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COURT OF APPEALS
STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

NO. 95

SARGEANT (DEREK),

Appellant.

20 Eagle Street
Albany, New York
October 15, 2025

Before:

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

Appearances:

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Official court Transcriber



1 CHIEF JUDGE WILSON: Last case on the calendar is
2 People v. Sargeant.

3 MS. COHEN: Good afternoon, Sarah Cohen, on
4 behalf of the appellant, Derek Sargeant.

5 May I reserve three minutes for rebuttal?

6 CHIEF JUDGE WILSON: Yes.

7 MS. COHEN: Thank you.

8 The New York Constitution unambiguously dictates
9 that the right to a twelve-person jury shall remain
10 inviolate forever. And the text of the constitution sets
11 forth the singular way in which that right can be given up,
12 and that is by a signed writing made in open court with the
13 approval of the judge.

14 JUDGE GARCIA: Didn't we reject that position in
15 - - - I may pronounce it wrong, but Gajadhar where Judge
16 Kaye and Judge Ciparick dissented, I think, making that
17 very argument? "There is no language in the constitution
18 that permits a felony jury trial, with fewer than twelve
19 jurors. And the right to be tried by twelve jurors, unless
20 waived in favor of a bench trial, is inviolate and cannot
21 be waived." And that's the dissent.

22 MS. COHEN: Your Honor, I think that Gajadhar
23 actually supports the position that I'm bringing forward.
24 Because the whole - - - the holding of Gajadhar was that
25 the waiver was constitutionally permissible, specifically

1 because the way that you can waive it in the constitution
2 was strictly adhered to.

3 So in Gajadhar, the defendant made a signed
4 writing in open court with the approval of the judge. And
5 that's why the - - - this court held that it was a valid
6 waiver.

7 JUDGE GARCIA: So you agree that - - - and the
8 dissent was wrong, that that process didn't follow the
9 constitutional waiver process?

10 MS. COHEN: Yes. Yes, Your Honor. The dissent
11 was - - - the position of the dissent, which I agree was
12 wrong, was that basically that you can't have an eleven-
13 person jury even if the waiver provision is followed.
14 Because the dissent was saying the waiver provision only
15 allows you to have a bench trial.

16 JUDGE GARCIA: Right.

17 MS. COHEN: And - - - no. I agree that's - - -
18 that's not this court's precedent. So - - -

19 JUDGE TROUTMAN: Are you - - -

20 JUDGE HALLIGAN: So - - - go ahead.

21 JUDGE TROUTMAN: Are there constitutional rights
22 you can forfeit?

23 MS. COHEN: Yes, Your Honor. There are
24 constitutional rights that you can forfeit. For example,
25 the right to confront witnesses, or the - - -

1 JUDGE TROUTMAN: Why isn't this one? When you
2 are alleged to have taken action to cause there to be
3 eleven instead of twelve jurors, in the first instance.

4 MS. COHEN: Why isn't this one that you can
5 forfeit?

6 JUDGE TROUTMAN: Correct.

7 MS. COHEN: For a few reasons. This is a - - -
8 this right, the source of this right is located in a
9 different constitutional provision than those that you can
10 forfeit. So the right to - - -

11 JUDGE TROUTMAN: So you can do whatever you want
12 here to cause the jury to lose its original composition and
13 not suffer any consequence?

14 MS. COHEN: Well, the consequence would be a
15 matter for the Penal Law to address. And it's currently,
16 there's a misdemeanor and a felony for jury tampering and
17 jury bribing. And if a stricter penalty - - -

18 JUDGE TROUTMAN: So hypothetically, if a
19 defendant is out on bail, and they go and they assault the
20 juror, causing the juror to be in the hospital, therefore
21 unavailable to complete the trial, and it - - - there, you
22 are saying the only recourse for the court or for the
23 system is that the defendant then be charged with a new
24 crime? That there's nothing short of a mistrial that could
25 occur as to the other?

1 MS. COHEN: Yes, that is my position, Your Honor.
2 And it's - - -

3 JUDGE GARCIA: It would be hard to pick a jury in
4 the new trial. You get a retrial, that's going to be
5 public, right? This is a mistrial, because - - - let's use
6 the hypothetical. A juror was assaulted and put in the
7 hospital by the defendant, and he's being prosecuted for
8 that. But now we're going to pick a new jury for the
9 retrial. That might be a little hard, right?

10 MS. COHEN: Well, a few things. I mean,
11 hopefully the jurors - - - there would be jurors who had
12 not become aware of any publicity relating to the case. I
13 think that's a general requirement for someone to be
14 qualified as a juror.

15 JUDGE SINGAS: What if he does it again in the
16 second trial? He figures this worked for me the first
17 time, I'll try a second mistrial.

18 MS. COHEN: Well, I think that there's a lot of
19 measures that could be taken between - - - to make the
20 second trial different than the first trial, to make that a
21 lot less likely to happen, that are already in place within
22 our existing legal scheme. For instance, the defendant
23 could be remanded, an anonymous jury - - -

24 JUDGE TROUTMAN: What if he engages someone else
25 to take care of it this time, because he can't get - - - do

1 it himself?

2 MS. COHEN: It's possible, Your Honor. I would
3 still submit that the Constitution does not permit
4 forfeiture of this very fundamental right, and that that
5 would be a matter - - -

6 JUDGE TROUTMAN: So the defendant could do
7 whatever he or she wishes, they can never forfeit that
8 right?

9 MS. COHEN: Yes, that's right, Your Honor. And
10 there are other rights that this court - - - although there
11 are some rights that can be forfeited, there are other
12 rights that are so fundamental that they can't be forfeited
13 although they can be - - -

14 CHIEF JUDGE WILSON: So what if - - - let me try
15 another hypothetical on you. What if the judge tells the
16 defendant, before anything happens, you can't go anywhere
17 near a juror or go to their homes or anything like that?
18 If you do that, you will forfeit your right to a twelve-
19 person jury. Still not good?

20 MS. COHEN: I think that a warning, something
21 like the Parker warnings, which in the context of
22 forfeiting the right to be present - - -

23 CHIEF JUDGE WILSON: Yep.

24 MS. COHEN: - - - if a warning is given, you can
25 be deemed to have impliedly waived your right to be

1 present. That is foreclosed in this context by this
2 court's decision in Page. That was a 1996 decision where
3 the defendant said that he would consent to be tried by a
4 jury of eleven. So he expressly waived the right to a jury
5 of twelve.

6 He switched positions on appeal and said that
7 that consent was invalid. And this court ordered a new
8 trial because the - - - the waiver didn't strictly comply
9 with the Constitution.

10 So the type of warning Your Honor is suggesting
11 would go towards an implied waiver.

12 CHIEF JUDGE WILSON: Well, what about a
13 forfeiture? What about a warning for a forfeiture?
14 Because in some circumstances, right, we will not forfeit a
15 constitutional right unless the defendant has been warned
16 that that's the consequence.

17 MS. COHEN: I mean, I think conceptually that the
18 difference between forfeiture and waiver is that a waiver
19 is knowing and voluntary, and an implied waiver is implied,
20 knowing, and voluntary. Whereas a forfeiture happens by
21 operation of public policy without regard to the
22 defendants.

23 JUDGE TROUTMAN: But a forfeiture wherein you
24 lied to the judge. You say you're sick. You lay in wait.
25 And you go to the door of a juror, and you say, I'm here.

1 And you say I found you. You're public record. And now
2 the juror wants to come off the case. All of those things
3 transpired by you.

4 Is there a difference between that as opposed to
5 the defendant accidentally, or even purposely, gets into
6 the same elevator and a juror hears something? Do we treat
7 them both the same?

8 MS. COHEN: I mean, I think that the difference
9 you're pointing out is that one has a - - - one is like an
10 accident, and the other one has some level of intentional
11 wrongdoing. I think that - - -

12 JUDGE TROUTMAN: Malevolence, perhaps?

13 MS. COHEN: I'm - - - and I'm sorry?

14 JUDGE TROUTMAN: Malevolence, perhaps?

15 MS. COHEN: Yes. Article 1 protects this right
16 to a different - - -

17 JUDGE GARCIA: Does it though? Does it protect
18 the right, Article 1 to a twelve-person jury? I mean, I
19 think that's kind of an interesting question. Because it
20 seems like Article 1, Section 2, which I think you can
21 trace back to 1777 and beyond, right? Into the Charter of
22 Liberties, and all guarantees you inviolate, as you say, a
23 right to a jury.

24 But the twelve-person jury, they didn't put in
25 that section. They put it in 1961, a lot later, in our - -

1 - the Judiciary Article. Right?

2 MS. COHEN: That's right, Your Honor. But this
3 court has always interpreted Article 1, Section 2 when it
4 guarantees the right to a jury. This court has
5 consistently held that a jury in that context refers to a -
6 - -

7 JUDGE HALLIGAN: But not - - -

8 JUDGE GARCIA: But why do you need eighteen? Why
9 do you need eighteen if Section - - - Article 1, Section 2
10 guarantees you a twelve-person jury?

11 MS. COHEN: I think that Article 18 - - - I'm
12 sorry. Article 6, Section 18, was passed as part of the
13 Judiciary Act, which was setting forth a very comprehensive
14 scheme for the Unified Court System and how - - - how that
15 would - - -

16 JUDGE GARCIA: Was it limiting Article 1, section
17 2 then?

18 MS. COHEN: No. Because it actually refers to
19 Article 1, Section 2.

20 JUDGE GARCIA: So then why would you need to set
21 out a twelve-person jury in Section 18 when it's already
22 guaranteed by Article 1, Section 2?

23 MS. COHEN: Well, I think it's redundant,
24 frankly. But this court has continued - - -

25 JUDGE GARCIA: It says only for felony

1 indictments. Right?

2 MS. COHEN: It is only - - - and it's as well in
3 Article 1, Section 2, it's only for felonies.

4 JUDGE GARCIA: So it's your position that Article
5 1, Section 2 covers more than that?

6 MS. COHEN: No.

7 JUDGE GARCIA: That a twelve-person - - - so it's
8 really the Judiciary Article that guarantees a twelve-
9 person jury, not Article 1, Section 2?

10 MS. COHEN: No, Your Honor. And in this court's
11 decisions in Page and in Gajadhar, which were after the
12 Judiciary Article, this court has continued to locate that
13 right to a twelve-person jury in Article 1, Section 2.

14 So it would be a departure from this court's
15 recent precedent. Gajadhar was in 2007, and Page was in
16 1996, and both of those cases still said that Article 1,
17 Section 2 guarantees that right.

18 JUDGE GARCIA: Why - - - I'm struggling to
19 understand the text then. Why would you need to put that
20 in Section 18 if it's guaranteed in Article 1, Section 2?

21 MS. COHEN: I don't know. Frankly, I don't know.
22 But I do know that this court has continued to say that
23 it's guaranteed in Article 1, Section 2.

24 JUDGE GARCIA: Well, a jury trial right is
25 certainly - - - continues to be guaranteed. But in 1961,

1 they amended the Judiciary Article to add the twelve-person
2 requirement for felony. So it's to me an interesting
3 question. So what does Article 1, Section 2 get you? And
4 why did you need Section 18? And how do you read those two
5 things together?

6 MS. COHEN: I agree. I agree that it's an
7 interesting question, but I - - - this court in Page in
8 1996 said that when the - - - when an alternate was
9 substituted without that signed writing in open court as
10 required by Article - - - Section 1 - - - Article 1,
11 Section 2. This court said that that infringed the
12 defendant's - - -

13 JUDGE HALLIGAN: But that's the waiver path,
14 right? I'm not sure how that answers the question of
15 whether forfeiture is permissible. And I'm not sure how
16 the text or the history squarely answer that either.

17 I mean, there's certainly references, you know,
18 as you said and Judge Garcia mentioned. Go back and look
19 at the common law tradition, the Charter of Liberties, you
20 see references to twelve. But I don't see that as
21 excluding forfeiture. So how do we take that away from the
22 sources we have?

23 MS. COHEN: Well, I just - - - I want to - - - I
24 think that the word "inviolable" - - -

25 JUDGE HALLIGAN: But I looked at that too, and I

1 didn't see anything which gave any content. And I know
2 it's a word that sounds significant, I think. But I didn't
3 see anything in the constitutional history that gave any
4 specific content to that word or explained why that word
5 was chosen.

6 So what's the historical reference for putting as
7 much weight as you do on that word?

8 MS. COHEN: Well, it's - - - I can't point to
9 anything in the history of the 1938 - - -

10 JUDGE HALLIGAN: I mean, usually, I think when we
11 are looking at what a particular word means in a
12 constitutional provision, we look at what the indicia are
13 about what the drafters or the framers, you know, intended
14 when they picked that word. And maybe they thought about
15 other words, and they chose this word instead, or something
16 like that.

17 But I really couldn't find anything along those
18 lines when I look through the constitutional history
19 sources. And I don't think I saw something along those
20 lines in your brief.

21 So it makes me think we're sort of left to wonder
22 how much content to give it and whether to read it as
23 excluding forfeiture.

24 MS. COHEN: I think the court would only need to
25 look to those types of discussions among the framers in - -

1 - in the case where the plain text is ambiguous. But here,
2 when there's an unambiguous word and phrase chosen in the
3 plain text - - -

4 JUDGE CANNATARO: Well, on - - -

5 MS. COHEN: - - - there's no need to look beyond
6 it.

7 JUDGE CANNATARO: - - - on this question of
8 ambiguity, you would have to concede, am I not right?
9 That the word "inviolable" is not textually connected to
10 twelve people? Because it's Article 1, Section 2? Yeah.

11 MS. COHEN: But it's textually connected to the
12 right to a trial by jury. And this court has held over and
13 over and over again from the time that that phrase was
14 first used up through Gajadhar in 2007, the court's most
15 recent opinion, that - - - that that means a twelve-person
16 jury.

17 So it would be a big departure for this court now
18 to hold that it didn't.

19 JUDGE RIVERA: So look - - - so that - - - that -
20 - - that constitutional provision's obviously there to
21 protect the defendant. Benefits a defendant, a person
22 charged. As does the constitutional provision with respect
23 to waiver. Right? Sort of, again, ensuring that the
24 defendant knows what they're doing, understands what
25 they're giving up, and their - - - the significance, the

1 importance of that. Right?

2 But why can't we look at it as if - - - that
3 there is this right that's protected. But there's a
4 presumption there that when a defendant abuses the right,
5 that that's not what that constitutional right is intended
6 to do. That is to say, when a defendant games the system
7 in this way, is trying to tamper the juror, and figures
8 it's always a win-win situation. Either the juror is
9 thrown off, or they're not thrown off, and I've been able
10 to speak to them - - - whatever it was, I'll - - - I'll get
11 a mistrial or I'm going to proceed with twelve, and I've
12 been able to somehow impact a particular juror.

13 Why can't we look at it in that way? That - - -
14 that's with the understanding the defendant is indeed
15 abiding by the rules of the proceeding and the rules of the
16 practice.

17 MS. COHEN: I don't think there's anything in the
18 text that - - -

19 JUDGE RIVERA: No, there's not anything in the
20 text. I'm not disagreeing with you. But it's the point
21 that - - - that the right exists to protect a defendant, to
22 ensure that they have this right.

23 But when a defendant acts in complete violation
24 of all of the rules of the proceedings, and is trying
25 indeed, to tamper with a juror, that there's no longer - -

1 - the purpose is not being served in that scenario?

2 MS. COHEN: If this court is going to allow for a
3 forfeiture of this right, short of a constitutional
4 amendment, then it needs to create a very protective rule
5 with a very high threshold for the forfeiture of such an
6 important right.

7 I would point to this court's holding in Shanks,
8 a 2021 case about the forfeiture of the right to counsel.
9 And this court held that that must be - - - can be
10 forfeited only as a measure of extreme last resort, after a
11 persistent course of egregious conduct toward successive -
12 - -

13 JUDGE RIVERA: Do you know what the court did
14 here?

15 JUDGE SINGAS: Do you know what the court did
16 here?

17 JUDGE RIVERA: I'm sorry.

18 MS. COHEN: I'm sorry?

19 JUDGE RIVERA: Well, we have the same question.
20 Do you think that that is the - - - the standard that the
21 court applied here?

22 MS. COHEN: No, I do not.

23 JUDGE RIVERA: No?

24 MS. COHEN: It was not a measure of extreme last
25 resort here. It was not a measure of last resort at all.

1 And I mean, in the court's own written opinion
2 about - - -

3 JUDGE RIVERA: Well, the egregious conduct. Can
4 you go that far?

5 MS. COHEN: No. I don't think so because - - -

6 JUDGE RIVERA: No?

7 MS. COHEN: - - - egregious conduct has to
8 distinguish some acts of tampering with a juror from
9 others. One could say that any act of tampering - - -

10 JUDGE TROUTMAN: Why, if in this instance - - -

11 MS. COHEN: - - - with a juror is egregious.

12 JUDGE TROUTMAN: - - - when the effect is, the
13 jury is deliberating. So under normal circumstances, you
14 can't - - - even if there were extra jurors, alternates,
15 you can't simply just replace an alternate. But after the
16 sworn jury is deliberating, you can only replace with the
17 defendant's consent.

18 So if you look at the timing of conduct, you're
19 saying that's not egregious? An egregious consideration?

20 MS. COHEN: I'm - - - I am saying that, Your
21 Honor. And the - - - if any time a defendant did - - -
22 tampered with a juror that led to a forfeiture, that rule
23 is not administrable because there - - - it could - - -
24 what if the defendant went up to eleven of the jurors on
25 the lunch break and said something to all of them at once?

1 Would that defendant then be - - - have forfeited all
2 eleven of those jurors and be - - -

3 JUDGE RIVERA: You're saying, went up to them and
4 did more than say, have a nice meal?

5 MS. COHEN: Said, you know - - -

6 JUDGE RIVERA: Said, I'm innocent. I'm being
7 railroaded.

8 MS. COHEN: Yeah.

9 JUDGE RIVERA: Here are my documents.

10 MS. COHEN: Right. Under the People's proposed
11 rule, that defendant would forfeit the right to all eleven
12 of those jurors, and - - -

13 JUDGE HALLIGAN: The court says something a lot
14 more than that. I mean, the court says, "there's clear and
15 convincing evidence the defendant acted in a calculated
16 manner and hatched a scheme. I won't go on and read it all
17 because I know your light is on. But the findings of the
18 court are pretty significant.

19 MS. COHEN: This court announced a higher
20 standard in Shanks. It can't just be egregious. It needs
21 to be a persistent course of repeat egregious conduct, and
22 it needs to be - - -

23 CHIEF JUDGE WILSON: He let someone get - - -

24 JUDGE HALLIGAN: So you to have to tamper with
25 two jurors or five? Or how does that apply?

1 MS. COHEN: It would need to be a remedy. I
2 think that dovetails with my argument that it would need to
3 be a remedy of last resort. So you would - - -

4 JUDGE RIVERA: What if he beat up a juror?

5 MS. COHEN: I think that - - -

6 JUDGE RIVERA: Oh, just one?

7 MS. COHEN: I don't think that it's a remedy of
8 last resort unless there is - - -

9 JUDGE RIVERA: No. Is that egregious?

10 MS. COHEN: It could be egregious. I think that
11 we're sort of on the - - - I can think of examples that are
12 far more egregious than we have in this case, and examples
13 that are far less egregious than we have in this case. And
14 egregious needs to mean something more than anyone who
15 tampers with a juror.

16 And in Shanks, this court held that to give up
17 the right to counsel, it must be egregious enough to
18 forfeit the right, not simply just egregious.

19 CHIEF JUDGE WILSON: Thank you.

20 MS. O'BOYLE: May it please the court. Good
21 afternoon, Your Honors.

22 For the respondent, Assistant District Attorney
23 Danielle O'Boyle from the office of Melinda Katz.

24 JUDGE TROUTMAN: Would you agree that it can't
25 just be any conduct? If the court were to adopt a

1 forfeiture rule, what does - - - what would "egregious"
2 mean?

3 MS. O'BOYLE: I think egregious would necessarily
4 be on a case-by-case basis. But in terms of looking for a
5 rule, I think that our proposed rule is - - - is far
6 narrower than what the defense is proposing.

7 And that would be that applying the standard that
8 the trial court did here, which is that by clear and
9 convincing evidence, the defendant's misconduct caused the
10 juror to be unable to serve.

11 JUDGE HALLIGAN: Why shouldn't the Shanks
12 standard apply?

13 MS. O'BOYLE: I think that standard would be
14 unworkable, Your Honor. And to say - - -

15 JUDGE HALLIGAN: Why?

16 MS. O'BOYLE: - - - that it would have to be a
17 persistent course of egregious misconduct. I think there
18 are a few problems with that.

19 So first, I know the defense - - -

20 JUDGE HALLIGAN: Well, I think - - - I think what
21 Shanks says is extreme last resort. Does it say
22 "persistence" specifically?

23 MS. O'BOYLE: I know that the defense has argued
24 that it would have to be persistent.

25 JUDGE HALLIGAN: Yeah. I'm just asking - - -

1 MS. O'BOYLE: I'm not sure if in Shanks it was
2 that. I know in some of the right to counsel cases, they
3 use a persistent course of egregious misconduct.

4 JUDGE HALLIGAN: Okay. Well, if you take it as
5 extreme last resort remedy, that wouldn't require, I don't
6 think, repeated incidents. Why wouldn't that be the
7 appropriate standard?

8 MS. O'BOYLE: I don't think it has to be extreme
9 last resort, but I think that certainly here the
10 defendant's conduct was very egregious. And I think the
11 defense is minimizing that, to say that having come up with
12 this - - -

13 JUDGE RIVERA: No, but this question is not about
14 the egregiousness. This is about what would be the remedy
15 for the conduct?

16 MS. O'BOYLE: Yes, Your Honor. But in terms of
17 what the standard would be, I - - - I don't think it has to
18 be defined as an extreme last remedy.

19 JUDGE RIVERA: Why not? And I think that's the
20 point. Why not?

21 MS. O'BOYLE: Well, I think - - - I think that
22 the clear and convincing evidence standard is enough. And
23 I think it actually, in some ways, contemplates that it
24 would be a last resort.

25 JUDGE HALLIGAN: Clear and convincing evidence of

1 what?

2 MS. O'BOYLE: Clear and convincing evidence that
3 the defendant engaged in misconduct that caused a juror to
4 become unavailable to serve.

5 JUDGE CANNATARO: Well, getting back to this
6 extreme last resort. If there had been an alternate there
7 who defendant indicated he would consent to substituting
8 that person in, which would make the - - - the remedy
9 chosen here seem, you know, not the last resort available.
10 Why would that not be okay?

11 MS. O'BOYLE: Your Honor, I think that presents a
12 far different scenario. And that's somewhat of my point
13 here. That here it really was an extreme last resort
14 remedy because there were no alternates available. But I
15 just want to highlight what some of the - - - Your Honors
16 had pointed out before. That most times, by the time we're
17 at the stage of deliberations, the alternates have already
18 been excused, and even if they were not, the defendant
19 would have to consent to that substitution.

20 JUDGE CANNATARO: Granted.

21 MS. O'BOYLE: So we're leaving control with him.
22 But here - - -

23 JUDGE CANNATARO: But you seem to have disavowed
24 the extreme last resort requirement. You said that's not
25 necessary or something like that.

1 MS. O'BOYLE: I think - - -

2 JUDGE CANNATARO: And I'm just questioning
3 whether that's really fair to say.

4 MS. O'BOYLE: It's difficult to say, Your Honor.
5 I think in most cases it would end up being an extreme last
6 resort remedy. Because I'm not denying that this is an
7 important right. That the right to a twelve-person jury
8 is, in fact, fundamental.

9 JUDGE CANNATARO: And there may be other remedies
10 available that adequately, you know, deal with the
11 violation short of giving a person a ten-, nine-, eight-
12 person jury?

13 MS. O'BOYLE: Yes, Your Honor. There could be
14 other remedies. Here there were none available. This
15 trial court had no reasonable path forward that would not
16 have afforded - - -

17 CHIEF JUDGE WILSON: I do worry about your
18 articulation of the standard, though, the way you put it.
19 So for example, the defendant is in custody with some
20 officers. The juror is on the elevator with the defendant.
21 The defendant glares meanly at the juror. The juror goes
22 back to the court, reports that and says, I can't serve
23 anymore.

24 That meets your standard as you articulate it.
25 Defendant did something deliberate, caused the juror not to

1 be able to continue. But that sort of thing happens
2 probably more frequently than it should. But it happens
3 frequently enough that we might want - - - not want to lose
4 the right to jury trial.

5 MS. O'BOYLE: Yes, Your Honor. But I think in
6 that scenario, the ultimate point is that there has to be
7 some discretion on the part of the trial judge. And that's
8 why I'm hesitant to say - - -

9 CHIEF JUDGE WILSON: Well, it has to be a
10 standard. From us there has to be a standard for the court
11 to - - - to promulgate, for lower courts to understand what
12 it is. And your standard bothers me.

13 MS. O'BOYLE: In response to that, Your Honor, I
14 think that the standard has to leave some discretion,
15 though. So to say that it has to be clear and convincing
16 evidence of misconduct that causes that juror to be unable
17 to serve. I think that there should be some level of
18 egregiousness in there - - -

19 JUDGE RIVERA: Or an attempt to influence or
20 intimidate?

21 MS. O'BOYLE: That would certainly fall within -
22 - -

23 JUDGE RIVERA: As opposed to the hypothetical
24 you've got.

25 MS. O'BOYLE: I think that's closer to the

1 scenario we have here, Your Honor. And that certainly
2 falls within a more egregious - - -

3 JUDGE RIVERA: And would that not - - - yeah. I
4 was going to say. Wouldn't that constitute egregious
5 conduct?

6 MS. O'BOYLE: Yes, Your Honor. But I - - - I
7 think - - - I think in that scenario, a trial judge would
8 be very unlikely to proceed with eleven jurors if it was
9 something slightly more innocuous. I think we do have to
10 give that level of discretion there, though. But I think
11 that - - -

12 JUDGE RIVERA: Oh, you mean - - - I'm sorry. I
13 want to circle - - - or I want to get to this point you're
14 making.

15 That a judge would be less likely to proceed with
16 eleven. You mean that the judge would not release the
17 juror? Even if the juror said, I'm uncomfortable, I can't
18 be unbiased anymore?

19 MS. O'BOYLE: No, Your Honor. I suggest that in
20 those circumstances, a court would exercise its discretion
21 and likely grant a mistrial there.

22 JUDGE HALLIGAN: I see. I see.

23 MS. O'BOYLE: Because in some circumstances, that
24 may be the appropriate path to proceed on. Here, that
25 would have given the defendant a significant windfall - - -

1 JUDGE RIVERA: In effect - - -

2 MS. O'BOYLE: - - - after what was unquestionably
3 egregious conduct.

4 JUDGE RIVERA: - - - a benefit from the bad
5 conduct?

6 MS. O'BOYLE: Exactly, Your Honor. So I think
7 that the rule can simply be that on a case-by-case basis,
8 if the defendant engages in deliberate misconduct that
9 results in the unavailable - - - or sorry, a juror becoming
10 unable to serve, that a court could find that a defendant
11 forfeits that right.

12 JUDGE HALLIGAN: So I went to look to see if I
13 could find any examples where a court in New York,
14 historically, other states anywhere, had found that a
15 defendant forfeited the right to a full complement of
16 jurors, whatever that number might be, through this kind of
17 misconduct, I couldn't find anything.

18 Now, you analogize to forfeiting the
19 confrontation right. But I think that that has precedence
20 going back to the, like, 16th or 17th century. So it seems
21 to me you're asking us to do something that really hasn't
22 been done before.

23 Why shouldn't that give us some pause?

24 MS. O'BOYLE: Well, Your Honor - - -

25 JUDGE HALLIGAN: Or am I missing some of the

1 precedent?

2 MS. O'BOYLE: I do not think you're missing any
3 of the precedent. I have not seen this specific factual
4 scenario arise in any other decision. But it's not as
5 unprecedented as the defense would make it. And the
6 defense is trying to put this right - - -

7 JUDGE HALLIGAN: Well, if we're not seeing any
8 cases where it's come up, I'm not sure how - - - I guess, I
9 think the question is, has a court signed off on allowing
10 an eleven-person jury to proceed on the basis that the
11 defendant forfeited the right to a full complement? Or
12 whatever the number is. And I can't find any other - - -
13 any other examples.

14 MS. O'BOYLE: On a - - - a forfeiture ground in
15 New York State?

16 JUDGE HALLIGAN: Right.

17 MS. O'BOYLE: No, it hasn't been decided either
18 way.

19 JUDGE HALLIGAN: Or elsewhere.

20 JUDGE CANNATARO: Anywhere.

21 JUDGE HALLIGAN: I haven't seen it in any - - - I
22 haven't seen it in any other place either. Unless I'm
23 missing it.

24 MS. O'BOYLE: Well, federally, Your Honor,
25 there's obviously a different posture there and the Federal

1 Rules of Criminal Procedure actually allow that.

2 JUDGE HALLIGAN: Yes. But I haven't seen it in
3 any other states.

4 MS. O'BOYLE: I have not seen it. But I also
5 haven't seen the question presented. And I'm not sure what
6 courts would - - - would do. It just hasn't - - - the
7 factual scenario hasn't risen to the appellate level, in my
8 view, in any of the - - -

9 JUDGE HALLIGAN: Or perhaps - - -

10 JUDGE RIVERA: You have to have a confluence of
11 factors. Right? You have to have - - - the defendant is
12 out - - -

13 MS. O'BOYLE: Yes.

14 JUDGE RIVERA: - - - so that they can actually
15 get to the juror or - - -

16 MS. O'BOYLE: Right.

17 JUDGE RIVERA: - - - not otherwise in some kind
18 of holding. They - - -

19 MS. O'BOYLE: The defendant could be, yeah.

20 JUDGE RIVERA: - - - you - - - you have to - - -
21 you'd have to be tampering once the deliberatio have
22 started. And there are no - - - because the alternates
23 have been released. Or you're at the point where maybe
24 deliberations haven't started, but you don't have an
25 alternate, you've exhausted all the alternates, whatever.

1 I mean, it - - - it's a small kind of set of factors that
2 have to align - - -

3 MS. O'BOYLE: Undoubtedly.

4 JUDGE RIVERA: - - - to have this - - - and - - -
5 and then he's got to do - - - or she - - - has to do
6 something egregious that is discovered?

7 MS. O'BOYLE: Yes. There would have to be a
8 certain set of factors that align for this particular
9 situation to arise. Although, I would point out that the -
10 - - a defendant could still make this happen from - - -
11 while being incarcerated. Even if he or she were not the
12 person - - -

13 JUDGE RIVERA: Yes. That's true.

14 MS. O'BOYLE: - - - to personally - - -

15 JUDGE RIVERA: Through someone else. That is
16 true.

17 MS. O'BOYLE: - - - do it, right? I think that
18 the defendant - - -

19 JUDGE RIVERA: Correct.

20 MS. O'BOYLE: - - - if - - - if the defendant - -
21 -

22 JUDGE RIVERA: Yes.

23 MS. O'BOYLE: - - - were directing that
24 misconduct, it could still occur.

25 JUDGE RIVERA: Yes.



1 MS. O'BOYLE: So I think, though, that to respond
2 to that and to Judge Halligan's question, this principle,
3 though, of forfeiture, that's not novel. That's not
4 unprecedented. And the defense, by using and focusing on
5 this inviolate forever language, is trying to place this
6 right - - -

7 JUDGE HALLIGAN: When you say forfeiture is not
8 novel, do you mean with respect to other rights like
9 confrontation? Or do you mean with respect to the right to
10 a jury trial?

11 MS. O'BOYLE: I mean, with respect to, like,
12 other constitutional rights that can be forfeited.

13 JUDGE SINGAS: And what - - - what's the standard
14 on - - - because I don't remember when a defendant loses a
15 right to confrontation? What's the standard legal - - -

16 MS. O'BOYLE: That would be clear and convincing
17 evidence.

18 JUDGE SINGAS: Is it the same thing? Yeah.
19 Okay.

20 MS. O'BOYLE: The same one the court applied
21 here, Your Honor.

22 JUDGE RIVERA: So what does the word "inviolate"
23 in the constitutional provision mean? Why is it there?

24 MS. O'BOYLE: I can't answer as to why it's
25 there, Your Honor. I think that there's no doubt that

1 there is - - -

2 JUDGE RIVERA: Don't we have to ascribe some
3 meaning to it?

4 MS. O'BOYLE: We do. And I think that it, in
5 terms of the actual jury trial right, which I would note in
6 response to Justice Garcia - - - Judge Garcia's point
7 earlier, it is separate from the text that specifically
8 ties it to the number twelve. But that jury trial right,
9 the other rights - - - other constitutional rights, all
10 really flow from that. But I don't think that inviolate
11 forever means what the defense says it means and Gajadhar
12 really made that clear.

13 JUDGE HALLIGAN: But doesn't it have to mean
14 something? If all the words were intended to do was to
15 confer the right to a jury trial, presumably it would say
16 that. But it does add this extra word "inviolate". So
17 what meaning would you give that specific word?

18 MS. O'BOYLE: I think that it would certainly be
19 very fundamental and perhaps, in some ways, more
20 fundamental than the other rights, but not in such a way
21 that it cannot be forfeited.

22 JUDGE HALLIGAN: Okay. So then why wouldn't that
23 lead us, if we were to agree with you that it could be
24 forfeited in some circumstances, to adopt a very high bar
25 such as the one set forth in Shanks, in terms of when it

1 could be forfeited?

2 MS. O'BOYLE: I think it can be a high bar, Your
3 Honor. I don't think it needs to say the words "extreme
4 last resort remedy". But I do think, given the language of
5 inviolate forever, if this court were to do that and employ
6 that standard, I think certainly the circumstances would
7 rise to that here, and the court here would have abided by
8 that standard. I think the court really did treat this as
9 a last resort.

10 But I just want to point to the language that
11 this court used in Gajadhar.

12 JUDGE RIVERA: The last resort being equated
13 with, if I grant the mistrial, then the defendant benefits
14 from this conduct?

15 MS. O'BOYLE: Yes, Your Honor. I think that's
16 why I'm - - -

17 JUDGE RIVERA: It incentivizes the conduct moving
18 forward, of course. But I'm not going to let you benefit
19 from this kind of action?

20 MS. O'BOYLE: Exactly, Your Honor. I think
21 that's the problem with using the extreme last resort
22 remedy language only because, in theory, the mistrial would
23 be another path forward. It's not a reasonable one,
24 though. It's not an equitable one. And to say, oh, well,
25 we just do this again and let's hope the defendant doesn't

1 tamper with another juror. Well, the defendant now has the
2 benefit of a mistrial. There's a reason the defendant
3 requested that relief here, and he's requesting affirmative
4 relief based upon his own misconduct.

5 JUDGE CANNATARO: So would you just excise that
6 requirement, or would you articulate it a different way?

7 Because it seems to me like there has to be at
8 least some notion in the rule that you don't want to
9 exercise this power just because you're upset with
10 something the defendant did, or set - - - upset because
11 some kind of jury tampering you think might have occurred.

12 So what's the level of restraint that you suggest
13 we articulate?

14 MS. O'BOYLE: Well, I think that in saying to
15 engage in - - - requiring that the defendant, having
16 engaged or directed another person to engage in deliberate
17 misconduct, accounts for that. Because it's not just those
18 happenstance, innocuous occurrences.

19 JUDGE HALLIGAN: So the Chief's - - - the Chief's
20 example, maybe let me tweak it a little bit, where the
21 defendant is in the elevator and a juror gets in. And
22 maybe the defendant doesn't just glare at the juror but
23 says something and says something inappropriate. Is that
24 enough under your standard or no?

25 MS. O'BOYLE: I think it would - - - first of

1 all, we'd have to see if the juror was then unable to
2 serve. So here - - -

3 JUDGE HALLIGAN: No, let's say that really
4 unnerves the juror. The juror goes in and says, I can't
5 stay. I'm too - - - too scared.

6 MS. O'BOYLE: I don't think that it would
7 necessarily rise to the level of forfeiture there. I think
8 it could, and I think it would have to be a case-by-case
9 determination. And - - -

10 JUDGE HALLIGAN: It seems - - - that seems a
11 little hard to square with "inviolable right". If a comment
12 - - - one comment in an elevator could - - - inappropriate
13 for sure - - - but could result in forfeiture of the
14 twelve-person-jury right?

15 MS. O'BOYLE: But I think, Your Honor, that the
16 trial court would necessarily - - - and I think with
17 directive from this court, have to take that very
18 seriously, as the trial court did here. There was a
19 thorough inquiry. There was a full hearing. The trial
20 court went through all the alternatives and explained why
21 it could not acquiesce to the defendant's misconduct and
22 give - - - grant him a benefit.

23 So I don't think it's that any interaction in an
24 elevator would necessarily result in forfeiture.

25 JUDGE CANNATARO: You know, I have to tell you,

1 I'm a little concerned about this whole line of
2 questioning. Because that, to me seems to go to the
3 violation that leads to the forfeiture. Goes to sort of
4 the liability issue.

5 I'm talking about the remedy. I think there has
6 to be some admonition to courts if we were to articulate
7 this rule, that you really have to be - - - you know, you
8 just show some restraint in how you give out this remedy of
9 saying, well, you forfeited your right to a twelve-person
10 jury.

11 So again, I ask you, even if it - - - even if
12 it's a widely agreed, egregious form of, you know, contact
13 with a juror, if there's another remedy available that
14 doesn't go so far as depriving the person of a twelve-
15 person jury, how do we incorporate some suggestion that
16 maybe you want to look at that?

17 MS. O'BOYLE: I think the court could incorporate
18 that suggestion. I would just suggest that the court not
19 allow those alternative remedies to be things that would
20 benefit the defendant. So - - -

21 JUDGE CANNATARO: Such as a mistrial?

22 MS. O'BOYLE: Such as a mistrial or the defense's
23 alternatives of - - - charge the defendant with jury
24 tampering. Well, that does very little here. Here, the
25 defendant would have undoubtedly been found guilty of first

1 degree jury tampering. But it's a class A misdemeanor.

2 JUDGE CANNATARO: So there is a word that we can
3 use that's not last resort. So I'm just asking you, and I
4 - - - I'll stop asking now because your red light has gone
5 on.

6 What is that word that we should use? Or that
7 phrase that we should use to explain when it's appropriate
8 to go down this road?

9 MS. O'BOYLE: I think it - - - the court could
10 clarify. If it used the standard that we're asking for
11 that the defendant engaged in deliberate misconduct, that
12 it used the word perhaps egregious in there to suggest that
13 this does have to be something significant before taking
14 that right away. But here, the court certainly did that.
15 It employed the standard used in the witness tampering
16 context.

17 JUDGE GARCIA: I think if I could paraphrase
18 this. Is - - - yes, that goes to the violation that might
19 get you an eleven-person jury, the egregiousness. But
20 assume it meets the egregiousness standard, is there some
21 requirement for the judge to look - - - this isn't this
22 case. But if there's an alternate available and before
23 going with an eleven-person jury, consider bringing in an
24 alternate. Maybe even over the objection of the defendant.

25 MS. O'BOYLE: Yes, Your Honor. I think that

1 would present a different scenario and the court should
2 look to that.

3 Notably, it would still involve some type of
4 forfeiture because the defendant has to consent in writing
5 to the substitution of that alternate.

6 JUDGE GARCIA: Right. But it wouldn't be a - - -

7 MS. O'BOYLE: So it would still be a finding of
8 forfeiture.

9 JUDGE GARCIA: - - - forfeiture of a twelve-
10 person jury. It would be a forfeiture of your right to
11 consent or not to - - -

12 MS. O'BOYLE: Yes.

13 JUDGE GARCIA: - - - substituting an alternate.

14 MS. O'BOYLE: A different forfeiture.

15 JUDGE GARCIA: Right. It would still be a
16 forfeiture. But what I think Judge Cannataro is asking is
17 what type of language would we use to describe the need for
18 the court to do that?

19 MS. O'BOYLE: I think the language this court
20 could use would be directing the trial court to consider
21 alternative remedies without affording a benefit to the
22 defendant, which would include a mistrial, proposing other
23 things that's - - - as measures in that second trial of
24 selecting more alternates. I think that would be a very
25 workable rule. And contrary to the rule proposed - - -

1 JUDGE RIVERA: More alternates doesn't help once
2 you're in deliberations, which is the problem here, of
3 course.

4 MS. O'BOYLE: Exactly. That's why I - - -

5 JUDGE RIVERA: Let me ask you. The substitution
6 of the alternate without consent. That's not a
7 constitutional right, correct?

8 MS. O'BOYLE: It's not. It's statutory. I just
9 point out that it would still be forfeiture.

10 JUDGE RIVERA: No, no. I just want to be clear.

11 MS. O'BOYLE: Undoubtedly a different level of
12 forfeiture of a right at stake there.

13 JUDGE SINGAS: I don't see how a mistrial helps
14 either, because that's exactly what the defendant wants.

15 MS. O'BOYLE: Yes, Your Honor. That's what I
16 think this court would have to guard against as well. So
17 in saying yes, the court's at the first instance should
18 consider these alternative remedies. It has to be one that
19 does not afford the defendant a benefit as a result of his
20 misconduct.

21 JUDGE TROUTMAN: Unless - - -

22 JUDGE RIVERA: Well, this case is - - - I don't
23 know what Judge Troutman was going to say now. But
24 certainly I was going to say what Judge Troutman has
25 pointed out before. There's a certain deviousness that the

1 court finds in this conduct - - -

2 MS. O'BOYLE: Yes.

3 JUDGE RIVERA: - - - by the juror, which is
4 really, I think, in part, what drives the court to believe
5 if I grant this mistrial, you are benefited. Right? It's
6 that win-win situation. Either the juror was willing to go
7 ahead, and I - - - I've talked to them, I've given them
8 documents. Or they're not willing to go ahead and I'll get
9 a mistrial and I'll - - - I'll get another shot at it.
10 I've seen the prosecution's case, and maybe that improves
11 my defense moving forward.

12 MS. O'BOYLE: Yes, that could be it.

13 JUDGE RIVERA: But that kind of deviousness that
14 - - - the planning in advance, right? I mean, in this
15 case, the judge found, and I think we're bound by all these
16 factual findings, that the defendant had planned this not
17 on that day, but in advance.

18 Because the day before had already planted the
19 seeds of I've got this migraine. Trying to make it really
20 seem like that is, indeed, what was the reason for the
21 adjournment request. So there's something particularly
22 troublesome about what went on here.

23 MS. O'BOYLE: Yes, this is particularly
24 calculated. It involved setting it up from the very first
25 day of deliberations, having researched where the

1 foreperson lived, lying in wait at his home, claiming to
2 have been extorted, and trying to get the foreperson to
3 change his vote. All of that is undoubtedly part of that
4 deviousness standard.

5 And I just want to finally point out - - -

6 JUDGE RIVERA: And choosing that person in
7 particular?

8 MS. O'BOYLE: Yes, Your Honor.

9 And the rule that the defense is suggesting would
10 be that the conduct, no matter how egregious, and we
11 maintain that this is significantly egregious conduct. But
12 even if it had been more egregious, as Judge Troutman said.
13 If the defendant had assaulted a juror, if the defendant
14 had shot at a juror, that a court would be precluded from
15 employing a forfeiture analysis. That cannot be, because
16 the right to that twelve-person jury, no matter how
17 fundamental, does not guarantee the defendant the right to
18 abuse it, and then simultaneously invoke its protection.

19 CHIEF JUDGE WILSON: Thank you.

20 MS. O'BOYLE: Thank you, Your Honors.

21 MS. COHEN: A mistrial is not a hollow remedy,
22 and it is not a reward for a defendant in these
23 circumstances. The second trial in these circumstances
24 would look very different than the first trial. The - - -

25 JUDGE RIVERA: But what if - - - what if it looks

1 like that jury's - - - that jury's going to find me guilty.

2 MS. COHEN: It most likely would.

3 JUDGE RIVERA: I'd rather have another shot.
4 Excuse me. I'd rather have another opportunity with a
5 different jury?

6 MS. COHEN: Well - - -

7 JUDGE RIVERA: I mean, the defendant sat there
8 and seen all of the prosecution's case. May have even had
9 a conversation with their lawyer, and their lawyer says do
10 not be optimistic about this.

11 MS. COHEN: Your Honor, at the second trial, the
12 defendant will have generated evidence of his own
13 consciousness of guilt and of committing another crime.

14 JUDGE SINGAS: That's assuming that he'll get a
15 second trial. Once the witnesses find out what happened, I
16 don't think they're going to be eager to come in and
17 testify.

18 MS. COHEN: If the witnesses became unavailable
19 at the second trial, then the People would undoubtedly be
20 able to admit their prior testimony as it has already been
21 confronted.

22 JUDGE SINGAS: No. Because they wouldn't be - -
23 - they wouldn't be because - - - it wouldn't be a
24 forfeiture situation. It wouldn't be because of anything
25 the defendant did to them specifically, to allow then the

1 grand jury or prior testimony to come in. I'm just saying
2 - - -

3 MS. COHEN: Well, the - - - it would have been
4 confronted - - - so the - - - the confrontation clause
5 would no longer apply, arguably because the defendant would
6 have already fully cross-examined them during the first
7 trial. So I think - - - but - - - but fundamentally - - -

8 JUDGE TROUTMAN: But still the - - - a cold
9 transcript versus having a live witness does impact
10 subsequent jurors. So arguably the defendant would be
11 getting a benefit.

12 But would you say that it certainly it should not
13 necessarily be that the court must absolutely deny a
14 mistrial? It is for the trial court to consider, under all
15 the facts and circumstances, the nature of the conduct, et
16 cetera, the timing, and then make a determination as to, if
17 - - - not that you agree because you say he can't - - - he
18 gets a number of times to do things. But in the very
19 least, would you agree that all of those factors should be
20 taken into consideration and not absolutely saying - - -
21 because it seem to have been suggested by the prosecution
22 that the defendant should not, quote, benefit by getting a
23 mistrial. A mistrial may be appropriate, depending upon
24 the circumstances.

25 MS. COHEN: I think so, Your Honor. I think

1 that's right. And that's where we would get back to the
2 Shanks standard, because the question would be, is there
3 record evidence in any particular circumstance that it was
4 a remedy of extreme last resort? And I - - -

5 JUDGE RIVERA: So is that your position, should
6 the court decide that indeed, a defendant can waive - - -
7 excuse me, can forfeit a twelve-person jury based on
8 egregious conduct, tampering with a juror?

9 Is your position then, that the standard that
10 should apply in that kind of a case is Shanks?

11 MS. COHEN: Right.

12 JUDGE RIVERA: A last - - -

13 MS. COHEN: My position is that it can't be
14 forfeited.

15 JUDGE RIVERA: Its egregious and it's last
16 resort? Is that - - - I just want to know.

17 MS. COHEN: If it - - -

18 JUDGE RIVERA: Again, assuming you don't win on
19 this point.

20 MS. COHEN: Yes.

21 JUDGE RIVERA: What - - - what rule would you
22 advocate for - - -

23 MS. COHEN: The Shanks rule.

24 JUDGE RIVERA: - - - to otherwise protect the
25 defendant's right?

1 MS. COHEN: I would advocate for the Shanks rule,
2 if this court is going to adopt a rule. And I would just
3 point out that anything less than that leads to a real
4 danger that, you know, in this case only one juror was
5 tampered with, and it was a jury of eleven.

6 But this court needs to ensure that that trial
7 courts, when they're administering whatever rule the court
8 comes up with that - - - that it won't wind up with a line
9 drawing problem. Where, how many jurors can be forfeited?
10 Can the defendant forfeit all twelve jurors and just have a
11 bench trial? We don't - - - that's getting very far from
12 the fundamental right to a twelve-person jury.

13 So I would advocate the highest standard.
14 There's nothing in the Constitution that would allow this
15 context to have a less protective context than Shanks.

16 JUDGE RIVERA: Perhaps that's where inviolate
17 comes in, inviolate forever. That you can't move from a
18 jury to a bench trial based on even your bad conduct?

19 MS. COHEN: Sure. But what's a jury? What - - -
20 can you move to a one-person jury trial?

21 JUDGE RIVERA: How would they?

22 MS. COHEN: I would suggest that you cannot.
23 Thank you.

24 CHIEF JUDGE WILSON: Thank you.

25 (Court is adjourned)

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

I, Chrishanda Sassman-Reynolds, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Sargeant (Derek), No. 95 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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