COURT OF APPEALS

STATE OF NEW YORK

PEOPLE OF THE STATE OF NEW YORK,

Appellant,

-against-

NO. 42

COREY DUNTON,

Respondent.

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20 Eagle Street
Albany, New York
March 14, 2024

Before:

CHIEF JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHARON A. M. AARONS
ASSOCIATE JUDGE MADELINE SINGAS
ASSOCIATE JUDGE ANTHONY CANNATARO
ASSOCIATE JUDGE SHIRLEY TROUTMAN
ASSOCIATE JUDGE TRACEY A. BANNISTER

Appearances:

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Official Court Transcriber

CHIEF JUDGE WILSON: Next case on the calendar is People v. Dunton. And we're delighted to have with us, to my immediate left, our colleague from the Third Department, Sharon Aarons, and to the far left, our colleague from the Fourth Department, Tracey Bannister.

MR. SEEWALD: Good afternoon, Your honors. May it please the court. Andrew Seewald for the People. May I reserve two minutes for rebuttal?

CHIEF JUDGE WILSON: Yes, sir. And thanks for asking.

MR. SEEWALD: There are three main reasons why a reasonably competent appellate counsel could have concluded that the ejection issue in this case was not clear-cut and completely dispositive in the defendant's favor.

First, a reasonably competent appellate counsel could have - - - could have concluded that the defendant had received adequate warning before being ejected. A reasonably competent appellate counsel could have concluded that further warning was impracticable at that moment. And a reasonably competent appellate counsel could have concluded that the issue of defendant's ejection may not have entitled the defendant to a complete reversal on all counts - - -

JUDGE SINGAS: Do you think he got adequate warning?

MR. SEEWALD: Yes, Your Honor. Yes, I - - - I would say that he did. The totality of the court's warnings to him throughout the trial, and then the court's statements to him immediately before the jury was brought in, and then again after he had - - -

JUDGE TROUTMAN: Is the court limited to only considering information that - - - or incidents that unfold in the courtroom in the court's presence?

MR. SEEWALD: No, Your Honor. I - - - I - - - the court is - - - the court may consider all of the information, all of the incidents that the defendant engaged in, all of his misconduct even outside of the courtroom because the - - - the court specifically connected the defendant's misconduct outside of the courtroom to the risk that he presented inside the courtroom.

JUDGE CANNATARO: But Counsel, can I ask you? The - - - the warnings that the court did give to defendant prior to what happened - - - since you know the record, I'm sure, infinitely better than I do - - - were they - - - the ones that I saw were related to admonitions about his behavior outside the courtroom. I didn't see a warning to the defendant pertaining to what he may or may not do in the courtroom. Is that a good view of the record?

MR. SEEWALD: Well, Your Honor, I would note that

on December 14th, which was early in the trial, when one of the witnesses had - - - was - - - one of the key witnesses was testifying against the defendant, and there was allegation that the defendant had been glaring at the witness in an intimidating way. And the - - - and the judge told the defendant that he must conduct himself appropriately at all times during court proceedings and specifically said do not intimidate a witness.

JUDGE AARONS: But did he go further? He didn't necessarily accuse the defendant of doing that. And the attorney said, well - - - you know, how can you interpret? He always smiles or react or whether, how can you interpret that as an intimidation? But he didn't say that the consequence of you doing that is your removal from the courtroom.

MR. SEEWALD: That's - - - it's true that - - - Your Honor, that the court never put those two things together at any particular moment, that his in-court misconduct could result in his removal from the courtroom.

JUDGE AARONS: In fact, he even went further and said, you have been a gentleman throughout this whole proceeding. And he focused the warnings on the behavior outside the courtroom. Some of it he says, I don't know if it's true or not, but at one point he looked at the videotape, which indicated to him that the defendant

initiated some - - - some interaction with the - - - with the - - - either a court - - - either the correction officer or another inmate, unprovoked. And he warned him that that type of behavior, which delays the trial, he would forfeit his right to be there if he kept on engaging in those behaviors.

MR. SEEWALD: That - - - that's right, Your Honor. And so the defendant was on notice that through his own misconduct, it was - - - it would be possible for him to forfeit the right to be present. I want to address this statement that the - - - that the judge made, that the defendant had conducted himself as a gentleman in the courtroom. I believe that the Appellate Division misconstrued that statement and attached undue significance to it, certainly. And the reason I say that is because when the - - - that statement was made in connection with the judge anticipating that the defendant would - - - would - - - would pose a risk to the safety of everyone in the courtroom when the - - - the jury announced its verdict. He was concerned that the defendant might engage in the same kind of behavior that he engaged in outside the courtroom when the jury returned its verdict.

And that's why it was in connection with a discussion about whether the defendant would be handcuffed - - - would need to be handcuffed during the verdict. And

it was defense counsel who said, Your Honor, he's been a complete gentleman in the courtroom. And the trial judge said, well, it may be that he's been a complete gentleman - - - or I agree, he's been a complete gentleman in the courtroom but I still find that I need to have him handcuffed because I'm - - -

JUDGE TROUTMAN: Didn't - - - in fact, in this particular instance, didn't the court have concern about the defendant's behavior, even from the very beginning of the trial, with respect to whether he could stand and face the jury, and then, thereafter, with respect to how he could present his testimony?

MR. SEEWALD: That's exactly right, Your Honor. The judge was concerned from the very moment of - - - the very beginning of the trial, because the defendant's behavior out of court had been so egregiously terrible. And not simply that it was - - - it wasn't just misbehavior. It wasn't just disruptive behavior. It was violent behavior. It was unprovoked violence. He - - - it - - - it was - - - he struck a - - - a court officer or a corrections officer out of the blue. He spit at another corrections officer. So this judge was incredibly concerned that this defendant might do something similar inside the courtroom. And he was - - -

JUDGE CANNATARO: What happened similar? We had

a - - - as far as I can see, it's a verbal out - - - out - - - verbal outburst in the courtroom during the delivery of the verdict?

MR. SEEWALD: Right. Well, the - - - that's the point, Your Honors, is that the judge - - - if the question is whether the judge needed to deliver some additional warning to the defendant in that moment after the defendant had begun his outburst, whether - - - before having him ejected, the - - - the - - - the - - - the judge was well within his discretion. And I would argue, within his responsibility of protecting everyone in the courtroom, especially the jurors. The judge was within that discretion to - - -

JUDGE RIVERA: Well, what's the - - - what's the - - - protect them from what, if it's all verbal and he's handcuffed?

MR. SEEWALD: Well, protect them from something worse. The judge didn't want to find out what the - - - what else the defendant might do. The judge noted that this courtroom was - - - was very small.

JUDGE TROUTMAN: So wouldn't it have been better if the court, from the beginning, went through those particular warnings as to what conduct was expected of defendant at all times during the proceedings?

MR. SEEWALD: Yes, of course it would have been

better, Your Honor. But the question is in - - - in this case, on a coram nobis, the question is whether it was clear-cut and completely dispositive to appellate counsel at the time of the appeal, that the - - - that the ejection was improper. And - - - and - - -

JUDGE TROUTMAN: And so why wasn't it clear-cut to appellate counsel?

MR. SEEWALD: Well, because there was no existing authority at the time that - - - that made it obvious - - -

JUDGE AARONS: Wasn't there statutory authority that you have to warn the defendant before you remove him? Wasn't there authority already that existed?

MR. SEEWALD: Well, of course, the statute does - - - does state that the judge needs to give a warning before - - -

JUDGE AARONS: Unless it's not - - - it's an emergency situation or it's impracticable in order for him to do that. For example, a defendant leaping at a prosecutor or - - -

MR. SEEWALD: Well, that - - - that's right, Your Honor. But the - - - the existence of that statute doesn't mean that every instance of a judge ejecting a defendant without giving a warning in that moment would constitute reversible error. And that's the point. That there was nothing clear-cut and dispositive. There was no precedent

at that moment, the time of the defendant's appeal, that made it clear-cut and obvious that this was an issue that appellate counsel needed to raise.

JUDGE RIVERA: Is that - - - is that either because somehow the warnings prior were enough? Or is it because in - - - in the moment of - - - the heat of the moment, it was impracticable to give the warnings?

MR. SEEWALD: I - - - I would argue, Your Honor, it was both and also the possibility that the defendant had already been there for six of the seven counts of the jury returning the verdict, and therefore may not have been entitled to a complete reversal. And I would just say, wrapping up, that it's very telling in this case that the Appellate Division's decision finding that the ejection was improper and constituted reversible error, relied on two cases, primarily. It relied on - - -

JUDGE RIVERA: What about the affidavit? What about the affidavit of the lawyer that was overseeing the appeal?

MR. SEEWALD: Well, I would say one of - - -

JUDGE RIVERA: Because they didn't consider it?

MR. SEEWALD: - - - two things. One, that - - - that the fact that the attorney did not consider raising the issue doesn't really tell us much about why the attorney did not consider raising the issue. And second, I

would say that regardless, the - - - the standard is an objective standard, whether a reasonably competent appellate counsel would have raised this issue. And I - - - I would say that it was - - - it's very telling that the Appellate Division's decision, just - - - that finding that this attorney was - - - that these attorneys representing the defendant on direct appeal were incompetent - - -

JUDGE RIVERA: What - - - what if - - - what if we disagree with you, and at best, we think that the affidavit is ambiguous. Does that matter?

MR. SEEWALD: I - - - Your Honor, I would say it doesn't really matter. I mean, it's still an objective standard, and - - - and I would just - - - if - - - if I could just finish the thought that the - - - the Appellate Division relied on two cases, People v. Rivas and People v. Antoine. Rivas was a - - - a case in which - - - it was a two-defendant case and the defendant, Rivas, was ejected because of his codefendant's misconduct. So that case certainly would not be an obvious precedent supporting the proposition that this defendant was improperly ejected.

And then the other case that the Appellate Division relied on was People v. Antoine. And Antoine was not decided by the Second Department until this defendant's appeal was concluded. So it was not an existing precedent at the time of defendant's appeal. And if those are the

two cases that most clearly support the idea that the - - - that this case - - - that this issue was clear-cut and dispositive in the defendant's favor, then I would submit that there was no precedent supporting the idea that this issue was clear-cut and dispositive in the defendant's favor. And given all of the - - - the obvious competence of defendant's brief or defense counsel's brief in other respects, that omission of this one issue could not have amounted to ineffective assistance of appellate counsel under this court's standards.

CHIEF JUDGE WILSON: Thank you.

MR. SEEWALD: Thank you.

MS. SINGER: Good afternoon. My name is Sabrina Singer from Cleary Gottlieb Steen & Hamilton and I represent the defendant/respondent, Mr. Corey Dunton.

The violation of Mr. Duncan's right to be present was a clear-cut and dispositive error that his appellate counsel was ineffective for omitting on direct appeal - - -

JUDGE AARONS: Did - - - did Rivas, the case of Rivas, which existed prior to the direct appeal, wouldn't that have put the counsel - - - the appellate counsel on notice that giving a warning prior to the removal is necessary?

MS. SINGER: Yes. The Rivas - - -

JUDGE AARONS: Especially if the behavior is not

- - - as I said, it's an emergency or one of those situations?

MS. SINGER: That's right. The Rivas case is, to use the State's formulation, squarely binding precedent. But there is also an unambiguous state statute here and a court rule of practice. There is also more than fifty years of case law in New York and in the federal courts developing and establishing this right.

JUDGE RIVERA: But aren't there - - - aren't there recognized exceptions, as in it's not practicable to give the warning? So please argue why it's not - - - why it was practicable in this case?

MS. SINGER: Sure. A warning being impractical - - - impracticable is a recognized exception to the right to be present. It is impracticable when there is a physical threat in the courtroom. Your Honor, used the - - --

JUDGE RIVERA: Have we specifically said anywhere that that exception is limited to, quote-unquote, "physical threats"?

MS. SINGER: It's not.

JUDGE RIVERA: Okay.

MS. SINGER: But here - - -

JUDGE RIVERA: And does physical threat in any of that case law, mean an actual physical movement by the - - - the defendant that might suggest an impending physical

altercation?

MS. SINGER: That is what the courts have held. A physical imminence, an emergency - - -

JUDGE RIVERA: But you agree, if a defendant stood up and verbally threatened the judge that that might be enough?

MS. SINGER: It would depend on the aggressiveness of that behavior. Here, though, for example, the - - -

JUDGE RIVERA: If the defendant turns to the jury and says, I'm going to kill you?

MS. SINGER: Without more, arguably, that's not enough under the case law. For example - - -

JUDGE TROUTMAN: Even when the jury is rendering a verdict and the court is aware of conduct upon - - - on the part of the defendant that has been discussed throughout the trial, that his behavior is escalating and unpredictable.

MS. SINGER: Here the - - - Mr. Duncan's had behaved, as we talked about earlier, as a gentleman - - -

JUDGE SINGAS: But at that stage the judge said, I can see that the jury is visibly upset. So is there any part of the trial that's sacrosanct? Following up on what Judge Troutman said, when the jury is doing its job and at the moment that they're delivering their verdict, he has an

outburst and the judge is - - - is describing for the record that the jury is getting agitated and upset and he makes a decision to eject after general - - - I'll give you general warnings. I mean, shouldn't that fit one of the exceptions, just based on the stage of where that trial was?

MS. SINGER: There is no doubt that a judge has the ability to control what's happening in his courtroom. But here, the situation was under control. There is no - - -

JUDGE TROUTMAN: So is the court is supposed to ignore all of the information it had prior to the rendering of the verdict, in making a decision as to what was appropriate?

MS. SINGER: What the court is supposed to do, unambiguously, is issue a warning. I think the Rivas case is instructive here - - -

JUDGE TROUTMAN: So in this instance, it does not matter that the jury was in the midst of rendering the verdict, that the behavior was directed at the jury, and that even during deliberations there were allegations of continued escalating, assaultive behavior on the part of the defendant that the court was made aware of. Court was supposed to wait until he lunged at a juror; is that what you're saying?

MS. SINGER: I am not. What I am saying here is that there had been no escalating misbehavior, no pattern of misbehavior in the courtroom.

JUDGE TROUTMAN: What about when the court says to the attorney to control the client?

MS. SINGER: That's not enough under the case law. The right to be present is a right held by the defendant. A direction to his counsel - - -

JUDGE RIVERA: I don't - - - I don't think anyone's debating that or disputing that. The question is whether or not, under these unique circumstances, the defendant's conduct was enough for the judge to conclude it's impracticable and if there's something in the record that supports that? That's the issue.

MS. SINGER: That's right. And here there is nothing in the record that would render that warning impracticable.

JUDGE AARONS: What - - - what stops the court from when the defendant either laughs, or the first statement that he makes, to tell the officers or the clerk remove the jury and then reprimand the defendant and warn him? What stopped the court from doing that?

MS. SINGER: Nothing would have stopped the court from doing that in this instance. And nothing here would have stopped the court from doing what it was required to

do under the law.

JUDGE RIVERA: But that would be true even if it was fear of a physical altercation? But we don't require that. You - - - you - - - that's what you said when you got up.

MS. SINGER: That's correct. If there had been - - -

JUDGE RIVERA: So what makes it different here that the judge should stop - - - even though, as Judge Singas has already pointed out, the judge has put on the record that the jury is responding adversely, that it is upset - - - to have them walk out, give a warning, and bring them back in?

MS. SINGER: For one the defendant here is shackled, rendering the - - -

JUDGE RIVERA: He's handcuffed?

MS. SINGER: Huh?

JUDGE RIVERA: Handcuffed?

MS. SINGER: Handcuffed, yes. He's handcuffed. Rendering the the - - -

JUDGE RIVERA: Were the cuffs visible, by the way?

MS. SINGER: I do not know if it's - - -

JUDGE RIVERA: Okay.

MS. SINGER: - - - in the record if the cuffs

were visible. In any event, the defendant here is shackled. That was once - - -

JUDGE RIVERA: Handcuffed.

JUDGE TROUTMAN: Shackled or handcuffed?

MS. SINGER: Sorry. Handcuffed.

JUDGE TROUTMAN: The two are different.

MS. SINGER: Yes. Is handcuffed. Rendering it even more practicable for a warning to be issued here. There was no - - -

JUDGE TROUTMAN: Could he not flail his body, still, if he was angry at that point and cause injury to others - - -

MS. SINGER: There's no indication - - -

JUDGE TROUTMAN: - - - headbutting and et cetera?

MS. SINGER: - - - there is no indication in the record that the defendant here even stood up from his chair. The record is very clear this is a verbal - - -

JUDGE TROUTMAN: Isn't there a record that he engaged in assaultive behavior, albeit not in the courtroom, that was escalating during the time the case was pending?

MS. SINGER: There is evidence that there was misbehavior occurring at Rikers - - -

CHIEF JUDGE WILSON: And there was - - -

MS. SINGER: - - - out of the courtroom.

CHIEF JUDGE WILSON: - - - and there's evidence that he was warned about that behavior, that it might result in his exclusion from the courtroom; is that fair?

MS. SINGER: He was warned that if he continued to cause his own delay by failing to be produced to the courtroom in a timely manner, that he - - -

CHIEF JUDGE WILSON: But he - - - it wasn't his failure to be produced, the behavior was not simply sort of sitting there, right? It was that he was engaged in altercations, in some cases with the corrections officers?

MS. SINGER: There were some altercations - - -

CHIEF JUDGE WILSON: And so - - - so right. So my question then really is, at the time was - - - or even now, was there case law that made it relatively clear that a warning about misbehavior outside of court that would result in your exclusion, wouldn't suffice to exclude you for misbehavior that occurred in court?

MS. SINGER: The statute itself here is completely unambiguous that a defendant is entitled to understand the consequences of his continued misbehavior - - - that continued outbursts will result in removal. And that's the warning that wasn't provided here. And the statute was passed by the legislature after the Supreme Court's decision about this very choice that defendant has, constitutionally, the right to make under these

circumstances.

And I want to take a second to just come back to the Rivas case again. Besides being squarely binding precedent, to use the State's formulation - - -

JUDGE RIVERA: Let me ask you this. Let - - - let's say, on one of those prior warnings during the trial, not during the verdict, the defendant does conduct himself in a way that the judge sends him out - - - sends him out for the rest of that day. Let's just take one day. But lets him come back for the rest of the proceeding. All of that goes fine. Now we're at the verdict, and defendant did exactly what he did here. It's all verbal. We'll take your characterization of it. Did the judge have to wait or - - - or reissue a warning? Could they have, at that point, said corrections officers take control?

MS. SINGER: That's a closer question under the case law.

JUDGE RIVERA: And what makes it closer?

MS. SINGER: If there has been an explicit warning prior that gives the defendant that choice, the choice to continue to disrupt and be removed, or the choice to be quiet and stay. If - - -

JUDGE RIVERA: So it's a warning about your conduct at any time. It's not a warning about your conduct expressly at the - - - when the jury returns and the

verdict is read and perhaps polled, if - - - if you've gotten to that point. I just want to be clear on - - - for the timing of this warning.

MS. SINGER: Under the case law, the timing of the warning is a closer question. But here it is very clear from the record that there was never an explicit warning provided. Mr. Dunton was not required - - -

JUDGE RIVERA: Were there warnings? There are warnings ahead of the time? You just acknowledge that, or at least one warning. I'll go with one.

MS. SINGER: Sure. But there was no warning about the threat of removal from the courtroom. There was a - - -

JUDGE TROUTMAN: And - - - and the incident wherein he had to be - - - a chemical agent was utilized and the court is aware of that, is the court allowed to consider that when making a decision as to how to respond to the current situation?

MS. SINGER: The court is not required to disregard the history of its interactions with the defendant or the defendant's behavior entirely. But the question is whether or not defendant had been warned at some point in the trial, that it was clear to him that he had a choice which was either - - -

JUDGE CANNATARO: Well, Counsel, can we just - -

- on that point, can we go a little deeper and back to something you said? Weren't the prior warnings given - - - didn't they also include the potential consequence of him being excluded from the trial if he didn't comply with those - - - whatever - - - whatever it was that the court was requiring him to do at the time?

MS. SINGER: He was warned that if he continued to engage in behavior at Rikers that render delay to the trial, that trial might proceed in his absence. He was not warned that anything that he did in the courtroom, because he had behaved like a complete gentleman in the courtroom, might lead to the possibility of his removal.

JUDGE AARONS: Are those two distinct warnings?

MS. SINGER: They are. Parker warnings and the - - -

JUDGE SINGAS: I just have a question going back to the coram nobis. Do you think we need to know what the pro bono attorneys think about all of this? Is there a developed record there? And - - - and do we know why they didn't weigh in?

MS. SINGER: I don't think we need to get an additional affidavit.

JUDGE SINGAS: But there might be a legitimate strategy, and - - - and we don't know because we don't know anything from them.

MS. SINGER: There wasn't in this case because there was an affidavit submitted here from the counsel at Legal Aid, quote, "I reviewed the appellate record and made the ultimate decisions about litigation strategy and the claims to be pursued."

JUDGE SINGAS: At the appellate level?

MS. SINGER: Correct.

JUDGE SINGAS: Yeah. But what about the trial level?

MS. SINGER: The fact that trial counsel may also have been ineffective for failing to raise this issue in the moment - - -

JUDGE SINGAS: No. I'm suggesting that maybe they had a strategy that we're in the dark about.

MS. SINGER: There is no reasonable - - -

JUDGE RIVERA: How about, I don't want to lose an appealable issue because this person has been found guilty on the highest counts, six of the seven; it's unlikely he's going to be found not guilty on the seventh?

MS. SINGER: As I understand your question, you may be referring to the potential of a harmless - - -

JUDGE RIVERA: A mode of proceedings error, right? You agree with that, right?

MS. SINGER: I do. I do agree that this is a mode of proceedings error. I think that's a helpful label

for understanding this type of error. An error that fundamentally undermines the fairness of the proceedings.

JUDGE AARONS: And preservation is not required?

MS. SINGER: That's correct. I do want to spend - - - if you'll allow me, just a moment on Turner and the clear-cut and dispositive standard here, which is important to understanding the single error that was failed to be identified and considered by appellate counsel here. This was a clear-cut and dispositive issue. The strength of the claim comes from fifty years of case law and state statute establishing the right to be present here.

JUDGE RIVERA: Do you concede that this is the only error? This is it?

MS. SINGER: There were two additional errors raised in the writ of error coram nobis, that the First Department did not reach because it found this error so clear-cut and dispositive. So there are two additional potential errors in this case. For all the reasons discussed today, I ask that the First Department's decision be affirmed here. Thank you.

CHIEF JUDGE WILSON: Thank you.

MR. SEEWALD: Your Honors, most of the discussion in this case has been about the ultimate merits of whether the defendant was properly ejected - - -

JUDGE RIVERA: Let me ask, given this last - - -

last point. Let - - - let me just say.

MR. SEEWALD: Okay.

JUDGE RIVERA: Let's say we do not agree with the Appellate Division. We think this was the wrong call at - - - for this basis for the coram nobis, but there have been two other bases apparently raised regarding ineffective assistance of counsel. We have to send it back so that they consider the other two to decide whether or not that would be grounds to grant the - - - the coram nobis application?

MR. SEEWALD: I suppose that's one avenue the court could take, but I would suggest in this case that given the overall strength of the brief that - - - that appellate counsel supplied, that that really wouldn't be necessary to - - - for the court to send the case back to the Appellate Division to - - - to make a determination about those other issues. I would say that I would just remind the court - - -

JUDGE RIVERA: What about the YO issue? Because doesn't the Appellate Division have its own independent interests of justice jurisdiction to decide that independently? I'm not sure they could do it on the coram, but I'd like to hear your views of that.

MR. SEEWALD: That's true. I would just note that the - - - the extensive record that occurred at the

sentencing proceeding, in which the - - - the defense made very detailed arguments about the - - - about the defendant's age and whether that merited any leniency. And the judge considered those arguments and commented on them, but ultimately decided that the sentence what - - - that he imposed was warranted. And I think that made it quite clear that - - - that the judge would not have entertained a youthful offender adjudication.

I would also just say in discussing about why the - - - why a reasonable appellate counsel may not have chosen to raise this particular issue about the defendant's ejection in addition to all of the difficulties associated with that issue that we've been highlighting today, about the - - - the possibility of adequate warning, the possibility of impracticability of additional warning, it was also an issue that would have required appellate counsel to highlight the defendant's behavior. Or at least open up the appeal to extensive discussion about all the defendant's violent conduct before the trial, during the trial, and of course, that is relevant to this issue. And so it's appellate advocacy 101 to try to put the - - - your client in a - - -

JUDGE AARONS: That's speculation because the record is clear, it's - - - it's ripe with his behavior from the beginning of the trial to the end.

MR. SEEWALD: Right. But that - - - that only became relevant with regard to the ejection issue. So if appellate counsel, by not raising the ejection issue in the first place, that all of the defendant's misbehavior wasn't relevant to any - - - any of the other issues in the case. And I would just - - - just note that the appellate counsel before this court, which is a - - - a pure court of law, not a court that would have had the interests of justice jurisdiction that the Appellate Division had devoted the first two and a half pages of their brief to try to - - - trying to put their client in the best possible light. Highlighting his difficult childhood and other issues about his background. And so I think that just kind of illustrates what appellate counsel, what - - -

JUDGE AARONS: But meaningful representation means that you should at least know the case law and the statute that says that you should warn before you remove, and Rivas exist before the direct appeal.

MR. SEEWALD: Of course. There is no - - - of course, there was no question about whether a judge should issue the warning, is even required to issue the warning. But there are also many exceptions to that rule. This was not a - - - just a clear-cut, simple, mathematical defense, like the statute of limitations defense in Turner that was found to be clear-cut and dispositive in the defendant's

favor. There were lots of questions here about whether the defendant was adequately warned, whether the defendant - - - whether further warning would have been impracticable. And I would note in that regard that one of the - - - the standards for whether further warning is impracticable is whether the judge could have viewed that there would be no point to an additional warning.

And with respect to that, right before the jury was brought out, the judge had specifically told the defendant to behave himself. And the defendant assured the judge that he would. And then right - - - and then after the defendant started acting out during the verdict and the judge said, control your client, the defendant personally answered that direction and he said, I'm good. And then he immediately began escalating his abuse of the jurors. So at that point, the judge had ample reason to think that further warning would be impracticable. Judge - - -

JUDGE RIVERA: But is that only true based on the prior history outside of the courtroom? Would you agree that if there had not been any of that kind of prior history, that what defendant says in the courtroom as the verdict is being read, might not be enough for one to conclude, oh, this fits the exception of when it's impracticable?

MR. SEEWALD: Certainly, it - - - it's possible.

I'm - - - there's no question that the defendant's out-of-court behavior shaped the judge's view of the risk that he presented in court. And the judge was quite explicit about that. And the judge in that moment, in a very small courtroom, wanted to make - - - needed to make sure, I would argue, that the defendant didn't do anything that much worse.

JUDGE CANNATARO: Is that permissible - - - is that understanding on the part of the court permissible with respect to the practicability question? In other words, could the court take into account what it knew about defendant's prior behavior outside the courtroom in determining whether it's - - - it was practicable to warn him in the courtroom?

MR. SEEWALD: Absolutely, Your Honor. And - - - and in this particular case, the judge had specifically noted that the defendant had struck a corrections officer out of the blue, and he had specifically worried that the defendant might do something similar by surprise against his own attorney, against a court officer, and - - - and he - - - and against anyone else in the courtroom.

JUDGE RIVERA: And - - - and he put on the record, the jurors appeared upset - - -

MR. SEEWALD: The jurors appeared upset.

JUDGE RIVERA: - - - by the comments?

MR. SEEWALD: And I would note that after the judge made that record, he invited defense counsel to add whatever defense counsel might have to that. Defense counsel added nothing, didn't correct the - - -

JUDGE RIVERA: The nature of the charges and the verdict matter? Is that part of the equation? The fact that this was a very violent crime for which, by then, the jury had already said they find him guilty?

MR. SEEWALD: Well, I - - - yes, Your Honor. In the sense that the defendant - - - it - - - it kind of explains why the defendant acted out the way that he did and why the judge reasonably feared that the defendant might do something even worse than - - - than he was already doing.

JUDGE AARONS: But that - - - couldn't that be in all cases where, depending on the nature of the charges, the judges can reasonably fear that a defendant may react? And a lot of times when you get the verdict, it's handed to the judge, and then the judge calls the jury and from - - - the court officer gives it or the clerk gives it to the judge, the judge looks at it, and the jurors come in and then they read the verdict. So a lot of times the judge is on notice that a verdict has come in. It's a violent crime that the defendant may or may not be convicted of. So shouldn't there be a warning if he feels that the defendant

may react or somebody in the courtroom may react? Shouldn't there be a warning about such behavior?

MR. SEEWALD: Again, Your Honor, of course, if the judge was able to give a warning. If he - - - in that - - - in the heat of that moment had said - - - had given the warning that is stated in the CPL, of course that would have been preferable. Then of course there - - - there would - - -

JUDGE AARONS: But you know when you're rendering a verdict that there is emotions. People may react on one side or the other, right? Especially the defendant. So wouldn't it be prudent to have given the defendant, especially knowing the defendant has issues with corrections and how he behaved, to give him a warning before the - - - the verdict is delivered?

MR. SEEWALD: It - - - in hindsight, I'm sure if the court could have - - - could do this over again, before the jury was brought back in, the judge would have gone through a much more extensive warning of - - - would have given the defendant a much more extensive warning.

JUDGE AARONS: If we agree with you, what signal are we telling the trial court as far as adhering to the statute and warning the defendant prior to a verdict, or during the stage of the trial, that certain behaviors will cause you to be expelled from the courtroom?

MR. SEEWALD: Well, as far as the signal that the court would be giving, I would suggest that in order to reverse the Appellate Division here and affirm the conviction, all the court would need to find is that this - - - the issue of the ejection was not clear-cut and dispositive in the defendant's favor at the time of the appeal. And so the court would not need to render any judgment about whether the ejection itself was proper or not. If it was - - - if it - - - even as a difficult question of - - - if it's a close question at all about whether the ejection was proper, then it could not have been clear-cut and dispositive in the defendant's favor at the time of the appeal.

CHIEF JUDGE WILSON: Thank you.

MR. SEEWALD: Thank you.

(Court is adjourned)

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

I, Chrishanda Sassman-Reynolds, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Corey Dunton, No. 42 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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