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COURT OF APPEALS
STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

NO. 8

DIVINE FREDERICKS,

Appellant.

20 Eagle Street
Albany, New York
January 8, 2025

Before:

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

Appearances:

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1 CHIEF JUDGE WILSON: Next case on the calendar is
2 People v. Divine Fredericks.

3 MS. MEIS: Good afternoon, Your Honors. Marika
4 Meis, for appellant, Divine Fredericks. I'd like to
5 reserve three minutes for rebuttal.

6 CHIEF JUDGE WILSON: Yes.

7 MS. MEIS: Mr. Fredericks' detailed and specific
8 request for new counsel raised a serious possibility of a
9 breakdown in the attorney-client relationship that required
10 the court to conduct a minimal inquiry. It did not do so.
11 Moreover, counsel impermissibly opposed - - -

12 JUDGE TROUTMAN: What specific complaints did he
13 make that required the court to - - -

14 MS. MEIS: Okay. So he - - - there's really two
15 categories of areas here. One is his communication with
16 his lawyer. He raises the issue and specific facts that
17 his lawyer has denied requests for meetings in person or by
18 video, that his lawyer has hung up on him, his lawyer has
19 been disrespectful to him and his wife.

20 JUDGE TROUTMAN: Did he explain the circumstances
21 - - - context of the hanging up or the claimed hanging up
22 or the disrespect of his wife?

23 MS. MEIS: No. But he did give specific facts,
24 unlike in Porto, where you just have a form complaint where
25 the defendant circled some pre-printed ideas and didn't

1 write anything in the factual space that was provided.
2 This is more like Sides. What's he - - - what he's saying
3 here - - -

4 JUDGE CANNATARO: Don't - - - don't all
5 telephonic conversations end with someone hanging up?

6 MS. MEIS: Well, I think the clear inference is
7 that he hung up on him before - - -

8 JUDGE CANNATARO: He wanted to be - - -

9 MS. MEIS: He wanted to - - -

10 JUDGE CANNATARO: He wanted the conversation - -
11 -

12 MS. MEIS: Right.

13 JUDGE CANNATARO: - - - to end.

14 MS. MEIS: But it was termed - - -

15 JUDGE CANNATARO: Is that a specific factual
16 allegation that was even made in this case?

17 MS. MEIS: He's saying he hung up on him. The
18 clear inference of that is that I wasn't done with whatever
19 I needed to communicate. And collectively, they're saying
20 - - - he's saying I'm not communicating with my lawyer.
21 And this court has recognized in Sides that the
22 communication between a client and a lawyer, trust between
23 a client and lawyer is central to the attorney-client
24 relationship. So that warranted inquiry. You have a
25 separate series of - - - of complaints he makes about his

1 lawyer sort of not fighting for him. He says his lawyer is
2 not working in his best interest. He's not - - - he's
3 making arguments for the prosecution. He's telling him
4 just to plead guilty and not engaging with him in preparing
5 for trial. So that too suggests that there's been a
6 breakdown in communication. Those are seemingly serious
7 complaints - - -

8 JUDGE TROUTMAN: Aren't those - - -

9 MS. MEIS: - - - that triggered - - -

10 JUDGE TROUTMAN: - - - generalized arguments that
11 - - - or assertions that have been put forth in a number of
12 - - - of complaints about counsel? When, for whatever
13 reason, I just - - - I don't want this attorney. I want
14 another one.

15 MS. MEIS: They're - - - they're not just
16 generalized complaints like you've seen in some other
17 cases. It's - - - it's specific here. He's giving facts.
18 He's saying, look at - - -

19 JUDGE TROUTMAN: He's not fighting for me. What
20 does that mean?

21 MS. MEIS: Well, he said, referencing the prior
22 court date, specific statements his lawyer made were
23 arguments made on behalf of the prosecution. He is raising
24 specific facts. And it's precisely because the court
25 didn't conduct any inquiry, that he didn't allow Mr.

1 Fredericks to elaborate on those complaints. We have, in
2 fact, in the record Mr. Fredericks' subsequent letters and
3 his grievance where he says, in fact, he was only
4 communicating with the defense investigator. He was never
5 meeting face to face with his lawyer or having
6 conversations with him where he was allowed to communicate
7 and talk about his case.

8 CHIEF JUDGE WILSON: There's a couple of other
9 things that strike me as a little odd about the - - - the
10 colloquy and - - - and the transcript. You know, I think,
11 frequently, we've seen defendants who ask for a new lawyer
12 because they're trying to delay things, and it's just
13 lawyer number four, lawyer number five, I need a lawyer, I
14 need a lawyer. My understanding is this is the first time
15 he asked for anything, and one of his complaints is that
16 his lawyer was delaying the case.

17 MS. MEIS: Exactly, Your Honor.

18 CHIEF JUDGE WILSON: It seemed a little unusual.
19 And the other thing that seemed unusual in the record was
20 that his lawyer says, you know, he - - - he's just shooting
21 the messenger, which is an implication - - - shooting the
22 messenger usually, the way I understand that idiom is,
23 you're blaming the person who's delivering the message when
24 it's really the message you don't like, but you've
25 transferred that bad feeling to the messenger. The

1 messenger in this case is his lawyer, which at least
2 arguably seems to me that the lawyer has in some way
3 acknowledged that there's this breakdown in the
4 relationship.

5 MS. MEIS: I think that's correct, Your Honor.
6 This isn't an eleventh hour request made on the morning of
7 jury selection like in Porto or in many of the other cases.
8 This is made a year and a - - - over a year and a half
9 before trial. And he's saying, yes, my lawyer, in fact, is
10 delaying the case. He knows I don't want him on this case
11 anymore, and he's delaying it and trying to stay on, so - -
12 -

13 JUDGE SINGAS: But can't that also go to the
14 seriousness of his complaint? I mean, the - - - the people
15 are announcing not ready, and him accusing his lawyer of
16 joining in the unpreparedness of the people, why can't the
17 judge decide that's not a serious allegation here.

18 MS. MEIS: Well, it's a - - -

19 JUDGE SINGAS: Why - - - why shouldn't we defer -
20 - -

21 MS. MEIS: It's - - -

22 JUDGE SINGAS: - - - to the trial court?

23 MS. MEIS: It's seemingly serious. And this
24 court has required that the minimal inquiry probe into the
25 very nature of the disagreement and whether it can be

1 resolved. That wasn't done at all here. The court didn't
2 ask any probing questions about what was really going on
3 and whether the lawyer and - - - and Mr. Fredericks could
4 continue in a relationship that would work. You have a
5 young man who was facing fifty to life, really serious
6 charges, and if he's not communicating at all with his
7 lawyer, that definitely triggered the minimal inquiry
8 requirement. And there's no way to - - - to say that what
9 was done here by the trial court came anywhere near what
10 was required under the minimal inquiry. He had to ask at
11 least some questions the court. And he didn't ask anything
12 about what was really - - -

13 JUDGE SINGAS: So - - - so is it because no
14 questions were asked or because he only relied on the
15 defense attorney? What's your position on that?

16 MS. MEIS: Well, it's both, Your Honor. First of
17 all, what the defense attorney said was not really
18 responsive to Mr. Fredericks' complaints, and it was sort
19 of a backhand dismissal of what Mr. Fredericks had said.
20 But the court also asked no questions either of Mr.
21 Fredericks even after his lawyer had said things in
22 opposition to the motion. He didn't give him a chance to
23 respond. He didn't say, do you have anything else to add?
24 What - - - what is really going on here?

25 JUDGE SINGAS: Do you think it matters here in

1 this case where you had a detailed list in long form that
2 counsel - - - the defendant gave him because I mean, the
3 minimal inquiry is just to apprise the judge of what the
4 breakdown could potentially be, to give them some minimal
5 information.

6 MS. MEIS: Right. The - - -

7 JUDGE SINGAS: Does the - - - does the letter
8 here serve that purpose?

9 MS. MEIS: The letter said enough to make a
10 seemingly serious request that triggered the inquiry. The
11 inquiry - - -

12 JUDGE TROUTMAN: Was the letter or grievance
13 information before the court at the time that it made its
14 decision?

15 MS. MEIS: The subsequent letter that Mr.
16 Fredericks later filed, no. But I think it gives this
17 court an example of what Mr. Fredericks might have said had
18 he been given the chance to actually speak about his
19 complaints. And so you have that in the record, and that's
20 relevant. But what - - - what the attorney said didn't
21 really answer Mr. Fredericks' detailed and specific
22 complaints. It didn't address them, and the court didn't
23 ask a single question of either the lawyer or Mr.
24 Fredericks that was required here. You have to probe the
25 nature of the disagreement, see if it can be resolved. You

1 can imagine the court would have said, Counsel, I gave you
2 a chance to discuss this motion with your client. Did you
3 come to some sort of resolution? Are you going to have a
4 way to communicate in the - - - in the future? Mr.
5 Fredericks, is there anything you want to add? None of
6 that happened. That's not a minimal inquiry under this
7 court's clear precedence. And then turning to counsel's
8 opposing the motion, the court asked him, are you going to
9 adopt this motion? There's here a motion for a request for
10 new counsel. Counsel says, I'm opposing that. There's no
11 way to - - -

12 JUDGE TROUTMAN: Was counsel allowed to explain
13 what he or she has or hasn't done in a particular case, or
14 what they kept - - - what they believe the nature of the
15 disagreement to be so that the court can make a
16 determination? Can they set forth information for the
17 court to make that decision?

18 MS. MEIS: I think under this court's precedent,
19 there is a line that is drawn between providing some
20 information at the request of the court about the dispute
21 or alleged ineffectiveness. But here, the court didn't ask
22 a single question. Counsel sua sponte went into this sort
23 of backhand dismissal that the first - - -

24 JUDGE TROUTMAN: Did the court have the - - - so
25 you're saying that the defense counsel was only permitted

1 to explain if the court said, please explain?

2 MS. MEIS: Under this court's precedence, I think
3 so, yes. But beyond that, he clearly said, I'm opposing
4 that. In - - - in Mitchell, the lawyer said something
5 nearly identical, saying I do not adopt the merits or
6 factual assertions. This court found that crossed the
7 line.

8 JUDGE TROUTMAN: Did he look at the context in
9 which those words were stated?

10 MS. MEIS: I mean, I don't think there's any
11 other context than the court saying, what's your position
12 on this request for new counsel? First, was that - - -

13 CHIEF JUDGE WILSON: Well, he doesn't quite say
14 that, right? The court - - - the court asks, are you
15 adopting the motion? Right?

16 MS. MEIS: Correct. He asked that at the first
17 call. The lawyer says, I don't know anything about it.
18 The court gives an adjournment for him to - - -

19 CHIEF JUDGE WILSON: Yeah. Right.

20 MS. MEIS: - - - discuss it. And then he - - -

21 CHIEF JUDGE WILSON: But don't you think that's
22 the question that the lawyer is answering - - - or is asked
23 to answer? Let's start there.

24 MS. MEIS: Sure. But if he's - - - if he's
25 saying I'm opposing the motion instead of saying I - - - I

1 - - - I'm taking no position, which is permissible, or
2 maybe even - - -

3 CHIEF JUDGE WILSON: Well, could he say I'm not
4 adopting it? That's what you asked me.

5 MS. MEIS: I think he could maybe say no, but to
6 actually oppose it affirmatively makes him an adversary
7 against his pro se client.

8 JUDGE TROUTMAN: So is it - - - those words - - -
9 those words alone, that's the end of it. It doesn't matter
10 what follows if one deemed it an explanation?

11 MS. MEIS: I think what follows makes it even
12 more problematic because he, first of all, doesn't really
13 address the substance of Mr. Fredericks' motion. But to
14 the extent that he does, he backhandedly dismisses it and
15 suggests that it has no merit. That's addressing the
16 merits. That's opposing his client's motion. All of that
17 is prohibited under this court's clear precedent.

18 CHIEF JUDGE WILSON: He does address it a little
19 bit in that he says, I think, I or my private investigator
20 have met with him any number of times.

21 MS. MEIS: He says, I have given him everything.
22 We have gone over this, essentially. But that doesn't
23 really say - - -

24 CHIEF JUDGE WILSON: Did he say, met with him any
25 number of times, but he doesn't distinguish between himself

1 and the investigator?

2 MS. MEIS: No. He says, I or my - - - and - - -
3 and my - - -

4 CHIEF JUDGE WILSON: Yes.

5 MS. MEIS: - - - investigator have gone over
6 this. I guess there's some inference that someone has met
7 with him. But - - - well, Mr. Fredericks is saying, I've
8 never met with the lawyer. Meeting with the investigator
9 isn't a substitute for counsel. And even if the lawyer
10 does have an obligation to give his advice of the
11 triability of the case, the strength of it, whether Mr.
12 Frederick should take a plea, it's - - - it's Mr.
13 Fredericks' right to go to trial and his right to testify.
14 And if he said, I want to go to trial, the lawyer has to be
15 able to work collaboratively with him, prepare the case for
16 trial, prepare him to testify. And so it doesn't really
17 address it in any substantive way that will be consistent
18 with what this court has required under the minimal inquiry
19 or what's permissible in describing his conduct in response
20 to a request for new counsel.

21 JUDGE HALLIGAN: Focusing just on the minimal
22 inquiry claim you're making, if we were to agree with you
23 on that alone, what relief would flow? Would - - - would
24 your counsel be - - - would your client be entitled to new
25 counsel?

1 MS. MEIS: New trial, yes.

2 JUDGE HALLIGAN: New trial. But what about new
3 counsel?

4 MS. MEIS: Yes. New - - - new trial, new
5 counsel.

6 JUDGE HALLIGAN: If - - - if only we agreed on
7 the minimal inquiry and not on the conflict point?

8 MS. MEIS: Yes, I think so. It would be a better
9 course, certainly, to - - - I - - - I - - - first of all, I
10 don't think that the lawyer who handled this case is
11 perhaps still in practice, but in any event, I think new
12 counsel would be required under these circumstances.

13 JUDGE HALLIGAN: And why not - - - I - - - I
14 believe your adversary argues that remittal would be
15 appropriate. Why not that?

16 MS. MEIS: Well, this court has in - - - in
17 Sides, has said that reversal is appropriate, and here
18 you're six years later. A trial has already happened, a
19 grievance has been filed, things happened later. It would
20 be almost impossible to go back now and try to recreate
21 that moment of when this request was made, so this court
22 should follow its prior precedent and reversal, and a new
23 trial would be the remedy.

24 CHIEF JUDGE WILSON: Thank you.

25 MS. MEIS: Thank you.



1 MS. NECKLES: Good afternoon. ADA Nicole Neckles
2 for the office - - -

3 JUDGE TROUTMAN: What do you say in this instance
4 about the complaint that there were specific serious
5 allegations made and the court failed to meet its
6 obligation in making the appropriate inquiry?

7 MS. NECKLES: Your Honor, none of the complaints
8 listed in the letter were specific or seemingly serious.

9 JUDGE TROUTMAN: Was the letter dated?

10 MS. NECKLES: It - - - it was. I believe it was
11 November 2018. And at the next appearance that they had,
12 the court addressed the complaint. But I think it's
13 critical what happened at that moment. The court advised
14 counsel that this complaint had - - - that this letter had
15 been raised. It contained a motion for new counsel and
16 said to defense counsel, take it, review it, go and talk to
17 your client about it, and then come back to me. When they
18 came back, counsel advised the court the issue is,
19 defendant is not happy with the advice I have given him.

20 JUDGE RIVERA: Well, the - - - the - - - the - -
21 - before it got to that, he said, I oppose the motion.

22 MS. NECKLES: But - - -

23 JUDGE RIVERA: Right? That - - - that - - -
24 that's - - - that's a term of art. A lawyer knows what
25 they're saying when they say to the court, I oppose the

1 motion. But if I can, it just struck me as odd the rest of
2 what this lawyer said because it seems to be both an
3 attempt to respond to the motion, but it is also, as I read
4 it, an attempt to tell the court that there's not much to
5 the - - - to the defense, right? He wants to kill the
6 messenger. He doesn't like what I have to say to him or
7 what my investigator is communicating. That - - - that
8 strikes me as not going solely to the motion because the
9 motion is, I am not talking to you. So it's very hard to
10 say you want to kill the messenger and I've had
11 conversations when the motion is - - - we're not having
12 those conversations. It struck me that that - - - that
13 kind of language is going to the quality of the defense
14 itself.

15 MS. NECKLES: I would disagree with you on one
16 instance. The - - - in addition to the, we're not
17 communicating, the letter also says, this attorney has just
18 given me this advice. He's, you know, encouraging me to
19 plea. That is not what I want. So it - - - it also goes
20 to that.

21 JUDGE RIVERA: But - - - but that phrase - - - do
22 you not understand that phrase? That they don't like the
23 information. And they - - - they want to just shoot the
24 messenger. Isn't that more than just about the motion but
25 about the actual defense itself?

1 MS. NECKLES: No. I think it is counsel
2 explaining to the court his understanding of the factual
3 issue, that the defendant is not happy with his advice.
4 And counsel - - -

5 JUDGE RIVERA: Yes. The advice is going to the
6 defense; is it not?

7 MS. NECKLES: No. His advice - - - the - - - the
8 defendant has indicated that the advice - - - counsel is
9 advising him to accept the plea, and he disagrees with
10 that. But that falls within the purview of counsel's duty.
11 Counsel must give the defendant an accurate or his
12 interpretation of the evidence and defendant's likelihood
13 to succeed.

14 JUDGE RIVERA: But again, isn't - - - isn't - - -
15 isn't that putting to the court that your - - -

16 MS. NECKLES: I'm sorry, Your Honor?

17 JUDGE RIVERA: Isn't that putting to the court
18 that the client has a weak case?

19 MS. NECKLES: No, Your Honor.

20 JUDGE RIVERA: And - - - and that is not what our
21 case law permits.

22 MS. NECKLES: That is not - - - that does not go
23 to - - -

24 JUDGE RIVERA: Okay. Let's try this. Doesn't
25 our case law only permit counsel to explain what they may



1 or may not have done in - - - in - - - in response to the
2 allegations raised in a motion?

3 MS. NECKLES: Your Honor, I think two things are
4 being conflated.

5 JUDGE RIVERA: It - - - it - - -

6 MS. NECKLES: One, counsel - - - I believe
7 counsel has a duty to explain to the court - - -

8 JUDGE RIVERA: What they have and have not done -
9 - -

10 MS. NECKLES: Not just what they have - - -

11 JUDGE RIVERA: - - - not the quality of the
12 defense.

13 MS. NECKLES: Not just what they have and not
14 done. What is the issue? What is the issue that is
15 potentially creating the conflict? And what he said to the
16 court is, the issue is about the advice that I am giving
17 him. And so that, just from that alone, indicates to the
18 court that this is not a - - - a seemingly serious
19 complaint because counsel has a duty to give that - - - the
20 defendant that advice whether or not it's advice that the
21 defendant isn't going to like. Because if counsel doesn't
22 give the appropriate assessment on this case - - - and in
23 this case, that advice was warranted because given the
24 defendant's statement placing himself in - - - with the - -
25 - the victim, given the victim's identification of the

1 defendant - - -

2 JUDGE RIVERA: When you - - - when you preface
3 that - - - when you preface that, given our precedent, by
4 saying, this is when I have met with my client. I've met
5 with him X number of times. I've done it over the phone.
6 I couldn't do it in person, but we have spoken in the
7 following ways. Isn't that what you do rather than saying,
8 and by the way, the content of what I told them is
9 something they don't like?

10 MS. NECKLES: Your Honor, I think - - - you know,
11 in Washington, the court has said defense counsel should
12 have an opportunity to explain his conduct. I don't think
13 there's anything that - - -

14 JUDGE RIVERA: Conduct, not advice.

15 MS. NECKLES: No. He said - - - he doesn't say
16 what advice he's given. He's merely indicated - - -

17 JUDGE RIVERA: Well - - -

18 MS. NECKLES: - - - that the defendant does not
19 like - - -

20 JUDGE RIVERA: - - - he wants to kill the
21 messenger. He's saying his advice that the - - - right?
22 That the defendant is not pleased with. It can't possibly
23 be advice that furthers the defense.

24 MS. NECKLES: But it - - - it's - - - if
25 defendant does not like the advice, I think, that is

1 counsel attempting to give the court the information
2 without invading into the - - - the attorney-client
3 privilege that is so sacrilegious. That counsel is here
4 attempting to satisfy both goals. Give the court
5 information it is required to give, to tell the court, you
6 know, what his perception of the issue is with the
7 defendant. And here, that is given in the presence of
8 defendant. Certainly, if defendant believed that it was -
9 - - this is not the issue, that the issue is really about
10 the communication, he could have said so. His silence in
11 the - - - in the - - - in the presence of counsel making
12 that statement certainly tells us that was the issue. That
13 the issue was, he wasn't happy with the advice. And that
14 was the advice counsel was required to give him in that.

15 JUDGE SINGAS: Does it necessarily have to be
16 advice? Maybe he wasn't happy with the plea offer, and the
17 defense attorney says, you know what? He wants to kill the
18 messenger. The people are offering thirty years. He
19 doesn't like it immediately.

20 MS. NECKLES: Exactly.

21 JUDGE SINGAS: Is there any evidence in the
22 record that it was advice?

23 MS. NECKLES: No. He just said he was not - - -
24 what counsel says is, you want to kill the messenger, you
25 know, because you don't like the message. We're not - - -

1 it's not clear. Counsel, I think, is walking a tightrope.

2 JUDGE RIVERA: So just - - - just doesn't like
3 what I have to tell him. That doesn't sound like just
4 doesn't like the prosecutor's offer.

5 MS. NECKLES: It is an array of issue, and what
6 he's generally saying is he's not - - - the defendant is
7 not happy with what I'm saying. But that does not rise as
8 a - - - a basis for substitute counsel. It does not go to
9 whether or not counsel can provide competent
10 representation. And there's nothing here that says that
11 this - - - that just - - -

12 CHIEF JUDGE WILSON: Would you - - - would you
13 agree that the court didn't do a minimal inquiry? I'm
14 putting aside the question of whether it had to.

15 MS. NECKLES: Well, because I - - - I - - - I
16 would say the minimal inquiry is intended to - - - for the
17 court to acquire the information it needs to ascertain
18 whether or not a serious issue exist that may impact
19 counsel's ability to represent the defendant. The
20 conversation that occurred here, while brief, because a
21 minimum inquiry does not have to be extensive, did that.
22 It gave the court the information it needed to permit it to
23 make a decision. And so I would say that this conversation
24 between counsel and the defendant - - - counsel and the
25 court satisfies that minimal inquiry because it advised the

1 court. The court was aware of what the - - - the issue
2 was, and it was able to conclude that it's not a serious
3 thing that requires further - - -

4 CHIEF JUDGE WILSON: So how -- how does that --
5 how would that -- how would what -- how would the court's
6 inquiry address the allegation that the defendant's wife
7 was disrespected by counsel?

8 MS. NECKLES: But Your Honor, that, again, is not
9 a seemingly serious matter. That does not go to counsel's
10 -- to -- to whether counsel --

11 CHIEF JUDGE WILSON: I was asking us to put aside
12 the question of whether a serious inquiry was called for in
13 the first place and - - - sorry, minimal inquiry was called
14 for in the first place. Was there a minimal inquiry done?

15 MS. NECKLES: As to?

16 CHIEF JUDGE WILSON: As to the things that the
17 defendant complained about.

18 MS. NECKLES: Well, we don't - - - we only get to
19 that minimal inquiry if it's a seemingly serious complaint.

20 CHIEF JUDGE WILSON: Absolutely.

21 MS. NECKLES: And my position is that those other
22 things that he complained about was not seemingly serious.

23 CHIEF JUDGE WILSON: Were not serious.

24 MS. NECKLES: To the extent we might extrapolate
25 about the communication, that might be seemingly - - - but

1 defendant did not say his attorney was never speaking to
2 him. That's not what the letter said. What defendant said
3 is, he did not have an in-person visit, possibly at - - -
4 at Rikers or facilitate a video conference call. But you
5 know what? Each defendant, Your Honor, certainly may want
6 their attorney to see them in person every day and speak to
7 them every day. But that's not the reality. What the
8 record shows is that prior to this appearance where this
9 discussion is - - - is happening, defendant - - - there
10 were at least about eight prior appearances where defendant
11 and counsel appeared together. And the general practice is
12 that each time before an appearance and typically after an
13 appearance, defense counsel meets with their clients, and
14 they discuss the case.

15 JUDGE RIVERA: So why didn't counsel just say
16 that? Why did - - - that would just be a fact.

17 MS. NECKLES: Right.

18 JUDGE RIVERA: That would just be a fact. He
19 wouldn't be taking a position, and therefore, the motion
20 should be denied. It's just a fact.

21 MS. NECKLES: But that's separate from the - - -
22 whether or not the court can glean from the record if a
23 serious complaint is raised. And from the record, the
24 court could recognize that this - - - I'm not communicating
25 with my client is not really reflected. It's not serious.

1 The communication is apparent from the record. And - - -

2 CHIEF JUDGE WILSON: But it sounds like the - - -
3 the - - - the position the - - - the rule you're sort of
4 advocating then is, however seriously a defendant says my
5 counsel is refusing to meet with me and hasn't met with me,
6 the court can take a look at the record and see that there
7 have been five pre-trial conferences where the defendant
8 has been present and reject it without any further inquiry.

9 MS. NECKLES: No, Your - - - well, I think the
10 court gives the trial court some leeway because it
11 understands it is most familiar with the trial practice.
12 It's most familiar with the counsel before it, understands
13 whether or not these are, as I said, men of reason and
14 integrity able to handle the prosecution. But we don't
15 just have that. We have counsel saying, I have met with
16 him. I have spoken with him. We provided him with the
17 discovery.

18 CHIEF JUDGE WILSON: Well, he doesn't quite say
19 that. He doesn't quite say that.

20 MS. NECKLES: He - - - well, he says, I and my
21 investigator have gone over this stuff with - - - with - -
22 - with defendant any number of times. I think a fair
23 inference is we have met; we have discussed this. And you
24 know, we - - - we are - - - we have a full record beyond
25 this, right? And defendant, quite frankly, has indicated

1 in his other motions, he had the discovery. He - - - he
2 had provided a list of the discovery that counsel allegedly
3 provided with him. He - - - he actually, subsequently has
4 stated he had talked with counsel. He had conversed with.
5 He had met with the investigator. All of those things,
6 really, I think, flesh out the record and show that counsel
7 was providing the defendant with competent representation.

8 JUDGE TROUTMAN: If this had been right before
9 trial and the defendant says, he hasn't met with me to
10 prepare me for trial, would it be different then?

11 MS. NECKLES: I - - - I think, certainly, closer
12 to trial, the court gets more - - - more privilege to deny
13 it without having to engage that because it might be - - -

14 JUDGE TROUTMAN: No. With respect to it being a
15 serious claim. I'm getting ready to go to trial, but my
16 attorney hasn't sat down with me. I haven't met with him.
17 It's right before trial. If - - - if the defendant's trial
18 is on Monday - - -

19 MS. NECKLES: Right.

20 JUDGE TROUTMAN: - - - the defendant is appearing
21 on Friday before the court, making a complaint that I want
22 a new attorney. Yes, you look into issues, is he simply
23 trying to delay? But if he says, I haven't met or prepared
24 for trial, is that not a serious accusation that the court
25 would have to make an inquiry of in a robust manner?

1 MS. NECKLES: I think it would call for certainly
2 more information. If the - - - he's saying that throughout
3 our representation he has not spoken to me about this, it
4 would call counsel's ability to represent him.

5 JUDGE TROUTMAN: So are you suggesting that a
6 defendant can say that my attorney has not prepared me for
7 trial, my trial is on Monday, and there's no obligation for
8 the court to ask further?

9 MS. NECKLES: You Honor, what - - - I mean, A,
10 what does it mean when he says my attorney hasn't prepared
11 me for - - - for - - - for trial? The question is, is
12 counsel prepared for trial? Does counsel have an
13 understanding of the facts and the law?

14 JUDGE TROUTMAN: Doesn't the defendant have the
15 right to participate in his or her defense?

16 MS. NECKLES: Certainly. Certainly, Your Honor.

17 JUDGE TROUTMAN: And how can they do that if
18 their attorney - - - if their attorney is not communicating
19 with them? You - - - you've made some valid points, but
20 you're losing me at, I'm getting ready to go to trial and
21 my attorney doesn't have to talk to me and/or prepare me so
22 that I can make a decision as to whether I wish to exercise
23 my right to testify, give him information as to witnesses -
24 - -

25 MS. NECKLES: Right.



1 JUDGE TROUTMAN: - - - et cetera. If that's what
2 you're saying, that's a problem.

3 MS. NECKLES: No. I am - - - I am not saying
4 that, Your Honor. I've said that, certainly, defendant
5 here has not - - - did not allege - - - make such a broad
6 allegation that there has been no communication, that he
7 has not been able to talk to - - - to counsel. And such an
8 inference can - - - it's, A, disputed by counsel's
9 statement that he has spoken to the defendant, he had
10 provided him with information, and it's also belied by the
11 record.

12 JUDGE RIVERA: Actually, he doesn't say that. He
13 says, I or my investigator.

14 MS. NECKLES: I don't think that there's - - -

15 JUDGE RIVERA: Right?

16 MS. NECKLES: - - - a substantive difference.

17 JUDGE RIVERA: And then he doesn't say he's met.
18 That could mean he - - - he had one communication.

19 MS. NECKLES: Your Honor, A, I think the
20 investigator the - - - some of the things the defendant was
21 saying in his letters were geared to the investigator,
22 right?

23 JUDGE TROUTMAN: That is why I ask you the
24 question: does the - - - whether he needs to talk to - - -
25 quite frankly, there are assigned attorneys who have



1 investigators go to penal institutions, speak to the
2 accused all the time to get certain background information.
3 But there is an obligation for the attorney to communicate
4 with the client so that the client is prepared to make
5 decisions - - -

6 MS. NECKLES: Right.

7 JUDGE TROUTMAN: - - - as to whether to accept
8 the plea, whether to go to trial, and in fact, be prepared
9 for trial. That is where I see you seem to be blurring the
10 line.

11 MS. NECKLES: I - - - I think I agree with Your
12 Honor that, certainly, counsel needs to communicate with
13 his client. And I believe here, the - - - the record
14 supports that that communication occurred in that when
15 counsel says, I have spoken to him. I have - - - he
16 doesn't like the message. My investigator has spoken to
17 him. We have met and gone through the discovery any number
18 of times, that - - - this record support - - -

19 JUDGE RIVERA: Does he actually say, I have
20 spoken to him?

21 MS. NECKLES: Your Honor, I think that's a fair
22 inference from what counsel has said.

23 JUDGE RIVERA: No. No. What does he actually
24 say?

25 MS. NECKLES: And I'll read. He says, I and my

1 investigator, John Bruno, have gone over this stuff with
2 Mr. Fredericks any number of times. This is on 812 of the
3 record. And we have gone through everything, and Mr.
4 Fredericks just doesn't like what I have to tell him. I am
5 required to give him an honest assessment of the case. And
6 I think a fair inference is to say, we have met. We have
7 talked, and I - - - I believe the - - - the letter - - -

8 JUDGE RIVERA: And the honest assessment of the
9 case, you don't think that, however, is counsel informing
10 the court of counsel's assessment of the weakness of the
11 defense?

12 MS. NECKLES: I disagree, Your Honor. That is
13 just - - -

14 JUDGE RIVERA: I see.

15 MS. NECKLES: - - - a factual statement of what
16 defense counsel understands the conflict is. And we note
17 that the defendant - - -

18 JUDGE RIVERA: Well, yeah. So other than - - -
19 other than he wants to shoot the messenger, if all he said
20 is, we've met and I've given my honest assessment of the
21 case.

22 MS. NECKLES: I - - - I would say, Your Honor,
23 that on the record reference, that the very fact that
24 defendant says that the defendant - - - that counsel hung
25 up on me suggests that they were having conversations, but



1 he may not have liked what he was telling him - - -

2 JUDGE RIVERA: Hung up on the wife. I thought it
3 was hung up on the wife.

4 MS. NECKLES: I believe he - - - I would look at
5 the letter, but I - - - I would say he - - -

6 JUDGE RIVERA: Maybe you're right.

7 MS. NECKLES: - - - he said the - - - the both of
8 them. But just to briefly address, Your Honor, as to the
9 conflict, I think the counsel's use of the term I oppose
10 cannot create a conflict. That - - - that is, you know,
11 mere verbiage that counsel may have used to just speak
12 about whether or not, you know, he's - - - it's - - -

13 JUDGE TROUTMAN: But it may be unartful perhaps.

14 MS. NECKLES: It - - - it may be unartful, but I
15 don't think it gives any different information than when
16 counsel say, I don't adopt the motion. It - - - it really
17 - - - you know, it - - - it elevates form over substance.
18 It says the same thing. What we need to look at, and this
19 court has always said we look at the context, is what
20 counsel says afterwards. Does he take a position that's
21 really adverse to his client? And as we've discussed, I
22 don't think that that happened here, that all counsel did
23 was outlay - - - given an - - - an outline of the conduct
24 he took on behalf of defendant, that's responsive to the
25 complaints the defendant said. And he did not cross the

1 line that this court has set forth. And just to say,
2 defense suggests that counsel can only provide that
3 information when asked by the court. And I think that
4 would remove from - - - Washington says counsel should be
5 given the opportunity to speak on his behalf, and to say,
6 you know, what he has done. And to say that that can only
7 be done if asked a direct question, I think that would - -
8 - would give a right with no - - - no substance to it, and
9 that, really, counsel should be able to speak, whether it's
10 directly by the - - - the court or not. And what we need
11 to look at is what counsel said. And here, we do not
12 believe that counsel created a conflict by his statement,
13 and that defendant did not identify a seemingly serious
14 question that required further inquiry. I don't know if
15 the court has any questions about defendant's last claim
16 about the 440 motion. I would just briefly say that the
17 court here - - - I apologize. That defendant proposed rule
18 that, you know, every pro se motion should be inferred, a -
19 - - a question of fact is raised, then that should have a
20 hearing, that that rule is inconsistent with the mandates
21 of Article 440, which anticipates that - - -

22 JUDGE RIVERA: I thought that in their reply,
23 they disclaimed that they were seeking a pro se rule. I -
24 - - I - - - I didn't - - - I - - - I thought they said
25 that's not what they were doing.

1 MS. NECKLES: That was my reading of it, that
2 they - - - they may have said that, but what they've argued
3 is that if it's a pro se motion, it should be presumed to
4 raise a question of fact and should require them to get a
5 hearing. And I think this is in absolute conflict with the
6 language of - - - of 440, which contemplates that, you
7 know, before a hearing is even granted, a defendant is
8 required to meet a minimum burden. Defendant did not do
9 that here. He - - - he raised no question of fact, and
10 therefore, a summary denial was a prudent exercise of the
11 court's discretion. And to have hearings where there is no
12 question of fact, would merely just place a burden on trial
13 court, unnecessary.

14 JUDGE RIVERA: Does 440 require that he get an
15 affidavit from his lawyer?

16 MS. NECKLES: It does not, Your Honor. And
17 really, all that happened here is, a defendant - - -

18 JUDGE RIVERA: Or even explain why he couldn't?

19 MS. NECKLES: It - - - 440 requires that their
20 claim be substantiated. And he could substantiate it
21 through a question for - - - affidavit from counsel. He
22 could have substantiated by his own statements of personal
23 interactions with counsel. All the court really did here
24 was say, you did not substantiate this claim. You didn't -
25 - - and it's a very low burden. It's not saying that you

1 must have the affidavit. All it asks is that you reach out
2 to counsel and ask if counsel will provide an affidavit.
3 If he does not - - -

4 JUDGE RIVERA: Well, if he filed a grievance,
5 what - - - what would be the point of that?

6 MS. NECKLES: I apologize, Your Honor.

7 JUDGE RIVERA: If he filed a grievance, why would
8 you be reaching out to counsel to support your claim?

9 MS. NECKLES: Your Honor, it's not - - - it's to
10 merely say he might - - - you might file a grievance. That
11 doesn't mean that counsel would not respond to the motion.
12 And we note - - - I - - - I would note here that defendant
13 did file a grievance. The grievance did not find any issue
14 with counsel.

15 JUDGE RIVERA: No, I understand.

16 MS. NECKLES: But critically, he did not include
17 counsel's response to his grievance complaint. I think the
18 absence of that is telling. But the - - - what I would say
19 is defendant does not have to provide that complaint. He
20 could support it in other ways. Here, he did not provide
21 that support or any support. And so all we had here was
22 the court simply applying 440 and the precedence of this
23 and other courts.

24 CHIEF JUDGE WILSON: Thank you, Counsel.

25 MS. NECKLES: And we ask that you affirm.



1 CHIEF JUDGE WILSON: Thank you.

2 MS. NECKLES: Thank you.

3 MS. MEIS: Mr. - - -

4 JUDGE HALLIGAN: Counsel, on the - - -

5 MS. MEIS: I'm sorry.

6 JUDGE HALLIGAN: - - - if I can on the conflict -

7 - -

8 MS. MEIS: Yes.

9 JUDGE HALLIGAN: - - - argument, you're relying
10 on the statement, I'm opposing that. Anything else?

11 MS. MEIS: I'm also relying on what he said
12 afterwards without any question - - -

13 JUDGE HALLIGAN: Specifically - - -

14 MS. MEIS: - - - by the court where he, instead
15 of laying out what he did, I met with Mr. Fredericks on
16 each court date - - -

17 JUDGE HALLIGAN: Right.

18 MS. MEIS: - - - I've had calls with him - - -

19 JUDGE HALLIGAN: Specifically, he - - - where he
20 said, you mean, don't shoot the messenger?

21 MS. MEIS: Yeah. He's shooting the messenger.
22 He doesn't like what I have to say. That's not just
23 explaining what he may or may not have done in the case.
24 That's not explaining his conduct. That crosses the line
25 because he's saying - - - he's opposing the merits there.

1 And that's impermissible under this court's precedent.

2 JUDGE HALLIGAN: And - - -

3 MS. MEIS: And I'm opposing that as well - - -
4 his starting words. There's no way to interpret that other
5 than as an adversarial statement.

6 JUDGE HALLIGAN: You - - - you point us to
7 Mitchell, where, I think, counsel says perhaps a little
8 more than - - - than here. But are there any other cases
9 that you would point us to where there is, you know, a
10 similarly - - - you might disagree with characterization,
11 but I'll say - - - brief exchange that gives rise to a
12 claim?

13 MS. MEIS: Well, Mitchell and the companion case
14 in Mitchell, there were actually two cases in that. And in
15 each of them, counsel said something more along the lines
16 of what counsel said here. And this court found that
17 impermissible. In Mitchell, it was, I do not adopt the
18 merits or factual assertions. And in the companion case,
19 it was in regards to whether the plea had been coerced that
20 he - - - the plea was knowing and voluntary, taking a
21 position - - -

22 JUDGE HALLIGAN: But those are the - - - those
23 are the most on-point cases from your point of view?
24 That's what I wanted to ascertain.

25 MS. MEIS: Yes, certainly. Cases from this

1 court, and I think they're directly applicable here and
2 show that what counsel said, including his direct
3 opposition and everything afterwards, that was not the kind
4 of permissible explaining his conduct that was found in
5 Washington or any other case.

6 And returning just briefly to the seemingly
7 serious request, it was made here a year into the case.
8 And the case was on for trial. So going to what Your Honor
9 and Judge Troutman said about the timing and whether he's
10 communicating, he's - - - you have to look at everything he
11 said, not just the one complaint and if that makes enough.
12 Altogether, he's saying, I'm not communicating with my
13 lawyer. He wants to go to trial. The case is on for trial
14 that day. It's still a year and a half until the ultimate
15 trial is had. He's only communicating with the lawyer.
16 And - - - and counsel never, in fact, said that he was - -
17 - had spoken with him or met with him. He gives a sort of
18 generic thing about he and his investigator. And so yes,
19 that - - - that is a seemingly serious - - -

20 JUDGE RIVERA: Well, what about when he says,
21 we've gone over it?

22 MS. MEIS: I - - - we don't know what they went
23 over. I mean, because Mr. Fredericks said a lot of things.
24 So what is it that they went over?

25 JUDGE TROUTMAN: But if he went into the

1 particulars of things I reviewed with my client, wouldn't
2 that more readily support a claim that he's spilling out
3 into the public privileged information and undermining the
4 defendant's defense?

5 MS. MEIS: Yes. It - - - it - - - that could be
6 problematic, but he - - - he could still have detailed,
7 here's what I did. I've met with my client each time the
8 case was on. I meet with him down in the courthouse in the
9 pens. He doesn't have to go visit him at his jail
10 facility. That's not required. But is he having
11 meaningful conversations? Is he allowing his client, who
12 has expressed a desire to participate in - - -

13 JUDGE TROUTMAN: So your argument is that he
14 needed to affirmatively assert that he, in fact, did so?

15 MS. MEIS: He could provide facts about what he
16 did that the court can then use to decide the motion. And
17 of course, the issue here is not whether it rose to good
18 cause, but simply whether the minimal inquiry was required.
19 And it was here, and it wasn't done. Just turning briefly
20 to the pro se motion for the 440, if I may, the - - - the -
21 - - the court denied it for his failure to get an
22 affirmation from counsel or explain that failure. That
23 failure could not have been more apparent to this court.
24 Mr. Fredericks asked for new counsel at the sentencing
25 proceeding. He had filed a grievance. He provided those

1 materials to the court to show that he had done that,
2 requiring additional statement - - - a sworn statement, I
3 tried to get a letter from my client or I tried to an
4 affirmation - - -

5 JUDGE RIVERA: Did - - - did defendant have
6 counsel's response to the grievance?

7 MS. MEIS: I'm sorry, Your Honor?

8 JUDGE RIVERA: Did defendant have counsel's
9 response to the grievance?

10 MS. MEIS: I don't know whether he - - -

11 JUDGE RIVERA: Do you know? I don't know if you
12 know.

13 MS. MEIS: I don't know whether or not he did,
14 but he submitted, at least, to the court that he had filed
15 a grievance to - - -

16 JUDGE RIVERA: Yes.

17 MS. MEIS: - - - explain, obviously, that he and
18 his lawyer weren't communicating and then the issues that
19 he raised there, including that counsel failed to prepare
20 him for trial, failed to impeach the detective, failed to
21 call an alibi witness, those required information from
22 counsel. And that was the factual dispute to decide
23 whether or not there was a strategic reason. There's no
24 way that that didn't create a factual dispute that
25 warranted a hearing, and summary denial was inappropriate.

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Thank you.

CHIEF JUDGE WILSON: Thank you.

(Court is adjourned)



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

I, Brandon Deshawn, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Divine Fredericks, No. 8 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Brandon Deshawn

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