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COURT OF APPEALS  
STATE OF NEW YORK

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THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

NO. 18

JEFFERY BUSH,

Appellant.

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20 Eagle Street  
Albany, New York  
February 10, 2022

Before:

CHIEF JUDGE JANET DIFIORE  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE MICHAEL J. GARCIA  
ASSOCIATE JUDGE ROWAN D. WILSON  
ASSOCIATE JUDGE MADELINE SINGAS  
ASSOCIATE JUDGE ANTHONY CANNATARO  
ASSOCIATE JUDGE SHIRLEY TROUTMAN

Appearances:

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Official Court Transcriber



1 CHIEF JUDGE DIFIORE: Number 18, The People of  
2 the State of New York v. Jeffery Bush.

3 And we'll give our colleagues one moment to  
4 collect themselves before we begin.

5 You may remain where you are. Thank you.

6 Okay, good afternoon, Counsel.

7 MS. MA: Good afternoon, Your Honor. Two minutes  
8 for rebuttal, please?

9 CHIEF JUDGE DIFIORE: You may.

10 MS. MA: Thank you.

11 May it please the court, Ying-Ying Ma on behalf  
12 of the appellant, Jeffery Bush.

13 When a sentencing court upends the promised plea  
14 bargain on the day of sentencing, with a completely new  
15 type of sentence, which was never mentioned before the  
16 plea, no burden of preservation is placed on the accused,  
17 because there was not sufficient notice of this new  
18 sentence.

19 JUDGE SINGAS: Ms. Ma, wasn't this the judge  
20 asking? It was more an inquiry of the sentence. Is this a  
21 CD, rather than an imposition of the sentence? So couldn't  
22 at that point, somebody said, no, that's not what it is,  
23 Judge. I don't understand why, under these circumstances,  
24 the judge asking what the sentence was wouldn't allow for  
25 the defense a meaningful opportunity to object?



1 MS. MA: Well, the reason for that is, Mr. Bush,  
2 as a layperson, he has no idea what the two letters, CD,  
3 meant. Maybe his lawyer understood that to be the promise,  
4 but that was not the promise that was put on the record at  
5 the plea. That's clear from the plea minutes. Mr. Bush  
6 had no idea that he was going to be sentenced to a  
7 conditional discharge. And when the court just used - - -

8 JUDGE TROUTMAN: But the record is also clear  
9 that there was a negotiation. This plea went from a felony  
10 to a misdemeanor. His attorney negotiated out the  
11 possibility of probation. And it was clear that community  
12 service would be a part of it. The question is, how does  
13 the court pronounce sentence to accommodate the requirement  
14 of the community service?

15 MS. MA: Well, I understand Your Honor is saying  
16 that a community service sentence can only be imposed along  
17 with a conditional discharge, but that doesn't mean the  
18 court is not still obligated to put that on the record.  
19 Mr. Bush does not know that. I - - - I don't think many  
20 lawyers even know that, you know, you cannot impose a  
21 community service sentence without a conditional discharge.

22 JUDGE TROUTMAN: So it's not enough that he knew  
23 the most he faced, if he didn't com - - - complete the  
24 community service, was a year in jail. The court needed to  
25 specifically tell him, the mechanism that was going to be



1 utilized in order to impose a sentence of community  
2 service; is that what you're saying?

3 MS. MA: Yes, I think when the court tells him,  
4 at the plea, don't get arrested; otherwise, you'll face a  
5 year in jail, it's unclear that that is for a - - - I mean,  
6 it's completely not stated that that's for a year after he  
7 completes the sentence. It's - - - it could very well mean  
8 only in the period between the plea and the sentence, which  
9 is a very traditional condition of a plea, to show up to  
10 court, to not get rearrested, and to complete any  
11 conditions.

12 JUDGE TROUTMAN: And - - -

13 JUDGE WILSON: So could - - - could I - - - I'm  
14 sorry.

15 JUDGE TROUTMAN: Go ahead.

16 JUDGE WILSON: Could - - - could I - - - I've  
17 never practiced in New York Criminal Court, so you need to  
18 help me a little bit here. What do I make out of the form,  
19 the conditional discharge form, that's at page A20? So  
20 when I read the record, it's at least possible, but I have  
21 no idea if this is right or not, that what normally happens  
22 is, you take a plea, there's a day for sentencing, that's  
23 the return date for sentencing, and that, at that point,  
24 the sen - - - this form is filled out with the conditions  
25 for the conditional discharge in it, and then you meet

1           whatever those conditions are thereafter.

2                       But that something anomalous happened here, which  
3           was that Mr. Bush completed all his community service  
4           before this form was ever filled out. But he did fill - -  
5           - he did sign the form, and it does say a year, and it's a  
6           year from that date. Is this - - -

7                       MS. MA: Yes, that is - - - well, the normal  
8           procedure is - - - normally when somebody gets community  
9           service, it's on a misdemeanor plea, and so plea and  
10          sentence are imposed at the same time, and then the form is  
11          given to the person. It's unusual that on an indicted  
12          felony, there would be a plea down to a mis - - - a  
13          community service sentence, so that's why this case has  
14          some - - - somewhat unusual facts.

15                      And it's true that Mr. Bush did not object, but  
16          this court has - - - in People v. Turner, which was a very  
17          similar case, where the defendant there was not told about  
18          post-release supervision at her plea, and then at her  
19          sentence, the court announces it for the very first time.  
20          Ms. Turner, as well, she did not object, but not only that,  
21          she also told the court specifically that she had spoken to  
22          her lawyer about post-release supervision, and that she was  
23          still ready to proceed with sentencing. And the court  
24          still found that preservation was not required in that case  
25          because she didn't have sufficient notice.



1           She wasn't given the fact - - - the - - - the  
2           knowledge that she would face any period of post-release  
3           supervision. And the court specifically takes the time in  
4           - - - in its decision in Turner to distinguish People v.  
5           Murray, a case where the defendant was told about post-  
6           release supervision at the plea, and then at sentence, the  
7           only difference was the - - - the term of post-release  
8           supervision was changed from two years to three years.

9           So the court says that in that situation, the  
10          defendant is already aware of the nature of that sentence,  
11          specifically that if he violates the terms of PRS, then his  
12          term in prison could be extended. And that's exactly the  
13          situation - - -

14          JUDGE TROUTMAN: So are you req - - - would you  
15          require a rule that, at the time of plea, the court puts on  
16          the record every variation of sentence that could be  
17          imposed?

18          MS. MA: No, I'm asking for the imposition of the  
19          rule that already exists, which is that the court must make  
20          a clear record of each and every direct consequence of the  
21          plea. And a conditional discharge is clearly a direct  
22          consequence of the plea. It's an authorized sentence in  
23          the penal law. It's not - - - it's not something that can  
24          just be merely kind of suggested by - - - by - - - by  
25          announcing only one part of a conditional discharge, which



1 is, don't get rearrested. For that matter, you know, then  
2 a court can just impose probation by saying, don't get  
3 rearrested, because the - - - not being - - -

4 JUDGE RIVERA: But Counsel, my - - - Counsel, I'm  
5 on the screen. Can I just clarify this part of your  
6 argument in response to Judge Troutman's question about  
7 what's the rule you're seeking? It - - - it - - - is the  
8 rule that you've got to say, you're subject to a  
9 conditional discharge and how long the conditions are being  
10 imposed? Or is it just, I've got to run through all the  
11 conditions, even if I don't tell you the length of time?  
12 Or is it enough to just say, conditions will be imposed,  
13 and they're going to last a year? I mean, what - - - in  
14 this case, what - - - what would have been enough? What  
15 did the judge have to say - - -

16 MS. MA: I think the judge just - - -

17 JUDGE RIVERA: - - - at the plea?

18 MS. MA: - - - just had to say, conditional  
19 discharge with the condition being twenty days of community  
20 service. It's not that difficult to ask a judge to merely  
21 pronounce the actual name of the sentence at the plea, to  
22 fulfill its - - -

23 JUDGE RIVERA: Well, so the judge didn't have to  
24 say, and it's lasting a year?

25 MS. MA: Oh, one-year conditional discharge - - -



1           yes, we - - - we believe that the judge would have to - - -  
2           to impose a sentence - - -

3                   JUDGE RIVERA: Yeah, so that that's my - - - oh,  
4           okay. If the judge had said - - - or had not said it - - -  
5           not said the words, conditional discharge, but said, you'll  
6           be subject to conditions for a year, and then didn't set  
7           out the other conditions, community service has already  
8           been explained, so I - - - I'm not going to refer to that.  
9           Would that have been enough?

10                   MS. MA: I think the better rule is just to use  
11           the name of - - - of the sentence, as it's laid out in the  
12           Penal Law, and not to merely suggest what the sentence is,  
13           to give the - - - the accused person actual, clear notice  
14           of what the plea bargain that they're entering into is and  
15           what a direct consequence of that bargain will be.

16                   JUDGE RIVERA: Is that - - - but isn't - - - I -  
17           - - I may have misunderstood your argument. I - - - I  
18           thought your whole point to that was, so that a defendant  
19           would know what, if any, limitations are placed on their  
20           liberty?

21                   MS. MA: Yes, Your Honor. So I - - - I'm maybe  
22           not following - - -

23                   JUDGE RIVERA: Okay, but the - - - doesn't - - -  
24           so that - - - yes, I'm sorry. So doesn't that mean you  
25           have to tell them the amount of time their liberty is





1 constrained, as well as the nature of the constraints?

2 MS. MA: Yes, we are asking that the - - - that  
3 the court make a record at the plea of both the name of the  
4 sentence and the duration of the sentence.

5 JUDGE WILSON: So why - - -

6 MS. MA: And here neither - - -

7 CHIEF JUDGE DIFIORE: So the specific words must  
8 be, Mr. Defendant, I - - - this court sentences you to one  
9 - - - a conditional discharge, the duration of which is one  
10 year, and the condition attached is community service.

11 MS. MA: That's correct.

12 CHIEF JUDGE DIFIORE: And if they don't say - - -  
13 if the court only says, a conditional discharge, and the  
14 service is community - - - the condition is community  
15 service, by eliminating one year. Is that what are you  
16 suggesting that - - - that's not sufficient?

17 MS. MA: It - - - it is our position that the one  
18 year should be included, but here, there was not any  
19 mention of a conditional discharge. The only thing the  
20 court said was, if you complete - - - if you don't complete  
21 twenty days of community service, you'll go to jail.

22 CHIEF JUDGE DIFIORE: No, I - - - I'm  
23 piggybacking on Judge Rivera's question. What are the  
24 specific words that must be said, both one-year,  
25 conditional discharge, and then the - - - the conditions of



1 the conditional discharge?

2 MS. MA: Yes, I believe it is specified - - -

3 CHIEF JUDGE DIFIORE: Okay.

4 MS. MA: - - - in the criminal pro - - -  
5 procedure law, that when a court does impose a sentence of  
6 a conditional discharge, that it must specify the - - - the  
7 conditions of that discharge - - -

8 CHIEF JUDGE DIFIORE: Yeah.

9 MS. MA: - - - and the length.

10 JUDGE WILSON: And so why is this appeal not - -  
11 - sorry, over here - - - why is it not moot?

12 MS. MA: It's not moot because there's never been  
13 a prejudice requirement. In People v. Van Dusen, the court  
14 held that for a Catu error, the defendant does not have to  
15 show that they would have not - - - not taken the plea.  
16 That if the plea had been vacated, that they would have  
17 chosen to not take the plea.

18 So the - - - he - - - Mr. Bush suffered serious  
19 harm by living under the threat of incarceration for one  
20 year, by serving an entirely additional sentence, when he  
21 thought that he was getting a sentence of twenty days  
22 community service, and in fact - - -

23 JUDGE WILSON: Well, that - - -

24 MS. MA: - - - he diligently completed - - -

25 JUDGE WILSON: - - - that injury - - - I mean, if



1 he - - - if he did suffer some injury, men - - - mental  
2 anguish or whatever, during that year, we can't take that  
3 back. We can't remedy that. He's - - - as I understand  
4 it, a year went by; he wasn't rearrested; there was no  
5 other adverse consequence.

6 MS. MA: Judge, we still think that that is - - -  
7 that does require reversal, even though he completed the  
8 year with no - - - no new arrests. But he did have to  
9 serve an entirely additional sentence that was not part of  
10 his plea agreement.

11 JUDGE WILSON: Well, just help - - - help - - -  
12 help me out here with the - - -

13 MS. MA: And if you take that to its logical  
14 conclusion, the court - - -

15 JUDGE WILSON: But the - - - the consequence of a  
16 conditional discharge, if you meet the conditions, is that  
17 there's no conviction. Is that right or wrong?

18 MS. MA: No, it's just a sentence. There - - -  
19 the conviction still stands.

20 JUDGE WILSON: Okay.

21 MS. MA: But we do believe that in this case,  
22 because Mr. Bush cannot be made whole, as Your Honor is  
23 pointing out by a plea vacature, that dismissal - - -

24 JUDGE WILSON: Right.

25 MS. MA: - - - of the case is warranted.



1 CHIEF JUDGE DIFIORE: Thank you, Counsel.

2 MS. MA: Thank you.

3 CHIEF JUDGE DIFIORE: Counsel?

4 MR. SCHULMAN: Good afternoon, Your Honors. May  
5 it please the court. This case, there was nothing wrong  
6 with the plea itself. The plea, as it stood, was  
7 completely legal on its face. Defendant was told that if  
8 he satisfied the conditions, the twenty days community  
9 service, the 150-dollar man - - - mandatory surcharge, and  
10 the six-month license suspension, he would, in essence, be  
11 sentenced to an unconditional discharge.

12 Notably, this court has upheld cases where  
13 interim probation is issued as part of the sentence before  
14 the sentence is actually imposed. So although the  
15 conditional - - - the unconditional discharge words were  
16 not uttered, in substance, the defendant was told at the  
17 plea proceeding that if he satisfied these requirements, he  
18 would get nothing more. So the - - -

19 JUDGE RIVERA: So Counsel, can I just be clear -  
20 - - I'm sorry; I'm on the screen. There were no other  
21 conditions, only the ones you've named? And the minute he  
22 satisfied them, he was done; is that correct?

23 MR. SCHULMAN: Well, Your Honor, between the time  
24 of the plea and his sentence, he was not to get rearrested.  
25 He had to show up to court. But - - -



1 JUDGE RIVERA: Right.

2 MR. SCHULMAN: - - - after that point, the court  
3 never spoke of any additional conditions that Mr. Bush had  
4 to satisfy as part of this plea agreement.

5 JUDGE RIVERA: So I'm sorry. So then the form  
6 and the one-year have no applicability here?

7 MR. SCHULMAN: The - - - Your Honor, the court -  
8 - - there was a mistake here. The court de - - - defense  
9 attorney and the prosecutor surely made a mistake at the  
10 sentencing proceeding. The conditional discharge should  
11 never have been issued. The defendant should have received  
12 the unconditional discharge. But that goes to the - - -  
13 that validity of the sentence and not the validity of the  
14 plea.

15 So that the defendant's complaint in this case  
16 really concerns the validity of the plea, and the remedy  
17 he's seeking is not the remedy he deserves or is entitled  
18 to. Tellingly - - -

19 JUDGE RIVERA: All right. But before we get to  
20 the remedy, can you explain why this error that you say  
21 occurred, that it should have been an unconditional  
22 discharge?

23 MR. SCHULMAN: Well, Your Honor, he was told at  
24 the plea proceeding that if he satisfied those  
25 requirements, namely completing the twenty days of



1 community service, not - - - not getting rearrested, and  
2 showing up to court, then he would be - - - excuse me - - -  
3 he would be sentenced to a - - - he would receive a six-  
4 month license suspension, and he would be - - - there would  
5 be an imposition of a 250-dollar surcharge.

6 Now, at the sentence proceeding, the court  
7 imposed a conditional discharge. That aspect of the - - -  
8 of the sentence should have - - - should not have been  
9 uttered, and defendant should have received the benefit of  
10 his bargain, which is, namely, the unconditional discharge.

11 JUDGE RIVERA: So - - - oh, okay. So you - - -  
12 you're saying that exactly what he was told at the plea  
13 were the only conditions that validly could be imposed, or  
14 that because that's what wasn't imposed, that is his  
15 sentence?

16 MR. SCHULMAN: Well - - -

17 JUDGE RIVERA: Or that's what was mentioned,  
18 excuse me - - - that was the sentence that should have been  
19 imposed.

20 MR. SCHULMAN: Well, Your Honor, my position - -  
21 - our position is that, that's the sentence that should  
22 have been imposed. Of course, the court had the authority  
23 to increase the sentence at the sentencing proceeding, as  
24 is often done in cases where the victim speaks, or the  
25 court learned something new in between the plea and the



1 sentence; the - - - the sentencing court is entitled to  
2 increase the sentence. People v. Selikoff, and - - - and -  
3 - - and numerous cases thereafter, you know, provide the  
4 court the authority to increase the sentence.

5 JUDGE GARCIA: Counsel, I'm sorry - - - over here  
6 - - - if I missed this. But is this argument you're making  
7 here anywhere in your brief, that this was an erroneous  
8 sentence? I thought your argument was they had an  
9 obligation to object to this sentence. I - - - I - - - and  
10 maybe I missed it, and you can point me to it, but is there  
11 anywhere in your brief where you've said what you just said  
12 here in court today, that there was a different agreement  
13 and the court made a mistake. Is that in your brief?

14 MR. SCHULMAN: No, Your Honor, but we - - - we do  
15 believe this defendant had to preserve this argument. But  
16 going back to the issue of the - - - of the validity of the  
17 plea, there was no issue with the val - - - validity of the  
18 plea. The plea itself was legal, and if we look at the  
19 face of the proceeding, the record of - - - the record of  
20 the plea proceeding; there is nothing wrong with the actual  
21 plea itself.

22 JUDGE TROUTMAN: So if what you're saying is  
23 true, and I take it at your word. You're saying, he should  
24 have gotten an unconditional discharge. He can't get that  
25 now, so why shouldn't he get the relief that's requested by



1 the defense?

2 MR. SCHULMAN: Well, Your Honor, the relief he  
3 was entitled to was specific performance. He had relied,  
4 to his detriment, on the community service aspect of his  
5 plea. So had the defense attorney objected at sentencing,  
6 the court could have, and presumably would have, it appears  
7 on the record, that the court was not wedded to this  
8 conditional discharge, as evidenced by the question he  
9 asked at the outset of the proceeding, then the court would  
10 have excised that portion of the - - - of the conditional  
11 de - - - of the sentence, and the twenty-days community  
12 service.

13 However, dismissal of the plea - - - of the  
14 indictment and vacatur of the plea is not the remedy.

15 JUDGE GARCIA: Was the Appellate Division aware  
16 of this position you're taking here? Did you argue before  
17 the Appellate Division that this is a mistake?

18 MR. SCHULMAN: We argued that pre - - -  
19 preservation applied, Your Honor.

20 JUDGE TROUTMAN: But the mistake of imposition of  
21 a conditional as opposed to an unconditional, you're  
22 acknowledging was not argued in the Appellate Division?

23 MR. SCHULMAN: It was not. Had it been argued in  
24 the - - - had it been the defendant's position, and had  
25 that been argued, we would have - - - we would not have





1           opposed that relief. And we would have - - - we would have  
2           consented to the - - - to the aspect of vacating the  
3           conditional discharge.

4                        But just going back to the remedy for a second,  
5           Your Honor, while the defendant can't be put back to his  
6           original position, this is akin to cases where a defendant  
7           is tried, convicted, and later on raises a claim on appeal,  
8           which ultimately is meritorious. The defendant doesn't  
9           just have a dis - - - the - - - the remedy isn't just  
10          dismissal of the indictment and vacatur of the plea. He's  
11          entitled to a retrial, so while he isn't entirely made  
12          whole, that is the best that the - - - the criminal  
13          procedural law provides for. I - - - you know, it's not a  
14          perfect solution, but there's not much more that can be  
15          done in that respect.

16                        So just - - - just to reiterate and - - - and  
17          just to respond to my adversary's argument about People v.  
18          Turner and - - - and the - - - the line of other cases,  
19          McAlpin, et cetera - - -

20                        JUDGE RIVERA: Can I - - - I'm - - - Counsel, I'm  
21          sorry. I just - - - I just want to clarify something from  
22          your view about the actual sentence that is imposed. Is it  
23          your view that since - - - although it's not clear to me  
24          when the one-year runs; maybe - - - maybe you know when the  
25          judge intended the one year to run from - - - I assume from



1 the day of sentencing, but you tell - - - you can tell me  
2 otherwise - - - anyway, that for one year, he was subject -  
3 - - his understanding was he was subject to all of those  
4 conditions, and if he violated any condition, that then he  
5 would have, what? What would have happened?

6 MR. SCHULMAN: Well, Your Honor, there would have  
7 been Outley hearing, and it would have been - - -

8 JUDGE RIVERA: Um-hum.

9 MR. SCHULMAN: - - - determined whether he had  
10 violated any of those conditions, and - - -

11 JUDGE RIVERA: Right.

12 MR. SCHULMAN: - - - presumably, if he were, in  
13 fact, in violation of any of those conditions, he would  
14 have a - - - he would - - - he would be convicted of, you  
15 know, a violation of the conditional discharge.

16 JUDGE RIVERA: Would he - - - would he have been  
17 able to raise the claim he's raising now, in any - - - in  
18 any of these opportunities? Would he - - - or - - - or  
19 would he have been able to make the claim that you say - -  
20 - that you now concede that it's an unlawful sentence? I -  
21 - - I'm just trying to get straight what this procedure  
22 would have been, should he have violated during the one  
23 year, because you - - - are you conceding that - - - given  
24 that the one year was imposed, again, if he violated any  
25 conditions, he's now subject to some kind of hearing,



1 potentially some kind of sanction? Just - - - just trying  
2 to be clear on what would have happened.

3 MR. SCHULMAN: In terms of what the defendant - -  
4 - if I'm - - - if I'm understanding correctly, Your Honor,  
5 in terms of what the defendant should have done at the time  
6 the - - - the sentence of conditional discharge was  
7 imposed?

8 JUDGE RIVERA: No. I'm asking if - - - if during  
9 the - - - the one year after sentencing, if during the  
10 period during which he is subject to what you now say is an  
11 unlawful sentence, but let's just stay with this. And I  
12 thought you did mention it in your brief to us, but it may  
13 very well be you didn't raise it in the AD.

14 But in any event, if - - - if indeed he violated  
15 anything, you're saying yes, he would have - - - would have  
16 gone before the court; he would have been brought in for a  
17 violation. And so I'm - - - I'm just - - - I was just  
18 trying to clarify your perspective, your view as to how  
19 this would have played itself out, if indeed the - - - the  
20 conditions he's subject to, have been allegedly violated  
21 during the period of time he's subject to them?

22 MR. SCHULMAN: Your Honor, had he raised the - -  
23 - the fact that this conditional discharge never should  
24 have been issued in the first place, then - - - then there  
25 would be no violation of the conditional discharge and



1           whatever - - - had it been a new crime, then he would face  
2           the consequences of that crime alone.

3                       If I may just finish with one point, Your Honor?

4                       CHIEF JUDGE DIFIORE: Yes, please.

5                       MR. SCHULMAN: Just to distinguish this case from  
6           People v. Turner, People v. McAlpin, and People v. Louree,  
7           those cases all dealt with post-release supervision. And  
8           in each one of those cases, the plea itself, standing on  
9           its own, was invalid. So the defendant could never have  
10          received the benefit of his bargain at the time the plea  
11          was issued.

12                      In this case, however, the plea itself on its  
13          own, was valid, and the promise could have been imposed at  
14          sentencing.

15                      Thank you.

16                      CHIEF JUDGE DIFIORE: Thank you, Counsel.

17                      Counsel, your rebuttal?

18                      JUDGE GARCIA: Counsel, would you like to respond  
19          to this point, that the sentence was erroneous?

20                      MS. MA: The - - - the last point?

21                      JUDGE GARCIA: Yeah, that this is not the  
22          sentence that was agreed upon at all? It - - - it is - - -  
23          do you see that anywhere in the briefs before this court?

24                      MS. MA: No, I think it's telling that respondent  
25          is bringing up a completely new argument at oral argument



1 in front of this court that was not raised below, that was  
2 not raised in these briefs. I think that's a real reach to  
3 say - - - to make these arguments, because respondent is  
4 aware that this court has already fashioned a rule, that if  
5 applied as it should be in this case, dictates the outcome  
6 here. And before we - - -

7 JUDGE GARCIA: But do we think that it might  
8 change the outcome, the fact that we've just - - - I just  
9 heard, that this was not the agreed upon sentence.

10 MS. MA: I'm sorry, which was not the agreed upon  
11 sentence?

12 JUDGE GARCIA: That this conditional discharge  
13 was an error; it should never have been imposed.

14 MS. MA: That's - - - that's not how these - - -  
15 that's not how courts operate. It's not how we should, you  
16 know, create confidence in our justice system, is to say,  
17 oh, actually it was a mistake. You know, we agreed on this  
18 as the sentence, and now we're giving you this other thing,  
19 that - - - that, in fact, really undermines confidence in  
20 our justice system.

21 JUDGE RIVERA: Counsel, I'm - - - I'm - - - I'm  
22 on the screen. I'm a little unclear. I - - - perhaps it's  
23 not this exact argument about the lawfulness of the  
24 sentence. I thought they did argue in their brief here,  
25 that an unconditional discharge could have been imposed.



1 Then, I thought your response was that, no, they - - - that  
2 couldn't be imposed, which goes to the lawfulness of the  
3 sentence.

4 Did I misunderstand this briefing?

5 MS. MA: No, I think that I - - - well, I think  
6 on second - - - on second consideration, the court could  
7 have - - - our position is the court could have fashioned a  
8 creative remedy, to make Mr. Bush whole at that point. The  
9 court could have, for instance, imposed a conditional  
10 discharge and then immediately terminated it - - -

11 JUDGE GARCIA: But Counsel, I think that the  
12 issue that I - - - I - - - I think we're going sideways on  
13 here, on the bench, is my understanding of the argument - -  
14 - that argument Judge Rivera just said, you know,  
15 reiterated is, look, this is a sentence that could have  
16 been imposed, unlike the PSR sentences. You know, you - -  
17 - this sentence with a conditional discharge, this was  
18 legal under the statute. It's not unlawful.

19 What I thought I just heard, though, was that  
20 wasn't the agreed upon sentence in this case. That there  
21 should not have been a conditional discharge imposed here,  
22 and the argument now appears to be no harm, no foul; you  
23 know, we didn't agree to, you know - - - the defendant  
24 never agreed to a conditional discharge, but one got  
25 imposed, but you know, you should have objected.



1 I never heard the part about - - - that I can  
2 recall - - - that there was no agreement to impose  
3 conditional discharge. I thought the argument was, when  
4 the judge says CD, that's what people had agreed to. But  
5 it seems - - -

6 MS. MA: Yes, that's my understanding of their  
7 argument as well that, you know, maybe the lawyers had  
8 understood that to be the promise, but that was not what  
9 was told to Mr. Bush. What was told to him was just  
10 twenty-days community service. And in fact, he diligently  
11 completed those twenty days, before he even returned to  
12 court. It was twenty days out of a two-and-a-half-month  
13 period, which was every single weekend - - -

14 JUDGE TROUTMAN: So basically at the trial court  
15 level, everyone was confused about what the sentence was  
16 supposed to be?

17 MS. MA: I don't think we can know for certain,  
18 but what we do know is that Mr. Bush was not told that he  
19 would face - - -

20 JUDGE TROUTMAN: Right.

21 MS. MA: - - - a one year - - -

22 JUDGE TROUTMAN: But it's not until today, we're  
23 told, well, he should have gotten the CD. The People say,  
24 he did not receive the benefit of his bargain. Today they  
25 say that.



1 MS. MA: Yeah, it's easy for them to say today,  
2 but that's not what happened. He didn't receive the  
3 benefit of his bargain.

4 JUDGE TROUTMAN: No, no, they said, he didn't.  
5 He was supposed to get an unconditional discharge. He got  
6 a conditional discharge, but he shouldn't get the relief  
7 that you're requesting is their argument.

8 JUDGE GARCIA: Today.

9 MS. MA: I understand that, but I - - - I - - -  
10 as I have cited earlier, this court has never found that  
11 there is a prejudice requirement. And we do believe that  
12 living under a conditional discharge for an additional  
13 year, serving an additional sentence was a harm that Mr.  
14 Bush suffered, and so we do ask this court to reverse.

15 CHIEF JUDGE DIFIORE: Thank you, Counsel.

16 MS. MA: Thank you.

17 (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 The People of the State of New York v. Jeffery Bush, No. 18 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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