New York Court of Appeals

PEOPLE OF THE STATE OF NEW YORK,

Respondent,

v.

BRADFORD SHANKS,

Defendant-Appellant.

APL No. 2019-00246

BRIEF OF AMICI CURIAE THE CENTER FOR APPELLATE LITIGATION, OFFICE OF THE APPELLATE DEFENDER, CHIEF DEFENDERS ASSOCIATION OF NEW YORK, AND NEW YORK STATE ASSOCIATION OF CRIMINAL DEFENSE LAWYERS IN SUPPORT OF APPELLANT

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INTEREST OF AMICI CURIAE

Amici Curiae, the Center for Appellate Litigation, the Office of the Appellate Defender, the Chief Defenders Association of New York, and the New York State Association of Criminal Defense Lawyers are public-appellate defender firms or defense-lawyer associations with a significant interest in the protection of the fundamental rights to appeal and counsel—rights squarely implicated here. *See* Amici's Motion in Support of Amicus Brief (filed with this brief).

SUMMARY OF AMICI'S ARGUMENT

The right to appeal and the right to counsel are fundamental, enshrined in Article VI § 4(k) of the New York Constitution. *People v. Pollenz*, 67 N.Y.2d 267, 268-70 (1986). And this Court has long held that constitutional claims going to the "very heart of the process" survive an appeal waiver. *People v. Lopez*, 6 N.Y.3d 248, 255 (2006).

The question presented here is whether the fundamental rights to trial counsel and a neutral judge go to the "heart of the process" and are thus immune from waiver (here a waiver entered after trial). As these fundamental claims go straight to the fairness of our criminal-trial process, they are not waivable under *Lopez*, 6 N.Y.3d at 255; Point I, *below*.

But if this Court holds that these particular claims are non-waivable while leaving the appeal-waiver regime generally intact, it would "perpetuate, not avoid" the broader problem our law should "condemn[ ]": the enforcement of appeal waivers in general. *Crawford v. Washington*, 541 U.S. 36, 67 (2004). The time has come to revisit this Court's

decision in *People v. Seaberg*, 74 N.Y.2d 1 (1989), which created, without any legislative authorization, our modern appeal-waiver system. *See* Point II.

Seaberg suffers from several fundamental flaws as it: (1) misconstrued the critical benefits of appeals; (2) ignored that the very nature of an appeal—preventing error through appellate oversight—is incompatible with a waiver regime; (3) drastically overstated the ultimately irrelevant economic benefits of an appeal-waiver system; and (4) adopted a fictional theory that defendants can knowingly and voluntarily waive the right to appeal (and that appellate judges can determine as much from a cold record).

Instead of furthering the goals laid out in *Seaberg,* the actual effect of appeal waivers has been to shield error from the appellate spotlight and prevent reversals of convictions. Those are not legitimate interests.

Seaberg's experiment with appeal waivers should end. Defendants should be free to exercise their constitutional right to appeal.

This Court should also reject the Appellate Division's determination that Mr. Shanks forfeited his right to assigned counsel because he did not cooperate with two attorneys. *People v. Shanks*, 174 A.D.3d 1142, 1142 (3d Dep't 2019). A defendant can only forfeit the fundamental right to counsel under "extreme" circumstances—*i.e.* if he engages in "egregious" conduct that is intended to interfere with the orderly progression of trial. *People v. Smith*, 92 N.Y.2d 516, 521 (1998). This record, at best, indicates that Mr. Shanks had disagreements about strategy and several heated conversations with two attorneys. This is hardly the "extreme" or "egregious" conduct required to justify

forfeiture.

STATEMENT OF FACTS

A. The Trial Judge Denies the First Recusal Motion

In June 2015, Appellant Bradford Shanks was indicted with third-degree grand larceny, a Class D-felony, in Otsego County Court. The prosecution alleged that he misrepresented about $35,000 in income to obtain lost wages on an insurance claim. At the June 2015 arraignment, the court set bail, which Mr. Shanks successfully posted.

On July 10, 2015, Mr. Shanks appeared without counsel and indicated that he needed time to retain counsel as he had just been released from jail on bail. Because he was allegedly 45 minutes late for the *pro se* appearance (he arrived at 10 a.m. but the court claimed he should have been there at 9:15 a.m.), the court conducted a *sua sponte* bail-forfeiture proceeding. Mr. Shanks explained that he believed he was supposed to appear at 10 a.m. and "apologize[d]." The court did not forfeit his bail but increased it by 50 percent. Appendix 11-12 ("A").

The court found Mr. Shanks to be indigent and assigned him counsel. A24, A28**.** On March 4, 2016, assigned counsel moved to recuse the judge on judicial-bias grounds. A42-44. Counsel cited: (1) the court's apparent bias at the July 10, 2015 appearance (discussed above) and (2) a December 2, 2015 in-chambers conference, "wherein the district attorney . . . announc[ed] he was going to move to dismiss the case. In response, the judge expounded on the number of ways he could see that the case could still be successfully prosecuted." A44. Counsel argued that "[g]iven the situation[,] recusal is

advisable [because] objectivity cannot be guaranteed and reliability is questionable." A44. The court did not dispute counsel's account of the chambers conference but nevertheless denied the motion. A45-47.

B. The Court Bars Mr. Shanks from Representation by Assigned Counsel.

Before trial, four successive attorneys representing Mr. Shanks were relieved because of conflicts, illness, or relocation. A28-29 (conflict of interest related to prior representation of Mr. Shanks' wife); A60-61 (illness); A63 (conflict of interest); A65 (relocation to Georgia).

Two more attorneys were relieved after they cited difficulties communicating with Mr. Shanks. Specifically, in an August 2016 letter to the court, Diane DiStefano stated that "Mr. Shanks. . . holler[ed] at [her] for not calling him sooner" and counsel "ultimately told him that it was no wonder [she] was his fifth lawyer and hung up on him." A66. Ms. DiStefano wanted to discuss settlement offers, but Mr. Shanks insisted on trial. A67. Because she could not discuss the case with Mr. Shanks, counsel concluded that she could not provide effective representation, citing a "complete and total breakdown of the attorney/client relationship," which was "never particularly strong in the first place." A66.

Days later, the court asked Mr. Shanks if he had "trust in [counsel] [and could] continue to work with [her]." Mr. Shanks said, "I don't think so," and the court relieved Ms. DiStefano. The court said Mr. Shanks could not "be abusive to [his] attorneys" or "delay" the case by "yelling" at counsel. The court added that "[w]hether purposely or

inadvertently, each and everything that you've done throughout the course of this trial has caused delay." A69-A71.

The court refused to assign another attorney, informing Mr. Shanks that if he wanted trial representation, he would have to retain counsel on his own. A73.

Apparently reconsidering its decision, the court assigned new counsel, Lee Hartjen. During the four months Mr. Hartjen was retained, he requested four adjournments, citing scheduling conflicts, family issues, and difficulty reviewing the records. Mr. Hartjen then moved to withdraw on the grounds of Mr. Shanks' "behavior," "demands," "threats," and "unwillingness to prepare for trial." A74, A75-90, A96.

Mr. Hartjen informed the court that he and Mr. Shanks "g[o]t along okay" and had not "come to real blows about anything." A99. But they disagreed about trial-preparation strategy and Mr. Shanks was not cooperating with him. A99-100. Counsel added that Mr. Shanks accused him of incompetence, was "at times" "very aggressive," and had threatened a malpractice suit. A100-01.

The court asked, Mr. Shanks if he agreed with counsel's withdrawal application. Mr. Shanks answered affirmatively. The court relieved Mr. Hartjen and told Mr. Shanks that it would not assign new counsel given his non-cooperation with counsel and threats of lawsuits/disciplinary complaints. The court told Mr. Shanks he had to hire a lawyer for trial or represent himself at trial. A105-06.

In 2017, Mr. Shanks proceeded to trial *pro se*. A101-05, A110. The jury found him guilty of third-degree grand larceny. A212.

C. The Appeal Waiver

Mr. Shanks' new attorney filed several post-verdict motions, claiming (among other violations): (1) the trial judge was unconstitutionally biased and must recuse himself; and (2) Mr. Shanks' right to counsel was violated when the court barred assigned counsel. A221-28.

Prior to sentencing, the prosecution offered a sentence of time served on the condition that Mr. Shanks drop all pending motions and waive his right to appeal. A233-34.

At sentencing, the court confirmed Mr. Shanks "would be withdrawing th[e] motions in their entirety," and that he would be giving up "the right to appeal any issue relating to [his] conviction and ultimately [his] sentence." A235-36.

The written waiver that Mr. Shanks signed did not indicate that some issues remained appealable after executing the waiver. A243. Instead, it stated that Mr. Shanks was waiving his rights to appeal, to file a brief, and to assigned appellate counsel. A243.

D. The Third Department Decision

Mr. Shanks argued before the Third Department that, among other violations, the trial court violated his right to counsel and was not impartial. *See* Shanks App. Div. Br. Points IV, VI. Mr. Shanks also argued that the appeal waiver did not bar review of these claims. *Id.* at Point I.

The court affirmed. *Shanks*, 174 A.D.3d at 1142. After citing conflicting Third Department authority on the waivability of a right-to-counsel claim, the Court bypassed that procedural issue and reached the merits. *Id.* at 1142-43. The Court held that Mr. Shanks' purportedly "persistent pattern of threatening, abusive, obstreperous, and uncooperative behavior with successive assigned counsel" justified forfeiture of the right to counsel. *Id.* (quotation marks omitted).

As for Mr. Shanks' remaining claims, including the judicial-bias claim, the court found that the waiver of appeal covered those claims. *Id.* at 1143.

A Judge of this Court granted leave to appeal.

ARGUMENT

POINT I

The fundamental rights to counsel and a neutral judge go "to the very heart of the process" and are thus non-waivable.

A. The Right to Counsel

As this Court held in *People v. Lopez*, "an appeal waiver will encompass any issue that does not involve a right of constitutional dimension going to 'the very heart of the process.'" 6 N.Y.3d 248, 255 (2006) (quoting *People v. Hansen*, 95 N.Y.2d 227, 230 (2000)).

The right to trial counsel—without question—goes to the "very heart of the process." *Id* at 230. That fundamental right is the crown jewel of our constitutional system; it is the right that makes all other rights effective. *See People v. Jacobs*, 6 N.Y.3d

188, 195 (2005) (courts must exercise "the highest degree of vigilance in safeguarding and defending" the fundamental right to counsel.); *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963). When the system violates this core right, the trial is presumptively unfair. *United States v. Cronic*, 466 U.S. 648, 653-54 (1984). If the right to counsel at a felony trial does not go to the "heart of the process," it is hard to imagine what does. *People v. Griffin*, 20 N.Y.3d 626, 630-31 (2013) (the right to counsel goes to the "heart" and "integrity" of the process and thus is not subject to automatic forfeiture upon plea).

The Second and Third Departments have reached the same conclusion, finding that a right-to-counsel violation is immune from an appeal waiver. *People v. Best*, 186 A.D.3d 845 (2d Dep't 2020) (citing *Lopez*, 6 N.Y.3d at 255 and *Hansen*, 95 N.Y.2d at 230); *People v. Trapani*, 162 A.D.3d 1121, 1122 (3d Dep't 2018). This categorical rule should be adopted by this Court. A contrary holding would allow a conviction to stand even though an indigent defendant was, as here, unconstitutionally required to represent himself at trial.[1]

[1] Further, the waiver was invalid as to all claims that Mr. Shanks raised in the Appellate Division because "the rights encompassed by an appeal waiver were mischaracterized during the oral colloquy and in [the] written [waiver] forms . . . ." *People v. Bisono*, 36 N.Y.3d 1013, 1017 (2020). The written waiver incorrectly stated that Mr. Shanks was waiving the "right to take an appeal, to prosecute the appeal as a poor person, and to have an attorney assigned in the event that [he] is indigent, and to submit a brief, and/or argue before the appellate court on any issues relating to the conviction and sentence." A243. As the waiver form and oral colloquy (A232-42) failed to indicate (1) that an appeal waiver was not an "absolute bar to direct appeal" and/or (2) "that any issues survived the waiver," the waiver was defective under *Bisono*, 36 N.Y.3d at 1017.

The prosecution's two-page brief neither develops any principled legal theory, nor applies this Court's "heart of the process" standard. *Lopez*, 6 N.Y.3d at 255 (internal quotations omitted). Instead, the prosecution cites conclusory Appellate Division decisions, which either don't address violations of the right to *trial* counsel or have been undercut by subsequent decisions in the relevant departments.[2]

In any event, this Court's "heart of the process' standard, not conclusory Appellate Division decisions, controls the analysis. *Lopez*, 6 N.Y.3d at 255 255 (internal quotations omitted). Under that governing standard, there can be no real dispute that a right-to-counsel claim is immune from waiver.

B. The Right to a Neutral Judge

1. The prosecution has waived a waiver argument.

The prosecution's brief does not challenge Mr. Shanks' argument before this Court that a judicial bias claim is unwaivable. *See* Shanks Court of Appeals Br. 46-49; Prosecution Court of Appeals Brief 1-2. Accordingly, the State has "waived the waiver" argument. *E.g.*, *Garza v. Idaho*, 139 S. Ct. 738, 745 (2019) ("[E]ven a waived appellate claim can still go forward if the prosecution forfeits or waives the waiver.") (citing *United States v. Story*, 439 F.3d 226, 231 (5th Cir. 2006) ("In the absence of the government's

[2] *People v. Richardson*, 173 A.D.3d 1859 (4th Dep't 2019) (assessing a claim involving the right to counsel at the *grand jury* and citing cases that ultimately lead back to the Third Department's decision in *People v. Segrue*, 274 A.D.2d 671, 672 (3d Dep't 2000), which has been undercut by that Department's more-recent 2019 decision in *Trapani*); *People v. Whitfield*, 52 A.D.3d 748, 748 (2d Dep't 2008) (undercut by that court's more-recent decision in *Best*).

objection to Story's appeal based on his appeal waiver, the waiver is not binding because the government has waived the issue. We move to the merits . . . .")); *United States v. Murguia-Rodriguez*, 815 F.3d 566, 574 (9th Cir. 2016); *United States v. Quiroz*, 22 F.3d 489, 490–91 (2d Cir. 1994).

2. In any event, a judicial-bias claim is not waivable.

The right to a neutral and impartial judge is fundamental; so fundamental that it constitutes structural error. *People v. Towns*, 33 N.Y.3d 326, 331 (2019) (the right is a "fundamental principle of criminal jurisprudence") (citation omitted); *Williams v. Pennsylvania*, 136 S. Ct. 1899, 1909-10 (2016). Because an impartial judge is essential to both actual and apparent fairness—two cornerstones of our system—courts have "jealously guarded" this neutrality mandate. *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980). No doubt, a violation of the right to a neutral judge goes to the "heart of the process," thus rendering it immune from an appeal waiver. *Lopez*, 6 N.Y.3d at 255.

The unique facts of this case further undermine a waiver theory. Here, the purportedly biased judge actually *secured* the waiver. Therefore, the appeal waiver was directly infected by the impartiality violation. *Griffin*, 20 N.Y.3d at 630-33 (because the accused was, at the time of the plea, represented by an attorney in violation of his right to counsel of his choosing, the violation infected the plea itself and thus precluded an automatic-forfeiture theory).

More significantly, the purportedly-biased judge ultimately conditioned the negotiated sentence on a waiver of all pending claims, *including* the pending claim that

the judge was unconstitutionally biased and should be recused. A233-36. The fundamental unfairness worked by a purportedly biased judge securing a waiver of a pending recusal application and then insulating himself from appellate review is obvious. Such a regime cannot stand.

* * *

This Court should reverse the Appellate Division's order and, at a minimum, remand for consideration of the claims raised therein.[3]

POINT II

This Court should overturn *People v. Seaberg* and abolish appeal waivers.

As shown above, this Court could reverse on the grounds that certain claims are categorically immune from an appeal waiver. But in order to protect the fundamental right to appeal, this Court should go further by overruling *People v. Seaberg*, 74 N.Y.2d 1 (1989), and holding that appeal waivers are categorically unenforceable.

The right to appeal is enshrined in statute (C.P.L. Articles 450, 470) and the State Constitution. N.Y. Const. Art. VI, § (4)(k) ("The appellate divisions . . . shall have all the jurisdiction possessed by them on the effective date of this article [1962] and such additional jurisdiction as may be prescribed by law."); *People v. Pollenz*, 67 N.Y.2d 264, 268-70 (1986) (Article VI, § 4(k) "render[s] inapplicable the general rule that the right

[3] As the Appellate Division reached the merits of the right-to-counsel claim, this Court should review that claim here, as Mr. Shanks requests. *See* Point III, below.

to appellate review is purely statutory. . . . [T]he Legislature [can] expand the [subject-matter] jurisdiction of the Appellate Division [to hear certain claims on appeal] but not contract it . . . ."); *accord Lopez*, 6 N.Y.3d at 255.[4]

The Legislature has never suggested that the right to appeal is waivable. But in *People v. Seaberg*, this Court, apparently as a matter of common law, held that criminal defendants may validly waive their right to appeal. 74 N.Y.2d 1 (1989). *Seaberg* rested on several premises: (1) "there is no affirmative public policy to be served in fostering appeals or prohibiting their waiver"; (2) appeal waivers are the result of "mutual concessions," reflecting a genuine bargain between the parties; and (3) appeal waivers offer "final and prompt conclusion" of litigation, thus preventing the need to spend resources on the appeal. *Id.* at 7-8.

Seaberg was wrong when it was decided and the test of time has only confirmed the point. Thus, as Judges Wilson and Rivera recently observed in *People v. Thomas*, our experiment with appeal waivers should end. 34 N.Y.3d at 570-71 (Rivera, J.); *id.* at 587-

[4] In several cases, this Court has incorrectly stated, in dictum, that the right to appeal is "statutory only." *E.g.*, *People v. Thomas*, 34 N.Y.3d 545, 558 n. 1 (2019); *People v. Grimes*, 32 N.Y.3d 302, 310 (2018). This Court should take the opportunity here to correct this mistaken dictum in order to prevent further confusion about the state-constitutional nature of the right to appeal. *Pollenz*, 67 N.Y.2d at 268-70.

99 (Wilson, J.).

A. *Seaberg*'s Analysis of the Value of Appeals Was Unfounded.

Seaberg suggested that "there is no affirmative public policy to be served in fostering appeals or prohibiting their waiver." 74 N.Y.2d at 8. This suggestion is inaccurate and confirms that stare decisis has little force here. *People v. Hobson*, 39 N.Y.2d 479, 490 (1976) (a precedent has less stare decisis power when it is "ipse dixit" and not the product of careful reasoning).

Seaberg's cursory suggestion that appeals serve no public good ignores that appeals promote critical interests: (1) fairness, (2) accuracy, (3) enforcement of, and thus promotion of, the rule of law, (4) uniform application of the law, (5) articulation of legal doctrine, and (6) public confidence in our conviction and incarceration system. *See*, *e.g.*, *People v. Hollman*, 79 N.Y.2d 181, 189 (1992); *People v. Berrios*, 28 N.Y.2d 361, 369 (1971); *People v. Suitte*, 90 A.D.2d 80, 85 (2d Dep't 1982); Barbara Zolot, *The Gov't Tool You've Never Heard of that Conceals Police Misconduct*, N.Y.L.J. (ONLINE) (Sept. 18, 2020) (discussing the public's interest in the "deterrent effect that a critical appellate ruling might have on future conduct"). Given these compelling interests, "[o]ur State has always regarded the right to appellate review in criminal matters as an integral part of our judicial system and treated it as such. . . . [I]t has been the consistent policy of our courts to preserve and promote that right as an effective, if imperfect, safeguard against impropriety or error in the trial of causes." *People v. Pride*, 3 N.Y.2d 545, 549 (1958). The

suggestion that "fostering appeals" is not a public policy goal ignores a basic premise of New York—indeed American—law.

B. The right to appeal is not amenable to the concept of waiver.

The purpose of an appeal further confirms it is not amenable to waiver. An appeal's purpose is to correct judicial and prosecutorial error. It is illogical to, in turn, allow the very parties who have erred (the court and/or the prosecutor) to control access to the forum designed to correct *their* error. "One recalls the venerable maxim of Pascal: 'No one should be judge in his own cause.' Phrased less elegantly, in the vernacular, it is akin to having the fox guard the henhouse." *Windsor Park Tenants' Ass'n v. N.Y. City Conciliation and Appeals Bd.*, 59 A.D.2d 121, 147 (2d Dep't 1977) (Hawkins, J., concurring).

Similarly, a waiver system is incompatible with the critical oversight function performed by our appellate system. Appeals systematically ensure lower courts follow the law by deterring judicial/prosecutorial error. As this Court has long observed, an appeal is a "*safeguard* against impropriety or error in the trial of causes." *Pride*, 3 N.Y.2d at 549 (emphasis added). The appellate-waiver system—which shields countless errors from appellate review—causes this oversight system to break down as it "seriously weakens the deterrent effect" of appellate review. Michael E. Tigar, *Foreword: Waiver of Constitutional Rights: Disquiet in the Citadel,* 84 HARV. L. REV. 1, 21 (1970).

In a system overwhelmingly dominated by plea bargaining, the systematic nullification of an appeal's deterrent power has a significant impact on judicial and

prosecutorial behavior. As Professor Calhoun has commented, "[w]hen we take into account the fact that almost 90% of all criminal cases are disposed of by guilty plea, then we must recognize that we are talking about more than whether an individual defendant should be free to waive a particular right . . . We must confront a practice which presents the potential for closing the doors of the American criminal courtroom and shielding most criminal cases from any judicial review." Robert K. Calhoun, *Waiver of the Right to Appeal*, 23 HASTINGS CONST. L. Q. 127, 168-69 (1995).

Seaberg vaguely added that our "interest" in the rule of law "is protected by the procedural and substantive requirements imposed on the trial judge before the defendant may be sentenced." *Id.* at 9. But obviously, the premise of appellate review is that we cannot assume a judge will comply with "procedural and substantive requirements." *Seaberg* appears to have relied on the flawed theory that appellate review is academic because courts do not err.

Seaberg's broad claim that appellants should not be allowed to "repudiate an agreement of an individualized sentence knowingly and voluntarily accepted" fares no better. 74 N.Y.2d at 9. The suggestion that a defendant cannot "repudiate" an agreed-upon sentence is just an argument against the right to appeal in *all* plea cases, waiver or not. But this Court has protected the right to appeal in plea cases. In *Pollenz*, for instance, this Court struck down a statute limiting appellate review of sentences following a negotiated plea. 67 N.Y.2d at 268-70. *Seaberg*'s objection to repudiating "voluntarily accepted" sentences is at odds with the right to appeal itself.

C. Appeal waivers are neither voluntary nor knowing.

Seaberg found that defendants "voluntarily" waive the appellate right since "[n]othing requires a defendant to seek a plea bargain and there is nothing inherently coercive in leaving with the defendant the option to accept or reject a bargain if one is offered." 74 N.Y.2d at 8-9. This view clashes with reality.

Appeal waivers are not the result of any *real* negotiation. There is a gross disparity in bargaining power between the prosecution and defendant. *People v. White*, 32 N.Y.2d 393, 400 (1973) (there is an "inescapable element of coerciveness inherent in all plea bargaining"). A defendant is desperate to avoid prison and will not reject a plea offer because the prosecution demands an appeal waiver. Under these circumstances, the State holds the power and the defendant has nothing but a Hobson's choice to accept the waiver or risk a longer sentence. This power imbalance cannot be seriously disputed.[5]

Experience with the *Seaberg* regime confirms there is no real bargaining here. Even though the right to appeal is not one of the "rights automatically extinguished upon entry of a guilty plea," *Thomas*, 34 N.Y.3d at 564, appeal waivers have become "'part and parcel of plea bargaining'" and a "'purely ritualistic device,'" *People v. Batista*, 167 A.D.3d 69, 81 (2d Dep't 2018) (Scheinkman, P.J., concurring). "[M]any defendants

[5] This case confirms the point. Mr. Shanks had two options: risk a felony sentence of up to seven years or accept time served. To call that a "free choice" is to ignore reality.

find themselves faced instead with a fiat requirement that they waive their appeal rights as a precondition to bargaining." Calhoun, *supra*, at 167.

To be sure, there are some cases where a prosecutor may consciously reduce a sentence in exchange for the waiver of apparently meritorious claims. The present case, with all of its appealable issues, including a right-to-trial-counsel violation, is a good example. Prosecutors may also reduce a sentence in exchange for the waiver of a seemingly-powerful suppression claim, especially since appellate success could mean dismissal, a remedy the prosecutor wants to avoid. *People v. Ventura*, 139 A.D.2d 196, 204 (1st Dep't. 1988). Thus, the only cases where a defendant really "benefits" from an appeal waiver (by receiving a reduced sentence) are those where the prosecutor *suspects* reversible error has occurred. Calhoun, *supra*, at 167. That "transaction" is not worth defending as it constitutes an intentional effort to immunize a faulty conviction from appellate challenge.

Nor can appeal waivers be deemed "knowing." *Seaberg*, 74 N.Y.2d at 11. A defendant's knowledge cannot be accurately measured by appellate courts on a cold record. As Judge Wilson has observed, "[t]he defendant's own voice is conspicuously lacking" during a sentencing court's colloquy. *Thomas*, 34 N.Y.3d at 589. Determining the knowing quality of a waiver is a difficult and speculative inquiry that has spawned fact-intensive litigation, best demonstrated by this Court's recent invalidation—in one fell swoop—of ten waivers in one decision. *Bisono*, 36 N.Y.3d at 1017. Courts have examined waivers of "all shapes and sizes" (*Thomas*, 36 N.Y.3d at 574 (Garcia, J.)) and

developed a "tortured jurisprudence" (*id.* at 587 (Wilson, J.)) that requires unworkable analysis and creates unpredictable results. *See* Paul Shechtman, *Large Number of Invalidated Appeal Waivers Illustrates Need for Change*, N. Y. L. J. (ONLINE) (Jan. 6, 2021) (criticizing this Court's appeal-waiver jurisprudence as creating unpredictable results).[6]

D. Appeal waivers do not promote "efficiency." And even if they did, liberty trumps efficiency.

Although *Seaberg* expected appeal waivers to save appellate resources, 74 N.Y.2d at 8, they have actually opened the gate to a flood of appellate litigation. *See Batista*, 167 A.D.3d at 78 (describing how the appeal waiver has become "a pathway to future litigation"). Appeal waivers are commonly contested and frequently invalidated. In 2019 alone, the Appellate Divisions decided at least 500 cases involving their validity.[7] This accounts for about 15% of all 2,800 criminal appeals that Appellate Divisions disposed of in 2019.[8] And of those hundreds of cases, the waiver was held invalid in at least 100 appeals. *See also Batista*, 167 A.D.3d at 78.

Moreover, contrary to the *Thomas* Court's claim that "[a]ppellate review of the voluntariness of an appeal waiver is not onerous," 34 N.Y.3d at 566, it is in fact

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[6] Furthermore, most defendants who waive their right to appeal likely assume they cannot challenge their sentence after a negotiated disposition. But under New York law, they can. *Pollenz*, 67 N.Y.2d at 268-70 (upholding this very right); N.Y. Const. art. VI §, 4(k). Rarely, if ever, will a record demonstrate a defendant's actual understanding of this critical legal reality.

[7] *See also Thomas,* 34 N.Y.3d at 597 (Wilson, J.).

[8] Chief Administrator of the Courts, N.Y. State Unified Court System, *2019 Annual Report*, 34 (2019), https://www.nycourts.gov/legacypdfs/19_UCS-Annual_Report.pdf.

extremely time consuming to navigate the "amorphous and inconsistent guidelines susceptible to various interpretations." *Id.* at 595-96 (Wilson, J.). Judges must "devote countless hours comparing the inquiry conducted by a particular judge in a particular case with inquiries conducted by the same judge in other cases that we have already held to be effective or ineffective." *Batista*, 167 A.D.3d at 83 (Scheinkman, P.J., concurring).

Nullifying appellate review of invalid convictions or sentences also squanders resources. If an invalid conviction or excessive sentence remains intact because of an appeal waiver, our state loses resources—often hundreds of thousands of dollars in prison/supervision and post-conviction-litigation costs—enforcing that illegitimate judgment. That result also inflicts devastating economic harm on the defendant and the defendant's family, which has serious consequences on their community and ultimately the State's tax base. Thus, even if stifling appellate review nullified the cost of an appeal, the massive costs of affirming an invalid judgment offset those savings. *Seaberg* ultimately emphasized the resources *theoretically* saved by appeal waivers while ignoring the *guaranteed* savings created by appellate review.

Nor do appeal waivers meaningfully enhance the likelihood an offer will be extended in the first place. *Compare Thomas*, 34 N.Y.3d at 587 (Garcia, J.) (arguing to the contrary). It is "difficult to believe" that the "abolition of appeal waivers would have any impact whatsoever [on the extension of plea bargains] because the criminal justice system is simply too dependent upon plea bargaining to take seriously the notion that

prosecutors would cause plea bargaining to come to a halt simply because courts found appeal waivers to violate public policy." Calhoun, *supra*, at 193.

Judge Garcia's concurring opinion in *Thomas* also claimed there are "tens of thousands of cases where defendants decline to pursue an appeal as a direct result of their waivers." 34 N.Y.3d at n.12. This argument misconstrues the legal impact of the waiver. An appeal waiver often fails to cover the relevant claim and/or there is no risk in assailing it on appeal. Thus, rational defendants do not decline to appeal on waiver grounds. *Thomas*, 34 N.Y.3d at 597 (Wilson, J.) (noting that counseled defendants do not abandon an appeal because of a waiver). Instead, a defendant is far more-likely to decline to appeal post-waiver because of illegitimate reasons: (1) trial counsel unreasonably failed to file a notice of appeal—a ministerial and no-risk proposition for any defendant; or (2) trial counsel violated court and ethical rules by failing to file a motion for assignment of appellate counsel. *E.g.*, Appellate Courts Committee of the New York County Lawyers Association, *Proposals for Assignment-of-Appellate-Counsel Reform*, Letter to Chief Admin. Judge Lawrence J. Marks (Jan. 17, 2018).

But even if appeal waivers saved the government money in the long run, resources and "efficiency" cannot justify the nullification of the fundamental right to appeal. *See Stanley v. Illinois*, 405 U.S. 645, 656 (1972) ("[T]he Bill of Rights . . . [was] designed to protect the fragile values of a vulnerable citizenry from the overbearing concern for efficiency."). As the First Department explained in a case predating *Seaberg*, "[w]hat harm or prejudice are they seeking to avoid? It cannot be to spare the State the

cost of providing appellate review to a convicted defendant, for that would be offensive to the public policy of this State, which is committed to providing the right of appellate review and bearing the cost." *Ventura*, 139 A.D.2d at 204-05 (citing *People* v. *Rivera*, 39 N.Y.2d 519, 522 (1976) and *People* v. *Montgomery*, 24 N.Y.2d 130, 132-33 (1969)).

E. The government's real interest in appeal waivers is to insulate convictions from reversal.

The *real* interest advanced by appeal waivers is that they ensure the government, which has already invested time, energy, and political capital in a criminal conviction, does not lose that conviction. Like any litigant, the government zealously seeks to avoid reversal of its lower-court victories. Appeal waivers help the government accomplish that basic interest.

This blanket desire to affirm a conviction, however, is not a valid justification for the nullification of the constitutional right to appeal. *See Ventura*, 139 A.D.2d at 205 ("There is no legitimate State interest in preserving an unjust conviction for the sake of the conviction alone. And it is for us, not the prosecutor, to determine on an appeal whether a conviction is unjust.").

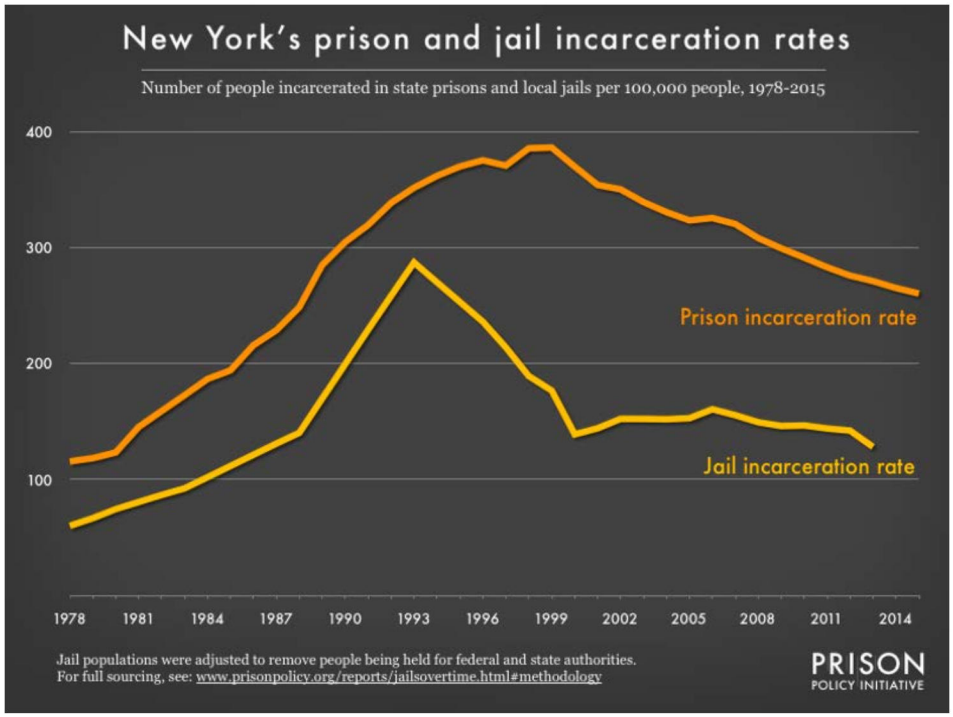
Moreover, times have changed since 1989 (when *Seaberg* was decided) and the government and public's view of the value of a mass-conviction regime—a regime facilitated by procedural bars such as appeal waivers—has changed along with it.[9] In

[9] *E.g.*, Bryan A. Stephenson, *Confronting Mass Imprisonment and Restoring Fairness to Collateral Review of Criminal Cases*, 41 HARV. CIV. RTS. CIV. LIBERTIES L. REV. 339, 339 (2006) ("Mass incarceration has fundamentally changed the administration of criminal

the late 1980s and early 1990s, the great volume of criminal prosecution was accepted as inevitable and even encouraged, as the public "insist[ed] upon more and more punitive application of the criminal law" and "demand[ed] tough law enforcement." Calhoun, *supra*, at 179. The chart below indicates that *Seaberg* was announced in the middle of the rise of this new political experiment, which from 1978 through 1999 saw a massive increase in the incarceration rate:[10]

justice in the United States. There is growing evidence that the dramatic rise in the number of people being sent to prison has also resulted in an extraordinary increase in the number of wrongful convictions, illegal sentences, and unjust imprisonments. Rather than expand and facilitate increased review of larger numbers of prisoner appeals, lawmakers and state and federal courts have sought to dismantle collateral appeal mechanisms, bar substantive remedies for constitutional violations, and restrict review of federal habeas corpus applications."); *see also Coleman v. Thompson*, 501 U.S. 722, 758-59 (1991). (Blackmun, J., dissenting) (decrying the use of procedural obstacles to preclude federal-habeas review).

[10] Joshua Aiken, *Era of Mass Expansion: Why State Officials Should Fight Jail Growth, New York's Prison and Jail Incarceration Rates* (May 31, 2017).



Appeal waivers also played an important role in this period's record-breaking expansion of the misdemeanor-conviction regime. *See* Issa Kohler-Hausmann, *Managerial Justice and Mass Misdemeanors*, 66 Stanford L. Rev. 611, 629, 642 (2014) (detailing the "rise of mass misdemeanors" in New York, which from late 1980 through 2012 resulted in more than 100,000 misdemeanor or violation convictions per year).

But since *Seaberg*, the government and the public have changed their attitude dramatically and now seriously question whether such a great volume of criminal prosecutions is valuable.[11] In turn, since their peaks at the turn of the century,

[11] *E.g.*, Peter D. Hart Research Associates, Inc., *Changing Public Attitudes toward the Criminal Justice System*,(Feb. 2002).

conviction and incarceration rates have dropped significantly.[12] New York's legislature has responded promptly to this shift, as Governor Cuomo's "aggressive[ ] push[ ]" for progressive criminal justice reform shows.[13]

Therefore, *Seaberg*'s implicit point—the State's interest in protecting a mass-conviction apparatus by preventing appeals outweighs the value of appellate review—is, even if acceptable in theory, no longer consistent with the world we live in.

* * *

Given the minimal benefits and the real-world harms of appeal waivers, the Court should abolish them. This result will enhance error prevention, promote error correction, and likely save resources in the long run.

As Judge Wilson queried in *Thomas*, "is an excellent judicial system one that insulates errors from judicial review, or one that considers the merits of every claim of error?" 36 N.Y.3d at 599. The latter system should be the goal. In *Seaberg*, this Court created a waiver regime that strayed from that goal. But having initially created the

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https://www.opensocietyfoundations.org/uploads/bff21c0a-6ef5-489d-b701-f59ffb19bdd6/Hart-Poll.pdf.

[12] Joshua Aiken, Era of Mass Expansion: Why State Officials Should Fight Jail Growth, *New York's Prison and Jail Incarceration Rates* (2017) https://www.prisonpolicy.org/profiles/NY.html.

[13] N.Y. State, *Criminal Justice Reform*, https://www.governor.ny.gov/programs/criminal-justice-reform (last visited July 16, 2021).

appeal-waiver system, this Court has the power to undo it. This Court should exercise that power here.

POINT III

This Court should hold that the trial court violated Mr. Shanks' right to counsel and, in doing so, develop categorical rules that protect this fundamental right. [add period]

The right to counsel is fundamental. U.S. Const. amend. VI; N.Y. Const. art. I, § 6. Without it, no trial can be fair. *Gideon*, 372 U.S. 344 (1963). This Court exercises the "highest degree of vigilance in safeguarding and defending" this right. *Jacobs*, 6 N.Y.3d at 195.

Here, the trial court held that Mr. Shanks forfeited his right to assigned counsel by purportedly failing to cooperate with counsel, prompting two withdrawal applications and delaying the case's progression. A101-05. While he was "welcome to hire counsel," he could no longer obtain assigned counsel. A105-06. This "forfeiture" decision was constitutional error.

This Court has never held that a defendant's conduct towards counsel, and its resulting "delay," can justify wholesale nullification of the right to assigned counsel. Instead, this Court has only stated, in dictum, that "egregious conduct" can trigger forfeiture, citing a case involving a defendant who "brutally assaulted his attorney." *People v. Smith*, 92 N.Y.2d 516, 521 (1998) (citing *People v. Gilchrist*, 239 A.D.2d 306, 307 (1st Dep't 1997)). *Smith* further held that forfeiture is an "extreme, last-resort." *Id.*

Now squarely confronted with the forfeiture issue, this Court should develop clear and categorical rules to protect the fundamental right to counsel. *See*, *e.g.*, *Crawford*, 541 U.S. at 61, 67-68 (adopting categorical rules governing the Sixth Amendment right to confrontation because an alternative "reliability" standard was amorphous and "manipulable" and the framers "were loath to leave too much discretion in judicial hands").

First, forfeiture does not apply unless the defendant's conduct is "egregious" and *intentionally* calculated to undermine the trial's orderly progression. *Smith*, 92 N.Y.2d at 521. The doctrine only kicks in as an "extreme[ ] last [ ] resort." *Id.* Certainly the right to counsel deserves as much protection as its twin Sixth Amendment right to confrontation, which can only be forfeited upon egregious and intentional conduct that is intentionally calculated to interfere with the trial. *See Giles v. California*, 554 U.S. 353 (2008) (when a defendant causes a witness' death, the Sixth Amendment still bars introduction of the witness' testimonial statements unless the defendant caused the death with the intent to interfere with the trial); *People v. Geraci*, 85 N.Y.2d 359 (1995) (intentionally procuring a witness' unavailability through threats triggers forfeiture of the right to confrontation).

Second, conduct that purportedly delays a case, such as a refusal to cooperate with counsel, can never justify forfeiture. The remedy for this delay concern is to decline to adjourn the case and force it to move forward—that is, to refuse to give the defendant the delay he is purportedly seeking. By nullifying the right to counsel instead of just

ending the delay, the forfeiture sanction goes too far and is untethered from the underlying problem. Responding to delay with forfeiture violates *Smith*'s teaching that forfeiture is an "extreme, last-resort." 92 N.Y.2d at 519.

Third, threatening a lawsuit or ethics complaint is never grounds for forfeiture of the right to counsel. The defendant here did not even file such a complaint, he only purportedly "threatened" to do so. In any event, a threat of a disciplinary complaint or lawsuit should not create a conflict justifying withdrawal of counsel—and certainly not wholesale forfeiture. To the extent counsel feels uncomfortable representing someone who has filed a complaint, that problem pales in comparison to the drastic harm worked by depriving a defendant of the right to counsel in a felony trial.

* * *

Here, applying these rules, none of Mr. Shanks' conduct towards his counsel amounts to "egregious" conduct warranting the "extreme last resort" of forfeiture. *Smith*, 92 N.Y.2d at 519. The record reflects that Mr. Shanks had common objections to his attorney's performance (not returning calls, for instance), had some heated conversations with counsel, and was not helping counsel prepare for trial. A101-05. These are typical attorney-client issues that cannot justify the drastic sanction of wholesale nullification of the *Gideon* right. This Court has never ratified such an extreme recourse and it should not do so here.

Nor does this record even confirm that Mr. Shanks was personally responsible for the delay in the case's progression. Four of Mr. Shanks' attorneys withdrew from

representation, one on the eve of trial, because of reasons unrelated to Mr. Shanks' conduct. In fact, Mr. Shanks' fifth attorney acknowledged that Mr. Shanks was frustrated by her delay. A66-67, 72. And one of Mr. Shanks' subsequent attorneys requested an adjournment four times due to his own scheduling conflicts—including a conflict with another matter, family issues, and difficulty reviewing the records. A75-90.

Further, this record does not establish that Mr. Shanks' purpose was to prevent the orderly progression of this case. Even the trial court did not believe Mr. Shanks was intentionally delaying the case, as it told Mr. Shanks that "*whether purposely or inadvertently*, each and everything you've done throughout the course of this trial has caused delay." A71 (emphasis added).

But even assuming Mr. Shanks' conduct intentionally delayed the case, the remedy was to decline to grant adjournments instead of forcing Mr. Shanks to represent himself at trial. Courts decline to grant adjournments to prevent further delay all the time in our court system. That remedy is particularly appropriate where the alternative is wholesale nullification of the right to trial counsel.

Lastly, Mr. Shanks' alleged threat of lawsuits or disciplinary complaints against his counsel cannot justify forfeiture. Even if he had actually pursued such a complaint, which he did not, his complaint would have created no conflict of interest, let alone justified wholesale forfeiture. Counsel's representation should have continued.

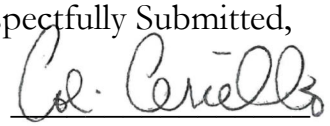
In the end, it is important to recognize exactly what the trial court did here. The court did not bar counsel—it only barred *assigned* counsel. Had Mr. Shanks had the

funds to hire an attorney, he would have been represented at trial. Poverty should never be the reason why a defendant suffers a conviction or loses the right to trial counsel. One would have thought *Gideon* settled that question long ago.

CONCLUSION

This Court should reverse the judgment of the Third Department and order a new trial.

Respectfully Submitted,

By: 

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DATED: July 22, 2021

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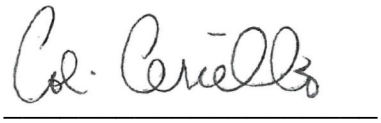

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