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COURT OF APPEALS
STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

NO. 82

ARTHUR H. MORGAN, JR.,

Appellant.

20 Eagle Street
Albany, New York
September 11, 2025

Before:

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

Appearances:

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Christian C. Amis
Official Court Transcriber

1 CHIEF JUDGE WILSON: Last case on the calendar is
2 People v. Morgan.

3 MR. SHARP: May it please the court. May I
4 reserve three minutes?

5 CHIEF JUDGE WILSON: Yes.

6 MR. SHARP: County court did not hold a
7 sufficient hearing under 670.10 to warrant the introduction
8 of prior testimony of a witness from the first trial. This
9 case, a week before trial happened, the People made a
10 request in order to show cause to get into evidence some
11 very important testimony that happened at the first trial
12 because a witness was unavailable. At the time, the
13 defense specifically requested that a hearing be held, and
14 that testimony be allowed, that the defense was not going
15 to accept the very brief letter submitted by the People at
16 face value and requested that a hearing be held. County
17 court ultimately decided, after going back into chambers
18 and reviewing - - - statute, came out and said that this
19 was a sufficient hearing and permitted the testimony.

20 What I want to draw - - -

21 CHIEF JUDGE WILSON: So what is the problem with
22 relying on the letter?

23 MR. SHARP: The problem with relying on the
24 letter is it essentially is a violation of due process,
25 which is what the statute is designed to do to protect a

1 defendant's right to confrontation. Drawing a parallel to
2 a - - -

3 JUDGE GARCIA: So you get a witness. You always
4 get a witness if you want one.

5 MR. SHARP: No, not always. So the parallel that
6 I would like to draw the court's attention to is where a
7 hearing is conducted when there's alleged misconduct on the
8 part of a defendant. This court in People v. Johnson - -
9 it's not in my brief - - - it's 93 NY2d 254 - - - discusses
10 when a hearing is required and when a hearing is not
11 required in those circumstances. A hearing is not required
12 when the evidence overwhelmingly establishes misconduct on
13 the part of the defendant or in the instance of waiver, for
14 instance. And so what the court - - - what this court has
15 done has drawn up a specific circumstance where there may
16 not need to be a hearing.

17 So it seems to me that this is essentially the
18 same thing. There's - - - there's a slight difference,
19 right? There's at least some opportunity for cross-
20 examination or opportunity for cross-examination under 60 -
21 - - 670.10 as opposed to misconduct by a defendant,
22 potentially. That's really the only distinction there. So
23 this court has held that a hearing is absolutely required
24 with those exceptions. I think that that same rule should
25 be applicable to 670.10.

1 CHIEF JUDGE WILSON: So if the letter had instead
2 been a sworn affidavit from the doctor, that still wouldn't
3 be sufficient? You'd need to have a hearing and bring the
4 doctor in?

5 MR. SHARP: I guess, it's - - - it's twofold,
6 right? One is, I think a sworn affidavit from a doctor
7 could be sufficient, depending on also what is relayed in
8 that affidavit.

9 CHIEF JUDGE WILSON: Well, you - - - well,
10 suppose it has the same content as the letter.

11 MR. SHARP: Then no, I don't think that the
12 content in there, particularly with - - - with - - - it was
13 a very brief letter.

14 CHIEF JUDGE WILSON: Uh-huh.

15 MR. SHARP: And what happened was when the court
16 came back and made its ruling that this was a sufficient
17 hearing, the defense placed on the record that there were
18 alternatives that wanted to be explored, which is why a
19 hearing was - - - was required. One is virtual testimony.
20 That letter basically just said it's not recommended she
21 testify. It - - - it stress - - - it could be stressful.
22 She has - - -

23 JUDGE TROUTMAN: But even with the virtual
24 hearing, does that not require testimony and potentially -
25 - - albeit, not in the courtroom - - - still putting a

1 person in the situation that the doctor advised against?

2 MR. SHARP: The problem is that letter is so in -
3 - - the - - - I guess the question is if - - - if - - - if
4 the rule is if one doctor says it's not recommended that
5 somebody testify because of whatever condition that they
6 have, and that needs to go and - - - and put that in a
7 letter, and that is plainly sufficient, then obviously, I'm
8 - - - I'm not going to be successful in this argument. The
9 question really is what - - -

10 JUDGE TROUTMAN: Doesn't it depend on who that
11 doctor is and their relationship to that particular
12 witness?

13 MR. SHARP: Yes, it depends on who the doctor is.
14 And the other thing that - - -

15 JUDGE GARCIA: If those are - - -

16 JUDGE RIVERA: And the reasons they give for why
17 the person can't testify.

18 MR. SHARP: Correct. And - - -

19 JUDGE GARCIA: But if those are the types of
20 things the judge is looking at and that judge is in the
21 courtroom, how do - - - what standard are we reviewing that
22 judge's decision under?

23 MR. SHARP: I - - - I - - - I don't think it's an
24 abuse of discretion standard. I think it would be the same
25 standard applicable for hearing in context of misconduct by

1 a defendant, which is not an abuse of discretion. It's a
2 de novo review of what the court did.

3 So in this case, all that was said - - - and the
4 - - - the problem with not having this hearing, right, is
5 one, the reason why a hearing is had is, on the one hand,
6 make sure that no gamesmanship is going on. Right. How is
7 it - - - how is the defense - - - unless you're going to
8 waive it - - - you - - - you - - - you don't care. It's
9 fine. We're going to allow the testimony in. How is the
10 defense going to check up on the validity of this letter?

11 CHIEF JUDGE WILSON: What would you have - - -

12 MR. SHARP: Right.

13 CHIEF JUDGE WILSON: - - - how did you imagine
14 the hearing - - - who would be the witnesses of the
15 hearing?

16 MR. SHARP: The witness at the hearing would be -
17 - - I mean, certainly, it would be the People's burden.
18 Right?

19 CHIEF JUDGE WILSON: Right.

20 MR. SHARP: And it's their burden to establish
21 unavailability. So they would, I would imagine, call the
22 attending physician - - - some sort of doctor. And I would
23 imagine that would probably be the only witness. And the
24 availability of the hearing, you're then able to ask the
25 doctor, you know, very specifically whether reasonable

1 accommodations can be made. One is the virtual testimony.
2 We don't know. This record certainly doesn't establish
3 whether or not the doctor's concern was travel from
4 Virginia to New York, whether testimony in court, as
5 opposed to from a hospital bed, would be more stressful
6 under the - - - those circumstances. Those are all things
7 that, you know, could be addressed and should be addressed
8 at that type of a hearing; and unfortunately, the court did
9 not do that.

10 The other issue in the dissent to address is the
11 Batson issue.

12 JUDGE GARCIA: I'm sorry. Before we leave that
13 just for one minute, you don't - - - did you preserve a
14 constitutional confrontation clause claim here or just a
15 statutory claim?

16 MR. SHARP: Well, I certainly - - - I did not use
17 the words, you know, confrontation clause during the
18 conversation with the court on that. My - - - my issue
19 with that analysis is the reason why 670.10 exists is it is
20 a legislatively authorized and judicially approved way of
21 circumventing a defendant's right of confrontation. And my
22 argument at the time was, essentially, you're not following
23 the statute, not holding a hearing, which is depriving my
24 client of the right of cross-examination of this witness.

25 We did challenge - - - I - - - I believe I did

1 make very specific reference to the fact that the cross-
2 examination at the first trial was insufficient, and I
3 understand the case law on that. But it becomes, you know,
4 difficult in these contexts where you now have a trial - -
5 - a retrial - - - where the issues are very different than
6 what happened in the first trial.

7 JUDGE GARCIA: So the confrontation claim seems -
8 - - goes to the original witness, right? Not the witness
9 you would have called at the hearing.

10 MR. SHARP: Correct. Yes. Yes. The defense,
11 after and during jury selection, made a Batson challenge -
12 - -

13 JUDGE HALLIGAN: Can I ask you on the Batson - -
14 - over here - - - on the Batson issue? Is it your position
15 that a court can never make an implicit determination on
16 step 3, or just that whatever happened here was not
17 sufficient?

18 MR. SHARP: I think that a court can make an
19 implicit determination depending on what the defense
20 arguments are. And I - - -

21 JUDGE HALLIGAN: So why - - - why not sufficient
22 here, would you say, if - - - if it can be done that way?

23 MR. SHARP: So - - - so I - - - I believe it can
24 be done. There's certainly case law that supports it.

25 JUDGE HALLIGAN: Uh-huh.

1 MR. SHARP: I - - - I understand the principles
2 behind it as well. But if the prosecutor states race-
3 neutral reasons, what - - - in their opinion, what are
4 race-neutral reasons are on the record and the defense is
5 then given an opportunity, as they're required to do so
6 under Batson, to rebut those, you know, race-neutral
7 reasons, and they simply say nothing further or something
8 like that, and then the court just denies the challenge at
9 that point. I think, at that point, you have, from there,
10 an implicit decision by the county court and basically
11 almost a concession when the defendant - - - defense
12 attorney does not actually challenge the prosecutor's
13 reasons.

14 JUDGE HALLIGAN: So - - - so what about - - - it
15 looks to me that - - - that - - - you know, at the close of
16 the colloquy, basically, the court says - - - sorry - - - I
17 believe it's the prosecutor, Mr. Carty. Was that the
18 prosecutor?

19 MR. SHARP: Yes.

20 JUDGE HALLIGAN: Okay. I just want to make sure
21 the record is clear. "Any dispute?", and there was no
22 response from defense counsel - - - Judge. And I - - - I
23 take it was you, you respond, "no, Judge, no dispute." So
24 why doesn't that bring any - - - any question about the
25 Batson issues to a close?

1 MR. SHARP: Because that was not in relation to
2 the Batson issue. The court makes its Batson determination
3 and then talks about the remaining peremptory challenges in
4 who is to remain to be seated and then asked whether there
5 is any dispute. And that is when Mr. Carty says, no, I
6 don't respond. And Mr. Carty follows up with making sure
7 that that's correct. It certainly did not have anything to
8 do with - - - with the Batson - - -

9 JUDGE HALLIGAN: I see. So - - -

10 CHIEF JUDGE WILSON: But what - - -

11 JUDGE RIVERA: Then I - - - can I ask you then -
12 - - I'm sorry - - - can I ask you then about the - - - the
13 interchange - - - the exchange - - - excuse me - - -
14 between the court and defense counsel and the ultimate
15 decision, because it does strike me that that is an
16 implicit determination as to step 3, so let's see what your
17 response is. I mean, defense counsel is making very clear
18 that the argument is that the court should not credit the
19 reasons given by the prosecutor for the two remaining.
20 Right?

21 MR. SHARP: Yes.

22 JUDGE RIVERA: Those two. But the court
23 clarifies what about the third one? And then counsel says,
24 I am agreeing that he - - - he, being the prosecutor - - -
25 provide a race-neutral reason that I find to be credible.

1 So it is obvious throughout this exchange that - - - and
2 there's - - - an earlier part of the exchange, I think,
3 supports this, but certainly here, because it's closest to
4 the determination by the court - - - that counsel is making
5 very clear that there is a credibility part of this Batson
6 determination and is arguing quite vigorously that the
7 court should not credit, in fact, is suggesting why it
8 sounds unbelievable.

9 And then the court says thank you with respect to
10 the other two. Right. Because you conceded on one. I
11 believe there's a race-neutral reason granted - - - race-
12 neutral reason - - - which would permit a challenge or
13 peremptory - - - which would permit a challenge or
14 peremptory challenge by the People not subject to Batson.
15 Challenge granted.

16 Why - - - in addition to what counsel is arguing
17 there about the crediting the prosecutor's reason, why
18 isn't this last part of it, would permit a race-neutral
19 reason, which would permit a challenge or peremptory
20 challenge by the People not subject to Batson, and that the
21 court is very aware of what it has to do under Batson and
22 says this is not a problem under Batson.

23 MR. SHARP: I see my time is up, can I please - -
24 -

25 CHIEF JUDGE WILSON: Oh, please, yes.

1 JUDGE RIVERA: I took all your time. My
2 apologies.

3 MR. SHARP: So it's - - - I mean, first of all,
4 the reality is you can always, you know, say that just by
5 the mere denial of a Batson challenge, that that is the
6 court implicitly making a credibility determination. And
7 that's part of the problem is what the law says - - - this
8 court says in Payne, is that it's the trial court's
9 responsibility to make sure there's an adequate record to
10 review and to develop.

11 When you look at what county court said, it's not
12 clear that county court is even referring to a reason that
13 was given by the prosecutor. It's left open. And saying -
14 - - it didn't say the prosecutor provided a race-neutral
15 reason for - - - that permits. It just says the court sees
16 a race-neutral reason. You could construe that as the
17 court finding its own reason. You can construe that as the
18 court agreeing with one of the prosecutor's reasons. The
19 record is certainly unclear on that point.

20 CHIEF JUDGE WILSON: But what is it that you said
21 at step 3 to demonstrate that the reasons given were
22 pretextual? Beyond credibility.

23 MR. SHARP: Beyond credibility?

24 CHIEF JUDGE WILSON: Yeah.

25 MR. SHARP: Certainly, I - - - in terms of the



1 length of residency, what was said is that that was just a
2 bare bones pretext. I - - - I did not go into the specific
3 - - -

4 CHIEF JUDGE WILSON: But that seems like
5 credibility, right? They're saying it's a residency
6 requirement, but you shouldn't believe that.

7 MR. SHARP: I mean, that's kind of the nature of
8 what a pretext is, right?

9 CHIEF JUDGE WILSON: Well, no, I mean,
10 ordinarily, what you see in a lot of these cases is
11 somebody will say, look, there were two white jurors who
12 were residents for only a year or two, and the prosecutor
13 didn't strike him.

14 MR. SHARP: Yeah.

15 CHIEF JUDGE WILSON: And that - - - you see that
16 a lot.

17 MR. SHARP: Sure. So this was the first round of
18 jury selection.

19 CHIEF JUDGE WILSON: Yeah.

20 MR. SHARP: The length of residency came from
21 jury questionnaires that were filled out.

22 CHIEF JUDGE WILSON: Uh-huh.

23 MR. SHARP: And so in - - - in the moment in time
24 when you're making these arguments, you don't really have
25 the time to shift through the thirty juror questionnaires

1 and do that sort of calculation on the fly. And so what -
2 - - what was said was really credibility. And you know, I
3 - - - I believed in arguing that it was a pretext was that
4 there was no cause to tie this to this particular case.
5 Two years was insufficient for one juror. Five years of
6 residency was insufficient for another juror. How many
7 years do you need of residency to, you know, be considered
8 an acceptable juror in that prosecutor's view?

9 Thank you.

10 MR. LIBERATI-CONANT: May it please the court.
11 Chris Liberati-Conant, for the People.

12 Your Honors, defense has a preservation issue
13 with respect to both of the arguments he raised here today.
14 To start with, Batson, defendant failed to raise a specific
15 challenge to the form of Batson inquiry, and this court's
16 law is clear - - - I - - - I point the court to both People
17 v. James and People v. Smocum. The defendant has a - - -

18 JUDGE RIVERA: What - - - what are you saying the
19 defendant should have done that was not done with respect
20 to the Batson?

21 MR. LIBERATI-CONANT: Yes. It would have been
22 quite simple here, Your Honor. He could have simply said,
23 when the judge made the ruling that you read here today,
24 could have said, Your Honor, you did not rule on pretext.
25 Objection. And at that point, the judge would have been

1 able to clarify the record and address the problem right
2 there. And I posit that the reason that - - -

3 JUDGE HALLIGAN: But so is it your view the judge
4 didn't rule on pretext?

5 MR. LIBERATI-CONANT: The judge absolutely did
6 rule on pretext, but that - - -

7 JUDGE CANNATARO: Is that an implicit ruling or
8 an explicit rule?

9 MR. LIBERATI-CONANT: So I just want to be clear.
10 My first argument is this argument is wholly unpreserved,
11 and so we don't need to breach the issue.

12 JUDGE CANNATARO: Made that point.

13 MR. SHARP: The second, though, is that first of
14 all, the judge did - - - whether you call it explicit or
15 implicit, it is as close to explicit you can - - - as you
16 can get - - -

17 JUDGE HALLIGAN: Well, where - - - where exactly
18 is the explicit ruling? Where in the transcript?

19 MR. LIBERATI-CONANT: It was in the - - - the
20 portion that Judge Rivera here read today. And I
21 understand the judge did not say you have not shown
22 pretext, and so I will fall back and say that the judge got
23 as close to being explicit as humanly possible without
24 doing so. And I do emphasize that - - -

25 JUDGE SINGAS: Well, aren't you really talking

1 out of both sides of your mouth because you're saying to
2 the defendant that he should have been more explicit and
3 say, objection, you didn't do step 3, but you're not
4 requiring that of the judge to say, okay, I'm going to rule
5 now on step 3.

6 MR. LIBERATI-CONANT: No, Your Honor, because
7 preservation is a rule of this court that - - - that
8 determines what the court can and can't review. The - - -

9 JUDGE TROUTMAN: But with respect to the three
10 steps of Batson, isn't that something that the court is
11 supposed to do? And - - - and that's the court's
12 responsibility. Are you not now suggesting that somehow it
13 is incumbent upon the defendant to tell the judge, you
14 didn't do step 3?

15 MR. LIBERATI-CONANT: Well, that's - - - that is
16 what preservation is, Your Honor, is that - - -

17 JUDGE TROUTMAN: I - - - I understand what
18 preservation is. But with respect to the Batson steps that
19 are required, is it true that there are, in fact, three
20 separate and distinct steps?

21 MR. LIBERATI-CONANT: Yes. I - - - there's no -
22 - - the People do not - - -

23 JUDGE TROUTMAN: Okay.

24 MR. LIBERATI-CONANT: - - - contend that there
25 are not, and the People do not contend that the judge needs

1 to go through all three steps. But the People also contend
2 that the defendants or the party opposing the Batson
3 challenge has a responsibility to object and to object
4 specifically to the form of the Batson challenge, and he
5 failed to do so here. And to - - -

6 JUDGE HALLIGAN: Well, he says - - - he says, I
7 think these are pretext - - - examples of pretext by the
8 DA's office, and I think that my Batson challenge should be
9 sustained.

10 MR. LIBERATI-CONANT: Well, so that - - - that
11 goes to a different issue, Your Honor, which is whether the
12 People presented a race-neutral reason and whether
13 defendant actually met his burden of showing that the
14 People's reasons were pretextual. And that would be an
15 issue that is essentially an affirmed finding of fact
16 before this court. The court implicitly found that the
17 prosecutor's proffered race neutral reasons were not
18 pretextual.

19 And I do note, as - - - as the court has already
20 noted here today, that the defendant, at that time, did not
21 offer anything beyond conclusory assertions that the
22 People's proffered reasons were pretextual, such as that
23 other jurors had been excluded - - - or had not been
24 excluded, even though they had lived in a county - - - in
25 the county for, you know, some number of years.

1 JUDGE RIVERA: Can I ask - - -

2 JUDGE TROUTMAN: And is there anywhere in the
3 record such discussion of - - - of other jurors and their
4 residency?

5 MR. LIBERATI-CONANT: I - - - I don't recall off
6 the top of my head, Your Honor. I'm sorry - - -

7 JUDGE TROUTMAN: But if it was, it was incumbent
8 upon the defense to - - - to assert same is what you're
9 arguing?

10 MR. LIBERATI-CONANT: Well, the argument is that
11 the defendant here did not offer anything aside from his
12 assertion that I believe this is pretextual - - -

13 JUDGE TROUTMAN: Right. But you're saying it's
14 more than an assertion; it is an identification of the
15 practice actually occurring in the manner that he suggests?

16 MR. LIBERATI-CONANT: I'm sorry. I don't
17 understand your question.

18 JUDGE TROUTMAN: He can't just simply assert it
19 in a conclusory way. You're saying the record needs to
20 support the claim.

21 MR. LIBERATI-CONANT: Yes. Yes. Well, that - -
22 - that is - - - that is largely correct. And he did - - -
23 I - - - I do grant that he did challenge the credibility of
24 the prosecutor in making that assertion, and the prosecutor
25 was therein viewed by the trial judge, who was in the best

1 position to judge the - - - the prosecutor's credibility.

2 JUDGE RIVERA: So when you say - - - in response
3 to an earlier question - - - that if it's not expressed - -
4 - the judge's determination of the Batson challenge - - -
5 if it - - - if it's not expressed, it's as close as it
6 gets. So what makes it close? Is it the language that I
7 quoted that the court said at the very end? Is it the
8 context? Is it both? What - - - what is it?

9 MR. LIBERATI-CONANT: Well, I - - - and I
10 appreciate, Judge, that you made a point beyond the one
11 that I made in my brief, which is that the context of that
12 conversation is important, and the context of that colloquy
13 is important. The judge made that ruling, as you just
14 suggested to - - - to counsel, in direct response to his
15 arguments that the prosecution's proffered reasons were not
16 credible. So at the very least, by then, listening to
17 those arguments and saying, essentially, no, this is proper
18 under Batson, and the People's challenge is proper under
19 Batson; I'm granting the challenges; the court has thereby
20 absolutely, implicitly made a credibility determination,
21 implicitly found that the People's proffered reasons are
22 not pretextual.

23 JUDGE RIVERA: Okay. Let's say the court didn't
24 find that so persuasive. But what about what the court
25 actually said as - - - is its determination?

1 MR. LIBERATI-CONANT: Right. And so I don't
2 recall the exact language, Your Honor, but I know you did
3 just read it, and I - - -

4 JUDGE RIVERA: Thank you. I mean, I'm - - - no,
5 I'm saying what - - - when you said it's as close as it
6 comes, and you've already said - - -

7 MR. LIBERATI-CONANT: Yes.

8 JUDGE RIVERA: - - - I raised something that was
9 not in the brief. So in terms of what you have argued to
10 the court, what makes it as close as it comes?

11 MR. LIBERATI-CONANT: Well, both - - - both the
12 passage that Your Honor read - - -

13 JUDGE RIVERA: I see.

14 MR. LIBERATI-CONANT: - - - in which the court
15 says that, you know, the - - - that - - - the People's
16 challenge is proper under Batson, and also, the court's
17 having just heard an argument on credibility and then
18 rejecting that argument in granting the peremptory
19 challenges.

20 JUDGE CANNATARO: How do you characterize the use
21 of race neutral in a - - - in a passage where you would
22 expect to see the word pretextual? So going back to that
23 very same passage you were just talking to Judge Rivera
24 about, the judge keeps saying there's a race neutral,
25 granted, race-neutral reason, which would permit a

1 challenge or peremptory challenge by the People, not
2 subject to Batson, challenge prevented. I would have
3 expected, at that point - - - because, you know, the
4 arguments had already been made as to why they were
5 pretextual - - - to see the word pretextual.

6 MR. LIBERATI-CONANT: I - - - I grant that the
7 court appears to have misspoken at that time. He used the
8 wrong - - - wrong language - - -

9 JUDGE CANNATARO: That's it? They just said the
10 wrong thing?

11 MR. LIBERATI-CONANT: And the - - - and the case
12 law cited in our brief stands for the proposition that when
13 we're talking about an implicit ruling on pretext, the fact
14 that the court happened to use the wrong language is not
15 dispositive.

16 JUDGE HALLIGAN: So how do we know then, that - -
17 - that he has made an implicit ruling?

18 MR. LIBERATI-CONANT: Well, this is why
19 preservation is so incredibly important here. Had there
20 been a timely objection, the court could have ruled - - -
21 could have clarified - - -

22 JUDGE HALLIGAN: I'm not sure that's responsive
23 to the question, though. If he made an implicit
24 determination, how do we know that?

25 MR. LIBERATI-CONANT: Well, so I - - - I think

1 some of the very good evidence of that is he implicitly
2 ruled that the People's reason - - - the People's proffered
3 reason was credible because he ruled so immediately after
4 defense counsel argued that the People's reasons were not
5 credible. The - - - the - - -

6 JUDGE HALLIGAN: So - - - so are you saying that
7 is an implicit ruling on step 3?

8 MR. LIBERATI-CONANT: I am.

9 JUDGE HALLIGAN: Okay. And so if we should take
10 that as an implicit ruling on step 3, then how is it that
11 it's not preserved? I'm - - - I'm struggling - - - I don't
12 understand how you could have both of those. Both argue
13 that it is not preserved, and there's an implicit finding.
14 It seems to me it must be one or the other.

15 MR. LIBERATI-CONANT: Because he is bringing this
16 argument here today that the judge at that time - - -

17 JUDGE HALLIGAN: But you're saying, I think, that
18 he put it before the judge sufficiently to get an implicit
19 ruling on the question, yes?

20 MR. LIBERATI-CONANT: Yes. And what I'm saying,
21 Your Honor, is if he believed - - - counsel believed, at
22 that time - - - as opposed to believing as he likely - - -
23 as - - - as - - - as the People posit he likely did - - -
24 he likely understood at that time that the court had just
25 ruled on the credibility of the witness. And so failing to

1 preserve that objection at that time actually prevented the
2 court - - - prevented a proper record in this case. And so
3 the defendant should not be allowed to sit on an objection
4 like that, leave the record as it is, and then use it at
5 the appellate level to then bring it up for the first time.

6 JUDGE GARCIA: Counsel, do you just want to
7 comment on the other issue on the hearing, specifically on
8 how should we review the judge's determination?

9 MR. LIBERATI-CONANT: Yes, Your Honor. So this -
10 - - this again, counsel today raised unpreserved
11 constitutional issues with respect to confrontation, with
12 respect to due process. Today, here - - -

13 JUDGE GARCIA: But on the hearing issue, that is
14 preserved.

15 MR. LIBERATI-CONANT: Excuse me?

16 JUDGE GARCIA: On the issue that he did preserve.

17 MR. LIBERATI-CONANT: Yes. There's no - - -
18 there's no doubt that the issue of whether the statute was
19 followed is preserved.

20 JUDGE GARCIA: How do we - - - under what
21 standard do we review the trial court's decision?

22 MR. LIBERATI-CONANT: This is an abuse of
23 discretion standard, Your Honor.

24 JUDGE GARCIA: What about the point that this is
25 more like misconduct by the defendant?

1 MR. LIBERATI-CONANT: Well, I - - - I do - - - I
2 do want to note for the court that this is the first time
3 that I'm hearing that argument, and so it makes it
4 difficult for the People to respond when I have not had an
5 opportunity to review it or research it. So again, this
6 goes to the very preservation of the issues by defendant -
7 - -

8 CHIEF JUDGE WILSON: Well, then why do you - - -
9 try it the other way. Why do you think this is an abuse of
10 discretion standard?

11 MR. LIBERATI-CONANT: Because it is essentially -
12 - - it's an evidentiary ruling. And so whether or not to
13 admit the unavailable witnesses testimony is an evidentiary
14 ruling, and that's why it is an abuse of discretion
15 standard.

16 I do want to note, Your Honor, that 670.20 of the
17 CPL requires, first, that the People make a motion
18 supported by facts. They did that here with the letter
19 provided by Dr. Tsonga (ph.). The statute then further
20 requires that the defendant have an opportunity to be
21 heard.

22 Defendant manifestly did have an opportunity to
23 be heard here. Here he did make argument. He did argue,
24 in fact, that the court should hold a further evidentiary
25 hearing. But as the Appellate Division held, this statute



1 does not require an evidentiary hearing on its face. If
2 the legislature had wished to compel an evidentiary
3 hearing, it could have stated that an evidentiary hearing
4 is required under the circumstances.

5 And beyond that too, the - - - even if there were
6 error here, this would be harmless error because the - - -
7 the - - - the - - - this testimony - - - the witness - - -
8 the - - - the - - - the testimony offered by this witness
9 was corroborated in multiple other instances, including by
10 the defendant himself, to more than one person in his
11 admissions to police, and including being corroborated by
12 the defendant's brother. So the fact of this jealous
13 argument that arose out of the defendant's belief that his
14 wife had cheated on him was not dependent solely on the
15 defendant - - - the testimony of Ms. Trella (ph.). It was
16 corroborated in multiple other instances as well.

17 Your Honor, I also want to add, with respect to
18 the issue of confrontation with respect to Ms. Trella.
19 There is no - - - as - - - as Your Honor suggested, there
20 is no confrontation issue here. The defendant had a full
21 and a fair opportunity to cross-examine Ms. Trella at the
22 first trial, and in his papers, Mr. Sharp has focused on
23 what he would have done differently strategically as
24 opposed to what - - - as opposed to any way in which his -
25 - - the prior counsel's cross-examination of the witness



1 was limited in that first trial.

2 Your Honor, to move to the issue of the
3 defendant's statements, just to briefly say, Your Honor,
4 that the - - - the trial court properly applied the law of
5 the case here.

6 JUDGE GARCIA: I have a question on that. There
7 was a suppression hearing in the original proceedings
8 before the first trial. The defendant had this letter
9 claiming to representation of the defendant at that time?

10 MR. LIBERATI-CONANT: I don't know. That's - - -
11 presumptively, the defendant had that letter at that time.
12 I can't tell the court one way or the other whether he did
13 or not. And that's one of the problems with the
14 supposition that this letter provides an extraordinary
15 evidence or an, you know, extraordinary reason to go beyond
16 the law of the case doctrine. There's no reason to believe
17 this is newly discovered evidence. This is evidence that
18 defense counsel would have liked prior counsel to have
19 used.

20 JUDGE GARCIA: It seems to me this is more an
21 issue for us of whether the judge erred in not reopening
22 the suppression hearing, at least for this issue, right? I
23 mean, we never ruled on the original suppression motion,
24 right?

25 MR. LIBERATI-CONANT: Well, that's correct. And

1 there - - - there's a problem with preservation here as
2 well, because the time for defendant to raise that to the
3 Appellate Division first would have been on the first
4 appeal.

5 JUDGE GARCIA: But he didn't raise suppression on
6 the first appeal?

7 MR. LIBERATI-CONANT: I don't believe so. And I
8 note that it's defendant's burden to show preservation - -
9 - or it's the party making the arguments burden to show
10 preservation.

11 JUDGE GARCIA: But he made the argument in the
12 trial court, right? And aren't - - - isn't our
13 preservation rule really related to the trial court, not
14 the Appellate Division?

15 MR. LIBERATI-CONANT: But in this case, it should
16 be related to the original trial court when he first had
17 the opportunity.

18 JUDGE GARCIA: I understand that argument.

19 MR. LIBERATI-CONANT: However, irrespective of
20 that, the law of the case was properly applied by the trial
21 court hearing.

22 I see my time is up, and so I thank you Your
23 Honors.

24 CHIEF JUDGE WILSON: Thank you.

25 JUDGE GARCIA: Counsel, can you just clear up

1 this last issue, if you know. Did the defense have the
2 letter at the first - - - before the first suppression
3 hearing?

4 MR. SHARP: I do not know. And one of the issues
5 in - - - first of all, I completely disagree that it should
6 be preserved at the Appellate Division on the first
7 instance - - - but the defendant did file a very voluminous
8 440 motion - - -

9 JUDGE GARCIA: But you never argued the letter in
10 the first suppression motion?

11 MR. SHARP: Correct. The defendant did file a
12 lengthy 440 motion that was denied by the trial court. The
13 appellant - - - alleging ineffective assistance on a lot of
14 grounds. The Appellate Division never touched it because
15 it was a very easy issue for them to reverse on.

16 JUDGE GARCIA: Understood.

17 MR. SHARP: And so that's where the importance
18 came in to, you know, bringing this letter to the court's
19 attention and saying we need to reopen this hearing, and
20 that's why it should have been reopened.

21 JUDGE GARCIA: You never claimed you didn't have
22 it the first time.

23 MR. SHARP: I did not know the answer to that.
24 The attorney who had represented him would - - - would not
25 contact me back. I was about, I think, the seventh or

1 eighth attorney reassigned to this client, so the status of
2 the file was bereft.

3 In terms of preservation on the Batson issue, the
4 People can always say you - - - you need to do more. The
5 reality and purpose of preservation is to alert the trial
6 court to the issue. Is there any doubt that that wasn't
7 done in this case in terms of - - -

8 JUDGE RIVERA: Well, it alerted the court that
9 there was a Batson challenge. I think his argument was,
10 did you alert the court that they had missed step 3?
11 Because that's true, if - - - if you had raised that, the
12 court could have said, oh, yes, I don't - - - I - - - I - -
13 - I credit - - - I credit the reason given. I thought I
14 said that or whatever the judge might have said.

15 MR. SHARP: I - - - I squarely put before the
16 court credibility is an issue, and the People would want me
17 to, after the judge issues his ruling, continue to argue
18 further. I think that it sufficiently put the court on
19 notice that it should make a credibility determination, and
20 then the court did not make, certainly, any explicit
21 credibility determination.

22 And Judge Troutman, I just want to respond to the
23 question about any other jurors in terms of length of
24 residency. That's certainly one way of demonstrating a
25 pretext. The problem is, is we're dealing with a small,



1 largely rural county in Columbia County, where, frankly,
2 most jurors are going to be long residing residents.

3 And in terms of arguing a pretext other than
4 credibility, as Judge Wilson asked me, is you're - - -
5 you're looking at two years. Okay. It - - - it - - - it
6 certainly doesn't seem like it. What's the relation to the
7 case? Right. What - - - how are you relating that to the
8 case? And then there's five years on the other one. And
9 then after the five years, there was another reason given
10 that I think is completely not borne out in the record.
11 And it becomes a point in time where, well, how many years
12 is required to do so? And when you're talking about small
13 communities, and you're talking about minority
14 representation and jurors, certainly some minority
15 representation in rural counties are going to be people
16 that move from different jurisdictions at a certain point
17 in time. And ultimately, that's what was happening, and -
18 - - and frankly, I think is why a pretext was established.

19 JUDGE RIVERA: So are you arguing - - -

20 CHIEF JUDGE WILSON: That seems like - - -

21 JUDGE RIVERA: I'm sorry.

22 CHIEF JUDGE WILSON: I'm sorry. That seems like
23 something that you might have said at step 3. That is,
24 Your Honor, this is a rural county. The incumbent
25 population here is largely white. However, in the last

1 several years, there has been an influx of other people
2 moving in, and that's why this is pretextual. That would
3 have at least been something.

4 MR. SHARP: Yeah.

5 CHIEF JUDGE WILSON: I mean, hindsight is always
6 2020, you know.

7 MR. SHARP: I can always do more, yes. And you
8 know, I - - - I think that, you know, of course, when
9 you're making arguments to a judge, you're - - - you're
10 also relying on the fact that this is a judge that presides
11 in that county and lives in that county and is aware of - -
12 - of those characteristics. With - - - without going into
13 too much further detail, but certainly, the record did
14 establish that that juror did relocate from Texas to New
15 York City and then to Columbia County. You know, he - - -
16 he did indicate to that.

17 JUDGE TROUTMAN: But again, the problem is when
18 the case is on appeal, it leaves that county. On a case
19 yesterday, I mentioned something from the community that I
20 come from. I asked a question that my colleagues wouldn't
21 necessarily know, but if you put it in the record, then you
22 give the reviewing court more information - - - helpful
23 information, let me say.

24 MR. SHARP: Sure. I understand. Only just my
25 word too, in terms of making an argument, but yes. Thank

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you.

CHIEF JUDGE WILSON: Thank you.

(Court is adjourned)



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

I, Christian C. Amis, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Arthur H. Morgan, Jr., No. 82 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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