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COURT OF APPEALS

STATE OF NEW YORK

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THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

NO. 58

BRADFORD SHANKS,

Appellant.

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20 Eagle Street  
Albany, New York  
September 2, 2021

Before:

CHIEF JUDGE JANET DIFIORE  
ASSOCIATE JUDGE JENNY RIVERA  
ASSOCIATE JUDGE EUGENE M. FAHEY  
ASSOCIATE JUDGE MICHAEL J. GARCIA  
ASSOCIATE JUDGE ROWAN D. WILSON  
ASSOCIATE JUDGE MADELINE SINGAS  
ASSOCIATE JUDGE ANTHONY CANNATARO

Appearances:

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Official Court Transcriber



1 CHIEF JUDGE DIFIORE: Appeal number 58, the  
2 People of the State of New York v. Bradford L. Shanks.  
3 We'll wait one moment, counsel, until your colleagues have  
4 an opportunity to leave or stay.

5 MS. MANLEY: Good afternoon. May it please the  
6 court, my name's Kathy Manley, representing appellant,  
7 Bradford Shanks. And I'd like to reserve two minutes for  
8 rebuttal.

9 CHIEF JUDGE DIFIORE: You have two minutes.

10 MS. MANLEY: Thank you.

11 This court should hold that the fundamental issue  
12 of right to counsel survives even - - - a forfeiture of  
13 counsel survives even a valid waiver of appeal.

14 JUDGE GARCIA: Counsel, can I - - - can we - - -

15 MS. MANLEY: Yes.

16 JUDGE GARCIA: - - - stop there because I know  
17 we're going to probably get into some of the merits. And -  
18 - - and I just want to talk about the waiver for a second.

19 So at that proceeding, as I see it, there's new  
20 counsel at the plea. That counsel says I've met with this  
21 defendant nineteen times to discuss this resolution. The  
22 People want a waiver of a right to appeal. There are some  
23 other charges, I think, relatively minor, right, that are  
24 also disposed of?

25 MS. MANLEY: Very minor that were not - - -



1 JUDGE GARCIA: But let's say we agree with you,  
2 and it survives a waiver. And now the next case comes - -  
3 - a hypothetical - - - next case comes and there's a  
4 serious assault charge out there, separate. Same facts,  
5 though, as here, this trial happened, we get to a plea.  
6 The People offer a deal. You get what you would have  
7 gotten in this trial, same sentence, you plead to the  
8 assault, you waive your right to appeal.

9 Can you make that deal?

10 MS. MANLEY: That - - - I think the - - - you  
11 just have to look at this court's decision in Thomas, and  
12 look at the colloquy on the waiver, regardless of the  
13 amount of consideration for - - -

14 JUDGE GARCIA: But is there any way you could  
15 waive the right to appeal in my hypothetical scenario?

16 MS. MANLEY: Including the forfeiture of counsel?

17 JUDGE GARCIA: Yes.

18 MS. MANLEY: No. I think that forfeiture of  
19 counsel - - -

20 JUDGE GARCIA: So you would preclude your client  
21 from ever being able to make that deal, which is I'll plead  
22 to the separate assault case with the plea I - - - with the  
23 verdict I have here, I'll get the same sentence I would  
24 have got for the verdict alone if I waive my right to  
25 appeal, but I can't do that?



1 MS. MANLEY: If he did a valid waiver of appeal,  
2 he could do that. And he could do that deal. It's a  
3 totally different situation than we have, but - - -

4 JUDGE GARCIA: So you could - - -

5 MS. MANLEY: - - - he could do that, but I think  
6 it - - -

7 JUDGE GARCIA: - - - waive?

8 MS. MANLEY: - - - still should not include the  
9 wholesale deprivation of the right to counsel.

10 JUDGE GARCIA: So my point is - - -

11 MS. MANLEY: But you could - - -

12 JUDGE GARCIA: - - - no matter what you allocuted  
13 to in that plea, the right - - - this forfeiture issue  
14 would survive on appeal?

15 MS. MANLEY: Yes. The - - - the forfeiture issue  
16 should survive on appeal. There's somewhat of an appellate  
17 division split, although I think the trend is going in the  
18 direction of saying that it survives a valid waiver of  
19 appeal. We have a new case in People v. Best in the Second  
20 Department that said that, kind of undermining the former  
21 case of People v. Whitfield. And then in the Third  
22 Department in 2008, there was People v. Trapani that said  
23 outright deprivation of the right to counsel goes to the  
24 heart of the process and survives both the waiver of appeal  
25 and a plea. And in - - - in my case, they actually said



1 assuming without deciding that it does survive. In the  
2 First Department, they said it survives a plea. And then  
3 the Third Department cited the - - - in Trapani, for - - -  
4 support for it surviving a - - - a waiver also.

5 The Fourth Department's the one that said it  
6 doesn't, in People v. Richardson in 2019. But and - - -  
7 and it said that it does survive a plea, but not a waiver  
8 of appeal. But that was a very different situation. We  
9 weren't dealing with wholesale deprivation of the right to  
10 counsel at trial. We were just dealing with the  
11 deprivation of counsel's assistance and - - -

12 JUDGE RIVERA: Do - - - do - - -

13 MS. MANLEY: - - - testifying at the grand jury -  
14 - -

15 JUDGE RIVERA: - - - do we - - - do we have to  
16 answer this question if we decide the waiver's invalid  
17 anyway?

18 MS. MANLEY: I think it - - - it's important to  
19 decide that question. And I also think the waiver is  
20 invalid and maybe it's important - - -

21 JUDGE RIVERA: But if we said the waiver's  
22 invalid, then - - -

23 MS. MANLEY: I guess you could - - -

24 JUDGE RIVERA: - - - that question is moot.  
25 Okay. So it - - -



1 MS. MANLEY: I guess - - -

2 JUDGE RIVERA: Let's get to the - - - whether the  
3 waiver's invalid.

4 MS. MANLEY: Okay. So - - -

5 JUDGE RIVERA: Because of course the appellate  
6 division's decided, I believe, pre-Thomas.

7 MS. MANLEY: Right. And that Thomas should apply  
8 because - - -

9 JUDGE RIVERA: Correct.

10 MS. MANLEY: - - - this is on direct appeal. So  
11 under Thomas, the waiver was invalid because there was no  
12 indication that any appellate rights remained at all.

13 The written waiver was even worse because it said  
14 you - - - you're waiving any and all rights to appeal, and  
15 then it listed some of the rights waived, which included  
16 the right to poor person status and assigned counsel on  
17 appeal. And that's clearly overbroad and mis - - -  
18 misrepresents the law.

19 And in - - - in Thomas also the - - - the  
20 majority said waivers of appeal only cover a narrow class  
21 of issues not forfeited by the plea. And here, there was  
22 no plea, so it covers - - - purports to cover a lot more  
23 and including the review of the entire trial where he was  
24 forced to represent himself. And I - - - but there was  
25 insufficient evidence.



1 CHIEF JUDGE DIFIORE: Counsel, let's move along  
2 to did the trial court properly conclude that this  
3 defendant forfeited his right.

4 MS. MANLEY: No. The - - - there was no record  
5 support for the kind of extreme - - - it's an extreme last  
6 resort according to this case in People v. Smith. There  
7 was no way that it even came close to that.

8 The Third Department quoted - - - quoted People  
9 v. Sloan in saying there was a persistent pattern of  
10 threatening abusive, obstreperous, and uncooperative  
11 behavior with successive assigned counsel - - -

12 JUDGE RIVERA: Is that - - - can I - - -

13 MS. MANLEY: - - - well - - -

14 JUDGE RIVERA: - - - is that as a matter of law,  
15 or because of the facts in the record?

16 MS. MANLEY: Well, there was no record support  
17 for what should be the standard here for - - - to go to  
18 that extreme, you know, last resort of taking away  
19 somebody's - - -

20 JUDGE RIVERA: So - - - so - - - so did the judge  
21 mischaracterize the record; is that your position?

22 MS. MANLEY: The judge did mischaracterize the  
23 record, yes, because he was saying that Mr. Shanks - - -  
24 that there was a long series of attorneys that Mr. Shanks  
25 was disrespectful to or abused or whatever he was saying.



1 And that's not the case.

2 The record shows that the first four attorneys  
3 left for completely different reasons, like, clear reasons,  
4 like having a conflict with representing his wife in the  
5 past. There was another one, David Taylor (ph.), who did a  
6 lot of work in the case, who was in the hospital at the  
7 time trial was supposed to happen. And then there was  
8 another one who moved to Atlanta. And then there was  
9 another one who had a conflict also. So there was no  
10 indication that Mr. Shanks did anything to cause problems  
11 with those relationships, with those attorneys.

12 It was just the last two - - -

13 JUDGE FAHEY: So - - - so let - - -

14 MS. MANLEY: - - - and they didn't rise to the  
15 level - - -

16 JUDGE FAHEY: Can I - - - can I ask you a  
17 question?

18 MS. MANLEY: Um-hum.

19 JUDGE FAHEY: It - - - it - - - assuming that the  
20 waiver of appeal was invalid, do we need to reach the  
21 counsel question?

22 MS. MANLEY: Well yes because it would be - - -

23 JUDGE FAHEY: Why?

24 MS. MANLEY: Because the Third Department - - -

25 JUDGE FAHEY: Couldn't we just sent it back



1 without reaching it?

2 MS. MANLEY: I mean, the Third Department did - -  
3 - did uphold the forfeiture.

4 JUDGE FAHEY: Um-hum.

5 MS. MANLEY: So I - - - I - - - you can reach  
6 that issue and - - - and it needs to be made clear that if  
7 you have problems communicating with two attorneys, and - -  
8 - and with - - -

9 JUDGE FAHEY: Let me - - - let me take you a step  
10 further. I understand what you're saying. Thank you. I -  
11 - - I just wanted to ask you just - - - just another area.

12 There was also a motion to ask the judge to  
13 recuse himself; is that correct?

14 MS. MANLEY: Yeah, there were two motions for  
15 that.

16 JUDGE FAHEY: Okay. Was - - - was there an  
17 unrecorded conference in this case?

18 MS. MANLEY: Yes. So that goes to the judicial  
19 bias. Attorney David Taylor submitted an affidavit in  
20 support of his motion for recusal, which he filed.

21 JUDGE FAHEY: Um-hum.

22 MS. MANLEY: And that might have been why he  
23 didn't want to come back in the case because that was  
24 denied and anyway - - -

25 JUDGE FAHEY: Um-hum.



1 MS. MANLEY: So he said - - -

2 JUDGE FAHEY: That's understandable, but okay.

3 So - - -

4 MS. MANLEY: In December 2015, there was this  
5 unrecorded conference where the district attorney had said  
6 he was preparing to move to dismiss the case. There wasn't  
7 enough evidence. And that's something that Mr. Taylor had  
8 pointed out to him with information from the IRS, that  
9 there were two tax returns filed and the taxes on that.

10 JUDGE FAHEY: Right. And - - - and what did the  
11 judge - - -

12 MS. MANLEY: So he said he was going to dismiss.  
13 And the judge gave him arguments for continuing to  
14 prosecute the case.

15 JUDGE FAHEY: All right. Now - - - now when you  
16 say this, what's the basis for the substance of the  
17 unrecorded conference, your information?

18 MS. MANLEY: It was David Taylor's affidavit.  
19 And the judge when he - - -

20 JUDGE FAHEY: But let me - - - all right. And  
21 let me ask the next question then.

22 Was the defendant present for this unrecorded  
23 conference?

24 MS. MANLEY: I don't believe he was. I - - - I  
25 don't know.



1 JUDGE FAHEY: What's the basis for your belief  
2 there?

3 MS. MANLEY: Well just because defendants aren't  
4 usually present in conferences. I think it was in  
5 chambers.

6 JUDGE FAHEY: So it wasn't in the - - - it wasn't  
7 - - - quite often in criminal cases, you know, I was a city  
8 court judge, you'd have conferences and sidebars, and you'd  
9 ask the defendant to step up, it would be quite common.

10 MS. MANLEY: I - - - I mean, I don't know - - -

11 JUDGE FAHEY: You just don't know. All right.

12 MS. MANLEY: - - - for sure whether he was there  
13 or not.

14 JUDGE FAHEY: All right. And at - - - at what  
15 point in the case's history, did the unrecorded conference  
16 take place?

17 MS. MANLEY: Well, it was the - - - David Taylor  
18 - - - it was - - - it was December 2015, David Taylor - - -

19 JUDGE FAHEY: When did the trial start?

20 MS. MANLEY: The trial started quite a while  
21 later.

22 JUDGE FAHEY: Yeah, I thought it was in the  
23 spring, but you know better than - - -

24 MS. MANLEY: 2017, right, so - - -

25 JUDGE FAHEY: Oh, that much further?



1 MS. MANLEY: - - - so I understand that the judge  
2 was frustrated that so much time had passed, but that  
3 wasn't the defendant's fault. These two attorneys that  
4 came in, that was towards the end of the process, shortly  
5 before trial.

6 JUDGE FAHEY: Um-hum.

7 MS. MANLEY: And it just - - - he - - - when the  
8 last attorney, Herschen (ph.), wrote a letter listing some  
9 issues he had. And he included the word threats, but then  
10 the judge had a - - - appearance where he said the  
11 prosecutor has to leave the room, and we're going to talk  
12 about this, I want to learn more about these issues. There  
13 was no mention - - -

14 JUDGE FAHEY: So - - -

15 MS. MANLEY: - - - of threats. It was nothing  
16 serious. It was - - -

17 JUDGE FAHEY: Let - - - let me ask this. If the  
18 waiver of appeal is invalid, what are you asking this court  
19 to do on defendant's bias claim?

20 MS. MANLEY: Well, I think that just as with the  
21 right to counsel, the issue of judicial bias, as it  
22 occurred here and in maybe other cases, should also survive  
23 - - - well, a waiver of appeal. But you're saying if the  
24 waiver of appeal is invalid, you don't necessarily have to  
25 reach that but - - -



1 JUDGE FAHEY: Yeah, wouldn't it all just go back?

2 MS. MANLEY: So I think the issue of judicial  
3 bias could go back to the Third Department because they  
4 didn't rule on that, they didn't reach that. But they did  
5 reach the forfeiture of counsel issue.

6 JUDGE FAHEY: I see. Thank you.

7 CHIEF JUDGE DIFIORE: Thank you, Counsel.

8 MS. MANLEY: Thank you.

9 CHIEF JUDGE DIFIORE: Counsel?

10 MR. DI DONNA: Good afternoon. May it please the  
11 court, my name is Christopher James Di Donna, and I'm  
12 appearing on behalf of the People.

13 It's the People's position that this matter that  
14 the Third Department correctly affirmed that the waiver of  
15 appeal here was proper, that the defendant executed it  
16 voluntarily, knowingly, and intelligently. Further, it's  
17 also the People's position that there was no judicial bias.  
18 If you look at - - -

19 JUDGE WILSON: Counsel - - - counsel, can I stop  
20 you there for a second?

21 MR. DI DONNA: Yes.

22 JUDGE WILSON: I think you submitted a brief that  
23 - - - that only rested on waiver.

24 MR. DI DONNA: Yes.

25 JUDGE WILSON: So why haven't you forfeited your



1 other arguments here?

2 MR. DI DONNA: Because it's the - - -

3 JUDGE WILSON: If the shoe was on the other foot,  
4 wouldn't you be sitting here arguing that the defendant,  
5 having failed to raise something in a brief, had forfeited  
6 it?

7 MR. DI DONNA: Well, Your Honor, it - - - it's  
8 the People's position that the - - - yes, we - - - we did  
9 in our brief to this court note that - - - or chiefly argue  
10 that the waiver of appeal was valid. But then we're also  
11 saying that the - - - the decision rendered by the Third  
12 Department, which covered these other issues, also should  
13 be affirmed. So we indirectly were - - - were supporting  
14 that belief that the - - - that the - - - the other issues  
15 here, the judicial bias, and then the forfeiture of the  
16 right to assigned counsel, were properly decided.

17 JUDGE FAHEY: You know it's - - - it's unusual to  
18 get such a short brief on these issues.

19 MR. DI DONNA: I - - - I understand that, Your  
20 Honor.

21 JUDGE FAHEY: How would - - - how would you - - -

22 MR. DI DONNA: I wish I had written it myself.

23 JUDGE FAHEY: I'm sorry?

24 MR. DI DONNA: I wish I had written it myself. I  
25 was not in the office at the time - - - well, I was in the



1 office, but it was not my duty to write it at that time.  
2 So I understand your position.

3 JUDGE FAHEY: Yeah, I see. It - - - it's  
4 difficult to give the People's arguments substance if they  
5 don't put substance to them when they present it to us.

6 MR. DI DONNA: I - - - I can't disagree with you,  
7 Your Honor.

8 JUDGE FAHEY: Okay. Thank you.

9 MR. DI DONNA: If I can continue, just to address  
10 some of the points that were raised by, I believe, Judge  
11 Garcia early on in the appellant's appearance. It was  
12 noted in the record that Mr. Shanks retained counsel post-  
13 verdict and that that counsel, Randall Charf (ph.), set - -  
14 - met with him nineteen separate times and he discussed  
15 this potential resolution in the case, which also included  
16 the resolution of the post-verdict motions that were filed.  
17 And it's the People's position that that conversation that  
18 took - - - those conversations that retained counsel, that  
19 Mr. Shanks obtained, that he had an opportunity to  
20 understand what he was going to be given.

21 Now, I wasn't privy, nobody's privy to what  
22 exactly happened during those nineteen separate engagements  
23 between retained counsel and Mr. Shanks. But it's People's  
24 position that when you take that in consideration plus the  
25 discussion that's on the record, I believe it was in April



1 of 2017, post-jury trial, post-verdict, and then the  
2 discussions that were had on the record concerning what's  
3 being given up, and the - - - the benefit that was being  
4 received, it's People's position that Mr. - - - that Mr.  
5 Shanks voluntarily, knowingly, and intelligently waived  
6 whatever particular rights, including this right, one of  
7 the rights here that's been contested about his right to -  
8 - -

9 JUDGE WILSON: So - - - so is it - - -

10 MR. DI DONNA: - - - assigned counsel - - -

11 JUDGE WILSON: - - - is it your understanding  
12 that an ineffective assistance of counsel claim survives an  
13 otherwise valid waiver or no?

14 MR. DI DONNA: No. That - - - that would - - -  
15 that would survive.

16 JUDGE WILSON: An ineffective assistance would.  
17 So why then wouldn't total deprivation of counsel also  
18 survive?

19 MR. DI DONNA: Well, because here, Your Honor, I  
20 think there's a public policy issue that exists. If we  
21 have a situation where an individual like Mr. Shanks here  
22 is provided with six assigned counsel, people from - - -  
23 from the local area bar - - -

24 JUDGE WILSON: That's a different issue. I'm  
25 asking you to assume for a moment - - - let me give you a



1 hypothetical instead of using the facts here.

2 MR. DI DONNA: Okay.

3 JUDGE WILSON: Suppose the trial judge had said,  
4 I'm refusing to appoint you counsel at all ever, you're  
5 just going to have to try this case yourself. And then  
6 after that, he goes ahead and executes a - - - a valid  
7 waiver. He's been deprived trial counsel. There's no  
8 record basis for doing that at all. Does that survive?

9 MR. DI DONNA: Well, I - - - I think that's kind  
10 of an apples and oranges situation be - - -

11 JUDGE WILSON: I'm - - - I'm just asking about  
12 that hypothetical. Let's assume it's a pineapple.

13 MR. DI DONNA: Okay. So you're saying that he is  
14 not provided any counsel whatsoever - - -

15 JUDGE WILSON: Until he gets to the plea and - -  
16 - and the waiver. So he's got counsel for the waiver and  
17 plea, but he does not have counsel for the trial, he's  
18 represented himself over his objection. Never had counsel,  
19 never been offered it. Asked for it, told he can't have  
20 it. Does that survive?

21 MR. DI DONNA: I would say in - - - in that  
22 situation, yes.

23 JUDGE WILSON: Okay. And so what's different  
24 then, why is this a pineapple instead of an apple?

25 MR. DI DONNA: So what's different here is that



1 there's record basis to show that Mr. Shanks engaged in  
2 behavior that rendered a breakdown in the relationship, the  
3 attorney-client relationship, that prevented his assigned -  
4 - -

5 JUDGE WILSON: So then you're not really - - -

6 MR. DI DONNA: - - - counsel - - -

7 JUDGE WILSON: - - - you're not really resting on  
8 the waiver then, you're just arguing he was appropriately  
9 denied counsel because of the record? The waiver has  
10 nothing to do with it.

11 MR. DI DONNA: Well okay, so to go - - - so - - -  
12 so to go back to the issue of the waiver. Here, if he's  
13 going - - - he had retained counsel at the time that the  
14 waiver - - - yeah, he had retained counsel at the time that  
15 he executed the written wavier of appeal. It's the  
16 People's position that if he's going to execute that  
17 written waiver of appeal, he's being advised by his  
18 retained counsel of what he's going to give up, what issues  
19 he's going to lose - - - or - - - or - - - or rights he's  
20 going to be able to lose in exchange for the favorable plea  
21 that he received.

22 JUDGE WILSON: Right. But I think I - - - I  
23 think you agreed with me - - - and stop me if I'm wrong - -  
24 - that if that waiver was valid, and was counseled, it  
25 still wouldn't reach a total deprivation of counsel in my



1 pineapple example. Just as it wouldn't reach ineffective  
2 assistance.

3 MR. DI DONNA: So - - - I - - - I - - - I don't  
4 know how to respond to that, I'm sorry.

5 JUDGE WILSON: Well, let me - - - go ahead and  
6 move on then.

7 MR. DI DONNA: Okay. So - - -

8 JUDGE FAHEY: Well, so - - - so let me ask this  
9 then.

10 MR. DI DONNA: Yes.

11 JUDGE FAHEY: The way I understand your argument  
12 is, first off, the waiver of appeal was - - - was valid,  
13 right?

14 MR. DI DONNA: Yes.

15 JUDGE FAHEY: And secondly, even though it's not  
16 briefed, you're saying that his conduct was so egregious  
17 that he in essence forfeited the right to counsel; is that  
18 an accurate characterization?

19 MR. DI DONNA: Correct, Your Honor.

20 JUDGE FAHEY: The cases that I look at it on  
21 right to counsel, when it's forfeited, usually involve  
22 assaults, sometimes assault on the attorney, a witness,  
23 something like that, spitting, threatening behavior,  
24 attacking the attorneys in - - - in a physical or almost  
25 always in some form of a - - - physically threatening



1 behavior. Disagreeing with counsel is not that. And  
2 hasn't been that.

3 How - - - how does this fall within those  
4 spectrum of cases?

5 MR. DI DONNA: I think it falls into the spectrum  
6 of cases because two of the attorneys, in particular,  
7 towards the end of and just before - - -

8 JUDGE FAHEY: Right. The - - - the last two.

9 MR. DI DONNA: Yeah, the - - - the last two.

10 JUDGE FAHEY: I think we'll agree that the last  
11 two - - -

12 MR. DI DONNA: So - - -

13 JUDGE FAHEY: - - - they weren't - - - they - - -  
14 they left, they didn't want to represent him.

15 MR. DI DONNA: Well, he - - - he made threats of  
16 malpractice. I think that's far worse than being spit upon  
17 in this profession. I - - - I think that's - - - that  
18 causes serious concerns for an attorney, and a great deal  
19 of discomfort. And causes an attorney - - - starts to  
20 divide the attorney's loyalty between him or herself and  
21 then his or her client.

22 JUDGE FAHEY: So you're saying the two that were  
23 identified are enough?

24 MR. DI DONNA: I - - - yes. In - - - in  
25 conjunction with everything else that took place here.



1 JUDGE FAHEY: Um-hum.

2 MR. DI DONNA: There were two additional  
3 attorneys, though, it's kind of buried in the - - - in the  
4 record. The first attorney, Ryan Meyersack (ph.), he not  
5 only left because there was a conflict of interest, but  
6 because he didn't - - - he could not work with the - - -  
7 the appellant here, Mr. Shanks. And that was noted in the  
8 record. And the - - - the appellant agreed with the judge,  
9 the trial court judge, that he couldn't communicate with  
10 him. So that was noted, I believe, on January 17th of  
11 2017.

12 JUDGE FAHEY: I thought they relieved the Public  
13 Defender's Office for a conflict of interest?

14 MR. DI DONNA: Yeah, it was also that. But if -  
15 - - if you also look in the record, Your Honor, and to the  
16 court, it's also noted that Mr. Shanks agreed with the  
17 judge that he said he could not get along with Mr.  
18 Meyersack.

19 Additionally, the other attorney referenced here,  
20 David Taylor, who was the second attorney who entered into  
21 this - - - entered into this representation - - -

22 CHIEF JUDGE DIFIORE: So Counsel, let me  
23 interrupt. When - - -

24 MR. DI DONNA: Yes.

25 CHIEF JUDGE DIFIORE: - - - when - - - when a



1 defendant offers to the judge, who's presiding, that he  
2 can't get along with the lawyer, what's the trial judge's  
3 obligation to probe that a little bit and figure - - - try  
4 to figure that out and maybe even help that along? I don't  
5 know, you tell me.

6 MR. DI DONNA: I - - - I think the judge is  
7 supposed to - - - the trial judge is supposed to say, you  
8 know, you - - - you need to work with your - - - your  
9 assigned counsel or your retained counsel. It's in your  
10 best interest to do so. If you don't, you may end up like  
11 Mr. Shanks did in this situation, representing yourself - -  
12 - representing yourself if you don't work with the - - -  
13 with the professional in this situation and defer to his or  
14 her - - -

15 JUDGE RIVERA: But the colloquy you're referring  
16 to occurred after that office had withdrawn, right? I  
17 mean, this is not contemporaneous with the representation.  
18 Or did I misunderstand you?

19 MR. DI DONNA: No. No. So initially - - -

20 JUDGE RIVERA: This is years later, is it not?

21 MR. DI DONNA: This - - - this is - - - so a - -  
22 - a record of the breakdown - - - of - - - of - - - of the  
23 issues between Mr. Shanks and his attorneys is noted on, I  
24 believe, January 17th, 2017. It was during that hearing,  
25 closed hearing, between Mr. Shanks, his current attorney at



1 that time, Lee Herschen, and the defendant, where the judge  
2 breaks down the - - - all the different lawyers that Mr.  
3 Shanks had had, and why those attorneys were no longer  
4 representing him. And it was noted there, Your Honor,  
5 where Mr. Meyersack was saying that he couldn't - - - or  
6 the - - - the defendant couldn't communicate with the - - -  
7 with Mr. Meyersack.

8 JUDGE RIVERA: So that's the first one. Let - -  
9 - I'm not so sure couldn't communicate gets you there. But  
10 let - - - let's say that's the first one. There's several  
11 others in between.

12 MR. DI DONNA: Yes.

13 JUDGE RIVERA: And he seems to be communicating  
14 just fine, right?

15 MR. DI DONNA: Well, to - - - to a degree. It's  
16 also noted at that same hearing in January of 2017 that  
17 even David Taylor, who worked a lot with Mr. Shanks, when  
18 he was asked a second time to represent him, he refused to.  
19 He said, I don't want to work with him based on his  
20 behavior. It's a small legal community, Knox Eagle County  
21 (ph.), and the word spread like a wildfire that - - - that  
22 he wasn't someone that anybody could work with.

23 CHIEF JUDGE DIFIORE: Thank you, counsel.

24 MR. DI DONNA: Thank you, Your Honor.

25 CHIEF JUDGE DIFIORE: Counsel, your rebuttal?



1 MS. MANLEY: Thank you.

2 First, I - - - I agree with amnesty that the  
3 prosecution did waive all of the arguments that weren't  
4 raised in their brief. And all that they raised in their  
5 brief was the issue of forfeiture of counsel surviving a  
6 valid waiver of appeal. So I think that's the only issue  
7 they should be able to go forward with.

8 But in any event, the forfeiture, there was no  
9 way that it rose to that level here. And - - - and the  
10 idea that threats of - - - of malpractice or filing I think  
11 it was a complaint to the committee, the idea that that  
12 should result in forfeiture of the right to counsel is - -  
13 - is not something this court should endorse at all. That  
14 - - - that's a very - - -

15 JUDGE FAHEY: Well, we all - - - we all have  
16 different experiences. You're practicing attorneys who  
17 work in cases where you're arraigning people and you go  
18 through it. Quite often, people would come in and scream  
19 at you at one point in a proceeding. The next time,  
20 they've calmed down and you - - - you could - - - that - -  
21 - that's a common occurrence I think that all of us who've  
22 dealt in the criminal law, on both sides of the V between  
23 you, has - - - has experience.

24 I guess the question is what the pattern of  
25 behavior is over time.



1 MS. MANLEY: Right. And this really, I don't  
2 think you can rely on what the judge said about what - - -  
3 I think the judge mis - - - misrepresented this record as  
4 far as these attorneys. And there's nothing from Mr.  
5 Meyersack saying he had problems with Mr. Shanks, and  
6 nothing really from Mr. Shanks saying that. There was just  
7 the judge kind of maybe remembering that wrong a couple  
8 years later. So I don't think we can really rely on that.

9 And I - - - Mr. Taylor never said that he wasn't  
10 coming back based on Mr. Shanks' behavior.

11 JUDGE FAHEY: One thing on - - -

12 MS. MANLEY: That's just not in the record and  
13 that's not the case - - -

14 JUDGE FAHEY: - - - one thing I'd asked you  
15 before.

16 MS. MANLEY: - - - and Mr. Shanks was surprised.  
17 He liked him.

18 JUDGE FAHEY: Not - - - no. One thing I'd asked  
19 you before is if we say that the waiver of appeal was  
20 invalid, then is there any reason for us to address at all  
21 the counsel question?

22 MS. MANLEY: Well, yes because it - - - the - - -  
23 you mean, the - - - the forfeiture issue?

24 JUDGE FAHEY: Right.

25 MS. MANLEY: Yes. Because the Third Department



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decided it wrongly.

JUDGE FAHEY: I see.

MS. MANLEY: And so - - - yeah.

JUDGE FAHEY: I see.

JUDGE RIVERA: Because they reached the issue?

MS. MANLEY: They did reach the issue.

JUDGE FAHEY: Right. I - - - I understand - - -

MS. MANLEY: In that one sentence, but yes.

JUDGE FAHEY: Yeah. Okay. Thank you.

CHIEF JUDGE DIFIORE: Thank you, Counsel.

MS. MANLEY: Thank you.

(Court is adjourned)



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

I, Amanda M. Oliver, certify that the foregoing transcript of proceedings in the Court of Appeals of The People of the State of New York v. Bradford Shanks, No. 58 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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