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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
November 17, 2021

Before:

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

Appearances:

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1 CHIEF JUDGE DIFIORE: Appeal No. 35, the People
2 of the State of New York v. Wilkins.

3 Counsel?

4 MR. SHIFFRIN: May it please the Court, may I
5 reserve two minutes for rebuttal, please.

6 CHIEF JUDGE DIFIORE: Two minutes, sir?

7 MR. SHIFFRIN: Please.

8 Mr. Wilkins did not impliedly waive his
9 Antommarchi rights violation when - - - when the court
10 first failed to clearly inform him that there had been a
11 violation of his right to be present at the sidebar
12 conferences or be conducted; second, failed to tell him
13 that the options with regard to that violation were for the
14 court to either declare a mistrial, conduct de novo
15 conferences, or for Mr. Wilkins to waive that violation
16 retroactively; and where the court failed to make any
17 inquiry of Mr. Wilkins regarding that violation what his
18 choices were of - - - with respect to those options.

19 The vague statements by the court and
20 prospective-only questions do not provide a basis for this
21 Court or any court to find that Mr. Wilkins knew that he
22 was being asked whether he wished to waive retroactively
23 the violation of the right to be present at those
24 conferences. The burden was on the court that had first
25 violated Mr. Wilkins' right to be present at those



1 conferences, and then was told that by - - - by the D.A. to
2 inform Mr. Wilkins of that, and - - - and again to inform
3 him of his choices, and elicit a response, elicit a choice.

4 The - - - even with respect to the prospective-
5 only question that was asked of Mr. - - - Mr. Wilkins, he
6 reserved his right to go through the side or on a case-by-
7 case basis. It was not only not a blanket waiver going
8 forward; it was not a waiver at all retroactively.

9 The People argue that the failure to object
10 constitutes an implied waiver. The reason that this Court
11 has repeatedly rejected an objection requirement in
12 Antommarchi cases, despite the fact counsel presumably
13 always knows - - - always knows the relevant law, is that
14 the right involved, the right to be present, involves both
15 fundamental and personal to the defendant. Therefore, this
16 Court, over thirty years - - - or excuse me, it's twenty-
17 nine years - - -

18 JUDGE FAHEY: Mr. - - - Mr. Shiffrin, on - - - in
19 an Antommarchi case, an implied waiver - - - there is such
20 a thing as an implied waiver; you understand that?

21 MR. SHIFFRIN: Absolutely.

22 JUDGE FAHEY: All right. And when does an
23 implied waiver apply? What's your understanding of the law
24 and when would it not apply?

25 MR. SHIFFRIN: The two cases that I found with



1 implied waiver of the right to be present from this Court
2 are People v. Spotford, cited and relied on by the People,
3 in which first there was an express waiver of an - - - of
4 an - - - of an Antommarchi hearing. But more importantly,
5 relevant here, after the hearing, the Court expressly
6 invited an objection, and there was no objection. He - - -
7 so unlike this case, Mr. Spotford was made aware of his
8 choice, and he - - - by his silence, it was clear he chose
9 not - - - not to object.

10 Similar - - -

11 JUDGE FAHEY: So - - - so - - -

12 CHIEF JUDGE DIFIORE: Does the - - - does the - -
13 -

14 JUDGE FAHEY: I'm sorry, Judge - - -

15 CHIEF JUDGE DIFIORE: Excuse me.

16 JUDGE FAHEY: - - - you go ahead.

17 CHIEF JUDGE DIFIORE: Does the language that the
18 court used after - - - I'll read the whole sentence. "As
19 to the four separate bench conferences, the defendants
20 remained at the counsel table with the prosecutors and
21 defense attorneys present." Is that still the intention of
22 each of the clients? Is that - - - how does that language
23 impact - - -

24 MR. SHIFFRIN: I think the reasonable reading - -
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CHIEF JUDGE DIFIORE: - - - the - - -

MR. SHIFFRIN: - - - of - - - of that language is a - - - is the court is asking prospectively, are you still intending to stay seated. Given the fact that it - - - it's undisputed that Mr. Wilkins was not informed before - - - before this - - - these - - - these four sentences by the judge, and before the D.A. pointed out the error, that he had a right to be present, that - - - that language cannot be reasonably read as requesting of Mr. Wilkins what - - - what his decision was with respect to the conferences already conducted.

The - - - it - - - it was easy. The court was asked by the prosecutor, please inform Mr. Wilkins of his right - - - or the two defendants, actually, of their rights and seek a waiver. Rather than do that, rather than seek and clearly inform them they - - - they don't - - - there was a violation of a right already occurred, give them the options, and ask for a decision, the - - - the court engaged in that - - - what I - - - I'd refer to as vague language. The Fourth Department, in reversing the codefendant's case, quoted vague - - - quoted vague language.

To - - - to find an inferred waiver based on that is very, very - - - is very different that Spottford where, again, there's an express invitation for an objection. The

1 only other case I found with an implied waiver of the right
2 to be present is - - - is Flynn, where, again, Mr. Flynn
3 was in - - - was told he was welcome to attend conferences,
4 and he chose not to attend. He was a - - - he was made
5 aware of his option and - - - and - - - and - - - and his
6 action reflected a decision.

7 JUDGE SINGAS: Counselor, I understand that it
8 was easy, and it should have been easy, but that's not the
9 situation we have here. So now we have a situation where
10 the juror is still in the box; in fact, the juror is
11 questioned after the Antommarchi, right. There hadn't - -
12 - there - - - there - - - they're questioning her, they're
13 engaging her. She's in the box; she hasn't left the
14 threshold of the courtroom. Had she left, I would agree
15 with you. But now she's there, subject to questioning,
16 subject to putting things on the record, subject to go - -
17 - to going back to sidebar. Does that alter your analysis
18 at all?

19 MR. SHIFFRIN: It - - - it doesn't for a few
20 different reasons. First of all, again, Mr. Wilkins was
21 never advised of his personal - - - his personal right to
22 engage with respect to - - - we'll refer now to Juror C.K.
23 (ph.).

24 More importantly, he wasn't present to observe
25 the demeanor and - - - and actual tone, et cetera, of - - -



1 of C.K. with - - - during that sidebar conference, he
2 wasn't - - - he was excluded from. This Court has
3 repeatedly - - - and there's cases cited in our brief at
4 pages 15 and 16 that repeatedly talked about the importance
5 of the personal observation of the - - - the defendant.

6 He was deprived of that. He was deprived of
7 that, again, through no fault of his. He wasn't informed
8 by the court. This Court, through the Antommarchi line of
9 cases has made - - - has made it the court's
10 responsibility, not counsel's responsibility, to - - - to
11 make sure a defendant is present unless there's a waiver.
12 That didn't happen here.

13 JUDGE SINGAS: No, I - - - I under - - - I
14 understand that. My only concern again, and what I'm
15 struggling with, is the fact that she was still there. The
16 defendant would then have an opportunity to gauge, you
17 know, her - - - her - - - her disposition, to hear her.
18 He's aware now of Antommarchi. His attorney is aware of
19 it. The attorney is actually questioning her when she's in
20 the box. She hasn't crossed that threshold outside the
21 courtroom.

22 You know, are we to say that that doesn't - - -
23 that to sit silently is something that we condone once all
24 the factors are present to make a change in - - - in the
25 situation? Under these facts. I understand what you're



1 saying generally, but - - -

2 MR. SHIFFRIN: The - - -

3 JUDGE SINGAS: - - - in this situation, when
4 she's still there - - -

5 MR. SHIFFRIN: This - - - first of all, this
6 defendant doesn't know he'd even - - - he - - - the
7 defendant, Mr. Wilkins, doesn't know he's allowed to do
8 anything. He's never told, you can speak. He's never
9 asked his opinion, et cetera. So there's no gamesmanship
10 on his part because he doesn't know that there's a
11 Antommarchi rule that - - - that's reviewable absent
12 objection, absent showing of specific prejudice. So the
13 personal right of the defendant, which is what
14 Antommarchi's about, clearly there was no gamesmanship by
15 him.

16 If - - - but in terms of the knowledge, the court
17 presumably knew all that. In this case, not just
18 presumably, was told this by the prosecutor. So there's no
19 reason to find cunning actions by - - - by counsel, and yet
20 naivete by the court. Having been told by the prosecutor,
21 gee, you should tell him - - - basically, we screwed up.
22 He's - - - can you tell him his right and seek a waiver.
23 The court did not do that, did not clearly explain there
24 was a violation. The court did not clearly seek a
25 retroactive waiver.



1 The onus on - - - on - - - with respect to
2 Antommarchi has - - - has - - - for all these years, has
3 been on the court, not on defense counsel. That's why the
4 no preservation requirement. Rather than now,
5 retroactively, coming - - - rather than now creating a new
6 objection requirement and applying without notice
7 retroactively to a case that was tried four years ago, the
8 simple rule should be, we have a clear rule with
9 Antommarchi. It's easy to follow, we know that because
10 there's only been eight Antommarchi violation on reversals
11 this century, okay, and including that of the codefendant
12 in this case.

13 If - - - if in a rare case that a court is made
14 aware that it made a mistake, the - - - the court should
15 then be obligated to correct itself. It should not be an
16 obligation on the defendant or counsel. Counsel, in
17 reasonable reliance on this Court's jurisprudence, that he
18 has no obligation or duty to object. To - - - to impose an
19 obligation on - - - on the counsel to reject - - - to
20 object, when we've been told through many, many cases there
21 is no such obligation, is fundamentally unfair to Mr.
22 Wilkins.

23 The - - - there was - - - there was reason to be
24 able to rely on this Court and this Court's prior rulings.

25 CHIEF JUDGE DIFIORE: Thank you, counsel.



1 Counsel?

2 MR. MYLES: Good afternoon, Your Honors. May it
3 please the Court.

4 Your Honors, it's well-settled law that a
5 defendant may waive their Antommarchi rights. And that is
6 precisely what happened in this case.

7 Going to appellant counsel's last point, the
8 People are not seeking to impose an obligation on a
9 defendant to affirmatively assert their Antommarchi rights.
10 Again, case law's very clear, there is no affirmative
11 obligation to do that.

12 What the People are - - - are asserting under the
13 facts of this case is that when a defendant does take
14 actions, those actions can constitute an implied waiver of
15 their Antommarchi rights. And in fact, going to Judge
16 Fahey's point, when you really consider Antommarchi
17 waivers, every Antommarchi waiver is a combination of an
18 explicit waiver and an implied waiver, which is no
19 different than what happened in this case.

20 JUDGE FAHEY: You know what I wonder about, is -
21 - - is - - - it's Mr. Myles, right?

22 MR. MYLES: Yes.

23 JUDGE FAHEY: Yeah, Mr. - - - Mr. Myles, is - - -
24 would you see any difference between your argument for an
25 implied waiver under these circumstances - - - because



1 there are circumstances in the Antommarchi jurisprudence
2 where an implied waiver is - - - is allowed. But under
3 these circumstances, is there any difference between this
4 type of an implied waiver and a preservation rule requiring
5 you to object? Whether you know about it or not, sometimes
6 things have to be preserved and you have to object. Here,
7 you're saying, whether you know or not, it seems you're
8 saying you have to object, which is just another way of
9 saying you got to preserve the objection.

10 MR. MYLES: I - - - I understand your point, Your
11 Honor. However - - -

12 JUDGE FAHEY: Um-hum.

13 MR. MYLES: - - - there - - - it is a fine
14 distinction, but it is a distinction. We are - - -

15 JUDGE FAHEY: Tell me what the distinction is - -
16 -

17 MR. MYLES: Yes.

18 JUDGE FAHEY: - - - as - - - as you see it.

19 MR. MYLES: Yes, Judge. Had the defendant done
20 nothing when it was brought to his attention that the - - -
21 that Antommarchi had not taken place, that the Antommarchi
22 waiver had not taken place, had he done nothing, there
23 would be an Antommarchi violation.

24 JUDGE FAHEY: Um-hum.

25 MR. MYLES: But by taking affirmative actions, by



1 stating that he wished to continue not going up to the
2 bench, that he - - - that he understood his Antommarchi
3 rights at that point - - -

4 JUDGE FAHEY: But - - - but he didn't really say
5 that, that he understood his Antommarchi rights?

6 MR. MYLES: Fair enough, Your Honor. Yes - - -

7 JUDGE FAHEY: Right.

8 MR. MYLES: - - - he didn't explicitly state he
9 understood his rights. But he did assert that he wished to
10 continue as he had been - - -

11 JUDGE FAHEY: You know what's an interesting
12 thing? These are essentially fundamental constitutional
13 rights and it - - - it seems that your - - - your analysis
14 would - - - would rely on a really subtle and thinly sliced
15 reading of - - - of the - - - conversation that took place
16 between the defendant and the bench. And I'm wondering if
17 - - - if you think it makes sense for us to rely on that -
18 - - that kind of a reading and preserving sort of a basic -
19 - - not sort of, a basic constitutional right?

20 MR. MYLES: Well, Your Honor, again, it's - - -
21 it's clear that the basic constitutional right is - - - is
22 a waivable right. And it is one which is waived in the
23 majority of trials.

24 JUDGE FAHEY: Sure.

25 MR. MYLES: And most cases that make it to this



1 courtroom rely on a fine parsing of the facts of the case,
2 as it relates to established law. So not to - - -

3 JUDGE GARCIA: Counsel, I'm - - - I'm sorry to
4 interrupt you, but - - -

5 MR. MYLES: Yes.

6 JUDGE GARCIA: - - - just on this waiver issue
7 and the constitutional right, I thought we said in Vargas
8 that significantly, the right to be present at sidebars is
9 not rooted in the Constitution, but rather in CPL 260.20?

10 MR. MYLES: 260.20, yes, Your Honor.

11 JUDGE GARCIA: So are we talking about a
12 constitutional waiver here or are we talking about a waiver
13 of 260.20?

14 MR. MYLES: There - - - there are case - - -
15 there are cases which discuss it in both contexts.

16 JUDGE GARCIA: But Vargas was a waiver case,
17 wasn't it?

18 MR. MYLES: It was - - - it was, Your Honor. I
19 think - - - I think People - - - I believe it was People v.
20 Roman which made the distinction that the right to be
21 present at sidebar conferences, while the sidebar
22 conferences do represent material stages of trial, but it
23 is not a core function of the trial; it's an ancillary
24 proceeding.

25 So in that sense, I would agree with you and - -



1 - and the Vargas court, which stated that it is a statutory
2 right. And again, in that sense, I believe you have to
3 look in each individual case where there is a waiver, you
4 need to look at all of the circumstances. And again, this
5 is a very unique case. The - - - the circumstances here
6 are as far as I'm aware, a case of first impression, where
7 the - - -

8 JUDGE WILSON: So - - - let me - - - let me - - -

9 MR. MYLES: - - - specific facts - - -

10 JUDGE WILSON: - - - let me ask you something.

11 So the Appellate Division, as I read it, decided the issue
12 regarding Juror C.K. on the ground that the trial court had
13 split the preemptory strikes. And that's the basis of the
14 dissent in the Appellate Division, from Justice Curran, as
15 well. They didn't decide on waiver. And you're now asking
16 us to decide on waiver. Why doesn't LaFontaine prevent us
17 from doing that?

18 MR. MYLES: Because the Appellate Division never
19 touched on that - - - there - - - that was argued below at
20 the Appellate Division, and they never addressed that in
21 their decision. They never addressed that, either agreeing
22 with it or disagreeing with it. They didn't - - - they
23 didn't address it either way. They said - - - they simply
24 decided the issue on the grounds that the defendant could
25 not have had any input at that sidebar, and so there was no



1 violation. And a little - - -

2 JUDGE WILSON: But then you're asking us to
3 affirm on a different ground than the Appellate Division
4 affirmed?

5 MR. MYLES: That's correct.

6 JUDGE FAHEY: Was - - - was there ever any
7 attempt in this trial to reconstruct a sidebar conference,
8 the sidebar conference?

9 MR. MYLES: No, I don't believe there was, Your
10 Honor.

11 JUDGE FAHEY: Um-hum.

12 MR. MYLES: There was never any - - - any request
13 for that type of remedial action by either party. And
14 going back, again, to just the general world of Antommarchi
15 waivers.

16 JUDGE FAHEY: Um-hum.

17 MR. MYLES: Every Antommarchi waiver - - -
18 rather, the typical Antommarchi waiver is an explicit
19 verbal waiver at the beginning of trial. However - - -

20 JUDGE FAHEY: But you can impliedly, by action, a
21 waiver - - - waive your Antommarchi rights. Of course,
22 that's when you know that you have that right?

23 MR. MYLES: Correct, Your Honor. And - - - which
24 is why - - -

25 JUDGE FAHEY: You - - - you wouldn't disagree



1 that he didn't know at that point that he had that right -
2 - -

3 MR. MYLES: At - - -

4 JUDGE FAHEY: - - - no one had told him that?

5 MR. MYLES: At which point, Your Honor?

6 JUDGE FAHEY: Well, at - - - at the point that -
7 - - the language that was quoted by defense counsel before,
8 the reading of that language itself. Is there any proof in
9 the record that says he knew that he had an Antommarchi
10 right then?

11 MR. MYLES: Prior to the point where the court
12 informed him of his rights, no, there's no indication that
13 he did - - -

14 JUDGE FAHEY: Okay.

15 MR. MYLES: - - - which is why we need to look at
16 his actions at that point and going forward from that
17 point.

18 JUDGE FAHEY: Well, it's - - - I'm sorry, go
19 ahead, Counselor.

20 JUDGE RIVERA: So Counsel, I - - - I'm sorry, I'm
21 on the screen.

22 CHIEF JUDGE DIFIORE: Judge Rivera.

23 JUDGE RIVERA: Let me ask you this, if - - - if
24 indeed the judge - - - if - - - if the record was clear
25 that the judge said moving forward, you can come up to the



1 sidebar, you have this right, you would agree then that he
2 has not implicitly waived the prior right or otherwise
3 somehow abandoned his objection to the prior violation,
4 correct, because the court is focusing prospectively? You
5 would agree if it's obvious that the court is informing a
6 defendant about a prospective right, that one shouldn't
7 take any - - - any statement or action to refer to a
8 retroactive waiver? Or do you see it differently?

9 MR. MYLES: If the only thing we had to go on was
10 the language of a court making it clear that it was a - - -
11 it was a prospective-only right - - -

12 JUDGE RIVERA: Yes.

13 MR. MYLES: - - - if that was all we had to go
14 on, then yes, I think we would be constrained to agree that
15 that could not in any way be considered an implied
16 retroactive waiver. However - - -

17 JUDGE RIVERA: Okay, so then if that's the case,
18 if the record is ambiguous and unclear, why wouldn't we
19 read it as not a waiver?

20 MR. MYLES: Because there is more that we have to
21 go on than just the judge's words. However, the judge's
22 words are indicative of, again, that language of, do you
23 wish to continue what you have been doing, do you wish to
24 continue not coming up. That indicates that they are
25 looking backwards in time. And the defendant's words and



1 actions going forward from that point indicate that the - -
2 - that there was no - - - there was no - - - excuse me,
3 that there was a waiver for the sidebars that had already
4 taken place. So we do not just have the judge's words in
5 this case. We have the judge's words, the defendant's
6 words, and the defendant's actions. And I - - - I see my
7 time - - -

8 JUDGE RIVERA: Well, the defendant's words are
9 that I'm going to take it one case at a time. It's not a
10 blanket, yes, moving forward, I defer to my lawyer, right?

11 MR. MYLES: That's correct, Your Honor. However,
12 which is why I stated that you have to look at not only his
13 words, but also his actions, and the fact that he did, in
14 fact, stay seated for multiple sidebars going forward from
15 that point.

16 Finally, Your Honors, should the Court find that
17 there was not an implied retroactive waiver, it would be
18 the People's position that this is precisely the kind of de
19 minimis violation that the Court recognized in People v.
20 Roman does not require reversal.

21 Thank you.

22 CHIEF JUDGE DIFIORE: Thank you, Counsel.

23 Counsel, your rebuttal?

24 MR. SHIFFRIN: Very quickly. First, the
25 statutory right involved here has been referred to



1 repeatedly by this Court as fundamental and personal, which
2 is why this Court has repeatedly held that it - - - that no
3 - - - no objection is - - - is required.

4 The second, and sort of following up with the
5 questions from Judge Rivera, the problem here is two - - -
6 twofold. One, there was the initial violation of my
7 client's rights. But when the court was informed of that,
8 it's - - - the problem is the failure of the court to make
9 clear to the defendant both that his rights were violated
10 and what his options were. He was never - - - and not - -
11 - having not been told of his options, he wasn't asked to
12 select among those options.

13 To now effectively say, well, you didn't do
14 anything, even though you weren't clearly told you could do
15 something, is to in effect reward a court for - - - for - -
16 - for repeated violations of the right to be present.

17 The Roman language just cited by - - - by - - -
18 by the prosecution, refers to cases as de minimis when the
19 defendant's presence could not have made a difference. The
20 defendant's presence could have made a difference here with
21 respect to both jurors - - - prospective jurors, C.K. and
22 C.O. C.K. was excused because of a preemptory challenge
23 announced by codefendant's counsel there under the statute
24 that's effectively the - - - announced by - - - by both
25 counsel. There's no - - - nothing in the record that shows



1 anything other than the statute was being followed here.
2 The - - - the two defendants and their counsel met together
3 after each round of questioning. The - - - in fact, the
4 court said you have two of twenty preempts.

5 The opposite is the absurd result that we - - -
6 that we actually currently have where the codefendant's
7 conviction was reversed because his - - - his attorney got
8 to announce the - - - the preempt and - - - and Mr.
9 Wilkins' attorney didn't. And the codefendant's attorney
10 was able to exercise eleven of the twenty preempts because
11 he - - - because he went first. That - - - that isn't the
12 law, and it's not what happened in this case.

13 With respect to C.O., C.O. was re - - - was
14 removed not for cause on consent, but on consent. In both
15 People v. Danielson and People v. Roman, this Court has
16 reversed on Antommarchi grounds when jurors have been
17 removed on consent. In Roman, this Court made the
18 distinction and - - - and the jurors who were removed for
19 cause on consent, it was - - - there's no input possible
20 for the defendant, but for the jurors who were removed in -
21 - - in Roman for - - - just on consent was reversible
22 error.

23 Over here, C.O. expressed concerns with respect
24 to the Greece Police Department, a police department not
25 involved in any way or shape in this case. She was never



1 asked whether she could be - - - put those aside in
 2 rendering a verdict in this case. She was never - - -
 3 there was nothing about her answers demonstrating that she
 4 was incapable of rendering a fair and impartial verdict in
 5 this case. Therefore, she would not have qualified for - -
 6 - for a for cause challenge if one had been made. She was
 7 removed on consent. Both attorneys - - - both defense
 8 attorneys expressed their consent prior to the - - - prior
 9 to the court removing her.

10 The - - - so C.O., who was removed, by the way,
 11 in answer - - - follow-up to a question from Judge Singas -
 12 - - removed prior to any discussion at all of Antommarchi.
 13 There was also a - - - a - - - a juror who was questioned
 14 outside Mr. Wilkins' presence - - - presence, who - - - Mr.
 15 Wilkins' presence could - - - could have made a difference.

16 The - - -

17 CHIEF JUDGE DIFIORE: Counsel, would the error
 18 have - - - Judge DiFiore.

19 MR. SHIFFRIN: I'm sorry.

20 CHIEF JUDGE DIFIORE: Would the error have been
 21 cured had the trial judge invited Juror C.K. back to the
 22 sidebar, included the defendants, and their counsel; would
 23 that have cured the error with respect to this defendant?

24 MR. SHIFFRIN: With respect to C.K, yes.

25 CHIEF JUDGE DIFIORE: And recreated the - - -



1 that would have cured it, okay.

2 MR. SHIFFRIN: With respect to C.K., there's no
3 question the case law allows for de novo conferences. I -
4 - - I - - - again, we - - - we urge that C - - - C.O. also
5 was in the same category. But in any event, we - - - the -
6 - - the problem was the court didn't engage in a de novo
7 conference, didn't grant a mistrial, and didn't clearly
8 give the option.

9 And finally, before I - - - the - - - in follow-
10 up to the question from Judge Wilson, I think there is a
11 LaFontaine problem because the - - - the - - - again, there
12 was no decision on waiver retroactively with no - - -
13 factfinding by the trial court in this case. There was no
14 finding on - - - in Mr. Wilkins' case. As an aside, in the
15 codefendant's case, the Fourth Department affirmatively
16 rejected the argument of waiver, saying that - - - that
17 it's - - - that the record was too - - - it was too - - -
18 what the court said was too vague and prospective only
19 questioning couldn't support a finding of implied waiver.
20 And therefore, the basis for this Court to make a decision
21 on grounds not reached by the courts below is - - - is a
22 LaFontaine problem.

23 CHIEF JUDGE DIFIORE: Thank you, Counsel.

24 MR. SHIFFRIN: Thank you.

25 (Court is adjourned)



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

I, Amanda M. Oliver, certify that the foregoing transcript of proceedings in the Court of Appeals of William A. Wilkins v. The People of New York, No. 35 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Signature: Amanda M. Oliver

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