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COURT OF APPEALS
STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

NO. 23

LEWIS (JARVIS),

Appellant.

20 Eagle Street
Albany, New York
February 12, 2026

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: First case on the calendar
2 is People v. Lewis.

3 MS. ROOT: Good afternoon. And may it please the
4 court. Zoe Root, on behalf of the appellant, Jarvis Lewis.
5 I'm requesting to reserve three minutes on rebuttal.

6 CHIEF JUDGE WILSON: Of course.

7 MS. ROOT: It is abundantly clear from the record
8 that Mr. Lewis did not want this retained attorney
9 representing him at his trial. But there is no record
10 indication that he chose to have a silent lawyer throughout
11 that very same felony trial. Mr. Lewis never knowingly
12 waived his effective - - - his right to effective
13 assistance of counsel on the record.

14 JUDGE SINGAS: Didn't he ask his attorney not to
15 do anything?

16 MS. ROOT: He did in the context of firing his
17 attorney. Every indication - - -

18 JUDGE SINGAS: But why is that - - - how do you
19 make that distinction?

20 MS. ROOT: So before the trial started - - - the
21 context here is really quite critical. Before the trial
22 started, Mr. Lewis requested a new attorney. That request
23 was denied. And when he went to the back with his
24 attorney, he fired him and said, I don't want you here. I
25 don't want you participating on my behalf. I want you to

1 leave. Thereafter, there was a long conversation between
2 the judge and counsel about whether Lembke would be
3 participating in - - - in the trial at all. Mr. Lewis was
4 not in the courtroom for those discussions.

5 JUDGE SINGAS: I understand that, and that was
6 because he chose not to be in the courtroom, correct?

7 MS. ROOT: Correct.

8 JUDGE GARCIA: So my point is, I don't know what
9 the distinction is once the judge told him, you're not
10 getting a new lawyer. So your choice now is either to go
11 with this one or represent yourself. And he said to his
12 lawyer, don't say a word. Don't do anything. Don't
13 represent me.

14 MS. ROOT: Right. So - - -

15 JUDGE SINGAS: How is - - - why isn't that a
16 waiver?

17 MS. ROOT: Yeah. So it's clear that the judge
18 and Mr. Lewis were having two different conversations. Mr.
19 Lewis was fixated on firing his attorney. What he didn't
20 understand and what was happening when he wasn't in the
21 room was that the judge was coming to the conclusion that
22 if this attorney were ordered to stay - - -

23 JUDGE TROUTMAN: But again, he wasn't in the room
24 because he chose not to be in the room.

25 MS. ROOT: Yes.

1 JUDGE TROUTMAN: And so this puts a court in a
2 very difficult position. Things can get quite volatile
3 when a person who is insistent on having his way and
4 decides to leave the courtroom.

5 MS. ROOT: Absolutely. It did.

6 JUDGE TROUTMAN: So what's the court to do when
7 he insists on leaving, and then you're saying, well, he
8 wasn't there and things were happening? Whose fault is
9 that?

10 MS. ROOT: Right. So the question of what's the
11 court to do is a good one. And I think, here, the judge
12 did bring him back into the courtroom. The problem is the
13 questions and the conversation that ensued were not the
14 right questions, and it wasn't the right conversation.
15 So - - -

16 JUDGE SINGAS: Right. I think we can say that if
17 we have a situation - - - I think we can all agree that - -
18 - where someone's cooperative and they're in the courtroom
19 and they're engaged and they're talking to the judge or
20 listening to the judge, and then we can look at that record
21 and say, you know what? The judge really didn't ask the
22 questions that should have been asked. But this is a
23 different situation, right? You'd agree with that. We're
24 in a - - - we're in a different posture here, because here
25 we have a defendant who gets up and walks out or refuses to

1 come out. So we don't really know what the colloquy would
2 have been had he stayed and listened to it. Like, the
3 defendant's own actions removed himself from it. So I
4 don't know what the judge would have said had he stayed.
5 Is it fair to make that distinction or not in your mind?

6 MS. ROOT: Well, there were numerous colloquies
7 that occurred in Mr. Lewis's presence. The problem was
8 there was no colloquy about waiver of counsel. And the
9 courts have held that it - - - that this is - - - this
10 right is one we must protect very dearly. And until there
11 is a waiver, the right needs to be protected.

12 JUDGE TROUTMAN: But how do you get a waiver
13 saying that it's free and voluntary when one chooses not to
14 participate? I mean, in getting a record of a waiver,
15 can't actions cause one to lose a right that they would
16 otherwise have?

17 MS. ROOT: Not in a situation like this when the
18 right is so incredibly important as the effective
19 assistance of counsel.

20 JUDGE TROUTMAN: And in this particular instance,
21 even when he was brought back into the courtroom, he would
22 still say, okay, I'm leaving. And isn't it difficult on
23 the - - - on a cold record to appreciate what was going on
24 at the time that the court was trying to resolve this?

25 MS. ROOT: I think one of the problems is that

1 there is no colloquy where the - - - it appears that the
2 court is actually trying to resolve this issue. The
3 question of whether or not - - -

4 JUDGE RIVERA: Well, no. I mean, look, yes, he
5 walks out. He won't answer questions. But the judge on
6 the flip side of the waiver you're talking about does ask,
7 do you want to represent yourself?

8 MS. ROOT: Yes.

9 JUDGE RIVERA: And he refuses to answer that
10 question to at least give the judge some sense of what is
11 it this individual wants to do?

12 MS. ROOT: Right. Well - - -

13 JUDGE RIVERA: So I don't think it's - - -
14 myself - - - I'm not speaking for anyone else. It seems
15 hard to make this argument that the judge made no effort.

16 MS. ROOT: You're right. There were efforts
17 made, but it was not a successful waiver.

18 JUDGE RIVERA: But the reason is he keeps walking
19 out, or he won't respond.

20 MS. ROOT: At times he did respond. And in fact,
21 the one time the judge asked him - - -

22 JUDGE RIVERA: Yeah. The response is, I fired
23 him.

24 MS. ROOT: The - - -

25 JUDGE RIVERA: Right?



1 MS. ROOT: The response is, I fired him, which is
2 an indication that he's essentially saying, why is this guy
3 still here representing me?

4 JUDGE RIVERA: Right. Correct.

5 MS. ROOT: And at that point, the judge could
6 have said, listen, I have ordered him to stay here. You
7 can't fire him anymore. You have two options. Either he
8 represents you or he stays silent. Which one do you want?
9 There's no indication that - - - that Mr. Lewis was
10 oriented to what was happening and what his choices were.
11 All we know for sure is that he did not want this attorney
12 representing him. We don't know - - -

13 JUDGE GARCIA: So Counsel - - - I'm sorry - - -
14 is your point that he didn't understand that if he walked
15 out of the room and he fired his attorney, but he couldn't
16 fire him, that the attorney wasn't going to do anything?
17 That's the disconnect?

18 MS. ROOT: It's one of the disconnects. I mean,
19 it's not a likely scenario, I think, for anyone that if you
20 request a new attorney and walk out of the room, that that
21 attorney would be ordered to stay in the room and remain
22 silent.

23 JUDGE RIVERA: The judge is telling you they're
24 not going to do that.

25 MS. ROOT: I'm sorry?

1 JUDGE RIVERA: The judge is telling you they're
2 not going to do that. So - - - and you've told the
3 attorney that you had retained you don't want them to do
4 anything, and you refuse to answer the question, do you
5 wish to represent yourself?

6 MS. ROOT: He said, I don't want you to
7 participate, and I want you to leave when he was firing his
8 retained attorney - - -

9 JUDGE RIVERA: Right. Okay.

10 MS. ROOT: - - - after requesting an effective
11 attorney.

12 JUDGE RIVERA: I understand that.

13 MS. ROOT: So every indication is that what he
14 really wanted was an effective attorney on his case, and
15 when the - - -

16 JUDGE HALLIGAN: But what he wanted was a
17 different attorney, and the judge had declined that
18 request.

19 MS. ROOT: Exactly. And so when - - -

20 JUDGE HALLIGAN: Well, those are different
21 things, I think.

22 JUDGE RIVERA: Okay. So - - -

23 MS. ROOT: Right. Well, he wanted to - - -

24 JUDGE RIVERA: So doesn't he know then that
25 you're not going to get another - - - he understands that.

1 Or are you saying he didn't even understand that?

2 MS. ROOT: Well, he was told you're not going to
3 get another attorney.

4 JUDGE RIVERA: Right. So - - -

5 MS. ROOT: What was not explained to him was that
6 this attorney had been ordered to stay in the room after he
7 had been fired - - - after his paying client had fired him,
8 and he was not told that if - - - if you don't speak up and
9 say something, he's just going to sit here silently and not
10 preserve your right to counsel and was - - -

11 JUDGE CANNATARO: But is that relevant - - -

12 JUDGE RIVERA: And what if he told him to leave
13 and doesn't know he's in the room? Now I'm confused by
14 your argument.

15 MS. ROOT: So he told him to leave, and then
16 every time he comes back in the courtroom, the guy is still
17 there.

18 JUDGE RIVERA: Right.

19 MS. ROOT: And he says, why is this attorney
20 still here? He's essentially saying, I fired him. And
21 what is missing from this conversation is an appreciation
22 and explanation to Mr. Lewis that he's here, but he's not
23 doing anything. He's not represented - - -

24 JUDGE RIVERA: Well, he might have known that if
25 he stopped walking out.

1 MS. ROOT: That's true. But that's - - - the
2 standard is that there needs to be a waiver before this - -
3 -

4 JUDGE TROUTMAN: Could it be - - -

5 MS. ROOT: - - - a defendant - - -

6 JUDGE RIVERA: But if he keeps walking out, then
7 what - - - does the judge follow him out and tell him I'm -
8 - - now I'm really - - - I'm just trying to - - - as a
9 practical matter.

10 MS. ROOT: Right, right? So if he walks out - -
11 -

12 JUDGE RIVERA: I think you've been asked this a
13 couple of times.

14 MS. ROOT: - - - then everybody upholds the right
15 to effective assistance of counsel. No waiver has
16 occurred. And so the attorney should represent him to the
17 best of his ability. That is - - -

18 JUDGE HALLIGAN: So is your complaint with the
19 colloquy or your complaint with the lawyer's decision to
20 stay silent in the face of that instruction?

21 MS. ROOT: Both. I - - - so the instruction was
22 not an instruction to stay silent at trial. And also there
23 was no colloquy whatsoever where Mr. Lewis was never told
24 the dangers of not having an attorney represent you at
25 trial. He wasn't asked, is this what you want? Do you

1 understand what you're giving up? And so there's - - -

2 JUDGE HALLIGAN: But if we conclude - - - I'm not
3 saying we would, but if we were to conclude that his own
4 conduct made, you know, a back and forth that would be, you
5 know, more precise along those lines, made that not
6 possible, then where does that leave us?

7 MS. ROOT: It leaves us with the court having
8 deprived him - - - the court and counsel having deprived
9 him a - - -

10 JUDGE HALLIGAN: So in your view, there's no
11 circumstance in which a defendant can, with his conduct,
12 essentially waive the right to that colloquy?

13 MS. ROOT: I - - -

14 JUDGE HALLIGAN: If the defendant walks out - - -
15 if, hypothetically, the defendant walked out every time a
16 judge attempted to engage in a colloquy, would that still
17 give rise to a violation in your view?

18 MS. ROOT: I - - - if no colloquy has happened -
19 - - and I'm sure there's a circumstance in which, you know,
20 the behavior is so outrageous that, you know, it's
21 impossible to uphold the right. But if there has been no
22 knowing voluntary waiver, the right needs to be upheld.
23 The responsibility falls on the court to ensure a waiver
24 has been affected. And if it has been - - -

25 JUDGE SINGAS: Well, how do you think the court

1 would have done that? Would you have been okay if he said,
2 order him out, handcuff him to the chair. I need to talk
3 to him?

4 MS. ROOT: Well, I don't - - - I don't know. I -
5 - - that's not what should have happened. If he continues
6 to walk out, then say, you know, we haven't had a waiver
7 here. Mr. Lembke, please proceed representing him at
8 trial.

9 JUDGE SINGAS: Well, I think he did tell - - -
10 the court told Lembke, go into the back. Tell him his
11 requests are denied. I think he said on page 829, I
12 anticipate moving forward with Lembke as his attorney.
13 Like, go tell him that. And when Lembke comes back, he
14 says, I told him, and he says, I don't - - - he doesn't
15 want me to participate. So I think he had an
16 understanding - - -

17 MS. ROOT: Right. That was the one and only time
18 that he spoke to Mr. Lewis, and Mr. Lewis said, in the
19 context of firing him, I don't want you to participate, and
20 I want you to leave.

21 JUDGE SINGAS: But it - - - it's after the
22 context of firing him because the judge said to Lembke, go
23 back there and say, we're continuing with you as the
24 attorney.

25 MS. ROOT: Right. That didn't happen on the

1 record, though, and it's critical for there to be - - -

2 JUDGE SINGAS: So we can't trust an - - - as an
3 officer of the court, what Mr. Lembke is telling the court?

4 MS. ROOT: Well, we can absolutely trust him, but
5 it doesn't meet the requirement for a waiver of a
6 constitutional right that has to be on the record so that
7 we can be sure he knew what he was - - -

8 JUDGE TROUTMAN: So what would your rule be in
9 order to get it on the record when the defendant chooses to
10 leave the courtroom? How would you effectuate that waiver?

11 MS. ROOT: There is no waiver. And the right to
12 counsel should've been held.

13 JUDGE TROUTMAN: And so he can walk out. He can
14 engage in all kinds of contemptuous behavior. And the
15 trial is just supposed to go on with the court ordering the
16 attorney. Is that your rule?

17 MS. ROOT: Yes. I mean, that's how it always - -
18 - you know, that is the expectation that a trial goes
19 forward. And it did, in fact, go forward. The entire
20 trial happened without - - -

21 JUDGE RIVERA: How many times before the
22 defendant walks out would you then say, okay, that's enough
23 now?

24 MS. ROOT: I - - - I don't - - -

25 JUDGE RIVERA: Now the defendant has undermined

1 the process - - - the judicial process.

2 MS. ROOT: Yeah. I mean, I don't think it needs
3 to be many times. I think the judge can say if you walk -
4 - -

5 JUDGE RIVERA: Oh, so why aren't the walk - - -
6 there's more than one.

7 MS. ROOT: Uh-huh.

8 JUDGE RIVERA: This is several times.

9 MS. ROOT: Yes.

10 JUDGE RIVERA: And at times when the judge is
11 trying to inform the defendant of the consequences of his
12 choices.

13 MS. ROOT: At no point does he talk about the
14 consequences of waiving counsel, though. So it's unclear
15 whether - - -

16 JUDGE TROUTMAN: Because he's interrupted. How
17 do you force someone to listen to you when he's walking
18 out? You're suggesting that even though the defendant
19 chose to walk out repeatedly while he's being given
20 instructions, that it's somehow the judge's fault that
21 those instructions were not completed?

22 MS. ROOT: I - - - it's not the judge's fault
23 that they weren't completed, but without a waiver, he
24 couldn't have authorized Lembke to not speak during the
25 trial, which is what he did.

1 JUDGE CANNATARO: He didn't suggest - - - the
2 judge didn't suggest to Lembke that he shouldn't speak
3 during the trial, did he? I thought Lembke was telling the
4 judge, based on the conversation that I had with my client,
5 I feel it's my ethical obligation not to participate - - -

6 MS. ROOT: Yes.

7 JUDGE CANNATARO: - - - which I take to mean he
8 fired me. So I have no authorization to do anything.

9 MS. ROOT: Yes. And he also said - - -

10 JUDGE CANNATARO: Much to the judge's chagrin,
11 right?

12 MS. ROOT: Right.

13 JUDGE CANNATARO: The judge wasn't happy about
14 that.

15 MS. ROOT: Well, the judge said I'm not going to
16 let you leave. I'm ordering you to stay here. And then he
17 said, if you believe that - - -

18 JUDGE RIVERA: And isn't that an effort to
19 protect the defendant's rights?

20 MS. ROOT: Yes. But the - - - he - - - him
21 saying, if you believe that your client doesn't want you to
22 speak, then that's fine, go ahead - - -

23 CHIEF JUDGE WILSON: He tells them at some point
24 that he's ordering him to stay here as standby counsel?

25 MS. ROOT: Right.

1 CHIEF JUDGE WILSON: So how do you stay as
2 standby counsel when your client is not present? What are
3 you standing by?

4 MS. ROOT: It's a very good question. I think
5 that there is a - - - the indication that he is standby
6 counsel suggests that Mr. Lewis has gone pro se. But
7 obviously, that has not happened. Mr. Lewis is not in the
8 courtroom. He's not representing himself.

9 JUDGE RIVERA: Again, it can't happen because
10 every time the judge asked him, do you want to represent
11 yourself? He walks out - - - he doesn't respond, and then
12 he walks out. I mean, maybe there's some complaint that he
13 may have against the lawyer.

14 MS. ROOT: Yeah.

15 JUDGE RIVERA: I don't know, but certainly, it
16 seems - - -

17 MS. ROOT: Well, he - - -

18 JUDGE RIVERA: - - - the judge has done a great
19 deal to try and protect this defendant's rights.

20 MS. ROOT: He describes his complaint that he
21 doesn't find this attorney effective and that he would like
22 a new one, and - - -

23 JUDGE RIVERA: Right. And the judge denies that.

24 MS. ROOT: Right. Then we get to the point where
25 Lembke is describing Mr. Lewis as his former client - - -

1 JUDGE RIVERA: Right.

2 MS. ROOT: - - - indicating that he does not
3 consider him Mr. Lewis' attorney.

4 JUDGE RIVERA: I understand.

5 MS. ROOT: And the judge is saying, okay, well,
6 you're standby counsel, but there's nothing to stand by.
7 There is no representation happening. And this wasn't a
8 situation where it was clear to everyone - - -

9 JUDGE RIVERA: Stand by because the defendant
10 keeps walking out.

11 MS. ROOT: But there's no representation
12 happening. So there's no standing by. And it - - - this
13 is a situation - - -

14 JUDGE RIVERA: Can I just ask, what is your view
15 when - - - well, it may not be fair to you. And if you
16 don't want to answer it, I understand. And that's fine.
17 But what is a lawyer going to do in that situation? Was
18 the lawyer supposed to actually, quote, unquote, "represent
19 him"?

20 MS. ROOT: Yes. I mean, the - - - no waiver had
21 been affected and the instruction to not participate was in
22 the context - - -

23 JUDGE RIVERA: Even though the client fires him?

24 MS. ROOT: If he's been ordered to stay in the
25 courtroom - - -

1 JUDGE RIVERA: Based on the judge's order. Okay.

2 MS. ROOT: Right.

3 JUDGE RIVERA: Okay.

4 MS. ROOT: So the order - - - the judge has
5 ordered him, you are the attorney now, whether you think
6 you're fired or not. As his attorney, it is his job to
7 provide meaningful representation, which he did not.

8 CHIEF JUDGE WILSON: Thank you.

9 MS. ROOT: Thank you.

10 MS. WALENDZIAK: Good afternoon. Amy Walendziak,
11 on behalf of the People again. Under this court's
12 decisions in Henriquez and Kelly a defendant can waive the
13 right to the effective assistance of counsel. And it's the
14 People's position that this particular defendant waived his
15 right. So he is not entitled to any relief on a claim that
16 Mr. Lembke was ineffective in this matter.

17 CHIEF JUDGE WILSON: Can I start you with a
18 hypothetical that's not - - -

19 MS. WALENDZIAK: Of course.

20 CHIEF JUDGE WILSON: - - - not this case?
21 Suppose - - - there are defendants who sometimes behave so
22 badly in court that they can't - - - they've waived the
23 right to be present, different from the right to counsel.
24 With me so far?

25 MS. WALENDZIAK: Yes. Absolutely.

1 CHIEF JUDGE WILSON: So let's suppose we've got
2 one of those cases where this is just somebody who has
3 clearly waived his right to be present. At that point,
4 could that person - - - could the trial proceed without a
5 lawyer representing the person?

6 MS. WALENDZIAK: Not without some type of waiver
7 having happened, though, I couldn't force - - -

8 CHIEF JUDGE WILSON: Well, that's the question, I
9 guess, is could you - - - could a defendant waive - - -
10 simultaneously waive either through conduct or proper
11 colloquy - - -

12 MS. WALENDZIAK: Right to be present.

13 CHIEF JUDGE WILSON: - - - right to be present
14 and the right to counsel?

15 MS. WALENDZIAK: I - - - candidly, I think in
16 that scenario, we would be talking about more of a
17 forfeiture analysis than necessarily a waiver - - -

18 CHIEF JUDGE WILSON: Okay.

19 MS. WALENDZIAK: - - - because my understanding
20 is - - -

21 CHIEF JUDGE WILSON: But could that happen?
22 Could the trial proceed with no lawyer and no defendant
23 present?

24 MS. WALENDZIAK: I think there have been cases
25 where that has happened. I believe in People v. Aiken, I

1 believe this court's decision, the defendant absented
2 himself, and there was no waiver. And then I believe the -
3 - - I don't recall exactly if counsel appeared but did not
4 mount a defense or simply did not attend the trial as well.
5 However, I don't know what the result of a waiver analysis
6 in that particular instance would be. Again, those aren't
7 the facts of this case. There was a - - - an attempted
8 waiver here to the extent that the defendant would comply
9 with that.

10 JUDGE SINGAS: And did you argue anywhere about
11 forfeiture - - - that this was a forfeiture?

12 MS. WALENDZIAK: I did not, Judge Singas, in this
13 particular case, again, because there was a waiver that was
14 conducted with this defendant. I think I - - -

15 JUDGE CANNATARO: And what - - - I'm sorry. So
16 what was the waiver here?

17 MS. WALENDZIAK: The waiver was the multiple
18 colloquies that the court conducted with the defendant. I
19 believe that there are four colloquies that the court
20 attempted to engage in before - - -

21 JUDGE CANNATARO: And just assuming for purposes
22 of this question, that there wasn't a fully articulated
23 classical waiver colloquy, which I don't think you'd
24 agree - - - disagree with, right?

25 MS. WALENDZIAK: I would say that the waiver that

1 was conducted was sufficient under the circumstances of
2 this case to ensure that this defendant knowingly,
3 voluntarily, and intelligently waived his right to counsel.

4 JUDGE CANNATARO: Okay. But can you be specific
5 as to what elements of those colloquies - - -

6 MS. WALENDZIAK: Sure.

7 JUDGE CANNATARO: - - - constitute a sufficient
8 waiver?

9 MS. WALENDZIAK: Sure. So with the first
10 instance, I believe this - - - the first attempted colloquy
11 occurred after the defendant made his initial request for
12 new counsel. The court denied that, and he left to go back
13 to sit with the jail deputy. And this was after he had
14 instructed Lembke, and Lembke relayed to the court that
15 Lembke was to do nothing. At that point, the court
16 informed defendant that he had the absolute right to be
17 present and to participate in his own defense. And then
18 that was when he asked him, do you want to represent
19 yourself? And the defendant, I believe, at that point,
20 walked out of the courtroom instead of answering.

21 On the second time that he was brought before the
22 court, the court, again, told him, you have the right to
23 assist in your own defense. You have the right to confront
24 witnesses. You have the right to testify on your own
25 behalf, and you have the right to be present.

1 And then on the third instance, which I believe
2 is the morning that opening statements and the presentation
3 of witnesses was set to begin, the court, again, tells him
4 that you have the right to be present and confront
5 witnesses. You have the right to have Mr. Lembke assist
6 you in your defense. You have the right to give an opening
7 statement, a closing statement, cross-examine witness - - -
8 witnesses, and your attorney can put on a defense for you.

9 And then on the very last day of trial before the
10 charge and - - - the charge conference and closing
11 statements, the court told him again that you have the
12 right to be present and assist in your own defense and that
13 you can change your mind at any moment. And I may have
14 missed one or two of the rights that the court relayed to
15 him. But again, taking this - - -

16 JUDGE CANNATARO: But you add it all up, and
17 that's a - - -

18 MS. WALENDZIAK: You add it - - -

19 JUDGE CANNATARO: - - - that's a waiver?

20 MS. WALENDZIAK: You add it all up. And again,
21 the fact that there were multiple attempts, and at
22 different points during these various colloquies, the
23 defendant is kind of hampering the court's ability to do
24 anything with him because he keeps walking out of the
25 courtroom.

1 JUDGE RIVERA: Well, under all of those examples,
2 or as you've described them, are the court assuming that
3 he's waiving the right to counsel, right? Because he - - -
4 the judge is immediately going to - - - let me tell you
5 your rights for self-representation.

6 MS. WALENDZIAK: Yes. And that's because, at the
7 outset of this, we not only have Mr. Lembke telling the
8 court that my client has instructed me not to participate,
9 but the defendant has repeatedly told the court, I fired
10 Mr. Lembke. I'm choosing not to be here. And he - - -

11 JUDGE RIVERA: Because he wants another lawyer?

12 MS. WALENDZIAK: Yes. And I don't - - -

13 MS. WALENDZIAK: He doesn't want to proceed with
14 this lawyer. I think that's very clear from the record.

15 MS. WALENDZIAK: I think that's very clear. But
16 I also think equally as clear is that the defendant wasn't
17 entitled to a new lawyer in this case. I believe this
18 court's decision in Arroyave showed - - - this was a delay
19 tactic. I think that the court's repeated assertions that
20 he thinks the defendant is trying to delay the trial are
21 supported by what was going on here.

22 CHIEF JUDGE WILSON: Why shouldn't the judge have
23 told Mr. Lembke, you have to mount a full defense?

24 MS. WALENDZIAK: Well, I don't think the court
25 could order Mr. Lembke to mount a particular type of

1 defense - - -

2 CHIEF JUDGE WILSON: No, not a particular type.
3 But just you have a professional responsibility to
4 represent your client.

5 MS. WALENDZIAK: Well, I don't think that the
6 court could necessarily order Mr. Lembke to do any
7 particular action because if, say, the defendant were - - -

8 CHIEF JUDGE WILSON: Well, he ordered him to
9 stay.

10 MS. WALENDZIAK: He did. But I guess getting to
11 what I was trying to say is that if this were a normal
12 situation with a defendant sitting there in court with
13 their attorney, the court has no ability to order that
14 attorney to give an opening statement or a closing
15 statement. That's - - -

16 JUDGE RIVERA: Yeah. But he does say to the
17 defendant, when the defendant says, Your Honor, I fired Mr.
18 Lembke, and I do not want to be here, court says, okay, I'm
19 ordering Mr. Lembke to represent you. The defendant
20 understands that the judge has ordered the attorney to
21 represent him.

22 MS. WALENDZIAK: And yet he continues to, by the
23 accounts of this record, tell Mr. Lembke not to
24 participate. So - - -

25 JUDGE RIVERA: By the way, after he specifically

1 asked the defendant, do you want to represent yourself?
2 And there's no response.

3 MS. WALENDZIAK: Yes. And that was part of the
4 problem too, is every time there is this, say - - - the
5 court is saying, okay, I understand you don't want Mr.
6 Lembke to represent you.

7 JUDGE RIVERA: Yes. But isn't - - -

8 MS. WALENDZIAK: But - - -

9 JUDGE RIVERA: - - - the defendant's
10 understanding that the court has ordered the attorney to
11 represent him, but he doesn't want to be there if this
12 attorney is representing him because he's dissatisfied. Of
13 course, he thinks this is wrong. Nobody should be
14 proceeding with this lawyer. He doesn't want this lawyer.
15 He thinks this lawyer is undermining him, doesn't
16 understand him, et cetera, whatever his dissatisfaction is.
17 When he walks out, isn't his understanding, the lawyer is
18 going to represent me?

19 MS. WALENDZIAK: I don't believe so - - -

20 JUDGE RIVERA: Okay.

21 MS. WALENDZIAK: - - - because again of his
22 instructions to the lawyer saying do not represent me.

23 JUDGE RIVERA: But that's not to the defendant.

24 MS. WALENDZIAK: I'm sorry. I do - - -

25 JUDGE RIVERA: That's not telling the defendant -

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MS. WALENDZIAK: I'm sorry. I - - -

JUDGE RIVERA: - - - that he's refused to comply with my order, right?

MS. WALENDZIAK: Well, the - - - I - - - what I was getting at is that the defendant is telling his attorney not to participate.

JUDGE RIVERA: Right.

MS. WALENDZIAK: And I think that the defendant is therefore aware that his attorney is following his instructions. And I think that - - -

JUDGE RIVERA: Even if the court is saying, I've ordered him to represent you?

MS. WALENDZIAK: Well, again, I - - -

JUDGE RIVERA: Or you think later in the colloquy - - - in these various colloquies, it becomes very clear to - - - or it's - - -

MS. WALENDZIAK: Yes. But the - - -

JUDGE RIVERA: - - - or at least there's enough in the record that a defendant should be able to understand, even though I've ordered him, this lawyer refuse - - - is not going to represent him?

MS. WALENDZIAK: Yes, Judge Rivera. I agree with the latter of what you were saying there - - -

JUDGE RIVERA: Okay.

1 MS. WALENDZIAK: - - - because, again, I
2 believe - - - I don't recall exactly which colloquy this
3 was in. I - - - there are multiple.

4 JUDGE RIVERA: Yes. Yes, I know.

5 MS. WALENDZIAK: But during one of those
6 colloquies, the court tells the defendant, you know, Mr.
7 Lembke has told us that - - - or told me that you don't
8 want him to do anything. Is that correct? You know, are
9 you sure you know what you're doing? I - - - at this
10 point, I think the defendant - - - there is enough in here
11 to show that he should be reasonably aware that his
12 attorney is complying with his instructions.

13 JUDGE CANNATARO: Can I just ask you, at any of
14 these times that the defendant is saying to the court, you
15 know, I've fired Mr. Lembke, and I want a new lawyer, is
16 there a - - - an exchange that either says or in sum and
17 substance comes to something like, that's denied. Your
18 choice is either move forward with Mr. Lembke or represent
19 yourself. Is - - - because I don't know that the choice
20 was presented to him in that way.

21 MS. WALENDZIAK: I don't - - - Judge Cannataro, I
22 don't believe it was presented quite as an ultimatum,
23 almost, of either you go with Mr. Lembke or you go by
24 yourself.

25 JUDGE CANNATARO: I don't know if it's an

1 ultimum. It's just a statement of what's going on. I'm
2 not - - -

3 MS. WALENDZIAK: Yes.

4 JUDGE CANNATARO: - - - giving you a new lawyer.
5 So you either have to use Mr. Lembke or represent yourself.
6 And that, to me, would be the essence of a waiver.

7 MS. WALENDZIAK: Well, I think there is - - - I -
8 - - again, I apologize for saying - - -

9 JUDGE RIVERA: What about what I quoted you?

10 MS. WALENDZIAK: The - - - well, in - - - at that
11 point - - -

12 JUDGE RIVERA: I've ordered him to represent you.
13 Or do you want to represent yourself?

14 JUDGE CANNATARO: Is that in there?

15 MS. WALENDZIAK: Yes, I believe so.

16 JUDGE RIVERA: Yes.

17 MS. WALENDZIAK: That is - - - I want to say it's
18 the second colloquy - - -

19 JUDGE RIVERA: I think you're right about that.

20 MS. WALENDZIAK: Yeah. So I think at that - - -

21 JUDGE SINGAS: Can we get to the sentencing?
22 Because I'm curious about your defense of the consecutive
23 sentences and why the possession - - - the simple
24 possession with - - - possession with intent of the same
25 weapon is not the same actus reus.

1 MS. WALENDZIAK: Of course. Would you like me to
2 finish addressing the ineffective assistance of counsel, or
3 should I solely address the second point?

4 JUDGE SINGAS: I mean, I'm ready for the second
5 point. I don't know about my colleagues.

6 MS. WALENDZIAK: Okay.

7 CHIEF JUDGE WILSON: Yeah. I might bring you
8 back, but go ahead.

9 MS. WALENDZIAK: Yeah. So there are the four
10 counts here. So there are two counts of the intent to use
11 unlawfully and the two counts of the simple possession. So
12 I suppose with - - - I believe it's May 22nd - - - I'll
13 refer to the one of each with the first incident and the
14 one of each with the second incident. So I believe the
15 second incident is probably the easiest to conceptualize.
16 We have the defendant sitting in a lawn chair. I - - -
17 it's on somebody's front lawn, and the police officers come
18 up to him. So before they've come up to him, he had that
19 gun in his - - - I believe it was waistband. So there has
20 been a completed possession. He has been unlawfully
21 possessing that loaded firearm without a license outside of
22 his home or place of business. And then it's when the
23 police officers come up and attempt to talk with him, and
24 there's the scuffle that ensues that he tries to pull it
25 out. And that was where the intent to use it unlawfully

1 against the officers during that scuffle comes in. And
2 that happens subsequent to a completed simple possession.

3 JUDGE SINGAS: Well, I mean, I don't know if I
4 see it that way because I don't know if it was the
5 defendant trying to pull it out to use it unlawfully or
6 whether the police were trying to remove it from his
7 waistband to secure it. I don't know that that's that
8 clear, but I don't think that's at issue. But my point is,
9 it's the same act of possessing it and then possessing it
10 with intent to use.

11 MS. WALENDZIAK: Well, again, that - - - under
12 this court's decision in Brown and I believe Malloy from
13 2019, if that - - - if the simple possession has been
14 completed before the intent to use unlawfully has come
15 about, there is a completed crime on that subdivision 3
16 charge - - -

17 JUDGE SINGAS: Well, won't that happen in any
18 crime really, where you have a gun like a gunpoint robbery
19 or a gunpoint burglary, you - - - you'll have the
20 possession of the gun absent somebody walking in and
21 handing a weapon to somebody who then uses it to commit a
22 robbery?

23 MS. WALENDZIAK: Well, I think there are many
24 cases when consecutive sentencing is permissible. However,
25 I do think there are circumstances where the - - - there

1 isn't any distinction between the simple possession and the
2 intent to use unlawfully.

3 JUDGE HALLIGAN: And what would that look like?
4 Can you give us an example?

5 MS. WALENDZIAK: So I think that in a part - - -
6 so in, say, a murder case where a defendant was going
7 specifically to murder a particular person and obtained the
8 gun in the process, there has - - - if he's already formed
9 the intent to murder the victim before obtaining the gun,
10 and then obtains the gun in order to do that, there's not
11 a - - - there's not a separate possession before that
12 intent has been formed.

13 JUDGE SINGAS: Well, let me ask you this.
14 Suppose there's someone who's a gang member, and he gets a
15 gun because he wants to protect himself. So for this
16 period of time, he has a gun, simple possession.

17 MS. WALENDZIAK: Yeah.

18 JUDGE SINGAS: Then he finds out that there's
19 going to - - - a gang member from another gang is looking
20 for him and is going to be at this corner, and they want to
21 engage, right? So he says, okay, I'm going to take this
22 gun that I've had now, and for this period, it's intent to
23 use, because if the - - - if this guy comes at me, I'm
24 going to use this gun, right?

25 MS. WALENDZIAK: Yes.

1 JUDGE SINGAS: But now suppose that that other
2 gang member drives by, doesn't stop, doesn't engage him,
3 keeps driving. Those two periods of possession of that
4 same gun can be run consecutively?

5 MS. WALENDZIAK: I do think there has been a
6 completed simple possession prior to the intent being
7 formed. I don't know that we - - -

8 JUDGE SINGAS: But the act is the same.

9 MS. WALENDZIAK: But again, it's the - - - it's
10 not only the act. There has to also be the intent in
11 conjunction with it. So I think, in that scenario, when
12 your intent and your act have completed the simple
13 possession, and then you subsequently form a new intent,
14 that is a separate crime under the CPW statute. And I do
15 know that this court is probably going to hear varied
16 circumstances with a similar issue in the later cases
17 today. I would - - - subject to the concession that I made
18 in my brief regarding the two simple possession counts in
19 this matter, I would ask the court to modify the sentence
20 accordingly. And though - - - although, Chief Judge
21 Wilson, I think you might have a question about the
22 ineffective assistance of counsel.

23 JUDGE GARCIA: What would - - - I'm sorry. What
24 would the result of that concession be in terms of an
25 actual sentence?

1 MS. WALENDZIAK: It has no practical effect, but
2 it would - - - defendant was sentenced to forty years
3 total. It would make his sentence thirty years, which is
4 still reduced by matter of law to the twenty that - - -

5 JUDGE GARCIA: I see. Right.

6 MS. WALENDZIAK: Yeah. There - - -

7 CHIEF JUDGE WILSON: You are very perceptive.
8 Yes. Your colleague, I guess, Mr. Hauser?

9 MS. WALENDZIAK: Ms.

10 CHIEF JUDGE WILSON: Is that right?

11 MS. WALENDZIAK: Ms.

12 CHIEF JUDGE WILSON: Ms. Hauser. I'm sorry. My
13 mistake. Seemed to - - - she raised a - - - an interesting
14 issue, which - - - with the court, right? And this is at
15 the end of the first day of trial, which is her discomfort
16 with the idea that Lembke was going to sit there and do
17 nothing. And the court then says - - - and her position as
18 an officer of the court, he can't do that. And I think
19 that that rests on the idea that most decisions at trial
20 are not up to the client, right, whether to cross-examine a
21 witness, whether to put a witness on, all those things,
22 whether to open, whether to close. The client can tell you
23 whatever the client wants, but it's ultimately your
24 professional responsibility. I think she's right about
25 that. She is asking the court for clarification. The

1 court then says - - - and Mr. Lewis is present at this
2 point - - - that Mr. Lewis instructed Mr. Lembke not to do
3 anything and has given him a specific instruction. And
4 then Mr. Lembke says, well, I think he was very clear the
5 last time he was here in court that he has discharged me as
6 a lawyer. So that creates a different circumstance. So
7 why doesn't that sort of support his position here? That
8 what Mr. Lewis thought was not that he was telling Lembke
9 to sit there and do nothing at trial. He was just saying,
10 I fired him, and I don't want him here at all?

11 MS. WALENDZIAK: I - - - well, again, I think at
12 that point still, the judge has repeatedly told him, I'm
13 denying your request for a new attorney.

14 CHIEF JUDGE WILSON: Right.

15 MS. WALENDZIAK: And Mr. Lembke is going to
16 continue representing you. And then he continues with this
17 course of conduct that supports that he is telling Lembke
18 to do nothing. I think that this - - - the facts of this
19 case, in particular, with the continued stating, I fired
20 Mr. Lembke, and I'm choosing not to be here, quite similar
21 to the facts of Kelly, where that particular defendant - -
22 -

23 CHIEF JUDGE WILSON: Yeah. I guess my question
24 is - - - well, go ahead. Go ahead.

25 MS. WALENDZIAK: Oh. So in Kelly, the defendant

1 kept saying, in response to any question that the judge
2 asked trying to have a colloquy was, I believe it's Allah
3 will judge me. Something to that effect, essentially, that
4 he's not willing to accept any attorney representing him.
5 So I think that we could - - -

6 CHIEF JUDGE WILSON: Yeah. I'm thinking about
7 this a little differently. What - - - from Mr. Lewis's
8 perception - - - point of view, sitting there, listening to
9 this, with the prosecutor saying, the lawyer can't just sit
10 here. He's got an ethical responsibility. The judge
11 saying, well, he's going to sit here. And he was told not
12 to say anything by his client, and the lawyer saying,
13 that's not what he told me. He told me that he's firing
14 me, not to sit here and do nothing if there's a trial. And
15 at the end of the day, what is it that Lewis likely thinks?

16 MS. WALENDZIAK: Well, I think, again, there has
17 been - - - this kind of ties hand in hand with that waiver
18 of, I think he has waived through his all - - - of these
19 extended colloquies, his right to the effective assistance
20 of counsel here. And I think when we're - - - when we're
21 talking about the - - - the counsel having the discretion
22 and has the ultimate decision-making over giving an opening
23 or a closing or cross-examining, all of those decisions
24 come out in the context of a defendant who, having accepted
25 the representation of that attorney and having reposed

1 decision-making to that attorney, they don't get to
2 override the attorney's decision on that matter. And here,
3 we don't have a defendant that has accepted Mr. Lembke's
4 representation.

5 CHIEF JUDGE WILSON: Even though the court has
6 ordered it, maybe.

7 MS. WALENDZIAK: Well - - - and I think that is
8 why we're - - - the court is kind of in a very difficult
9 position here in terms of how to proceed because we have a
10 defendant that's telling his attorney to do nothing.

11 CHIEF JUDGE WILSON: Well, I wonder if we
12 would've been here if the judge had done what Ms. Hauser
13 asked.

14 MS. WALENDZIAK: Well, but I think that that kind
15 of cuts against the fact that the judge didn't have to give
16 him a new attorney. I think the record fully supports that
17 this was a delay tactic. It was the point - - -

18 CHIEF JUDGE WILSON: Right. That just tell Ms. -
19 - - tell Mr. Lembke, you've got to put on a defense.

20 MS. WALENDZIAK: And - - -

21 CHIEF JUDGE WILSON: You have an ethical
22 obligation. I mean, that's what your colleague was saying.

23 MS. WALENDZIAK: And I think the court is telling
24 Mr. Lembke through ordering him to be here and saying,
25 well, it - - - it's up to you what you're going to do about

1 that, but I'm ordering you to do what I can, because,
2 again, I think if Ms. - - - if the court had acquiesced to
3 giving the defendant a new attorney here, he wasn't
4 entitled to one. He didn't make serious complaints. I
5 don't think there's any dispute that there wasn't a basis
6 for - - - or I'm sorry - - - that there wasn't good cause
7 for substituting Mr. Lembke. And I don't think the court
8 abused its discretion in finding that this was a delay
9 tactic on Arroyave. And so I don't really think the court
10 had a lot of other options than to proceed as went through
11 because the defendant is not entitled to a new attorney.
12 He does not want to represent himself. He continuously
13 told his attorney not to participate. And under those
14 circumstances, I would ask this court to find that there
15 was a waiver of his right and to affirm the conviction.
16 Thank you.

17 CHIEF JUDGE WILSON: Thank you.

18 MS. ROOT: The one and only time that the judge
19 asked Mr. Lewis if he had instructed his attorney to sit
20 there and do nothing, Mr. Lewis responded, no. While he
21 did walk out on colloquies multiple times, the only time he
22 was asked about in his instructions to Mr. Lembke, he
23 denied asking him to sit silently.

24 JUDGE GARCIA: What page is that on, Counsel?
25 I'm sorry.

1 MS. ROOT: That is on - - - I believe it's A-192.
2 He enters - - -

3 JUDGE RIVERA: He says that because what he tells
4 the court is, I fired him.

5 JUDGE CANNATARO: I don't think he says that.

6 MS. ROOT: So it's A-192 or page 288 in the
7 original page numbering. So the court says, and Mr. Lembke
8 told me you told him not to do anything. Just sit here.
9 Is that right? The defendant, no.

10 JUDGE HALLIGAN: But the next line - - -

11 JUDGE RIVERA: Doesn't he at some point say, I
12 told him I fired him?

13 MS. ROOT: Absolutely.

14 JUDGE HALLIGAN: Okay. That's the next line - -
15 -

16 MS. ROOT: Yes.

17 JUDGE HALLIGAN: - - - he says, what did you tell
18 Mr. Lembke about your - - - or his representation of you?
19 Nothing. I fired him, and I chose not to be here. And you
20 told him not to be here back and forth. Don't we have to
21 look at those responses together?

22 MS. ROOT: Absolutely. And that continues to
23 support the clear record that Lewis did not tell him
24 anything about how he should conduct himself in court. He
25 just said, you're not my lawyer. You're fired.

1 JUDGE HALLIGAN: I'm just struggling to - - - it
2 seems to me that the judge is saying, Mr. Lembke said you
3 told him not to do anything. Is that correct? Yes or no?
4 And the defendant is not accepting that dichotomy, right?
5 Instead, he's saying nothing. I fired him. He's not, I
6 don't think responding, to the question as I read that
7 portion of the record. So what should the judge have done
8 specifically at that point in your view?

9 MS. ROOT: So I think he does answer the
10 question, what did you tell him about his representation of
11 you? He says, nothing. I told him nothing about what he
12 should do in the courtroom. I fired him. And he - - - Mr.
13 Lewis - - -

14 JUDGE HALLIGAN: So what should the judge have
15 done at that point? The judge has - - -

16 MS. ROOT: Yes.

17 JUDGE HALLIGAN: - - - asked him, did you tell
18 Mr. Lembke to do nothing and sit here? And I don't think
19 he responds specifically to that question.

20 MS. ROOT: Yes. So - - -

21 JUDGE HALLIGAN: So what should the judge then
22 have asked instead?

23 MS. ROOT: So I think the judge could say, I
24 appreciate that you feel like Mr. Lembke has been fired. I
25 am not letting him leave. So our options now are: he

1 either meaningfully represents you, or we can conduct a
2 waiver where you can say - - -

3 JUDGE HALLIGAN: Well, but he says on the next
4 page, so to be clear, you've fired Mr. Lembke, and I've
5 told you you can't because it was just before the trial was
6 going to start, et cetera?

7 MS. ROOT: Right. But there's no way that Mr.
8 Lewis could have understood from that that he would sit
9 silently throughout the whole trial. He understands that
10 Mr. Lembke is there. He has no reason to understand - - -

11 JUDGE RIVERA: That's because he walks out.

12 MS. ROOT: Right. Right. But that doesn't mean
13 he's waived his right to effective assistance of counsel.
14 It just means he doesn't know what's happening in the
15 courtroom. And it's absolutely a difficult situation for
16 the judge, but not necessarily an excuse to allow this - -
17 - the most fundamental - - -

18 JUDGE RIVERA: Let me ask you this. Let's say
19 the judge asked exactly - - - or told him these are your
20 options.

21 MS. ROOT: Yes.

22 JUDGE RIVERA: Does exactly what you said the
23 judge should have done. And defendant does what he's done
24 every single time, no response and then walks out.

25 MS. ROOT: Right. So - - -

1 JUDGE RIVERA: What do you think that
2 constitutes? Is that now a waiver?

3 MS. ROOT: The right has not been waived because
4 he has not said on the record - - -

5 JUDGE RIVERA: So it sounds like you don't think
6 there's ever a waiver.

7 MS. ROOT: If - - - if he - - -

8 JUDGE RIVERA: Is it a forfeiture?

9 MS. ROOT: It's not forfeiture because the - - -
10 I - - - there has to be an on the record indication that
11 he - - -

12 JUDGE RIVERA: Okay. So what should happen?
13 Should the defendant choose to return, and the judge says
14 it again, and again, he conducts himself in exactly the
15 same way he has in the past, no response and walks out, is
16 there, at any point, where you would say, all right, now -
17 - - now it's a waiver or forfeiture, whichever way you want
18 to describe it, but the judge has done what they needed to
19 do?

20 MS. ROOT: Not unless there's an on the record
21 indication that he appreciates the meaning of the right to
22 be called - - -

23 JUDGE RIVERA: Okay. In my example, the
24 defendant keeps walking out, won't respond. So now what
25 a - - - a judge is not going to continue to, right, do the

1 same thing over and over with the same reaction. So what
2 then should the court do?

3 MS. ROOT: He should order Lembke to represent
4 him at trial especially given - - -

5 JUDGE RIVERA: And if the lawyer refuses to do
6 that, now where are we?

7 MS. ROOT: If the - - - then he's still been
8 deprived of - - - of effective assistance of counsel
9 because no waiver has been effected.

10 JUDGE RIVERA: And he gets another trial?

11 MS. ROOT: Yes.

12 JUDGE RIVERA: Where perhaps he'll do the same
13 thing again if he doesn't - - -

14 MS. ROOT: Yes.

15 JUDGE RIVERA: - - - get a lawyer?

16 MS. ROOT: So the - - - the context of the one
17 conversation that happened between Lembke and Lewis about
18 him requesting that he not say anything and leave was in
19 the context of firing him. So there's really no indication
20 that this is what he wanted during his trial, and he was
21 absolutely causing a challenge for the court, but this - -
22 -

23 JUDGE RIVERA: So if he doesn't - - - what he
24 did - - - he said what he didn't want is for the lawyer to
25 be there at all because he fired him.

1 MS. ROOT: Correct.

2 JUDGE RIVERA: That he shouldn't be here.

3 MS. ROOT: Right. And the expectation - - -

4 JUDGE RIVERA: You're saying that - - -

5 MS. ROOT: - - - is that he would be assigned
6 another lawyer.

7 JUDGE RIVERA: You're saying the problem is that
8 the lawyer is there - - -

9 MS. ROOT: The - - -

10 JUDGE RIVERA: - - - when he's told him, I don't
11 want him here?

12 MS. ROOT: The problem is that he is there being
13 his lawyer. So he is saying, I don't - - - you're not my
14 lawyer. I want another lawyer. And what he's not let in
15 on is that that is being interpreted as, I want you to
16 stay, sit silently, and do nothing.

17 JUDGE RIVERA: To do exactly what I didn't want
18 you to do, that's the problem, right?

19 MS. ROOT: Right.

20 JUDGE RIVERA: He fired the lawyer, did not want
21 him there. So your complaint is, oh, so if he's there,
22 then he should represent him, exactly what the defendant
23 did not want?

24 MS. ROOT: Well, the defendant - - -

25 JUDGE RIVERA: Contrary to the defendant's

1 wishes - - -

2 MS. ROOT: - - - did not want this attorney
3 representing him. No one ever floated the idea, do you
4 like the idea of someone just sitting here and doing
5 nothing? Or the one time that idea was posed to him, he
6 said, no.

7 JUDGE TROUTMAN: Don't you think that puts the
8 defendant in a position where he's controlling the
9 proceedings and not the court?

10 MS. ROOT: Well, the - - - if he won't do a
11 waiver, then he's not controlling the proceedings because
12 the trial just goes forward with both sides doing their
13 job - - - I - - - the People's proof being meaningfully - -
14 -

15 JUDGE TROUTMAN: And then he appeals, and he says
16 I didn't - - - he didn't consider - - - he was ineffective
17 because he didn't do X, Y, Z?

18 MS. ROOT: All right. I mean, look, depending on
19 the - - - as long as meaningful representation was
20 provided, that wouldn't be a - - -

21 JUDGE TROUTMAN: So he's to have forced
22 representation. Is that your rule?

23 MS. ROOT: It's not - - - it's not forced
24 representation when he never waived - - - when he never
25 indicated that he didn't want representation at all.

1 JUDGE TROUTMAN: When he says he didn't want that
2 lawyer, you're saying the court should have made that
3 lawyer - - - even when the lawyer says, I'm not going to
4 because he doesn't want to, the court should have ordered
5 him to participate. So he should have had a forced lawyer.

6 MS. ROOT: Well, it's - - - he's forcing the
7 attorney to participate. He's not forcing him to have a
8 lawyer. He never indicated that he didn't want a lawyer.
9 He just indicated that he didn't want this lawyer. And
10 this court held - - -

11 JUDGE TROUTMAN: Could you see how the court
12 could have thought that the defendant was engaging in delay
13 tactics to disrupt proceedings?

14 MS. ROOT: I absolutely understand how the court
15 could've seen that.

16 JUDGE TROUTMAN: And can you see how allowing
17 what you're suggesting would be quite disruptive to trial
18 courts all around the state?

19 MS. ROOT: Well, so a couple things. One is,
20 this court held in *People v. Lewis* last year that a court
21 cannot forgo a meaningful inquiry into a defendant's waiver
22 of a fundamental right simply because they suspect the
23 defendant has obstreperous motives. So yes, this was a
24 very difficult situation.

25 JUDGE TROUTMAN: That's not about just suspecting

1 motives. But when you're engaging in conduct that doesn't
2 allow for the conversation to take place, that's different.
3 That's not the court abdicating its responsibility. That's
4 the court being - - - in this instance, the argument is the
5 court was thwarted by the defendant's own actions.

6 MS. ROOT: I don't know that that's true because
7 the judge only asked him one question about whether he
8 wanted no advocacy whatsoever. There were - - - he spoke a
9 lot about the right to be present in the courtroom. And it
10 was during those conversations that he often walked out - -
11 -

12 JUDGE TROUTMAN: And each time the court engaged
13 in colloquy, the court was interrupted by the - - - by the
14 leaving of the defendant. Defendant just walked out.

15 MS. ROOT: I - - -

16 JUDGE TROUTMAN: So the - - -

17 MS. ROOT: Yes.

18 JUDGE TROUTMAN: - - - the problem here is we
19 don't know how far the court could have even gone if the
20 defendant stood still and had a meaningful dialog with the
21 court. That is, in part, part of the problem.

22 MS. ROOT: Yes. There are also sections in this
23 transcript where the judge speaks for pages and pages with
24 Mr. Lewis present. And so the question is, had he, instead
25 of telling him that he believes he's engaging in delay

1 tactics, instead asked him questions about his waiver of
2 right to counsel, would - - - would we have gotten a waiver
3 if he had started there? I think it's also important to
4 point out that the - - - the waiver the People point to
5 that - - - where he does actually discuss what could happen
6 at a trial, that all happens after the jury - - - after
7 jury selection has happened and the jury has been sworn.
8 And under Crampe, we really need to look at the defendant's
9 knowledge at the time the waiver happened. What did Mr.
10 Lewis understand at the moment that jury selection started?
11 He had not been told this is a really foolish idea. This
12 is very dangerous to not have a lawyer represent you. He
13 had not said on the record, I do not want any meaningful
14 advocacy. He had not been told, you know, the - - - this
15 is the value of counsel. This is a really important piece
16 of your trial here, and you should think long and hard
17 about giving it up. None of those conversations happened,
18 and there was no waiver on the record. And therefore, Mr.
19 Lewis was deprived of his right to counsel, and his
20 conviction should be reversed.

21 CHIEF JUDGE WILSON: Thank you.

22 (Court is adjourned)

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

I, Brandon Deshawn, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Lewis (Jarvis), No. 23 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Brandon Deshawn

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