDGE ABDUS-SALAAM: So that the super - -  
25 - are you saying the supervisor said, you can go find

1 Stephens and, you know, find out - - - you can talk  
2 to Stephens. You can do anything you want, if you do  
3 find him. Or you can look up any information that  
4 might be public or that you might use to either  
5 examine or cross-examine him. Is - - - is that what  
6 you're saying the super - - - just - - - just don't  
7 access the - - - the confidential file that we had on  
8 him?

9 MS. ZAYTSEV: Well, Your Honor, that's not  
10 what the supervisor said here, but frankly, they were  
11 incorrect. The - - - there was no conflict, and it  
12 was the judge's responsibility to clarify that on the  
13 record - - -

14 JUDGE STEIN: But even if they were not  
15 correct, wasn't Mr. Fisher in a conflicted situation  
16 between his supervisors and his client?

17 MS. ZAYTSEV: Well, again, if the - - - if  
18 the judge had clarified that there was no conflict  
19 created by this situation, Mr. Fisher's supervisors  
20 surely would have - - - one can assume - - - amended  
21 their stance on it.

22 JUDGE RIVERA: But what if they concluded  
23 the judge is wrong? Judge is wrong. We think  
24 there's a conflict and we're not going to follow  
25 this.

1 MS. ZAYTSEV: Well, in that case, what New  
2 York County - - - what Mr. Fisher's supervisors  
3 specifically told him was that they believed that  
4 this conflict was waivable, and that was a choice  
5 that was taken away from Mr. Fisher - - - from Mr.  
6 Watson here. He was not given - - -

7 JUDGE FAHEY: Let - - - let me - - - let me  
8 - - - on the waivable issue. Let - - - let me posit  
9 this to you. What if the court hadn't removed  
10 Fisher, and wouldn't you be as - - - as defendant's  
11 appellate counsel now, wouldn't you be argue - - - in  
12 front of us that counsel's inability to cross-examine  
13 a key witness would have been clear error?

14 MS. ZAYTSEV: No, Your Honor. There are -  
15 - - there are many cases where waivers like this have  
16 been upheld by the court. And it - - - People v.  
17 Caban is one example. And so there's - - - there's  
18 really no question that a defendant can waive  
19 potential conflicts of interest and that's not a - -  
20 - a basis for a valid appeal.

21 JUDGE ABDUS-SALAAM: Well, the problem I'm  
22 having, counsel, is that it does - - - it doesn't  
23 appear, although it's not absolutely clear, that  
24 defendant was actually waiving any conflict, because  
25 he said I want you, Mr. Fisher, to represent me, but

1 I also want to call this Mr. Stephens. And  
2 essentially, he's suggesting to Fisher, I want you to  
3 find him and bring him in here so he can testify. So  
4 I - - - I'm not sure that he was actually - - - I'm -  
5 - - I'm not getting that he actually waived anything.

6 MS. ZAYTSEV: Well, Your Honor, that's an  
7 excellent point, because it highlights yet another  
8 error committed here by the trial judge. The trial  
9 judge explained what the ramifications of a waiver  
10 would be and what the ramifications of continuing on  
11 with Mr. Fisher would be. In response to that, Mr.  
12 Watson unequivocally expressed that he understood  
13 what the ramifications were, to the extent that he  
14 then - - -

15 JUDGE PIGOTT: What was Mr. Fisher's  
16 position at that time?

17 MS. ZAYTSEV: Mr. Fisher's position was  
18 that he believed that there was a conflict but that  
19 it was waivable, and if - - - if - - - if the court  
20 would allow Mr. Watson to waive it, he would like to  
21 stay on as Mr. Watson's counsel.

22 JUDGE STEIN: Can the court ever decide to  
23 relieve counsel, even if the defendant is willing to  
24 waive a conflict?

25 MS. ZAYTSEV: Surely there are cases where



1 a conflict is so severe that - - -

2 JUDGE STEIN: What would have happened - -  
3 - what would have had to have happened here, for  
4 example?

5 MS. ZAYTSEV: Well, for example, there are  
6 numerous cases where the same attorney represented  
7 both - - - is represents - - - that represents the  
8 defendant, previously represented the witness that is  
9 going to be called by the People that - - -

10 JUDGE STEIN: So the tension that a lawyer  
11 might feel between investigating a potential avenue  
12 of defense by - - - from - - - with another witness,  
13 that the tension of wanting to pursue that, but not  
14 being able to because his supervisors have said you  
15 cannot do that, that's - - - that - - - that doesn't  
16 present a conflict?

17 MS. ZAYTSEV: Well, even if it does, again,  
18 that goes back to the question of whether Mr. Watson  
19 could waive that conflict, and it's under this  
20 court's precedent that's - - - the exactly the type  
21 of conflict that this court has repeatedly held is -  
22 - -

23 JUDGE STEIN: But - - - but I - - -

24 MS. ZAYTSEV: - - - waivable.

25 JUDGE STEIN: - - - but what we're talking

1           about is not whether it can be waived, but whether  
2           the court can take those circumstances and - - - and  
3           say, I - - - I really think that this - - - this  
4           lawyer is going to be in a Catch 22 situation. There  
5           is - - - it's a no-win situation for the lawyer, and  
6           regardless of what the defendant says now, because  
7           when the time comes and the People put Stephens on  
8           the stand, and the defendant says, you need to cross-  
9           examine him, then I'm going to be faced with a  
10          mistrial. So why isn't that appropriate?

11                       MS. ZAYTSEV: Well, as I said earlier, it  
12           was the court's responsibility here before  
13           disqualifying Mr. Fisher to ascertain whether there  
14           was a conflict in the first place. He could have  
15           done that in this case very simply by asking Mr.  
16           Fisher if Mr. Fisher had ever accessed any  
17           confidential information about Mr. Stephens.

18                       JUDGE STEIN: So the only way there could  
19           be a conflict is if he actually had confidential  
20           information about Stephens, is that - - -

21                       MS. ZAYTSEV: In this case, given that he  
22           works for a - - - an institutional defense  
23           organization, yes, because the typical imputation  
24           rules don't apply. If he were at a private firm,  
25           then there would also be a potential conflict created

1 by imputation.

2 JUDGE STEIN: But con - - -

3 JUDGE FAHEY: So it's not - - -

4 JUDGE STEIN: Yeah, go ahead.

5 JUDGE FAHEY: I'm sorry, Judge, go ahead.

6 JUDGE STEIN: No, you - - - you go ahead.

7 JUDGE FAHEY: So it's not just that there -  
8 - - that there are confidences, but he - - - as the  
9 Appellate Division said, he - - - he has to be privy  
10 to the confidences or information that they have for  
11 there to be any kind of conflict, is what you're  
12 saying.

13 MS. ZAYTSEV: That is correct. Yes, that  
14 is what I'm saying, and there are numerous cases that  
15 have st - - - that stand for that principle.

16 JUDGE RIVERA: Did - - - did the - - - did  
17 the judge have any obligation to address at least  
18 what at some point the defendant is identifying as  
19 his real problem here, which is, yes, he's had this  
20 lawyer for a long time but he just doesn't want to  
21 wait anymore. Is the nature of the - - - the  
22 criminal jus - - - the demands on the criminal  
23 justice system, where everything is going to get  
24 slowed down, he wants to get to trial, he wants to  
25 get this done and put behind him.

1                   And the judge doesn't respond to that.  
2                   Although, he does say, I sympathize with you and so  
3                   forth, but here's the problem, we have this conflict,  
4                   without saying, maybe - - - maybe you want to speak  
5                   to a lawyer about what this would really entail if  
6                   your concern is in part driven by delay.

7                   MS. ZAYTSEV:    The - - -

8                   JUDGE RIVERA:   Should the court have done  
9                   something about that to try and perhaps resolve this  
10                  issue that way?

11                  MS. ZAYTSEV:   Well, if the court had  
12                  allowed Mr. Watson to continue with Mr. Fisher, there  
13                  wouldn't have been any delay, and so I think the  
14                  court addressed the delay issue when he did  
15                  disqualify him by saying on - - - as on - - - I think  
16                  - - - the page you just read from - - -

17                  JUDGE RIVERA:   I understand, but I guess  
18                  I'm suggesting that the - - - the client might have  
19                  been willing to forgo this whole issue about the  
20                  waiver and whether or not Stephens can be crossed and  
21                  all of this, if - - - if he had some sense of what  
22                  would - - - what this really entailed to have  
23                  replacement counsel.

24                  MS. ZAYTSEV:    I - - -

25                  JUDGE RIVERA:   If what drives this engine

1 is I don't want to wait four more years for a trial,  
2 or I - - - I don't want to be stuck in this for  
3 months and - - - I want to get my li - - - I want to  
4 move on with my life.

5 MS. ZAYTSEV: Well, whatever his - - -

6 JUDGE RIVERA: And that his - - - that's  
7 all I'm saying. Is it incumbent upon the judge to  
8 try to respond to that concern, which is different  
9 from the conflict concern that - - - that is it,  
10 obviously, in this case?

11 MS. ZAYTSEV: The judge's responsibility is  
12 to make sure that any waiver is a knowing and  
13 intelligent one. So whatever the defendant's  
14 reasons, whether it's to avoid delay or because he  
15 has trust and confidence in this particular attorney,  
16 that's - - - that's the decision for the defendant to  
17 make, and to weigh - - - to weigh the consequences of  
18 the disqualification or - - - or of the waiver versus  
19 continuing - - -

20 JUDGE FAHEY: Well, but you're - - - you're  
21 sort of arguing for an absolute right for a  
22 defendant, and I don't think that is the law. It  
23 seems that this - - - it's - - - we're talking about  
24 a Sixth Amendment right that has to balance the right  
25 to choose your lawyer versus to have an effective

1 lawyer. And - - - and that's - - - that's the nub of  
2 this, I think. That's the core of it. And - - - and  
3 it's - - - I - - - and that's - - - because it's a  
4 balancing question, it - - - it seems that the court  
5 has to speak up when they - - - when they see a  
6 problem.

7 MS. ZAYTSEV: Well, Your Honor, it - - - I  
8 agree that it is a balancing test. It's not an  
9 absolute rule that I'm proposing. What I'm saying is  
10 that here - - - the balancing test has to take into  
11 account the severity of the conflict. And here, the  
12 alleged conflict was - - - it was remote and it was  
13 based on multiple layers of speculation and - - -

14 JUDGE PIGOTT: But didn't Fisher bring this  
15 on himself? I mean, wasn't it at - - - when he got  
16 the Rosario material that he - - - that he said I may  
17 have a conflict, because Stephens, or whatever his  
18 name is, is represented by the same office?

19 MS. ZAYTSEV: Well, he - - - he got the  
20 Rosario material just minutes before he first raised  
21 this issue to the court.

22 JUDGE PIGOTT: I know, but I - - - I would  
23 - - - I - - - not - - - maybe I - - - maybe I'd get  
24 disbarred. I mean, why tell anybody? I mean, why  
25 not just say, fine, we'll - - - you know, I'll

1 subpoena Stephens, get him in here, and we're ready  
2 to rock and roll, rather than drop this thing on the  
3 court and say, gee - - - and - - - and I don't know,  
4 obviously, the lawyers involved - - - I've got this  
5 dilemma. Why - - - so what? Where - - -

6 MS. ZAYTSEV: Well, again, at that time - -  
7 - I'm sorry.

8 JUDGE PIGOTT: No.

9 MS. ZAYTSEV: At that time it was Mr.  
10 Fisher's belief that Mr. Watson could waive the  
11 conflict, and so - - -

12 JUDGE PIGOTT: So - - -

13 MS. ZAYTSEV: - - - he was bringing it to  
14 the court's attention - - -

15 JUDGE PIGOTT: So why, why, why, why? Just  
16 - - - just get your client to waive it and move on.  
17 You don't have to tell the DA you have an issue. You  
18 don't have to tell anybody else you got an issue.  
19 And - - - and rock and roll. If - - - if the DA then  
20 went, wait, wait a minute, what - - - what is this  
21 that, you know, there's two people in here from the  
22 same firm, he said, shut up, it's not your problem.

23 MS. ZAYTSEV: Your Honor, I don't know why  
24 Mr. Fisher brought it to the court's attention, but  
25 he did, and perhaps he felt that it was his ethical

1 responsibility to do so, and - - -

2 JUDGE PIGOTT: But why would he then bring  
3 a motion? I - - - I - - - I just - - - I - - - I get  
4 the collaborative nature of - - - of trial work  
5 sometimes, but I - - - I just get mystified by - - -  
6 why - - - why would you come into the court and say,  
7 here - - - here's a dead possum? Do something with  
8 it. No, it's your possum; go bury it. I - - - I - -  
9 - I don't know why it ended up being Judge  
10 Carruthers' problem. I - - - it just seemed to me  
11 that Fisher said I got a problem, Judge, and solve it  
12 for me.

13 MS. ZAYTSEV: I - - - I was not - - -

14 JUDGE PIGOTT: I guess none of us will know  
15 that answer.

16 MS. ZAYTSEV: Yeah.

17 JUDGE RIVERA: Cooked possum. What - - -  
18 what - - - if - - - if the court agrees with the  
19 People, what is the potential impact on institutional  
20 defenders, or is this really limited to the unique  
21 circumstances of this case?

22 MS. ZAYTSEV: Well, I think it would depend  
23 on what basis the court agrees with - - - with us,  
24 but if - - - if the court were to agree that there  
25 was no conflict here in the first place, that has



1 significant impact on institutional defenders. There  
2 are a huge number of indigent defendants that come  
3 through the system every single year, and there's a  
4 very small number of institutional defense  
5 organizations.

6 So to find disqualification in these  
7 circumstances would potentially impact hundreds or  
8 thousands of defendants' right to counsel of their  
9 choosing.

10 JUDGE STEIN: Would that still be the case  
11 if - - - if it was limited to the - - - the fact - -  
12 - not that - - - that the same institutional defender  
13 had represented the, you know - - - another person,  
14 but that that person could - - - could be an  
15 important witness in the case?

16 MS. ZAYTSEV: I - - - I'm sorry, Your  
17 Honor. Would you mind - - -

18 JUDGE STEIN: If - - - the conflict was  
19 found based on the fact that that witness could be in  
20 - - - that other client could be an important witness  
21 in the case, which the lawyer was prohibited from  
22 pursuing; if it was narrowed in that way, would it  
23 have the effect that you just described?

24 MS. ZAYTSEV: If it was narrowed so that it  
25 only applies when it's an important witness in the

1 case?

2 JUDGE STEIN: Well, obviously, it could be  
3 narrowed to that - - - that sole instance, but if - -  
4 - if that was the basis of the decision here - - -

5 MS. ZAYTSEV: I - - - I - - -

6 JUDGE STEIN: - - - rather than just the  
7 fact that that - - - this gentleman had at one time  
8 been represented?

9 MS. ZAYTSEV: Yeah, I think it would  
10 continue to have the same impact, because that's  
11 really the - - - the typical situation in which this  
12 occurs. Pretty much anytime that you have - - - due  
13 to the small number of - - - of institutional defense  
14 organizations, anytime you have a witness that has a  
15 rap sheet, it's very likely that that witness is  
16 going to have been represented by one of the  
17 institutional defense organizations, and like perhaps  
18 the one that is at issue here.

19 JUDGE PIGOTT: Thank you. I think we have  
20 your argument.

21 MS. ZAYTSEV: Thank you.

22 JUDGE PIGOTT: Ms. Poole?

23 MS. POOLE: Defense counsel had - - - had  
24 an ongoing ethical obligation to Mr. Stephens. New  
25 York County Defender Services had an ongoing

1 obligation to their former client. And they were not  
2 entitled to disregard that merely because they had a  
3 new client.

4 JUDGE ABDUS-SALAAM: So that they - - - did  
5 they have to find Stephens and get him to waive any  
6 conflict as well as getting a waiver from Mr. Watson?

7 MS. POOLE: A - - - a waiver from Mr.  
8 Stephens might have - - - is - - - is one potential  
9 way to resolve the question. But counsel couldn't  
10 find Stephens at - - - up to the point where he'd  
11 been looking for him. And his supervisors, who were  
12 really in the best position to determine whether  
13 there was a conflict here, potential or actual, based  
14 on their ethical obligations to these two men in  
15 related cases.

16 This is not sort of a Wilkins situation,  
17 where the witness is - - - was represented by the - -  
18 - by the public defender agency in an unrelated case.  
19 These are related cases. And - - - and the defense  
20 has suggested that - - - that maybe Stephens would  
21 admit to having the gun. He would require counsel at  
22 that point. There - - - there are all sorts of  
23 conflicts inherent in this situation and that's - - -

24 JUDGE PIGOTT: Why - - - why would he need  
25 - - - why would he need counsel? Wasn't - - - wasn't

1 his case over?

2 MS. POOLE: His case on - - - on possessing  
3 drugs was over. He - - - he had not been charged or  
4 tried or pled out to anything involving a gun.

5 And the supervisors in this situation were  
6 in the position to evaluate their own ethical  
7 obligations to both of these men and evaluate what  
8 counsel had done. And what we know is that counsel -  
9 - - he - - - he got the Rosario disclosures, there  
10 was - - - the case was recalled several times. When  
11 it came back in, he said, I - - - I have pulled the  
12 file on Mr. Stephens.

13 And the other thing that we know that he  
14 did - - -

15 JUDGE ABDUS-SALAAM: Counsel, in - - - in  
16 regard to the file, could you clarify what file we're  
17 talking about? Is it a file that is a public file  
18 that anybody can look at, like the NYSID sheet, or is  
19 it something that the New York County Defender  
20 Service was keeping?

21 MS. POOLE: It appears to be the New York  
22 County Defender Service file, because what - - - what  
23 happened - - - and he doesn't clarify that, but what  
24 he does tell the judge is that he's taken two courses  
25 of action. He has pulled the file and he has gotten

1 an investigator to try to find Stephens. And when  
2 everybody returns to court after - - - after the  
3 internal evaluation by New York County Defender  
4 Services, and the judge asks for an update - - -

5 JUDGE ABDUS-SALAAM: Does it make a  
6 difference - - -

7 MS. POOLE: - - - he says, I - - -

8 JUDGE ABDUS-SALAAM: Does it make a  
9 difference which one of the files, whether it was the  
10 New York County Defender Service file or one of the  
11 public files?

12 MS. POOLE: If he had pulled the New York  
13 County Defender Service's file, then I think it's  
14 unquestionably - - - there's an actual conflict  
15 that's been created by that. But even if he had  
16 pulled a Supreme Court file or - - - or something to  
17 that effect, the - - - there's information that's  
18 available to him at - - - if he's Stephens' attorney  
19 as a New York County Defender Services attorney. And  
20 there's information that's not, for example, the  
21 NYSID sheet, and I believe that the CJA sheet is also  
22 sometimes included by the clerks in that packet  
23 that's not given out to the general public.

24 JUDGE RIVERA: But if - - - if - - -

25 MS. POOLE: And so whatever - - -

1 JUDGE RIVERA: If the court affirms, what's  
2 - - - what's the impact on the DA?

3 MS. POOLE: On the D - - -

4 JUDGE RIVERA: Beyond this case, if any?  
5 It's the same question I asked them on the other  
6 side. I'm asking you.

7 MS. POOLE: Well, it would - - - it - - -  
8 there - - - it put - - - I think it puts - - - I - -  
9 - I think the bigger impact is on - - - on what  
10 defense attorneys are supposed to do, because they do  
11 have a clear obligation to - - - to their clients,  
12 former and present.

13 JUDGE STEIN: What is your interest here?

14 MS. POOLE: The interest here is that - - -  
15 is that the judge was not incorrect in determining  
16 that there was a conflict here.

17 JUDGE STEIN: So you don't want to see a  
18 reversal?

19 MS. POOLE: What?

20 JUDGE STEIN: You don't want to see a  
21 reversal of the conviction?

22 MS. POOLE: Right, exactly. And - - - and  
23 the judge - - - and the judge's - - -

24 JUDGE RIVERA: My question was about beyond  
25 the one case.

1 MS. POOLE: Right, and I - - - and I think  
2 if - - - if the Appellate Division's decision is - -  
3 - is affirmed, then I - - - I think it calls into  
4 question how this court views the ethical obligation  
5 of - - - of defense attorneys, and I - - - and I  
6 think that that's going to be incredibly problematic  
7 for everyone to evaluate these kinds of situations.

8 JUDGE PIGOTT: Well, but doesn't this free  
9 up the - - - the public defenders to more readily be  
10 able to defend?

11 MS. POOLE: Yes, but at what cost? Because  
12 - - -

13 JUDGE PIGOTT: I assume - - -

14 MS. POOLE: Because at - - - the - - -

15 JUDGE RIVERA: I thought you were going to  
16 argue you'd have more ineffective assistance of  
17 counsel claims.

18 MS. POOLE: Absolutely. I mean - - -

19 JUDGE RIVERA: That's where I thought you  
20 were going.

21 MS. POOLE: Arguably - - - I mean, I - - -  
22 I suppose if the ruling was - - -

23 JUDGE FAHEY: That's what I was asking the  
24 other side before. Wouldn't - - - wouldn't they just  
25 come up and argue, they didn't call the witness, it

1           could have gotten me off? There was a conflict;  
2           therefore it was ineffective assistance of counsel.

3                       MS. POOLE: Right. And - - - and - - - and  
4           that's - - - and that's the problem that's presented  
5           to judges in these situations. And to say that  
6           judges have no discretion to - - - to weigh what - -  
7           - what's happening here, and they cannot accept  
8           defense - - - the defense attorney's statement that  
9           there is - - - there is a conflict here. They - - -  
10          they understand their ethical obligations. They have  
11          reviewed what has happened, what is in these files -  
12          - -

13                      JUDGE RIVERA: Should - - - should the - -  
14          - did the court have any other duties or obligations  
15          - - - same question I asked them - - - with respect  
16          to the fact that to the extent this defendant is  
17          concerned about a delay in the proceedings, that  
18          that's what drives this engine. Did the judge have  
19          to do anything in response to that?

20                      MS. POOLE: Well, the - - - the judge did.  
21          And - - - and - - - and the judge said, you know, I -  
22          - - I understand that - - -

23                      JUDGE RIVERA: I suppose.

24                      MS. POOLE: - - - and - - - and he - - -  
25          from the - - - even the first day that - - - that the



1 potential conflict had been waive - - - raised and -  
2 - - and the judge realized there was a problem, he  
3 said that, you know, there might be counsel that we  
4 can get in to - - - to take care of this case right  
5 away. When - - - on the - - - when they all returned  
6 to court, and the judge said I'm going to have to  
7 reappoint counsel; I'm going to try to get somebody  
8 who's - - - who's able to come in right away.

9 Defend - - - the defendant said, the guy  
10 you called in but - - - I talked to before, he seems  
11 really busy. I don't want that guy. And the defend  
12 - - - and - - - so the judge said, okay.

13 JUDGE PIGOTT: Well, you know, it just  
14 seems - - - I - - - I get - - - I, of course, wasn't  
15 there, but I - - - I just don't know why there wasn't  
16 a motion. I - - - I really don't, because this - - -  
17 if - - - if I was - - - if I was in a situation  
18 similar to this, I suppose, if somebody said, well,  
19 my boss tells me I can't go find a witness, I'd say,  
20 well, I'm telling you, you can, and I'm ordering you  
21 to, and they - - - and they cannot stop you from  
22 going and finding a witness. I mean, that was  
23 absurd. And may - - -

24 MS. POOLE: But it - - -

25 JUDGE PIGOTT: And maybe it wasn't absurd.

1           Maybe - - - maybe, you know, there were facts that  
2           would tease out that would say it's not, but I - - -

3                       MS. POOLE:   But the - - - but the - - -

4                       JUDGE PIGOTT:  - - - sitting around holding  
5           hands and deciding, well, you know, we're going to  
6           throw your lawyer off, we're going to go find you  
7           another one, it seemed odd.

8                       MS. POOLE:   But the - - - the judge doesn't  
9           have any reason to question what - - - what New York  
10          County Defender Services has - - -

11                      JUDGE PIGOTT:  Sure you do.

12                      MS. POOLE:   - - - has determined is - - -

13                      JUDGE PIGOTT:  If - - - if - - -

14                      MS. POOLE:   And the only way that he could  
15          - - -

16                      JUDGE PIGOTT:  Let me just finish the  
17          sentence.  If - - - if - - - if he came in and said  
18          my boss tells me that I can't put on a defense but I  
19          want to.  So judge, I have a conflict.  I'd say you  
20          better put on a defense or I'll report you to the Bar  
21          Association.  I mean, they - - - you got to sort that  
22          stuff out.

23                      MS. POOLE:   But that's not - - - but that's  
24          not what - - -

25                      JUDGE PIGOTT:  I mean, you can't say, oh,

1           because the boss says you can't do something, I'm  
2           going to - - - I'm going to relieve you.

3                       MS. POOLE:   But that's not the situation  
4           here.  Fisher wasn't coming in and saying I disagree  
5           with my supervisors.  He was saying we - - - you  
6           know, we - - - we did an internal evaluation and this  
7           is - - -

8                       JUDGE PIGOTT:  That's why - - -

9                       MS. POOLE:  - - - this is what we  
10          determined.  And the only way - - -

11                      JUDGE PIGOTT:  That's why I thought a  
12          motion would be clearer.

13                      MS. POOLE:  But the only way that the judge  
14          could have evaluated that situation is to - - - to do  
15          the type of inquiry that this court has consistently  
16          warned against.

17                      JUDGE PIGOTT:  Did you - - - did you not -  
18          - - did you miss my thought about a motion?  Do you  
19          just disagree that you can't file a formal motion?

20                      MS. POOLE:  I think - - - I think he could  
21          have filed a formal motion, but he was making an oral  
22          motion before the court.  So the court was - - - was  
23          aware of the situation.  The only thing that the  
24          court could have done is called in the supervisors  
25          and said - - -

1 JUDGE PIGOTT: Right.

2 MS. POOLE: - - - well, will you please  
3 reveal to me what the confidential information in  
4 your files were - - -

5 JUDGE PIGOTT: No. What - - -

6 MS. POOLE: - - - and what - - - what your  
7 defense strategies are?

8 JUDGE PIGOTT: No, no. He could have said,  
9 what's the basis upon which you're telling this  
10 lawyer that you - - - that you've hired, that you  
11 pay, that he can't defend this guy properly?

12 MS. POOLE: And - - -

13 JUDGE PIGOTT: And let them try to describe  
14 how this is impossible.

15 MS. POOLE: And as Fisher told - - - told  
16 the judge, it was because of their ongoing ethical  
17 obligations to Mr. Stephens, and - - -

18 JUDGE PIGOTT: But that's a - - - that's a  
19 conclusion. I - - - I'm not going to debate it with  
20 you. It - - - it just - - - it just strikes me that  
21 - - - that Fisher comes in and says I got a conflict,  
22 but I don't want to be relieved.

23 MS. POOLE: Well - - -

24 JUDGE PIGOTT: And the judge says, well,  
25 gee whiz, you know, maybe you should be relieved, but

1 I understand - - - maybe you shouldn't be relieved,  
2 and then we got Stephens over here, and - - - and  
3 there's nothing you can grasp.

4 MS. POOLE: But it - - - but the - - - the  
5 rules of professional conduct - - - and this court  
6 itself in - - - in People v. Sanchez just a few years  
7 ago acknowledged the fact that even legal - - - even  
8 Legal Aid, Public Defender Services, they have  
9 ongoing ethical obligations to their former clients.

10 JUDGE PIGOTT: Ms. Poole, no one is  
11 disputing that. Please don't think that I'm  
12 suggesting that they don't have ongoing ethical  
13 obligations to their clients. Of course they do. So  
14 does the DA's office.

15 So if the DA's office had hired Mr. Fisher  
16 and he said, you know, because I've gotten hired by  
17 the DA, I can't represent this person anymore, they'd  
18 probably go farther and say, not only can you not,  
19 but that district attorney can't. But those would be  
20 decisions that would be made based on - - - on the  
21 ethics.

22 And my only point is that this one seemed  
23 to just kind of flow, and typical - - - because we're  
24 an appellate court, I'd kind of liked to have seen a  
25 nice motion.

1 MS. POOLE: I - - - I - - - I just think  
2 that the only thing that the judge could have - - -  
3 could have brought out that wasn't brought out would  
4 have been protected information, confidential  
5 disclosures, and defense strategies. And this court  
6 has warned against judges doing that.

7 JUDGE PIGOTT: You honestly think that's  
8 what - - - that's what was at issue here?

9 MS. POOLE: Yes.

10 JUDGE PIGOTT: Wow. I - - - I don't know  
11 why you couldn't subpoena Stephens and ask him all  
12 kinds of questions.

13 MS. POOLE: Because New York County  
14 Defender Services had represented him in a related  
15 case.

16 JUDGE PIGOTT: Okay. I think we have your  
17 argument. Thank you.

18 MS. POOLE: Thank you.

19 (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. Lawrence Watson, No. 19, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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