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COURT OF APPEALS
STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

WILLIAM A. WILKINS,

Appellant.

NO. 35

20 Eagle Street
Albany, New York
April 28, 2021

Before:

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

Appearances:

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Karen Schiffmiller
Official Court Transcriber



1 CHIEF JUDGE DIFIORE: Number 35, the People of
2 the State of New York v. William Wilkins.

3 Let's just wait one moment, Counsel, until they
4 clear out.

5 Counsel?

6 MR. JUERGENS: Good afternoon, may I reserve two
7 minutes for rebuttal, please?

8 CHIEF JUDGE DIFIORE: Yes, sir.

9 MR. JUERGENS: May it please the court, Dave
10 Juergens, representing appellant, William Wilkins. In this
11 case, the trial court held two sidebar conferences with
12 prospective jurors, that dealt with their ability to remain
13 impartial in this - - - in this case.

14 We know that Mr. Wilkins was not present, and we
15 know that at the - - - when they were held that he had not
16 waived his personal fundamental right to be present. So we
17 submit that Mr. Wilkins met his initial burden of
18 establishing two Antommarchi violations, and the burden
19 then shifts to the People, to show that this record negates
20 any possibility that Mr. Wilkins could have provided
21 meaningful input - - -

22 JUDGE STEIN: Well, isn't that sort of begging
23 the question, because haven't - - - haven't we said that -
24 - - and I - - - I realize that there are two separate
25 questions, one is retroactive, one is prospective, but we -



1 - - haven't we, at least implicitly, said that - - - and I
 2 think explicitly said, as far as that you can waive - - -
 3 well, we've certainly said you can explicitly waive your
 4 right to be at - - - to - - - to - - - to be present at a
 5 sidebar, right? So we know that. It's a - - - it's a
 6 waivable right.

7 The question is, is was it waived here, and can
 8 it be waived retroactively, because here, you know, the
 9 record shows that the defendant, in fact, did waive his
 10 right prospectively. He said, if I want - - - if I want to
 11 come and - - - and be at the - - - at the conference, I'll
 12 - - - I'll let you know. So the question is, is under the
 13 circumstances here, where it was raised, the juror - - - at
 14 least, one of the jurors was still, you know, in - - - in
 15 the box, subject to further questioning and was questioned
 16 even after it was raised, and nothing was ever said. So
 17 can the - - - to me, the question is, is, can we and should
 18 we recognize that as a permissible implied waiver? Not,
 19 you know, whether - - - not necess - - - I - - - I mean, I
 20 think there may be a question as to whether he could have
 21 provided meaningful input, but - - - but I see that as
 22 really a very secondary question. So would you - - - would
 23 you address the waiver issue?

24 MR. JUERGENS: Well, I think the waiver issue
 25 would go more to point - - - point two, with respect to the



1 Prospective Juror CO. The People - - -

2 JUDGE STEIN: CO or CK?

3 MR. JUERGENS: Well, if - - - if - - - okay, let
4 - - - let - - - let's do - - - on CK, the - - - basically
5 the Antommarchi violations were brought to everyone's
6 attention, and at that point, there was options available
7 to the trial court. The trial court could have granted a
8 mistrial - - -

9 JUDGE FAHEY: Yeah, but didn't - - - didn't the
10 court excuse her - - - excuse her for cause? Or was that
11 CO?

12 MR. JUERGENS: CO, I think.

13 JUDGE FAHEY: CO, okay, thank you.

14 Go ahead.

15 MR. JUERGENS: Yes, with - - - with - - - with
16 respect to Juror CK, basically the trial court had the
17 option of granting a mistrial or obtaining an expressed
18 retroactive waive - - - or an expressed retroactive waiver
19 of the fact that Mr. Wilkins was not present at the
20 sidebar. Or the court could have conducted a de novo
21 conference with - - - with CK.

22 None of those options were given to Mr. Wilkins.
23 He was told about his right to be present on the record,
24 after the violation already occurred. And we look at what
25 was said to see whether or not there was - - - I would



1 argue there couldn't be an implicit waiver, because we
2 commonly think of an implicit waiver as someone being told
3 of a - - - of a known right, and then by their behavior,
4 they don't exercise that right. And we can see an implicit
5 waiver - - -

6 JUDGE FAHEY: But - - - but don't the implicit
7 waiver cases come up in the context usually - - - I - - - I
8 thought it came up this way, where they're told about the
9 right and then the issue comes up in - - - in when - - - it
10 comes up usually when a defendant is refusing to come to
11 court, and - - - and the case law is developed out of that
12 situation. There's an implicit waiver then.

13 MR. JUERGENS: And - - - and - - - and in this
14 court, in People v. Flynn, talked about an implicit waiver
15 in this type - - -

16 JUDGE FAHEY: Right.

17 MR. JUERGENS: - - - of situation, where the
18 defendant was told he's welcome to come up and attend the
19 sidebar conferences, and then he doesn't do so. And from
20 that - - -

21 JUDGE FAHEY: One of the things I struggle with
22 is - - - is saying how can someone waive something that
23 they don't know about? And here, the implicit waiver cases
24 that I've seen, are cases where there wasn't a waiver
25 given, but there's a record before that - - - that shows a



1 basis for that knowledge. I - - - I guess - - - is there
2 anywhere in the record that we can look to - - - your
3 argument is a total absence of knowledge.

4 MR. JUERGENS: Yes.

5 JUDGE FAHEY: Is there anywhere that - - - that
6 you're saying that that can be contested?

7 MR. JUERGENS: I believe it was conceded
8 basically by the parties and the court - - -

9 JUDGE FAHEY: I - - - I had thought that the
10 People pointed out to the judge that - - - that there was
11 an error here.

12 MR. JUERGENS: Correct. And - - - and - - - and
13 it was stated on the record that yes, no Antommarchi rights
14 were advised - - -

15 JUDGE RIVERA: Is - - - isn't really - - - isn't
16 really - - - or one way - - - let me put it differently - -
17 - one way, apropos of what Judge Fahey is asking about, of
18 thinking about this case and the factual scenario is that
19 it's not a waiver case, right? Or first of all, the
20 comment about prospectively what he can do, he's clearly
21 reserved his right - - - he hasn't waived any right - - -
22 he's reserved his rights.

23 And then the question becomes whether once he's
24 informed of what he can do in the future, whether or not
25 one would take his realization of the right to be present



1 at the sidebars, and not saying anything, becomes an
2 abandonment of the claim, the Antommarchi claim, with
3 respect to the past violation, rather than seeing it as a
4 waiver.

5 MR. JUERGENS: Well - - -

6 JUDGE RIVERA: Can - - - can we look at it that
7 way? Is that an appropriate, sort of, analytical framework
8 for this case?

9 MR. JUERGENS: I don't believe I've come across
10 any cases involving a forfeiture.

11 JUDGE RIVERA: No, you're in the big times now.
12 You're at the Court of Appeals. So the question is whether
13 or not this might be one way of thinking about it.

14 MR. JUERGENS: Well, I think that the - - -

15 JUDGE RIVERA: I mean, we do have case law that
16 distinguishes - - - you've mentioned forfeiture - - -
17 forfeiture from waiver, or whether or not in the context is
18 an abandonment of a claim that exists, but that the person
19 is not pursuing.

20 MR. JUERGENS: Well, Mr. - - - Mr. Wilkins was
21 never advised of what options he had. And he - - -

22 JUDGE RIVERA: For the past - - - for the past
23 violations, and - - -

24 MR. JUERGENS: For the past violations.

25 JUDGE RIVERA: Okay.



1 MR. JUERGENS: - - - there were no Antommarchi
2 sidebars going forward. There were three sidebars that
3 involved excusals for grounds that involved the juror's
4 availability to serve, not the juror's impartiality.

5 Here, the Appellate Division basically said that
6 there was no Antommarchi violation, because the codefendant
7 was acting as a second prosecutor, exercised the preemptory
8 challenge, and therefore, Mr. Wilkins never had any
9 opportunity to give meaningful input to his attorney.

10 JUDGE STEIN: Do you agree with that analysis by
11 the Appellate Division?

12 MR. JUERGENS: That - - - that was, in this
13 reading of the record, I believe Justice Curran in his
14 dissent pointed out that the record fully supports the fact
15 that they were operating under the mandatory statute, which
16 says the defend - - - codefendants are to be treated as a
17 single party, and in fact, the trial court would have no
18 authority to direct the two codefendants to operate
19 independently. They - - - that would - - - as I've pointed
20 out in my brief - - - would produce absurd results where it
21 becomes important which defendant goes first during the
22 exercise of the preemptory challenges.

23 If you went first, you could exercise a monopoly
24 over the preempts. If it was a split of the preemptory
25 challenges, you could basically give an advantage to the



1 second acting defense attorney. So I would - - - and then
2 the absurd results part of it is that the codefendant gets
3 a reversal and Mr. Wilkins does not, simply because the
4 codefendant had a letter in the alphabet that was lower and
5 went first, and I think that would be an absurd result.

6 CHIEF JUDGE DIFIORE: Thank you, Counsel.

7 Counsel?

8 MR. MYLES: Good afternoon, Your Honors, may it
9 please the court, Scott Myles on behalf of the people.

10 Your Honors, I believe this is a case where the
11 waiver applies, the waiver of the right to be present at
12 the sidebar conferences. Now it - - - the record is clear
13 that there was a waiver - - - an explicit waiver of all
14 prospective sidebar conferences.

15 JUDGE WILSON: But wait, well, let me stop you -
16 - - sorry, over here - - - let - - - let me stop there you
17 there. Do you perceive a difference between a defendant
18 who says I have complete faith in my counsel; I don't ever
19 want to be at a sidebar - - - that - - - that seems to me
20 to be a pretty clear waiver, and perhaps can even be
21 effective retroactively, if it's stated that way - - - as
22 opposed to a defendant who says, I'm going to take it on a
23 case by case basis; if I want to come up, each particular
24 time, I'll let you know. That - - - that latter one
25 doesn't sound to me like a waiver; it sounds more like a



1 reservation of rights.

2 MR. MYLES: Your Honor, I don't believe there is
3 any functional difference, because even in the case - - -
4 the first instance of your hypothetical - - -

5 JUDGE WILSON: Well, I got to tell you. The
6 Chief would have a very different view, if I said I am
7 never going to dissent, and I said I'm going to take it on
8 a case-by-case basis.

9 MR. MYLES: As I was saying, it - - - in the case
10 of a defendant who says I am never going to come up, to
11 call that a waiver, whereas the other hypothetical is a
12 reservation of rights, I believe is erroneous, because even
13 in the first instance, where a defendant says, I never want
14 to come up, the defendants are always informed that they
15 can change their mind at any time. So even that explicit
16 waiver, blanket waiver, is revocable. So even that
17 explicit blanket waiver is not an explicit blanket waiver,
18 because the defendant still retains the right at any time -
19 - -

20 JUDGE RIVERA: So - - - so how can there be a
21 retroactive, implicit waiver that applies all the time? If
22 - - - if it is, as you say, you can change your mind at any
23 time? You can do something different whenever you want.
24 So then how can we ever view something as an implicit
25 waiver?



1 MR. MYLES: It can be viewed as - - - as an
2 implicit waiver, because the defendant never reasserts the
3 right. In the case of Judge Wilson's hypothetical, a
4 defendant who says, I never want to come up, and then
5 remains seated, has not only explicitly waived that right
6 through his words, but he has also implicitly continued to
7 waive that right through his actions. So in any situation,
8 even when there is an explicit verbal waiver, you kind of
9 have to look at - - -

10 JUDGE RIVERA: Is it - - - is it possible to read
11 the record that the judge is telling him, this is what you
12 can do moving forward, but is not being informed about
13 anything that has happened in the past. And that is all
14 the defendant is responding to, as opposed to what you are
15 suggesting, that the defendant should have understood - - -
16 the defendant himself, in that moment, should have
17 understood, oh, this means, I have to now say expressly,
18 that I wish I had been able to stand up before the court
19 and be part of those sidebars that they're talking about.

20 MR. MYLES: Are we talking about the record as it
21 exists in this case?

22 JUDGE RIVERA: Yes.

23 MR. MYLES: I believe - - - I don't believe
24 that's a fair reading of the record, because the trial
25 judge, when he - - - when - - - when he was reminded about



1 the Antommarchi violation, he points out that the defendant
2 - - - that both defendants had remained seated during all
3 previous sidebars, and asks the defendant if it's his
4 intention to continue in that way.

5 So the defendant was essentially - - -

6 JUDGE RIVERA: But then - - - but then if the
7 defendant, as Judge Wilson's pointing out, then basically
8 reserves the right moving forward, which means it is not a
9 waiver. How can one view what happened in the past as a
10 waiver? Right? He can't undo it, right?

11 MR. MYLES: No, he can't - - -

12 JUDGE RIVERA: The bell has rung.

13 MR. MYLES: The bell had rung at that point as
14 far as the jurors who had been excused. There would be
15 remedies the court could have taken at that point, with the
16 other jurors who remained.

17 JUDGE RIVERA: But he's not informed of that,
18 right?

19 MR. MYLES: No, Your Honor, but it would be
20 incumbent upon the defendant at that point to - - - to
21 raise an objection, to raise - - - to say - - -

22 JUDGE FAHEY: You see, that - - - that's an odd
23 analysis, because it - - - it seems to be that you're
24 establishing a rule that in essence requires the defendant
25 to preserve the objection to the process.



1 MR. MYLES: Your Honor, I believe - - -

2 JUDGE FAHEY: I - - - I can't see any difference
3 between the implied waiver analysis and a new preservation
4 rule, where there had never been one before that you're
5 offering. There are circumstances where implied waiver has
6 been properly allowed, but this is not that circumstance.

7 MR. MYLES: Your Honor, I believe the situation
8 here is - - - is no different than the situation in People
9 v. Spotford, where the court found that implied waivers - -
10 - that a defendant's future actions can constitute an
11 implied waiver of - - -

12 JUDGE FAHEY: Well, let - - - let me give you the
13 language on Spotford - - - first of all, that was held to
14 be an expressed waiver, and there we said a valid implied
15 waiver is - - - where is "defendant is aware that the trial
16 will proceed" and failed to show up. That - - - that's
17 certainly a situation, I think, where you're right. But
18 that's not the situation we have here. It's - - - it's a
19 little different.

20 Let me ask you this. Let's - - - I - - - I got
21 three questions. First, would you agree that the court is
22 the person responsible for informing the - - - to the
23 defendant of the Antomm - - - of their Antommarchi rights?

24 MR. MYLES: Yes.

25 JUDGE FAHEY: Not his attorney, not the People,



1 not - - - not the defendant himself, but the court must
2 inform the defendant that he has this particular right,
3 fundamental right to be present. That's what the case law
4 seems to say. You agree with that?

5 MR. MYLES: Yes.

6 JUDGE FAHEY: Second point is, is there any
7 record support anywhere, and if you could, just cite to me
8 the pages, where 270.25(3) was violated, because I don't
9 see you even asserting that it was violated in your brief.
10 The reason I ask, is because the Appellate Division relied
11 on that.

12 MR. MYLES: Yes, Your Honor. My difficulty with
13 the Appellate Division's analysis is that the Appellate
14 Division does not cite to the portion of - - -

15 JUDGE FAHEY: Well, how about you? Do you cite
16 anywhere that we could look to say it wasn't - - - that
17 this particular CPL clause was violated?

18 MR. MYLES: I do not, Your Honor. I have - - - I
19 have - - -

20 JUDGE FAHEY: So can we assume then that - - -
21 that - - - that this was not violated and the People
22 concede that point?

23 MR. MYLES: The People concede that I can't find
24 it.

25 JUDGE FAHEY: That's good enough. I trust you,



1 because you got to know it better than all of us. So all
2 right.

3 MR. MYLES: I do - - -

4 JUDGE FAHEY: So my third point - - - that brings
5 me to my third point then. With - - - without, you know,
6 that pre-knowledge of what - - - that - - - that the court
7 supplied, it seems like we're saying that the defendant, in
8 this situation, must bring this to the court's attention,
9 the defendant must, and if he doesn't, then he hasn't
10 preserved his right to challenge this.

11 MR. MYLES: I - - - I don't believe that is the
12 situation, Your Honor. When - - - because again, the - - -
13 the defendant's Antommarchi rights were explicitly
14 explained to him by the court, just late.

15 JUDGE FAHEY: Uh-huh.

16 MR. MYLES: So if at that point when the
17 defendant is informed of his rights, when - - - if the
18 defendant does not assert that some remedial action be
19 taken in regards to the - - - the sidebar conferences that
20 he had not been present for, before he was informed of his
21 rights, if the defendant expresses no reservations or no
22 issues with those conferences, then that combined with his
23 expressed waiver going forward, does constitute - - -

24 JUDGE FAHEY: Okay.

25 MR. MYLES: - - - an implied waiver.



1 JUDGE STEIN: So - - - so - - - so - - -

2 JUDGE FAHEY: I do - - - I do understand your - -
3 - your argument, Mr. Myles, and let me say this; I respect
4 your intellectual integrity for answering my questions the
5 way that you did. Thank you.

6 MR. MYLES: Thank you, Your Honor.

7 JUDGE STEIN: So just to clarify what you just
8 said. So you're saying that if - - - if the court never
9 gave the defendant or notified the defendant of his
10 Antommarchi rights, then there's no obligation on the
11 defendant's part to - - - to raise it?

12 MR. MYLES: Correct, Your Honor.

13 JUDGE STEIN: But once it's raised, the defendant
14 may, by conduct or by inaction, indicate either - - -
15 whatever you want to say, a waiver of forfeiture or
16 whatever, of those rights, and I'm not sure it even
17 occurred to me - - - are - - - are you also sort of saying
18 that, by not requesting remedial action, that that is
19 actually a waiver going forward; that's a waiver of a right
20 to request remedial action? Is that a separate right? I -
21 - - I'm just asking the question. I - - -

22 MR. MYLES: I don't believe that would be a
23 separate right. It would be the same rights as the defend
24 - - - that the defendant has under Antommarchi to begin
25 with. My point was that, at the point that the defendant



1 is informed of his Antommarchi rights, that have
2 technically already been violated, because there were
3 sidebar conferences that took place without his presence
4 before he was informed of that right. Once he is informed
5 of that right, if they - - - if he does not express any
6 dissatisfaction with the process at that point, then that
7 is an implied - - - an implied waiver.

8 JUDGE WILSON: So let me - - - let me vary the
9 facts slightly, and ask what you think about this. Suppose
10 after the - - - immediately after the point where he's - -
11 - everybody knows there's been a violation; he's informed -
12 - - informed of his rights - - - there are no further
13 sidebars. Is there still an implied waiver?

14 MR. MYLES: Yes, I believe given the defendant's
15 - - -

16 JUDGE WILSON: So it doesn't really turn on the
17 conduct?

18 MR. MYLES: I'm sorry, Your Honor?

19 JUDGE WILSON: It doesn't really turn on the - -
20 - his failure to stand up and say I want to attend this
21 sidebar. You're not - - - your argument isn't based on
22 that at all.

23 MR. MYLES: Well, it - - - I think there is still
24 conduct to look at in the fact that the defendant - - -

25 JUDGE WILSON: But - - - and that conduct - - -



1 that other conduct would be sufficient in your view to - -
2 -

3 MR. MYLES: I be - - -

4 JUDGE WILSON: - - - to constitute a waiver?

5 MR. MYLES: Combined with his verbal - - - with
6 his verbal waiver, yes.

7 JUDGE WILSON: He's saying, I'm - - - I will let
8 you know on a case-by-case basis, and no other case shows
9 up.

10 MR. MYLES: Yes, Your Honor.

11 JUDGE WILSON: Okay.

12 CHIEF JUDGE DIFIORE: Thank you, Counsel.

13 MR. MYLES: Thank you.

14 CHIEF JUDGE DIFIORE: Counsel?

15 MR. JUERGENS: Thank you.

16 CHIEF JUDGE DIFIORE: What is the effect of
17 defendant not raising the prior - - - his absence from the
18 prior conference after the judge instructs on the
19 Antommarchi rights? The defend - - - are- - -

20 MR. JUERGENS: It - - -

21 CHIEF JUDGE DIFIORE: Is it your position that
22 the defendant can just let that lay and - - -

23 MR. JUERGENS: Yeah, if - - - if - - - if the
24 defendant is required to ask for some sort of remedy once
25 he gains knowledge, that's basically the functional



1 equivalent of injecting a preservation requirement into
2 this analysis, which this court has said, since 1992, a
3 defendant is not required to object. It's a violation of
4 his fundamental right to be present.

5 JUDGE GARCIA: But Counsel - - - Counsel, over
6 here, sorry.

7 MR. JUERGENS: Yes.

8 JUDGE GARCIA: Here's, I guess, a little
9 variation on - - - on what this issue is we're batting
10 around here. You're right on preservation. And I think
11 what I struggle with here is - - - well, I tend to struggle
12 with in some cases with mode of proceedings errors and
13 errors that don't require preservation.

14 I can see the defendant's right to be present
15 here. And let's say an ordinary case, defense lawyer goes
16 up, defendant isn't present, defense lawyer knows the
17 defendant isn't present, doesn't say anything, waits, gets
18 a verdict he doesn't like, transcript shows the defendant's
19 not present, that's an Antommarchi violation, and there was
20 no need to preserve that error, and we've said that.

21 Here, it's different. And here, at a time when
22 the error could have been cured, it's raised not by the
23 defense lawyer, or just with the defense lawyer, it's
24 raised by the court, with the defendant in the presence of
25 his counsel, when that juror is still available, and



1 nothing is said in terms of I want the juror back; I want a
2 mistrial. And we go on, have a trial, get a verdict.

3 That to me, raises a fundamentally dif - - - if
4 you want to say it as preservation, if you want to say it
5 as implied waiver, it raises a fundamentally different
6 issue, and I have so much trouble seeing why we would want
7 a rule like that, because it seems that the entire
8 justification of defendant's presence and the need - - -
9 the need - - - you know, the - - - the lack of any need for
10 an objection, is no longer there. Why - - -

11 MR. JUERGENS: I would - - - I would - - -

12 JUDGE GARCIA: Why would we want that rule?

13 MR. JUERGENS: I - - - I would say the rule
14 should be that in these circumstances, the defendant's got
15 to be told what his options are by the court. The
16 defendant's got to be told - - - told, and this is
17 important here, because the - - - this Antommarchi
18 discussion was sandwiched between two mistrial motions for
19 instructional error, should have been given your options.
20 Look, we got this violation; do you want to just do - - -
21 have a do-over? We'll grant a mistrial?

22 JUDGE GARCIA: So the rule there would be, again,
23 the defense lawyer has no obligation here, even though in
24 the defense lawyer's presence, the defendant is advised of
25 this right, presumably the defense lawyer knows what the



1 remedies are, but again, we're going to say, now, the
2 defendant has to be told that, and the defendant has to
3 waive, in some way, specifically?

4 MR. JUERGENS: Well, the defend - - -

5 JUDGE GARCIA: Again, why would we want that
6 rule?

7 MR. JUERGENS: The defendant should be given his
8 op - - - his - - - his available options. If he chose not
9 to exercise those options, saying, no, I'm good; we - - -
10 you know, don't have a mistrial, or no, I really don't need
11 to have a de novo sidebar with the juror in question, then
12 sure, the defendant - - - at that point, you might be
13 looking at some sort of a forfeiture argument. But the
14 defendant does not have a burden to cure the error. There
15 was a clear Antommarchi violations. It could have been
16 cured, if there was a for-cause challenge or if there was a
17 - - -

18 JUDGE RIVERA: Well - - - well, Counsel, do we -
19 - - do we want to rule, since the court has made clear that
20 the right is the defendant's, not counsel's, correct?

21 MR. JUERGENS: Correct.

22 JUDGE RIVERA: Okay. So do we want a rule where
23 a defense counsel may disagree with defendant about
24 defendant's appearance at sidebar and as a consequence
25 conduct - - - the - - - the lawyer, conduct themselves in a

1 way that suggests to this defendant that there is no right,
2 or that the lawyer should be deciding that? Isn't the
3 point that the court is interacting with the defendant?
4 This is one of those rare occasions where the court is
5 basically interacting with the defendant, and saying the
6 defendant has to speak, as opposed to their lawyer?

7 MR. JUERGENS: Yes, I think the - - - this court
8 has held, essentially, that it's a personal right of the
9 defendant. While we will, you know, require a waiver to be
10 in the defendant's presence, or if it's being reported by
11 the trial - - - or by the defense attorney, this court has
12 looked to whether the defense attorney has said, I've
13 talked to my client, I've explained the rights to him, and
14 he wants to waive the right in particular.

15 JUDGE RIVERA: Well, it does kind of make sense
16 that if the - - - the court is telling you what your right
17 is, and the court has then failed in its duty, as Judge
18 Fahey had already set out, that the court would explain to
19 you what your rights are, then isn't that the rule you'd
20 want?

21 MR. JUERGENS: Yes.

22 CHIEF JUDGE DIFIORE: Thank you, Counsel.

23 (Court is adjourned)

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

I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of the People of the State of New York v. Williams A. Wilkins, No. 35 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



Signature: _____

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