COURT OF APPEALS

STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

No. 168

LUIS ALVAREZ,

Appellant.

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20 Eagle Street
Albany, New York 12207
September 7, 2012

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE CARMEN BEAUCHAMP CIPARICK
ASSOCIATE JUDGE VICTORIA A. GRAFFEO
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE ROBERT S. SMITH
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE THEODORE T. JONES

Appearances:

KENDRA L. HUTCHINSON, ESQ.
APPELLATE ADVOCATES
Attorneys for Appellant
2 Rector Street
10th Floor
New York, NY 10006

DANIELLE HARTMAN, ESQ.
DISTRICT ATTORNEY'S OFFICE FOR THE COUNTY OF QUEENS
Attorneys for Respondent
12501 Queens Boulevard
Kew Gardens, NY 11415

Penina Wolicki
Official Court Transcriber

CHIEF JUDGE LIPPMAN: People v. Alvarez; People v. George.

Counselor, you're on Alvarez?

MS. HUTCHINSON: Yes. Yes, Your Honor. Good afternoon. May it please the court, my name is Kendra Hutchinson, and I represent Luis Alvarez in this matter.

CHIEF JUDGE LIPPMAN: Okay. Go ahead. Do you want rebuttal time, counselor?

MS. HUTCHINSON: Two minutes, please, Your Honor.

CHIEF JUDGE LIPPMAN: Two minutes. Sure.

MS. HUTCHINSON: Thank you. At this point, the propriety of the closure does not appear to be at issue, nor are the People seriously complaining about what defense counsel did or said. Instead, in Mr. Alvarez's case, it appears that they're asserting that my client himself was untimely or that he waived his right to review of this claim.

However, defense counsel made a specific objection as soon as he learned of the closure, and that is all that was necessary in this case.

JUDGE CIPARICK: What he claims is that he couldn't really see the family had left, but it wasn't until after that he was aware that the family

had been asked to leave. Is - - - and that's when he made his objection?

MS. HUTCHINSON: That's correct, Your Honor. He was - - -

JUDGE CIPARICK: There was no opportunity beforehand.

MS. HUTCHINSON: - - - he was conducting jury selection - - -

JUDGE CIPARICK: Right.

MS. HUTCHINSON: - - - essentially during - - -

JUDGE CIPARICK: Right.

MS. HUTCHINSON: - - - the first - - - the entire first round. And he - - - in many ways, the court did a secret closure here.

JUDGE CIPARICK: There was no announcement that we're asking the family to leave because we have no room for the jurors?

MS. HUTCHINSON: Exactly. Gave the parties no notice and gave the parties no opportunity to make a record. So in this instance, it would be unreasonable to think that defense counsel would have to look behind his shoulder to see if the court was - - -

JUDGE PIGOTT: Secret sounds - - - makes it

sound like he was being sneaky.

MS. HUTCHINSON: The court?

JUDGE PIGOTT: Yes.

MS. HUTCHINSON: Well, you know, the court said he did this in every trial. And I have absolutely no doubt that this was unint - - - you know, it was not intentionally trying to violate anybody's right to a public trial. But this was a blanket policy that the court did.

JUDGE PIGOTT: It's a problem, I guess, in these smaller courtrooms, where you're trying to get, I guess, sixty jurors in so that you don't have to repeat yourself twice - - - repeat yourself when you get a new venire because you've got eleven, and you didn't get the twelfth. Is there a problem with simply saying we'll leave the back row open, or how many seats do you need, Mr. Defendant, or something like that?

MS. HUTCHINSON: No, we don't think there's a problem at all. And in fact, this is People v. Martin. This is a small courtroom, absolutely, but in People v. Martin, this court recognized that one can leave chairs for the parents; one can leave a row; one can even notify the parties that they're doing it.

CHIEF JUDGE LIPPMAN: But when this happened, though, the - - - at the point that it was raised, it's really after the violation occurred, and the judge couldn't really consider alternatives, right? There could only be, what, a mistrial?

MS. HUTCHINSON: At this point, Your Honor, yes, a mistrial is the only proper vehicle, particularly in light of the fact that counsel did not have the opportunity to make a record before. It's obvious - - -

JUDGE PIGOTT: But how are you harmed by this? I mean, you're right, you didn't know until later. But why - - - he would have known if he wanted the family there or if he had something to inquire about with respect to the family.

MS. HUTCHINSON: Well, I think the People are contending that the right was unimportant to my client. And if that's sort of what Your Honor is speaking to, my client obviously cared. He was speaking to his mother before this happened. He brought this up to his attorney. It's not like he remained silent for - - -

JUDGE SMITH: Suppose he didn't care. Does the - - - if we find he didn't care, do we affirm?

MS. HUTCHINSON: No, Your Honor. But this

is, I think, in essence, like a rationale that the People are urging upon this court for affirming the conviction in this case, that - - - no. But it is clear from this record that my client did care. He brought it up to his attorney. And the defense counsel preserved his right by moving for a mistrial.

JUDGE PIGOTT: I could be confusing the cases, but didn't he talk to his mother, and then she left?

MS. HUTCHINSON: He talked to his mother right - - - just prior to the jury panel entering at 11:25. And then the first round of jury selection goes on for about an hour. Five jurors are picked. And then my client - - - a second round is seated. And then there's - - - my client is remanded for the lunch recess. And then after that lunch recess, my defense counsel puts this objection on the record, this mistrial.

JUDGE READ: Let me make sure I - - -

JUDGE GRAFFEO: I'm trying to - - -

JUDGE READ: - - - understand what you're arguing.

MS. HUTCHINSON: Sure.

JUDGE READ: In terms of preservation, are you saying whether it needs to be preserved or not is

irrelevant to your case, because it was, since the objection was lodged as soon as possible?

MS. HUTCHINSON: What we're saying here is that defense counsel made the objection as soon as he was aware of the closure.

JUDGE READ: So do you concede it has to be preserved?

MS. HUTCHINSON: No, we do not concede that it has to be preserved, Your Honor. But if it - - -

JUDGE GRAFFEO: You don't have to - - - you don't have to preserve it?

MS. HUTCHINSON: No, Your Honor. This objection does not - - -

JUDGE GRAFFEO: So this judge seemed to - - - I think this was the case where the judge indicated that this was kind of a regular practice.

MS. HUTCHINSON: Yes.

JUDGE GRAFFEO: So that means all the other defendants who never voiced any objection - - -

MS. HUTCHINSON: Yes, in this case - - -

JUDGE GRAFFEO: - - - could come in with a habeas and claim that their Sixth Amendment right now was violated?

MS. HUTCHINSON: In this case the issue was preserved, Your Honor. But in any event, this issue

need not be preserved.

JUDGE GRAFFEO: No, I'm asking you - - -

MS. HUTCHINSON: Yes.

JUDGE GRAFFEO: - - - are you saying that it needs to be preserved, but in your case the defense attorney did it at the first available opportunity; or are you saying you don't need to preserve this type of - - -

MS. HUTCHINSON: In any event, we do not need to preserve this for two - - -

JUDGE SMITH: Am I right that you're making an alternative argument - - -

MS. HUTCHINSON: That's correct, Your Honor. If this court were to find that this were unpreserved, in any event, no preservation was necessary for two reasons.

JUDGE GRAFFEO: So can you explain why it is this attorney didn't realize that defendant's mother wasn't in the courtroom for this? Because it's not like this was ten minutes.

MS. HUTCHINSON: Sure. I think because the court didn't inform them of the closure and give them an opportunity to be heard on it. I think that's why defense counsel was not aware of it. Defense counsel had no obligation, during jury selection, while he's

presumably focusing on the jurors and probably conferring with his client about which jurors were suitable, to look behind his shoulder to see that my client's mother was there.

And indeed, the record doesn't even show when my client, himself, became aware. But the People assert that he was aware of it from the very second that his parents weren't there. But this could have happened at the beginning of round 1 - - -

CHIEF JUDGE LIPPMAN: But do you agree that this is a customary practice in this part of the world that this happens all the time and - - -

MS. HUTCHINSON: It - - -

CHIEF JUDGE LIPPMAN: - - - is it obvious to the defendant - - - that the defense attorney would not know that that's what happened here, especially when the mother seems to be so important to the defendant?

MS. HUTCHINSON: Well, it seems to be a regular practice with this judge. And I've seen Queens courtrooms. They're pretty small.

CHIEF JUDGE LIPPMAN: Yes, well that's what I'm saying.

MS. HUTCHINSON: Yes.

CHIEF JUDGE LIPPMAN: With any of the

courtrooms in New York City - - -

MS. HUTCHINSON: They are pretty small.

CHIEF JUDGE LIPPMAN: - - - that could become a practice in the small courtroom.

MS. HUTCHINSON: Yes. But that said, Your Honor, defense counsel said I was not aware; I did not turn around all the way to the corner. And nobody contested that he would have been aware or should have been aware or something wasn't aware. He - - -

JUDGE CIPARICK: Can a defendant waive his right to a public trial?

MS. HUTCHINSON: Yes. A defendant can waive his right to a public trial.

JUDGE CIPARICK: What would he have to do?

MS. HUTCHINSON: Pardon me, Your Honor?

JUDGE CIPARICK: What would he have to do in order - - -

MS. HUTCHINSON: Well, I can tell you what's not enough. Silence is not enough. Silence is not enough. This is a Constitutional right. The record has to demonstrate that - - -

JUDGE SMITH: What about telling your mother you don't have to stay?

MS. HUTCHINSON: No, Your Honor. That was

not sufficient to waive this. And first of all, the argument that he was telling his mother not to stay relies on speculation. The record discloses in a parenthetical that the court reporter records him speaking to a family member in Spanish in the audience, and then him saying to no one in particular, perhaps to his lawyer, because nobody responds, "I was telling her she could leave, because all we're doing is picking a jury."

That is all the record discloses. He could be talking to some other audience member, number one. Number two, he didn't excuse his father, who was also there. He didn't say, oh, you know, Dad, you can go home, too. Number three, he didn't excuse other public - - - other members of the public who might have been kicked out as well.

And importantly, I think the really most important part is that a waiver has to be knowing, intelligent, and voluntary. I think People v. Parker, I think the Parker rights are a very apt case to consider for waiver here. In Parker it was recognized - - - and as we all know, a defendant can waive his right to be present through implied conduct, actually, even after. However, Parker recognized that a defendant has to be aware of the

right, and the record has to disclose it, and also has to be aware of what giving up that right entails.

JUDGE PIGOTT: Where does it - - - you know, it's a public trial, whether they're there or not. I mean, you've got all the jurors who are not part of the panel yet. So I mean, it's not like a Star Chamber. But if you go to the other way, I mean, does the defendant - - - if the judge says now you obviously have a right to have your family and relatives and friends here. Does he say great, I've got fifty-six buddies of mine from high school that want to be here, so can I have the right-hand side of the courtroom?

MS. HUTCHINSON: Well, I think if the judge had engaged in Waller, as he should have, and as he - - - as he really should have, I think the judge could have considered this, could have said look, you know, we only have limited seating. Let's balance this out. Let's put in some chairs. Let's reserve one row. Let's figure this out.

JUDGE PIGOTT: And then what happens if you say great. Mom and Dad were there, but I don't talk to my dad. My mom was okay, but if Grandma had been there, she was the one that raised me and nobody asked me if I could have Gra - - - I mean, are we

going to get into a parade of where we draw these lines?

MS. HUTCHINSON: I think the real key here is that Waller was never even complied with. We have - - - the judge considered absolutely no reasonable alternatives, and that is all this court needs to decide.

JUDGE SMITH: And then you're saying that if the judge had said okay, we've only got - - - the courtroom's not much bigger than a postage stamp; you're going to - - - we're going to let in your parents and not your grandparents, that might be an appropriate exercise of discretion?

MS. HUTCHINSON: I think it would present a different case, Your Honor. I think if the judge had even bothered to honor my client and the public's right to a public trial for at least this round of voir dire.

CHIEF JUDGE LIPPMAN: Okay. Thanks, counselor.

MS. HUTCHINSON: Thank you very much.

CHIEF JUDGE LIPPMAN: Thank you.

Counselor?

MS. HARTMAN: Good afternoon. My name is Danielle Hartman, and I represent the People of the

State of New York.

CHIEF JUDGE LIPPMAN: Go ahead, counselor.

MS. HARTMAN: There was no secret closure here that obviated the need for defendant to preserve the issue in the first instance.

CHIEF JUDGE LIPPMAN: Is it conceivable that the defense attorney just would not have known that the mother was not there?

MS. HARTMAN: I should say from the outset, that this is a very, very small courtroom. This is a courtroom where there are two rows for spectators.

JUDGE SMITH: Are you asking us to disbelieve him when he said I didn't notice it until now?

MS. HARTMAN: No, we're not asking you to disbelieve. What we're asking - - - in looking at the language of the mis - - -

JUDGE SMITH: Did the court below disbelieve him?

MS. HARTMAN: In looking at the language of the mistrial application, what the attorney says is, in the way that I did not notice that the defendant's parents were there, my client most certainly did notice. And there, for that reason, we can credit the fact that the defense was aware of the - - -

JUDGE SMITH: Is the defendant's awareness enough?

JUDGE CIPARICK: He didn't speak up?

MS. HARTMAN: No, the defendant being aware is one issue; and the second issue is the attorney could easily have been aware. If he - - -

CHIEF JUDGE LIPPMAN: So it's what he should have known? Is that - - -

MS. HARTMAN: It's what he should have known. If the distinction between - - -

JUDGE SMITH: What did he do wrong?

MS. HARTMAN: If the distinction between secrecy and publicity is obviated just by turning around, then this really isn't a secret proceeding.

JUDGE PIGOTT: Well, the district attorney could have known, too. I mean, we're all officers of the court. I mean, could that ADA have said, by the way, Judge, you just threw everybody out of this courtroom except the jurors, and under Waller you've got to do something about that.

MS. HARTMAN: There's no indication that the prosecutor knew. But it would certainly be helpful - - -

JUDGE PIGOTT: So can we assume - - - can we assume - - - I mean, what I'm trying to avoid is

putting all the onus on the defense lawyer and say well all you had to do was turn around. But so did the DA. I mean, nobody was paying attention on this issue except the judge who says this is my rule. I always - - -

MS. HARTMAN: Well, the person who was paying attention to the issue was the person whose right it was; the person who knew who he wanted in the courtroom and who he didn't.

JUDGE SMITH: But isn't it unfair, I mean, to - - - for the Judge commits and error and doesn't - - - by making a ruling he chooses not to disclose, isn't it unfair to say well, it's the defendant's fault, he should have noticed; or defense lawyer's fault, he should have noticed.

MS. HARTMAN: It most certainly would have been the better practice for the court to have announced what it was doing. It would have resolved a lot of the issues that are coming up now.

JUDGE SMITH: But it doesn't - - - shouldn't the preservation obligation be limited to what you actually know? Are you going to - - - in that situation, are you going attach a negligence - - - are you going to put a reasonable care burden on the defense lawyer, when the judge didn't even choose

to verbalize his ruling?

MS. HARTMAN: Here it is not unreasonable to put some kind of burden on a defendant, where the defendant truly knows about the closure and where the attorney could have known about the closure, so that we can avoid the idea of gamesmanship. To - - -

JUDGE PIGOTT: But why is that on him or her? You know, if you're going to give Antommarchi rights and if you forget - - - if the judge forgets, I mean, I would think the People say, Judge, don't forget; you've got to give these or you're going to find yourself getting reversed, you could have done that - - - not you personally, but whoever was the district attorney there could have said, Judge, before you close this courtroom - - - and at least up in my neck of the woods, usually the DA and the judge are together all the time. They get assigned to a part.

So if anybody knew that there was a policy, it may not have been the defense lawyer as much as it would have been the People's lawyer.

MS. HARTMAN: Well, we don't have the - - - we don't have the policy of a prosecutor being assigned to a judge anymore. But what we do have here is this issue of gamesmanship.

If we have a defendant who can sit by and watch an error occur and then say nothing of the error until after it has happened and then try to assert some claim on appeal, that's very different from what the prosecutor had. The - - -

JUDGE SMITH: Well, the defendant - - - are you talking about the defendant personally?

MS. HARTMAN: I'm sorry?

JUDGE SMITH: Are you talking about the defendant personally?

MS. HARTMAN: I'm talking about the def - - - yes, the defendant and the defense.

JUDGE SMITH: But he - - - you say he watched an error occur. Is he supposed to know it's error?

MS. HARTMAN: Well, I think he - - - when his attor - - - what we have here is a defendant who heard his attorney assert a mistrial application based on the deprivation of a public trial right. He immediately inserts himself into the conversation. He's not speaking to his attorney. He's asserting himself.

And if you look at this defendant, this is not a raw defendant. This is a defendant who on other inst - - - during other instances of the case,

really tried to make certain points to advocate for himself.

JUDGE SMITH: Are you arguing that that colloquy with his family member was a waiver of his public trial right?

MS. HARTMAN: What we are saying about that statement - - -

JUDGE SMITH: Could you try a yes or no to that question?

MS. HARTMAN: We believe that - - -

JUDGE SMITH: Yes or no?

MS. HARTMAN: - - - to the extent that his - - - yes, it is a waiver. To the extent that his attorney asserted his right, he essentially undid what his attorney said. The public trial right is not extraordinarily complicated. You know who you want in the court. You know who - - -

CHIEF JUDGE LIPPMAN: Is it clear what he said that in that context he was waiving?

MS. HARTMAN: I think that there - - - that it is clear that he had no need or desire. He didn't - - - he wasn't going to benefit from the values of the Sixth Amendment trial right. That's what it tells us. It tells us that this defendant didn't feel that his family being there in any way

compromised his ability to have a fair trial. And in no way - - -

JUDGE JONES: Is there any indication that he understood that right, that he understood that he was waiving it?

MS. HARTMAN: I think the way in which he inserted himself into that conversation showed he fully understood that right. He understood what his attorney was saying. And, you know, there's something in the record to be considered, is that his attorney might have just made a strategic decision to assert the public trial right, and the defendant, knowing how he felt about his personal public trial right, said I don't really care. It's not - - -

CHIEF JUDGE LIPPMAN: What could he know about - - -

MS. HARTMAN: - - - it's of no moment to me.

CHIEF JUDGE LIPPMAN: - - - what could he know about his right to an open trial?

MS. HARTMAN: He could know - - -

CHIEF JUDGE LIPPMAN: What could he know in a real sense, in a meaningful way, about that right?

MS. HARTMAN: Well, the public trial right is to make the defendant feel good, to feel he has

the comfort of his family there. So he knows that he doesn't need his family there. And in fact, in the reply brief there's some mention of the mother being sick. So if it's indeed the mother who he's speaking to, then he really wanted to let his - - -

CHIEF JUDGE LIPPMAN: You think he's taking it upon himself and saying, yeah, I waive that right. I know I have a right to a public trial, but I don't really care whether my family's here or not. You really think that's what he said?

MS. HARTMAN: I think he said I don't have any interest in having my family here. And one suggestion is, my mom's really sick, she should go home. But to the ex - - -

JUDGE SMITH: What about your adversary's point: maybe his father was there? So he said you can go - - - maybe the essential message was you can go Mom, Dad's enough.

MS. HARTMAN: Well, maybe - - - that could be one situation. I mean - - -

JUDGE SMITH: It's obviously not a waiver, is it, on that hypothesis?

MS. HARTMAN: Well, if the court - - - even if this is not a waiver, what this really is, is a de minimis closing, where the publicity was really - - -

the length of time it took to get rid of two prospective jurors for hardship.

If we look at the court's policy, it says - - - the blanket policy - - -

CHIEF JUDGE LIPPMAN: You're going to the trivial? That's what you're saying; that this - - -

MS. HARTMAN: Yes.

CHIEF JUDGE LIPPMAN: - - - doesn't matter?

MS. HARTMAN: If we were to look - - - if we were to look at the concept of triviality - - -

CHIEF JUDGE LIPPMAN: That's a pretty tough road to hoe, you know, to find it trivial, on this particular issue.

MS. HARTMAN: Well, what we have here is the court introduces itself. Seven pages later, two prospective jurors are removed for hardship. By that point in time, by the court's own stated policy, the defendant's parents are now back in the courtroom. They are back in the courtroom before the judge has even done a general voir dire, a general questioning of the jury. And - - -

JUDGE JONES: One person, for sure, who knew that they were not in the courtroom, was the judge.

MS. HARTMAN: Yes. And but I think that

goes to show that the judge - - - because this happened - - - if you really look at the transcript, over seven pages where the parents' family - - - or the parents weren't there, it's almost like the court considered reasonable alternatives. And defendant, by not objecting, didn't allow the court to maybe develop the analysis it needed to under Waller. It's - - - because it happened when all - - - when the prospective jurors were being question in chambers. It's like the judge said this is the best I have. I can only seat forty prospective jurors here. And this is what I'm going to do. This is my policy.

And defendant, observing this, had the obligation, under the rule of preservation, to object. This was not secret or concealed. This does not constitute a mode of proceeding. It was incumbent upon the defendant, when he made this, to speak. And this was a defendant, again, who had advocated for his own interests on a number - - -

JUDGE JONES: You're assuming - - -

MS. HARTMAN: - - - of occasions.

JUDGE JONES: - - - you're assuming he has a full grasp of his Constitutional rights.

MS. HARTMAN: I think that this particular defendant did. I don't - - - I think this - - -

JUDGE JONES: Not this particular - - - any defendant?

MS. HARTMAN: I think that - - - I mean, you take it at a case-by-case - - - it's a case-by-case analysis. The defendant wants the court to adopt a mode of proceeding analysis, much like it does in jury note cases. But there it's not that any time a jury note issue arises, it results in a mode of proceeding analysis. What really happens is you have to look at the deprivation. And here, there just wasn't a total deprivation. It's not like in O'Rama where the defense attorney doesn't have an opportunity to participate.

JUDGE SMITH: Well, mode of proceedings, I understand, would mean that no preservation was required at all. Your adversary does argue that, but she says in the alterative, she's saying this was preserved.

MS. HARTMAN: Right.

JUDGE SMITH: Isn't that what we're talking about?

MS. HARTMAN: Our point is mode of proceeding doesn't apply and that if we look to see what the defense did with respect to preservation, it is unpreserved. It is untimely. Because at this

point, the court no longer had an opportunity to correct its error.

CHIEF JUDGE LIPPMAN: Okay, counselor.

MS. HARTMAN: Thank you.

CHIEF JUDGE LIPPMAN: Thank you.

Counselor, rebuttal?

MS. HUTCHINSON: Very briefly. The People rely - - - the People's reliance on defendant's personal knowledge of the factual basis of the legal objection is contrary to the law and unfair. He's not co-counsel; he's not a lawyer. As Judge Lippman said, how could he know that he has this right? And it's an unworkable rule. Would we pause every time defense counsel makes an objection and say did your client know about this beforehand?

They also assert that my client isn't going to benefit from the protection of - - - or what he said shows that he doesn't want to benefit from the protection of the public trial right. He asserted this right. He asserted this to his attorney. His attorney asserted it for him. And we also have to remember that the public have a right - - - has a right to be present.

And finally, as for triviality, they assert that my client's parents were only gone for these two

jurors, I guess. The record doesn't support that. My defense attorney in this case stated they were gone for the first round. Nobody contested that; not the DA there.

And in any event, this is precisely the facts of People v. Martin where this court rejected triviality on - - -

JUDGE PIGOTT: When you say "the first round", are you saying the first round of objections or just the first round of questioning by the court?

MS. HUTCHINSON: The entire first round of voir dire is what the defense attorney said.

JUDGE PIGOTT: Objections had been - - -

JUDGE CIPARICK: So even though seats may have become available, the parents didn't come back in?

MS. HUTCHINSON: My - - - the trial counsel here asserted, my client told me that they were not present during the first round, and the second round was seated right before, so - - -

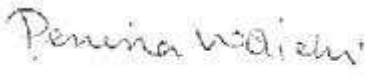
Thank you very much, Your Honors.

CHIEF JUDGE LIPPMAN: Okay. Thanks, counsel.

(Court is adjourned)

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

I, Penina Wolicki, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Luis Alvarez, No. 168 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



Signature: _____

Agency Name: eScribers

Address of Agency: 700 West 192nd Street
Suite # 607
New York, NY 10040

Date: September 13, 2012

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Appearances:

DENISE A. CORSI, ESQ.
APPELLATE ADVOCATES
Attorneys for Appellant
2 Rector Street
10th Floor
New York, NY 10006

SHOLOM J. TWERSKY, ESQ.
KINGS COUNTY DISTRICT ATTORNEY'S OFFICE
Attorneys for Respondent
350 Jay Street
Brooklyn, NY 11201

Penina Wolicki
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CHIEF JUDGE LIPPMAN: Okay, George. Ms. Corsi?

MS. CORSI: Pardon me. Pardon me, Your Honor.

CHIEF JUDGE LIPPMAN: That's okay. Get settled.

JUDGE CIPARICK: Now, here, there was no preservation whatsoever, right? So you're alleging that it's a mode of proceedings error?

MS. CORSI: Yes. Primarily, Your Honor, we are contending that Presley was a sea change statement on the public trial right, and Presley exempted public trial claims from preservation. Presley put the burden on the trial court to consider alternatives to - - -

CHIEF JUDGE LIPPMAN: But in Presley they did preserve, right?

MS. CORSI: No, Your Honor. Actually, in Presley the Court reached the rule despite the fact that the Georgia Supreme Court found that there was no preservation, because it was only a nebulous request. And as general objections are general - - - are disapproved of, they are the equivalent of no objection. That's the rule - - - that was the rule in Georgia and that's generally the rule in New York.

CHIEF JUDGE LIPPMAN: Do you want rebuttal - - - let me interrupt. Do you want rebuttal time, counselor?

MS. CORSI: Pardon me. Yes, Your Honor, please. Two minutes, please.

CHIEF JUDGE LIPPMAN: Sure. Go ahead.

MS. CORSI: Thank you.

CHIEF JUDGE LIPPMAN: Continue.

MS. CORSI: So in Presley, the Court put the entire burden of the third prong of Waller on the trial court. And the third prong of Waller resolves the conflict between the mandatory postulate of open trials and a purported overriding interest.

In other words, Waller (3) is the whole point. The third prong is the whole point of Waller. And if the onus is on the trial court to consider reasonable alternatives, it obviates the need for defense counsel to raise an objection to begin with.

Presley states that the public has a right to be present whether or not any party has asserted that right. And Presley states this in support of its holding that under the Sixth Amendment, just as under the First, the court has to consider alternatives even when the parties - - -

JUDGE SMITH: Could that - - - I'm not

sure, as I sit here - - - but could that mean, in context, that the public has a right to be present, even if there's no one outside waiting to get in?

MS. CORSI: Yes, Your Honor. It's the opportunity for the public to be there. There doesn't - - -

JUDGE SMITH: What language in Presley says to you that the states can't enforce preservation rules?

MS. CORSI: Two things, Your Honor. The quote that the public has a right to be present whether or not any party has asserted the right, which it stated in direct support of its holding regarding the sua sponte burden with respect to the third prong.

Also, Your Honor, the fact that despite the Georgia Supreme Court's finding of a lack of preservation, Presley - - - the Supreme Court reached the issue here to put the entire burden of the third prong - - -

JUDGE SMITH: But as the court in Presley recites the facts, it says Presley's counsel objected to the exclusion of the public from the courtroom. That's a little different from your case.

MS. CORSI: Yes, Your Honor. But as the

lower court in Georgia found, it was merely a general objection, which is the - - - in essence, no objection at all, in New York and in Georgia. So the - - -

JUDGE PIGOTT: What's great about this one, though, is not only did he not object, but he said thank you.

MS. CORSI: Well, Your Honor, thank you is not acquiescence. The court - - - excuse me - - - defense counsel was merely being - - - at best we can infer that defense counsel was being courteous. Oftentimes, after the court has issued an adverse ruling, it's a gut reaction by the party to say "thank you, Your Honor" and move on to whatever matter is pressing for him.

We cannot assume that courtesy is a waiver. And related to that, Your Honor, defense counsel's silence on this matter is not a waiver. The public trial right is a Constitutionally based right of axiomatic importance that this court has recognized many times and the federal courts have recognized many times.

The waiver of Constitutional rights have to be knowing, intelligent and voluntary. Nothing in this record shows that the defendant understood the

significance of the public trial right or the consequences of closure. This is indistinguishable from other rights that require affirmative, intelligent - - -

JUDGE GRAFFEO: If we agree with you it's a mode of proceedings, what is it the judge has to do?

MS. CORSI: The judge - - - once the court - - -

JUDGE GRAFFEO: I can conceive of situations where the jurist may not know there's a relative in the audience.

MS. CORSI: They may not know. And plus, there's also the general right of the public to walk in.

JUDGE GRAFFEO: We heard the term "gamesmanship" used before. I could see that that could certainly come into play.

MS. CORSI: Well, that presumes that speculative concerns regarding gamesmanship are more important than the public trial right. And I don't - - -

JUDGE GRAFFEO: What if the defendant tells his mother to leave the courtroom, so that they establish this error?

MS. CORSI: Well, that's not this case.

But even if the def - - -

JUDGE GRAFFEO: No. But I'm looking at the ramifications - - -

MS. CORSI: Oh.

JUDGE GRAFFEO: - - - of the rule that you're suggesting. You're suggesting we eliminate a preservation requirement.

MS. CORSI: Well, Your Honor, the defendant may have a - - - the defendant not requiring his mother to be there does not equal an intelligent waiver of the general public to be there or some other person. There's also - - - the public trial right is important because it is a contemporaneous review of the proceedings by the public. And that serves as a check on the court and the parties.

JUDGE GRAFFEO: But that's why I'm asking you, what does the judge have to do?

MS. CORSI: The judge - - -

JUDGE GRAFFEO: I take it you're saying the judge has to sit there and say do you have any relatives in the courtroom?

MS. CORSI: No, what the judge has to do is go through the Waller protocol. The moment the judge feels there's some need to exclude the public, it has to articulate on the record, pursuant to the fourth

prong, the overriding interest - - - and lack of space and a generic risk of taint are not sufficient; there has to be a concrete threat of improper influence. The judge has to also put on the record reasonable alternatives that could be suggested by the parties, but if they're not, the court has to consider them as well. And it's very easy to implement. Leave the last row open. Open the door to the courtroom so that people can just stand at the margins and listen.

And the court also has to cons - - - also has to put on the record - - - the court also has to make the closure as narrow as possible to protect the interest. Here the court did none of that. It simply closed the courtroom.

And as the dissent in the Georgia Presley court said, if a courtroom is not big enough for the public, it's not big enough for a criminal trial. And here, no accom - - - the court considered no accommodation for insufficient reason.

With res - - -

JUDGE PIGOTT: Well, he said - - - you know, he said, "The defendant has some people in the courtroom, and they're certainly entitled to be here. The only thing I would ask, when we have potential

jurors come in, there will not be enough seats for everyone. Within five minutes, I'll excuse people. In order to not have spectators and jurors sitting together, I'll have the spectators leave. I'll have the court officer explain to them." And then he said as soon as the seats open up, we'll bring them back. Is that reasonable?

MS. CORSI: No, Your Honor. It's not. Because there was a - - - the court did close the courtroom for insufficient reason, under Martin and Presley. Martin and Presley state that insufficient room is not enough. And a generic risk of taint is not enough. And the court has to consider accommodations. There's nothing to - - - the court easily could have opened the last row from the get-go.

CHIEF JUDGE LIPPMAN: Okay, counsel.

MS. CORSI: Thank you.

CHIEF JUDGE LIPPMAN: You'll have rebuttal.

MR. TWERSKY: Good afternoon. My name is Sholom Twersky and I represent the respondent.

Your Honor, my opponent is saying that the judge should have engaged in a Waller test. There has to be an objection first. The court has a right to know whether the defendant is, in fact, consenting

or not consenting, because sometimes they might want to consent.

JUDGE SMITH: But aren't - - - shouldn't the judge have known that he wasn't supposed to do what he did?

MR. TWERSKY: Your Honor, there were a lot of judges that were following Colon, reasonably, and thought that limited seating capacity, until Presley and Martin came down, was a good enough reason to allow spectators to be temporarily removed from the courtroom. It happened all the time. And there are a lot of cases coming up - - -

JUDGE JONES: Yet there are also a lot of judges who encourage spectators and the defendant to consent to having their relatives wait outside during the first rounds of jury selection.

MR. TWERSKY: Your Honor, there was nothing like that here. In fact, what you have here is you have a court who's saying, unlike in Presley, they have a right to be here.

Again, I'm not justifying, under Presley, what the court did. What I am saying is that neither Presley nor Waller said the defendant doesn't have to object to it. Listen to the language of Waller: "In sum, we hold - - - we hold that under the Sixth

Amendment, any closure of a suppression hearing," because that's the proceeding at issue there, "over the objections of the accused, must meet the tests set out in Press Enterprise and its predecessors."

So that's not - - - number one, that's certainly not saying that we throw out all the contemporaneous objection rules that apply to Sixth Amendment in the states in this country. And it may actually imply that it may not be a federal Constitutional violation if the def - - - unless the defendant objects.

JUDGE SMITH: Well, your adversary says that Presley changed the world.

MR. TWERSKY: It changed nothing regarding preservation. Those were - - - if you look at the Second Circuit decision in Downs v. Lape, it analyzed this, it addressed this issue, and it said that even if there's a facial tension between New York's contemporaneous objection rule and the narrow holding of Presley regarding the third prong of Waller, it's not resolved in favor of the defendant. Why? For a very simple reason. Because the defendants in Presley and in Waller offered specific objections.

And it's not true, if you look at the Georgia Supreme Court decision, that it's clear that

they were relying on their own contemporaneous objection rule. And certainly Presley didn't focus on that, because Presley says all over the place that defendant objected. And Waller makes it more clear than any Supreme Court case, which is the case that Presley was interpreting for the law, that in fact, the defendant has to object order for the four-prong test to even kick in. So - - -

JUDGE CIPARICK: How - - - I'm reading from Presley right now as you're talking - - -

MR. TWERSKY: Yes.

JUDGE CIPARICK: - - - and I see this line. It says, "The public has a right to be present whether or not any party has asserted the right."

MR. TWERSKY: Your Honor, if you then look at the next sentence, it then wants to exemplify that dicta - - - not holding, but dicta - - - by talking about Press Enterprise, which was a First Amendment case. Because under those circumstances, where does the public have an enforceable right which this court has held is the case? When it comes to the First Amendment. Then you can have members of the press; you can have members of the public actually moving for Article 78 proceedings, as certainly members of the press have done, to say I want access to this

courtroom. That's where the public's right is implemented and is enforceable.

The defendant - - - there's even a question whether the defendant would even have standing to raise the First Amendment rights of the public. What the Sixth Amendment is, is a personal right of the accused. That's what's said over and over again in the case law. It's for the benefit of the defendant. And therefore, the defendant has to say whether he wants it or not. The right shouldn't be foisted upon him.

When you're talking about mode of proceedings, these are rights that a defendant cannot waive, cannot consent to. Is it unreasonable that there would be defendants that would basically say during voir dire maybe there are members of the venire persons, maybe they would be more forthcoming if there were less people in the courtroom; I'd prefer to have people out. Or I don't want my family members to hear some of the facts of this crime; I prefer to have them outside of the courtroom.

Some defendants want the family in. They want that - - -

JUDGE PIGOTT: Do you think they have the right to do that?

MR. TWERSKY: Absolutely. They - - -

JUDGE PIGOTT: So some defendant can say, Judge, I see that ABC News and the local TVs are here. I want them out. I don't want them watching my trial.

MR. TWERSKY: They certainly have the right to do that. But then - - -

JUDGE PIGOTT: I'm not so sure.

MR. TWERSKY: - - - but then the First Amendment right would come in. Then the judge would have to say, ah, but does the New York Times and ABC News have a First Amendment right - - -

JUDGE PIGOTT: Well - - -

MR. TWERSKY: - - - and balance those - - -

JUDGE PIGOTT: - - - can they say - - -

MR. TWERSKY: - - - interests.

JUDGE PIGOTT: - - - well, I don't want the victim's family here, because they scare me?

MR. TWERSKY: Your Honor, just because he's asking for it, doesn't necessarily mean that the court has - - - is obligated - - -

JUDGE PIGOTT: I know.

MR. TWERSKY: - - - to follow that. What I'm saying is - - -

JUDGE PIGOTT: But you're making it sound

like this is all up to the defendant. He gets to pick who's going to sit in the courtroom.

MR. TWERSKY: I'm not saying it's up to the defendant. What I'm saying is he has - - - at least he has the right to not oppose it, if he doesn't - - -

JUDGE PIGOTT: Has the right to - - -

MR. TWERSKY: - - - because he may have a rationale.

JUDGE PIGOTT: Say that again. He has the right to not oppose what?

MR. TWERSKY: Right. In other words - - -

JUDGE PIGOTT: He has the right to not oppose what?

MR. TWERSKY: - - - the closure of the courtroom.

JUDGE PIGOTT: But that begs the question. I mean, you can't close the courtroom. We all know that.

MR. TWERSKY: But the question is, is it something that is - - - you can claim on appeal as a Constitutional violation or a statutory violation under New York law. The question is, does preservation still apply? Does the stare decisis of - - - since People v. Miller in 1931, where

preservation has been applied to this right by this court, as well as the numerous Appellate Division decisions, should that still apply.

And the fact is, as my colleague spoke about, there is a problem with possible gamesmanship here because you could have defense attorneys - - - because this is a structural error. It's per se reversible. Perhaps defendants - - - maybe they're not necessarily consenting to it, but at least maybe at most they're indifferent. It doesn't matter to them. A lot of the times there's nobody in these courtrooms.

JUDGE PIGOTT: Yes, I never think that's a strong argument to accuse your other - - - your opponents of gamesmanship, as if somehow that never happens on the other side.

MR. TWERSKY: The truth is, it is something - - - it's not something that I'm coming up with. It's something that the cases have talked about as one thing to consider when you're determining whether something should become - - - go into that very narrow category of mode of proceedings error.

And so it's not just the fact that there could be gamesmanship, not just the fact that it could be inured to the defendant's benefit, so he may

want it, but also, it could be prevented. Preservation could prevent this. Because what happens - - - my colleague's case is a very - - - I find it to be very unusual. Because normally all the transcripts I see, and I see a lot of closure cases, is where the courts are basically announcing their intention as to what they're going to do.

And the reason is because they have to tell the court officers this is what you have to instruct the spectators. They have to make arrangements before it actually gets done. That's the moment. That's the perfect moment for the defendant to say I object.

JUDGE PIGOTT: What do you mean when you - - - what do you mean when you say you see a lot of closure cases?

MR. TWERSKY: What I mean is, in our appeals bureau there are a lot of - - - a lot of these cases are coming up, because like I said - - -

JUDGE PIGOTT: Well, at some point, would you pick up the phone and tell somebody when there's a closure issue, tell the judge he can't close the courtroom.

MR. TWERSKY: Judge - - -

JUDGE PIGOTT: It might save you - - -

MR. TWERSKY: Judge, these appeals don't come up to us that quickly. The fact is these - - - a lot of these are - - - it's still - - - it's pre-Martin, pre-Presley. And like I said - - -

JUDGE PIGOTT: Still catching up, I gotcha.

MR. TWERSKY: Yes, everybody was following People v. Colon, and the trial judges thought that they were doing the right thing by saying that the prospective jurors and the family couldn't sit next to each other, because it would be potentially prejudicial, until the Supreme Court said no, not so much.

So therefore, for both reasons, because Presley and Waller, if you look at the language of the holdings of those two cases, there is no way that this court can find that they were stating that New York State's contemporaneous objection rule, if they apply to Sixth Amendment violation, it's a federal - - - a Sixth Amendment right, it's a federal Constitutional violation.

And in fact, it may not be a federal Constitutional violation unless the defendant objects. And certainly, because of the narrow category of mode of proceedings error, the public trial right is just not a good fit.

CHIEF JUDGE LIPPMAN: Okay, counselor. Thanks.

MR. TWERSKY: Thank you.

CHIEF JUDGE LIPPMAN: Counselor, rebuttal?

MS. CORSI: Thank you, Your Honor.

Open trials are a mandatory postulate and there are narrow exceptions. Therefore it's perfect - - - it fits perfectly within mode of proceedings errors. And if gamesmanship were a true concern, courts would never recognize other mode of proceeding errors such as the delegation of judicial duty or double jeopardy or Constitutional - - -

CHIEF JUDGE LIPPMAN: Where do you draw the line for the judge? I mean, is it just reasonable? I had asked earlier about somebody with a large family or somebody that wants to bring in their high school football team buddies or somebody who wants to bring in their gang members or - - - I mean, what does the judge do here? I mean, he doesn't have to accede to every request by the parties, does he?

MS. CORSI: No. But there has to - - - the court - - - there can be a discussion between the court and the parties, once the court assumes its sua sponte duty to consider reasonable alternatives, which may include opening the door, perhaps having a

monitor. If there's a lot of interest in the case, the court could have another - - - there could be another room where the public can sit, and there's a monitor.

JUDGE PIGOTT: Yes, but you know, I mean, there's probably - - - I don't know how many each one of these judges get - - - but I mean these cases just keep coming. And so you can't say we're going to have an extra room for this and closed circuit television and stuff. You think opening the doors is enough?

MS. CORSI: It may be. But the point here is, Your Honor, that the public had no choice but to remain outside. That's what's important here. There are many options a court can consider. But this court considered none. It closed the courtroom until the case was well into its first round of jury selection.

And I'd like - - - if I may mention quickly with respect to the People's triviality argument. In Martin this court made it clear that it's a per se rule of reversal. And in any event, jury selection was well underway. The court asked open-ended questions designed to provoke responses from the jurors, including whether they recognized the

parties, whether they recognized anybody from the witness list, and mentioned to the - - - excuse me - - - noted that it was a one-witness eyewitness case, inviting the jurors to take into consideration their religious or philosophic concerns regarding one-witness eyewitness cases. A lot happened here during the closure.

And the court did not follow any of the Waller precepts. And it had to do it on its own.

CHIEF JUDGE LIPPMAN: Okay, counselor.

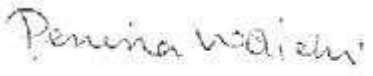
MS. CORSI: Thank you.

CHIEF JUDGE LIPPMAN: Thank you. Thank you all.

(Court is adjourned)

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

I, Penina Wolicki, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. William George, No. 169 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



Signature: _____

Agency Name: eScribers

Address of Agency: 700 West 192nd Street
Suite # 607
New York, NY 10040

Date: September 13, 2012