

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

COURT OF APPEALS

STATE OF NEW YORK

-----  
The People of the State of New York

Respondent,

-Against-

No. 23

Boris Brown

Appellant.

-----

20 Eagle Street  
Albany, New York  
March 19, 2019

Before:

CHIEF JUDGE JANET DIFIORE  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE LESLIE E. STEIN  
ASSOCIATE JUDGE EUGENE M. FAHEY  
ASSOCIATE JUDGE MICHAEL J. GARCIA  
ASSOCIATE JUDGE ROWAN D. WILSON  
ASSOCIATE JUDGE PAUL FEINMAN

Appearances:

DAVID J. KLEM, ESQ.  
CENTER FOR APPELLATE LITIGATION  
Attorney for Appellant  
120 Wall Street, 28th Floor  
New York, NY 10005

SYLVIA WERTHEIMER, ADA  
NEW YORK COUNTY DISTRICT ATTORNEY'S OFFICE  
Attorney for Respondent  
One Hogan Place  
New York, NY 10013

Sharona Shapiro  
Official Court Transcriber



1 CHIEF JUDGE DIFIORE: Good afternoon, counsel.

2 MR. KLEM: Good afternoon, Your Honors. Could I  
3 request three minutes for rebuttal, please?

4 CHIEF JUDGE DIFIORE: You may have three minutes.

5 MR. KLEM: The representation of Mr. Brown was  
6 completely unethical. A lawyer cannot accept payment - - -

7 JUDGE STEIN: Let's assume that that's correct.  
8 Does that answer the question before us?

9 MR. KLEM: It should, in part. It's not  
10 completely binding, but the ethical rules do in fact weigh  
11 in. And when this court is deciding whether a certain type  
12 of representation should be unwaivable, certainly if the  
13 ethical rules say that it cannot occur, it would seem like  
14 it would make sense - - -

15 JUDGE STEIN: Well, wouldn't that mean that any -  
16 - - any improper conflict then would be an unwaivable one?

17 MR. KLEM: No.

18 JUDGE STEIN: Because - - - because any improper  
19 conflict is against the ethical rules. So - - - so  
20 following your argument then, it seems to me that we'd have  
21 to say that you could never waive a conflict that - - -

22 MR. KLEM: Well, I think there's a difference  
23 here which is when we're talking about a broad category,  
24 when there's a current client who is paying for a other - -  
25 - a concurrent client's representation, that that is a



1 broad category, that should simply not be waivable, but  
2 it's - - -

3 JUDGE GARCIA: But let's say - - -

4 MR. KLEM: - - - the conflict is of course - - -

5 JUDGE GARCIA: - - - you have a company that's  
6 under investigation, and you have a CEO. The company pays  
7 the CEO's - - - for the CEO's lawyer; that's okay, right?

8 MR. KLEM: I presume so.

9 JUDGE GARCIA: Right. So now let's say the  
10 company is being investigated for some other environmental  
11 case, and that same lawyer is representing the CEO in the  
12 criminal - - - criminal securities fraud case, let's say,  
13 and the company's paying for that lawyer to represent him,  
14 that's not waivable? That CEO can't come in and say, you  
15 know, I want this lawyer, actually, I have a right to  
16 counsel of my choice, I know they're paying, I know he's  
17 representing them in an unrelated environmental matter, and  
18 I want this lawyer. No way, the judge has to disqualify  
19 the lawyer. It's unwaivable.

20 MR. KLEM: I mean, it's certainly unethical. So  
21 - - -

22 JUDGE GARCIA: But we're asking about - - -

23 MR. KLEM: Why - - - why would - - -

24 JUDGE GARCIA: - - - unwaivable.

25 MR. KLEM: Why would - - -



1 JUDGE GARCIA: So that's unwaivable.

2 MR. KLEM: It would seem odd that the court would  
3 say, you know what, you could - - - you could continue in  
4 this completely unethical representation - - -

5 JUDGE GARCIA: But isn't that what they do in a  
6 conflicts waiver all the time? I mean, a conflicts waiver  
7 is a divided loyalty waiver. Now, that's unethical; you  
8 should represent one client. But the - - - there is a  
9 right to have the lawyer of your choice that butts up  
10 against this right. And our cases speak about that  
11 balancing.

12 So you want to put, it seems, the hand here to  
13 say in all cases the judge looks at that client and says I  
14 don't care, you're a sophisticated person, you know what  
15 you want, you're approving a full waiver of all of this,  
16 but you know, I know better than you, and this is a  
17 violation of the DR rules, and you can't have that lawyer.

18 MR. KLEM: And the ethical rules do in fact  
19 permit waivers. One wouldn't be permitted here. But let's  
20 turn to the facts of this case as to what makes this case  
21 so extraordinary. And it wasn't just a concurrent  
22 representation with one of the individuals paying for both  
23 of them. The individual we're talking about here, Salaam,  
24 is deeply implicated in this murder. There is significant  
25 evidence pointing - - -



1 JUDGE GARCIA: But you can represent  
2 codefendants. I mean, how much more implicated can you be?  
3 You can waive. You can have joint representation. I mean,  
4 that's - - - your codefendant's pretty implicated in the  
5 scheme.

6 MR. KLEM: Well, it's not just the implication;  
7 it's the fact that their interets - - - interests, excuse  
8 me, are diametrically opposed here. Salaam needs to keep  
9 himself out of this murder case. He wants to be scot free  
10 and get away with this.

11 JUDGE STEIN: What evidence has the defendant  
12 come forward with of Salaam's involvement in - - - in the  
13 shooting?

14 MR. KLEM: There is a huge amount of evidence.  
15 It starts with motive. He has more motive - - -

16 JUDGE STEIN: Is any of it - - - well, is there  
17 any admissible evidence?

18 MR. KLEM: His motive is, of course, admissible  
19 and was admitted. He was - - -

20 JUDGE STEIN: Yes, but who's going to - - - who's  
21 going to present the evidence of his motive?

22 MR. KLEM: It came in at the trial in - - - in  
23 this case. His motive was he was robbed. A gang leader  
24 was robbed and disrespected, in his territory, of 5,000  
25 dollars in cash and his 15,000-dollar rolodex - - - rolodex



1 - - - Rolex, excuse me.

2 JUDGE RIVERA: You dated yourself with that.

3 MR. KLEM: Getting too old. And then returns to  
4 the scene with his armed posse.

5 JUDGE GARCIA: But all of that came in.

6 MR. KLEM: He is in - - -

7 JUDGE GARCIA: All of that came in.

8 MR. KLEM: Yes.

9 JUDGE GARCIA: So what's the conflict to keep  
10 out? What wasn't presented?

11 MR. KLEM: I don't think that's the appropriate  
12 analysis, but - - -

13 JUDGE GARCIA: But if it's a potential conflict,  
14 it kind of is the appropriate analysis, right, because then  
15 it's did it affect the conduct of the defense.

16 MR. KLEM: Sure. It's not merely limited to what  
17 didn't come out but - - -

18 JUDGE GARCIA: And putting aside the waiver here,  
19 right?

20 MR. KLEM: But we could - - - but we could talk  
21 about what counsel should have done.

22 CHIEF JUDGE DIFIORE: What was the role of  
23 counsel at the Gomberg inquiry?

24 MR. KLEM: The role of - - - I'm sorry; you're  
25 talking about the independent counsel who was - - -



1 CHIEF JUDGE DIFIORE: No, no, trial counsel.

2 MR. KLEM: Trial counsel needed to inform the  
3 court and independent counsel of the scope of the conflict,  
4 and he utterly - - -

5 JUDGE FEINMAN: So wouldn't we need to - - -  
6 procedurally, wouldn't there need to be a hearing before  
7 any determination could be made on waivability or  
8 unwaivability? In other words, if we ruled, as a matter of  
9 law, under these circumstances, that this is unwaivable,  
10 wouldn't that be a premature adjudication, given the fact  
11 that the court did not really have all the facts before  
12 when it made that determination?

13 MR. KLEM: Perhaps, if there are actually facts  
14 in dispute.

15 JUDGE FEINMAN: So it would seem that if - - -  
16 the more prudent course, if we were going to do anything  
17 with it, would be to send it back for a hearing for the  
18 court to be able to put Mr. Chabrown - - - is that how you  
19 say his name?

20 MR. KLEM: Chabrowe.

21 JUDGE FEINMAN: Chabrowe, I'm sorry - - -  
22 Chabrowe on the stand?

23 MR. KLEM: That - - - that would not be  
24 inappropriate if there's in fact disputes at issue. In  
25 terms of the Gomberg inquiry itself, though, this court, in



1 Cortez, put the obligation not on counsel but on the court  
2 to make that full record. And that - - -

3 JUDGE STEIN: Well, what could the court have  
4 done, given what the court was told at the time of the  
5 Gomberg inquiry?

6 MR. KLEM: Well, the court knew a lot of  
7 information about Salaam's involvement at that point. It  
8 wasn't merely that Salaam - - -

9 JUDGE STEIN: But did the court know that - - -  
10 that Salaam had paid for the attorneys' fees?

11 MR. KLEM: No. Both Mr. Chabrowe and the  
12 prosecutor which - - - the prosecution knew. Both of them  
13 decided to keep that from the court.

14 JUDGE STEIN: Well, did - - - did Mr. Chabrowe -  
15 - - did you ask Mr. Chabrowe, when - - - when you were  
16 making the 440 motion, why he didn't say anything?

17 MR. KLEM: According to Mr. Chabrowe, he couldn't  
18 see there being any conflict or any problem with this  
19 whatsoever, so he did not inform his client of any of it  
20 and didn't inform Eric Sears, the conflict lawyer, of any  
21 of it.

22 CHIEF JUDGE DIFIORE: What are the two lawyers'  
23 roles when they know that a defendant, during the course of  
24 an inquiry made by the court, is misleading the court?  
25 When the court asks are you or your family paying for this



1 lawyer, and the defendant - - - this is my recollection;  
2 correct me if I'm wrong - - - and the defendant responded,  
3 yes, indicating either he or his family were paying. Are  
4 you suggesting that the lawyer who has different  
5 information has no obligation, as an officer of the court,  
6 to correct that record?

7 MR. KLEM: Two answers. One, of course the  
8 attorney has an obligation to. The second point is that  
9 wasn't actually the question that was asked. The question  
10 that was asked was whether you or your family has hired  
11 this individual. And in fact Mr. - - -

12 CHIEF JUDGE DIFIORE: What did he respond?

13 MR. KLEM: - - - Mr. Brown did cause Mr. Chabrowe  
14 to be hired. It was through his family. And yes, I - - -  
15 I agree it could have been misleading. Both the prosecutor  
16 and Mr. Chabrowe probably should have brought that to the  
17 attention of the court. I - - - I don't dispute that. But  
18 that shouldn't be laid on Mr. Brown. This was - - -

19 CHIEF JUDGE DIFIORE: I wasn't suggesting that.

20 JUDGE FEINMAN: One of my concerns here, though,  
21 is that if you have this unwaivable conflict rule that  
22 you're advocating, doesn't that give the defendant an  
23 opportunity to go forward with that conflicted lawyer and  
24 then come back later on and say, well, I lost the trial,  
25 and it turns out so-and-so was paying for it. I mean, it's



1 sort of allowing him to be the architect of his own second  
2 bite at the apple, if you will.

3 MR. KLEM: One would think, going back to the  
4 Chief Judge's point, that the attorney has an obligation to  
5 complete candor to the tribunal, plus I've yet to see this  
6 mythical defendant who embraces being convicted of murder  
7 in the slim hopes that his appeal is somehow going to be  
8 victorious many years - - -

9 JUDGE STEIN: Oh, but it is possible - - -

10 MR. KLEM: - - - down the road.

11 JUDGE STEIN: It's possible, right, that - - -  
12 that a defendant would be willing to risk a conviction of  
13 murder to - - - to protect someone else with whom that  
14 defendant is - - - is close or aligned or loyal or  
15 whatever.

16 MR. KLEM: I think this case speaks to that.

17 JUDGE STEIN: Okay. So if - - - let's say this  
18 had played out differently. Let's say this was all above  
19 board and - - - and this defendant said, no, I - - - I  
20 didn't - - - I chose this lawyer but - - - but Salaam is -  
21 - - is paying for the lawyer, and - - - and all of a sudden  
22 the lights go off and everybody says, oh, whoa, okay, wait  
23 a minute, this - - - this is a serious conflict and - - -  
24 and explains it to him in every way possible. And he says  
25 it's okay, it's all right, this is what I want; I want this



1 lawyer to represent me. Can't do it? Can't do it?

2 MR. KLEM: I - - - I don't believe this conflict  
3 should be permitted by the court at all because it permits  
4 someone like Salaam to pull the puppet strings. He's  
5 paying for my client's defense, he's paying for the  
6 codefendant's defense, and - - -

7 JUDGE STEIN: What if the defendant knows that  
8 Salaam didn't do it? The defendant knows - - - you know,  
9 nobody else knows that he pulled that trigger. What if he  
10 knows that?

11 MR. KLEM: This is the defense in the case, that  
12 he needs to explain the two pieces of evidence against him,  
13 why one - - - one of Salaam's underlings is fingering him  
14 and why he confessed. The defense in this case is simple;  
15 it's because Salaam did it. No reasonable rational  
16 defendant would ever accept that. And for the court to  
17 accept that waiver, knowing everything that the court would  
18 know here, would be permitting a defendant to, in essence,  
19 commit suicide and to protect a guilty party or potentially  
20 guilty party.

21 JUDGE RIVERA: Counsel, can I just clarify, I'm  
22 just trying to understand the basis for your analysis. Are  
23 you arguing at all that under the state constitution  
24 there's some greater protection or are the - - - the cases  
25 under the federal constitution coextensively apply here.



1 MR. KLEM: I think it's coextensive in this case.  
2 Wood v. Georgia talks very much about this exact type of  
3 conflict where we have - - - I mean, the language from the  
4 Supreme Court - - -

5 JUDGE RIVERA: So you're not asking us to decide  
6 that the state constitution should - - - an argument under  
7 the state constitution requires some different analysis.

8 MR. KLEM: I would happily embrace that for the  
9 result, but I'm not sure that's at all necessary or even  
10 necessarily appropriate here. And just to be clear, even  
11 if this is a waivable conflict, it's clearly an actual  
12 conflict that was not waived, and it's equally clearly that  
13 I'd also win under the third prong that it clearly impacted  
14 the representation here and it was not waived.

15 JUDGE GARCIA: Chief, may I ask one question?

16 CHIEF JUDGE DIFIORE: Yes, you may.

17 JUDGE GARCIA: I'm sorry. I don't see a  
18 challenge to, let's say this - - - this conflict issue  
19 wasn't in the case, the third-party payer, there was a  
20 conflict, dual-representation conflict. You haven't  
21 challenged, as I understand it, that waiver proceeding with  
22 respect to that conflict.

23 MR. KLEM: Oh, I absolutely do, that the entire  
24 waiver proceeding consisted of the court and independent  
25 counsel just saying to Mr. Brown that Salaam, we know he



1 was there, so we don't think he's going to be called as a  
2 witness, the prosecutor isn't calling him, you're not  
3 calling him. Maybe he'll be called; he'll take the Fifth -  
4 - - Fifth if he's called. In the unlikely event, your  
5 counsel will have a hard time cross-examining him. That's  
6 not at all what the dual conflict issue is in this case.

7 JUDGE GARCIA: Well, your argument in - - - well,  
8 and I'm just asking; I don't know - - - was that that  
9 proceeding was insufficient to waive the dual  
10 representation conflict.

11 MR. KLEM: Absolutely. The court never told the  
12 defendant he had a right to conflict-free representation,  
13 the court never instructed him on the dangers, and the  
14 actual conflict was never explained to Mr. Brown or  
15 independent counsel.

16 JUDGE GARCIA: If the court had done that, would  
17 that have been sufficient to also waive the third-party  
18 conflict?

19 MR. KLEM: The third-party pay conflict?

20 JUDGE GARCIA: Yeah, I'm sorry.

21 MR. KLEM: No, absolutely not. That represents -  
22 - -

23 JUDGE GARCIA: What's the difference there?  
24 What's the delta? What additional conflict waiver would be  
25 necessary? What dual loyalty problem does that raise that



1 wouldn't have been waived in what you describe as a full  
2 conflict on the dual-representation issue?

3 MR. KLEM: Because we would have a tremendous  
4 concern that it's not merely split loyalties but that  
5 counsel is operating under this bias of payment from the  
6 paying client, and that it's much worse than just dual  
7 loyalties. His first loyalty is now to Salaam.

8 CHIEF JUDGE DIFIORE: Thank you, counsel.

9 MR. KLEM: Thank you.

10 CHIEF JUDGE DIFIORE: Counsel?

11 MS. WERTHEIMER: May it please the court. Sylvia  
12 Wertheimer for the People.

13 It's critical to the analysis here that, as  
14 Justice Garcia - - - as Judge Garcia said, the defendant  
15 also has a constitutional right to counsel of his choice.  
16 Here he exercised that right, knowing that Salaam was  
17 present.

18 JUDGE RIVERA: Counsel, there is, though,  
19 recognition that some conflicts are just not waivable.  
20 Granted, I know that - - - that the two of you are debating  
21 what kinds of conflicts may fit in that particular  
22 category, and I think even defendant recognizes, a narrow  
23 category. But why doesn't this fit when it - - - it seems  
24 to me you've got three things going on. You've got the  
25 representation of a suspect. You've got the suspect paying



1 for the representation of the defendant. And you've also  
2 got that it's not just a suspect, it's that you're going to  
3 point the finger at that suspect as being the person who's  
4 the shooter. Right? So it - - - it means that the  
5 defendant is not guilty of that crime, but that Salaam is.  
6 Doesn't that make it slightly different from just pointing  
7 at a witness or a suspect who may be implicated in some  
8 part of the crime but doesn't necessarily mean that the  
9 defendant would be found not guilty of that particular  
10 charge? Isn't that slightly different?

11 MS. WERTHEIMER: Well, first of all, there was no  
12 credible admissible evidence here that Salaam was the  
13 shooter or played any role - - -

14 JUDGE RIVERA: Well, let me just go - - -

15 MS. WERTHEIMER: - - - in - - -

16 JUDGE RIVERA: - - - with this hypothetical.  
17 What if there was? The three things that I've pointed out,  
18 if that's what the evidence showed, would you say that in  
19 that kind of case that might be one of those small number  
20 of cases that fits within, again, that narrow category of  
21 unwaivable conflicts?

22 MS. WERTHEIMER: It might. I mean, it should be  
23 a very narrow category, but if - - - but the problem is  
24 that here there's absolutely no evidence that would support  
25 that Salaam was the shooter. We also have a situation

1 where defendant - - -

2 JUDGE RIVERA: Well, do you need that kind of  
3 proof? Isn't this a question of just a defense that could  
4 be mounted? And isn't there enough here to mount that  
5 defense? Whether or not it would successful is another  
6 story. Obviously that doesn't even get you ineffective  
7 assistance of counsel.

8 MS. WERTHEIMER: Well, but the defendant here  
9 knew; he was there. So if - - - if he knew, as the People  
10 submit and as the jury found, that he himself fired the  
11 shots, it certainly makes perfect sense for him and would  
12 be totally rational for him to say, well, I'm not worried  
13 about making a defense that would implicate - - - that  
14 would point the finger at Salaam. I'm not going to falsely  
15 implicate my friend. I don't think this court would want  
16 to enforce a notion that lawyers are required to somehow  
17 present defenses that - - - that there's no reason to  
18 believe is true, and that even the defendant, who was  
19 present, won't say is true and has never said is true.

20 JUDGE WILSON: Isn't it hard to say that this  
21 didn't in fact operate on the defense when the People  
22 introduced testimony from the Detective Walla saying he had  
23 never heard that anyone other than the defendant had fired  
24 the gun. And then defense counsel attempts to cross-  
25 examine Walla, based on Walla's own notebook that says that



1 Ant Warrior told him that Ock shot him, and the court then  
2 has to resolve this problem and says I'm going to strike  
3 everything. Didn't it operate under that?

4 MS. WERTHEIMER: Well, the judge struck it  
5 because there was no admissible evidence, not because - - -  
6 because it wasn't that Detective Walla had spoken to Ant  
7 Warrior. Detective Walla explained, and the prosecutor  
8 explained that the notation indicated that somebody else  
9 told the detective.

10 JUDGE WILSON: He struck Detective Walla's  
11 testimony as well, right?

12 MS. WERTHEIMER: But it was on the grounds that  
13 it was hearsay. It was rumor. Detective Walla - - - all  
14 Detective Walla - - - he had not spoken to Ant Warrior.  
15 Detective Walla had spoken to somebody else who said that  
16 Ant Warrior.

17 Now, here, in the 440.10 affidavit, now you have  
18 counsel - - - counsel is accusing the trial counsel of not  
19 having properly investigated because he was under the  
20 strings of Salaam. But now, three years after the  
21 conviction, with new counsel, we have not one shred of  
22 additional evidence, nothing from Ant Warrior, nothing from  
23 Mel, nothing to substantiate what was totally hearsay and -  
24 - - and rumor. And that should not be a basis for finding  
25 an unwaivable conflict or that anything - - -

1 JUDGE WILSON: Wasn't that the purpose - - -

2 MS. WERTHEIMER: - - - operated on the defense -

3 - -

4 JUDGE WILSON: Wasn't that the purpose of asking  
5 for the 440?

6 MS. WERTHEIMER: Excuse me?

7 JUDGE WILSON: Wasn't that the purpose of asking  
8 for the 440 to try and get evidence of that nature?

9 MS. WERTHEIMER: No, I don't believe. I think in  
10 order, first of all, to get the 440, it was incumbent upon  
11 him to come forward three years later with something. Also  
12 - - -

13 JUDGE STEIN: So couldn't he have come forward in  
14 his own affidavit with saying somebody else - - - this - -  
15 - this guy is the one that did it?

16 MS. WERTHEIMER: Why? I mean, it's - - -

17 JUDGE STEIN: Why?

18 MS. WERTHEIMER: It's - - -

19 JUDGE STEIN: I was there; I saw it, you know?

20 MS. WERTHEIMER: It's so - - - it smacks of such  
21 gamesmanship to say that I didn't know my best defense  
22 would have been when he's not there and he won't say that  
23 that's actually what happened.

24 And in terms of the operation on the conflict, I  
25 mean, this was a strong evidence of guilt, a case where

1 there was a strong evidence of guilt that left defense  
2 counsel with few, if any, good choices. But a  
3 disinterested defense counsel certainly could have decided  
4 that the best thing to do would be the defense that he  
5 mounted.

6 He tried to blame Cuadrado, the identifying  
7 witness, and say that it was - - - that it was him. He  
8 tried to suggest that the People's proof, generally, was -  
9 - - was not - - - not credible and should not be believed.  
10 Pointing the figure at Salaam would not have undermined  
11 Cuadrado's identification testimony. There's absolutely -  
12 - - the defendant distorts the evidence - - - the record a  
13 lot. There was absolutely no evidence that Cuadrado had  
14 any part in any gang that involved - - - and therefore that  
15 it wouldn't have effectively undermined his identification  
16 testimony.

17 Also the notion that it operated - - -

18 JUDGE GARCIA: Counsel, I'm sorry, is there an  
19 allegation that the prosecutor knew that there was a  
20 third-party payment here?

21 MS. WERTHEIMER: I just - - - I believe I just  
22 heard counsel say that, and I - - - I would submit there's  
23 nothing in the record to indicate - - -

24 JUDGE GARCIA: Is it in the 440 anywhere?

25 MS. WERTHEIMER: No. In fact, in the 440.10, the



1 People dispute - - - the prosecutor disputes and questions  
2 whether that's even true. The one person, of course, who  
3 did know that Salaam was paying was the defendant who  
4 misled - - -

5 JUDGE FAHEY: Well, see, that brings me back to  
6 the hearing question. Wouldn't this mystery be solved  
7 about whether or not there was a payment and - - - by just  
8 bringing the attorney in for the 440 and have him answer  
9 these questions?

10 MS. WERTHEIMER: Well, we're assuming, for the  
11 sake - - - no, because we're assuming, for the sake of the  
12 440.10, that it is true that he paid, but we're saying even  
13 if that is the case, because of the evidence in the - - -

14 JUDGE FAHEY: Well, the reason I ask is because  
15 the theory of unwaivable conduct seems to rely on the proof  
16 of these benefactor payments. And it's kind of the  
17 underlying legal philosophies behind - - - behind the case  
18 Schwarz and the other cases that came under the Second  
19 Circuit having to do with benefit - - - benefactor  
20 payments. And I think how can this issue even be addressed  
21 unless you have that attorney come in and testify, and the  
22 court opens it up for a hearing and then see what happens?

23 MS. WERTHEIMER: Well, but in this case we  
24 accepted for - - - because Schwarz was a very unusual case.  
25 The Second Circuit itself has stated that it - - - Schwarz



1 was a case where there's a ten-million-dollar multi-year  
2 retainer agreement. Nothing like that happens here.

3 JUDGE FAHEY: Um-hum.

4 MS. WERTHEIMER: We accept - - - we're saying  
5 that even if it's true that Salaam paid for the lawyer, it  
6 could not have operated on the conflict or - - - or  
7 resulted in an unwaivable conflict - - - resulted only in a  
8 potential conflict that didn't operate because there was -  
9 - - Salaam, there was no evidence, no reason to believe  
10 that Salaam participated or was involved in the shooting.  
11 He did not - - - there's no evidence of any conduct. The  
12 defendant referred to motive. Motive isn't conduct; it's  
13 just speculation. There's not one thing here to suggest  
14 that Salaam is the person who committed - - -

15 JUDGE RIVERA: There's motive and there's the  
16 fact that he went back, right? He went back. And they  
17 weren't just going back to kind of hang around, right?

18 MS. WERTHEIMER: Yeah, he went back, but - - -  
19 but that doesn't mean that he - - -

20 JUDGE RIVERA: So he's at the scene at the time.

21 MS. WERTHEIMER: Yes, he was at - - - and that's  
22 - - - that's classic presence. Mere presence does not - -  
23 -

24 JUDGE RIVERA: You have the 911 call that - - -

25 MS. WERTHEIMER: The 911 - - -



1 JUDGE RIVERA: - - - mentioned him by name or  
2 nickname, whatever.

3 MS. WERTHEIMER: Says "Ock and them".

4 JUDGE RIVERA: Right.

5 MS. WERTHEIMER: And that's because every - - -  
6 maybe people know Ock, but - - -

7 JUDGE FAHEY: Well, the question is, is that  
8 sufficient? Forget about an unwaivable conduct. Let's  
9 just talk about opening up a hearing. It's not the same  
10 thing. I think, you know, forget about the end result for  
11 a question. The question is whether or not the court had  
12 sufficient evidence to make a determination that it  
13 wouldn't open a hearing. And this seems to me to be at  
14 least sufficient to require the court to ask a few  
15 questions, to bring Chabrowe in and ask some questions.  
16 How do we - - - how do we not do that? How could you not  
17 want that? It's just a simple search for truth. And the  
18 court did not have all of the information in front of it  
19 when it made its initial determination.

20 MS. WERTHEIMER: Well, because because the court  
21 had presided over the trial. The court - - - the court - -  
22 -

23 JUDGE FAHEY: Okay. So maybe another judge needs  
24 to decide it, but nonetheless a court. I'm not criticizing  
25 this judge at all but - - - because I don't think that this

1 judge had all the right information. But a court, a  
2 tribunal should, in - - - in any circumstance, have this  
3 information in front of it, at least the opportunity to ask  
4 that question.

5 MS. WERTHEIMER: To ask - - - I'm sorry, I don't  
6 understand what question.

7 JUDGE FAHEY: You don't understand what question?

8 MS. WERTHEIMER: What question they would ask  
9 because I mean, the question would be did - - - were you in  
10 any way affected in your representation here by the fact  
11 that you represented Salaam. And the answer would be - - -  
12 is clearly, from the record, no.

13 CHIEF JUDGE DIFIORE: Well, questions like did  
14 your lawyer talk to you about possible plea negotiations.  
15 Did your lawyer talk to you about possibly cooperating with  
16 the prosecutor, things of that nature, for the judge to - -  
17 - 440 judge to determine.

18 MS. WERTHEIMER: Well, I mean, he said - - - he  
19 says that there were no such discussion - - - no such  
20 discussions, and - - -

21 JUDGE FAHEY: But of course "he said" isn't the  
22 same as having a judge ask those questions in the context  
23 of a 440 hearing.

24 MS. WERTHEIMER: No, I'm talking about the  
25 defendant said that he did not - - - that - - - that there



1 was - - - there was no discussion like that.

2 And again, it all comes down to the fact that if  
3 there's no - - - if there was nothing - - - there's no  
4 reason to believe that Salaam was the shooter or did  
5 anything. He wasn't involved in - - - in an attempted  
6 robbery. This was the - - - the jury found this was the  
7 act of - - - the person who fired the gun was the only  
8 person who was responsible for the shooting. There is  
9 absolutely no evidence that that was Salaam. And - - - and  
10 therefore you can't - - - there's nothing further to  
11 explore or to suggest that it would have operated on the  
12 defense by failing to raise - - -

13 JUDGE FAHEY: See, everybody's different, and  
14 there's an element of discretion involved here, in fairness  
15 to the court and to all of you, but if I had been sitting  
16 there, I'd think to myself, once information had been  
17 withheld from me, that I didn't have when I made my initial  
18 determination, I'd want to ask a question about it and see  
19 where it led. You're assuming what the answers are going  
20 to be. And you may be correct, in fairness to you, but - -  
21 - but logically, until those questions are asked by the  
22 court and the court makes a determination, has it all in  
23 front of us, it seems to be an - - - an inherent failure of  
24 the process, that the sanctity of the process is undermined  
25 by the failure to ask those questions.



1 MS. WERTHEIMER: Well, I respectfully, you know,  
2 would - - - would disagree because I think that the record  
3 here, as to everything that happened, shows that there just  
4 was no basis for - - -

5 JUDGE FAHEY: I understand. I'm not arguing for  
6 an unwaivable conflict. I - - -

7 MS. WERTHEIMER: Well, no, but there was no basis  
8 - - -

9 JUDGE FAHEY: I'm just arguing that some  
10 questions should be asked here.

11 MS. WERTHEIMER: But there was no basis for this  
12 - - - for this defense, for - - - for a defense that would  
13 have fingered Salaam. It wouldn't have been a better  
14 defense. There's also no evidence in this record that it -  
15 - -

16 CHIEF JUDGE DIFIORE: Would it be worth a 440  
17 court exploring what exactly conflict counsel knew and what  
18 he advised?

19 MS. WERTHEIMER: The independent counsel?

20 CHIEF JUDGE DIFIORE: The conflict counsel, yes.

21 MS. WERTHEIMER: Again, I believe that the record  
22 is sufficient as it is. The - - - the - - - critically,  
23 the records show - - - I think it's - - -

24 CHIEF JUDGE DIFIORE: Conflict counsel know - - -  
25 isn't there an affirmation in there that conflict counsel



1 was not aware that someone else - - - that Ahmed Salaam was  
2 paying? Isn't - - - isn't that a key factor for conflict  
3 counsel?

4 MS. WERTHEIMER: He wasn't aware - - - but the  
5 payment, again, only makes a difference if there's evidence  
6 - - - a reason to think that Salaam was involved in the  
7 criminal conduct. Again, it might be an ethical violation  
8 but it - - -

9 JUDGE WILSON: There's a witness who said I saw a  
10 man go into a car with a gun and leave right after the  
11 shooting. And that's clearly not the defendant.

12 MS. WERTHEIMER: That witness, the - - - the  
13 defense counsel here asked to speak with that witness.  
14 That witness ultimately said - - - what the prosecutor said  
15 is that that witness said that the person she saw had  
16 braids, which matched defendant's appearance, and that the  
17 person in the line-up who looked most - - - she just wasn't  
18 sure to make an absolute identification, but the person she  
19 saw who looked most like that person she saw with the gun  
20 was the defendant. And it was after being told that, that  
21 the defense counsel decided, oh, I'm not going to talk to  
22 her and I'm not going to call her because that witness also  
23 would have supported the conclusion that it was defendant,  
24 it was not Salaam. So that's - - - again, it was a total  
25 misrepresentation. That witness would not in any way have



1 supported the notion that it was Salaam. That witness - -  
2 - she said the person had braids.

3 I - - - we understand that - - - you know, that  
4 all of these rights are very important, but again, I think  
5 as Judge Garcia said, there's also a concern about  
6 gamesmanship here, and - - - and we submit that this case  
7 should be resolved in a way that doesn't promote  
8 gamesmanship and doesn't rest on distortions and  
9 speculation. And we ask that the conviction be affirmed.  
10 Thank you.

11 CHIEF JUDGE DIFIORE: Thank you, Ms. Wertheimer.  
12 Mr. Klum?

13 MR. KLEM: In response to Judge Garcia's question  
14 about whether the prosecutor knew, I'd direct you to pages  
15 113 and 114 of the appendix that details the Rikers call  
16 and the Bergen County calls which were turned over by the  
17 prosecutor to the defense, where it's unmistakably clear  
18 that Salaam is the one paying for both their defenses.

19 JUDGE STEIN: Do we know when that was - - - when  
20 the - - - when the prosecutor received those call - - -  
21 those - - -

22 MR. KLEM: We don't know whether the receipt - -  
23 - we don't know, is the short answer. It was before - - -

24 JUDGE STEIN: We don't know whether it was before  
25 or after the Gomberg - - -



1 MR. KLEM: It was before trial. But I'll point  
2 out that at trial, when the judge at trial got concerned,  
3 all of a sudden, that, oh my God, Ock Salaam is all over  
4 these materials, how could you be representing him at the  
5 same time, it was the prosecutor who assured the court, at  
6 the time, don't worry about it; we did a full inquiry back  
7 then. So the prosecutor certainly knew at that time. I  
8 want to - - -

9 JUDGE GARCIA: Counsel, you cited Wood v. Georgia  
10 before about the Supreme Court's view of third-party  
11 payments. But Wood v. Georgia, the Supreme Court sent that  
12 case back to determine whether or not there was a conflict  
13 and if so whether it was waived. So I - - - I read Wood v.  
14 Georgia that - - - as saying this isn't an unwaivable  
15 conflict.

16 MR. KLEM: I wasn't - - - I didn't mean to  
17 suggest that they were holding it was an unwaivable  
18 conflict. They were pointing out the inherent dangers in  
19 this type of - - - of arrangement.

20 I do want to talk about the evidence here because  
21 my adversary keeps saying there's absolutely no evidence.  
22 We went through the motive, we went through the  
23 opportunity, we went through that he was present, went back  
24 there with a gun. The 911 call, we talked about, where in  
25 the background I think it just says "Ock", maybe it says



1 "Ock and them", but it certainly refers to Salaam, not Mr.  
2 Brown.

3 We didn't talk about how it was Salaam's car that  
4 got trashed with everybody saying - - - explaining why they  
5 trashed the car. They trashed the car because the shooter  
6 came from the car. They trashed Salaam's car. And that  
7 was admitted at trial through Detective Walla. We didn't -  
8 - -

9 JUDGE STEIN: But all of what you're describing,  
10 it seems to me that it - - - it would be pretty risky to -  
11 - - to bring in all of that evidence because it - - - it  
12 seems that it equally implicates the defendant.

13 MR. KLEM: It all came in, so it wasn't a matter  
14 of risky or not; it was how you then use that evidence at  
15 trial. But I want to talk about - - -

16 JUDGE STEIN: Okay. But what - - -

17 MR. KLEM: - - - Ant Warrior because I think - -  
18 - I'm sorry.

19 JUDGE STEIN: No, go ahead.

20 MR. KLEM: Ant Warrior, there's a Brady  
21 disclosure. You're representing a twenty-year-old kid in a  
22 murder case. You get a Brady disclosure which says Salaam  
23 is going around say - - - or Ant Warrior, who was present  
24 at the shooting, is saying Salaam fired the shot. What  
25 would you do? Any counsel is going to investigate that up

1 the wazoo to get ahold of Ant Warrior and get him as a  
2 witness.

3 And what do we know happens here? Well Chabrowe  
4 puts in a call and leaves a message for Ant Warrior, but  
5 then he learns - - - oh, I wonder where he learns - - -  
6 that Ant Warrior is "adamantly" opposed to cooperating, so  
7 he drops it. That is classic conflicted counsel. And Ock,  
8 had Salaam not been paying for his fee, any other attorney  
9 in this murder case would be investigating that and would  
10 be seeing what they could get as admissible evidence.

11 If my adversary is correct, which I don't believe  
12 she is, that there's overwhelming evidence in a twenty-  
13 year-old facing murder charges, what would you do as  
14 unconflicted counsel?

15 JUDGE RIVERA: So if much of the evidence you  
16 already pointed to was - - - was brought in at trial, is  
17 this really a complaint by the defendant of: you just  
18 didn't do enough as opposed to you didn't really present my  
19 defense?

20 MR. KLEM: No. I mean, it's - - - it's much more  
21 than that. And again, this isn't - - - this is a conflict  
22 issue. I mean, it's not that we have to prove innocence  
23 here or something. This is having an attorney whose  
24 loyalty is divided and here hopelessly conflicted.

25 What I was getting at before is if it truly was



1           overwhelming evidence, and you had a twenty-year-old facing  
2           murder charges, you know, wouldn't you talk about a plea  
3           discussion? Maybe the prosecutor is interested in the  
4           kingpin here. Maybe the prosecutor is interested in going  
5           after Salaam, the one who's - - -

6                        JUDGE STEIN: Did the defendant bring another 440  
7           on ineffective assistance of counsel?

8                        MR. KLEM: Another one may lie on that, but  
9           certainly one lies on the conflict claim. We'd ask that  
10          Your Honors reverse on that matter, or we're happy to have  
11          the hearing, because I don't think any of these facts are  
12          actually really disputed. But to the extent that the court  
13          feels that a new - - - that a more broader record is  
14          appropriate, we'd be happy to make that. Thank you.

15                       CHIEF JUDGE DIFIORE: Thank you.

16                       (Court is adjourned)

17

18

19

20

21

22

23

24

25



1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25

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

I, Sharona Shapiro, certify that the foregoing transcript of proceedings in the Court of Appeals of People of the State of New York v. Boris Brown, No. 23, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

*Sharona Shapiro*

Signature: \_\_\_\_\_

Agency Name: eScribers  
Address of Agency: 352 Seventh Avenue  
Suite 604  
New York, NY 10001  
Date: March 26, 2019

