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COURT OF APPEALS
STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

NO. 41

DWIGHT REID,

Appellant.

20 Eagle Street
Albany, New York
April 20, 2023

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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1 CHIEF JUDGE WILSON: The next matter on the
2 calendar is No. 41, People v. Dwight Reid.

3 MR. GREENBERG: Good afternoon, Richard Greenberg
4 for Dwight Reid.

5 Your Honor, may I reserve three minutes for
6 rebuttal?

7 CHIEF JUDGE WILSON: Yes, you may.

8 MR. GREENBERG: Thank you.

9 Your Honors, the right to a public trial is one
10 of the most fundamental and bedrock principles of our
11 justice system. In this case, Dwight Reid was denied his
12 right to a public trial when the court abruptly closed the
13 courtroom to all spectators for the remaining four days of
14 the trial.

15 I think, to be clear, there is no precedent for a
16 closure of this magnitude of this scope, duration - - -

17 JUDGE TROUTMAN: But the court can - - -

18 MR. GREENBERG: - - - and breadth - - -

19 JUDGE TROUTMAN: The court can close a trial,
20 correct?

21 MR. GREENBERG: In rare instances, under Supreme
22 Court doctrine Waller v. Georgia, and Presley, yes. In
23 rare instances, and only if the protocols established by
24 the Supreme Court - - -

25 JUDGE RIVERA: So - - - and so - - -



1 MR. GREENBERG: - - - policy.

2 JUDGE RIVERA: - - - so then what - - - what
3 would a judge do, let's - - - let's just take, of course,
4 the case before us. But we can go a little bit further.

5 What does a judge do if a judge is the one
6 observing the room, everyone else has their back to the
7 observers, if it is the judge's sensibility that there's an
8 attempt at intimidation, not through any words, but through
9 particular mannerisms by staring down, as the judge
10 described it. What - - - how should have the judge
11 proceeded, let me ask you that?

12 MR. GREENBERG: Well, for one thing, the - - -
13 what set this off was that someone took photographs - - -

14 JUDGE RIVERA: Yes.

15 MR. GREENBERG: - - - in the courtroom.

16 JUDGE RIVERA: Yes. Yeah.

17 MR. GREENBERG: But getting to the question of
18 staring down - - -

19 JUDGE RIVERA: Yeah.

20 MR. GREENBERG: - - - that was the - - -

21 JUDGE RIVERA: Well, the - - - as I understand
22 the judge's statements, that the judge believed that there
23 had been intimidation wafting in that courtroom.

24 MR. GREENBERG: Right. The judge said that. And
25 that was her subjective, impressionistic view of what was

1 going on. However, not a single witness ever complained
2 about intimidation or threats or - - - or felt any - - -

3 JUDGE RIVERA: Yes. But - - -

4 MR. GREENBERG: - - - bit uncomfortable.

5 JUDGE RIVERA: - - - this is what I'm saying.

6 What is a judge to do if that is their sensibility of
7 what's going on in that courtroom?

8 MR. GREENBERG: Well, I think as a start, the
9 judge could admonish the audience and say, folks, you know,
10 I don't like the staring that's going on; I think it's
11 making people uncomfortable; please tone it down. That
12 would be a start.

13 And the last-case scenario would be - - -

14 JUDGE TROUTMAN: How do you make a distinction
15 between staring and intently paying attention to testimony
16 that's being given?

17 MR. GREENBERG: I don't think you can. And I
18 think that's one of the problems with what the judge did
19 here. People are allowed to stare. That's what happens in
20 a trial. People take sides; they're - - - they're there.
21 It's a very serious case; it's a murder case. And there
22 will be high emotion.

23 Nobody acted out. There was not a single
24 instance where somebody acted out in the courtroom and
25 acted out of decorum. There was not a single witness - - -

1 JUDGE RIVERA: In addition to an admonishment,
2 what else could the judge do?

3 MR. GREENBERG: Well, as a last resort, if there
4 were certain individuals - - -

5 JUDGE RIVERA: Um-hum.

6 MR. GREENBERG: - - - who are making court or
7 witnesses uncomfortable, then you remove that person. You
8 don't remove everyone. We know the judge not only removed
9 the people that she claimed were staring or intimidating in
10 some way, but she removed everyone from the courtroom,
11 including the family of the deceased, who clearly had - - -

12 JUDGE TROUTMAN: But this - - -

13 MR. GREENBERG: - - - nothing to do with any of
14 this.

15 JUDGE TROUTMAN: Counsel, you said uncomfortable;
16 she can remove for uncomfortable.

17 MR. GREENBERG: No, I don't think she can.

18 JUDGE TROUTMAN: How does - - - how does the
19 record - - -

20 MR. GREENBERG: I'm saying - - -

21 JUDGE TROUTMAN: - - - establish what - - -

22 MR. GREENBERG: There's - - -

23 JUDGE TROUTMAN: - - - that someone violated or
24 did something that the judge should do that, remove - - -
25 or close the courtroom?

1 MR. GREENBERG: Well, the - - - number one, the
2 judge should hold hearing, a Hinton hearing, which was not
3 done in this case, and allow the parties to speak, maybe -
4 - -

5 JUDGE TROUTMAN: Does the Defendant have to
6 request that hearing?

7 MR. GREENBERG: No, of course, not. That's the
8 protocol. The defense objected in this case to the
9 closure, suggested an alternative, which was a reasonable
10 one, one that was actually - - -

11 JUDGE TROUTMAN: Did he need to?

12 MR. GREENBERG: Did he need to?

13 JUDGE TROUTMAN: Was he the one required to give
14 an alternative - - -

15 MR. GREENBERG: No. No, no - - -

16 JUDGE TROUTMAN: - - - to what the judge did?

17 MR. GREENBERG: - - - the judge has to consider
18 alternatives on its own; the court must.

19 But counsel did object, and he also pointed out
20 the need for factfinding when he said, look, we don't even
21 know who took a picture in this courtroom. You're throwing
22 everybody out for the acts of one person.

23 Now the judge acted very precipitously here. She
24 could have questioned members of the audience; she could
25 have admonished the audience; she could have done a number

1 of different things. She could have questioned counsel.
2 When the prosecutor stood up to request closure, she did it
3 only on the grounds that it had come to the prosecutor's
4 attention that someone had taken pictures in the courtroom
5 and posted them on the internet. Turns out, there were
6 innocuous pictures; it shouldn't have happened, and the
7 judge could have taken some action with respect to that.

8 But then, the judge, on her own, went further and
9 said, well, I've also noticed people staring up here and
10 acting in intimidating fashion - - -

11 JUDGE RIVERA: You're right. The judge, at one
12 point, did, though, attempt to clarify the record that this
13 is a cumulative effect, that the intimidation had been
14 going on for some time, then there's the - - - the - - -
15 the court reporter that - - -

16 MR. GREENBERG: I guess my question - - -

17 JUDGE RIVERA: - - - brings something to the
18 judge's attention. It - - - it seemed when I was reading
19 that record that the photos were the last straw.

20 MR. GREENBERG: Well, that's what the judge said
21 after she closed the courtroom. She tried - - -

22 JUDGE RIVERA: Yes.

23 MR. GREENBERG: - - - to clean it up a little
24 bit. But I think what's important to note here is that not
25 once in this trial did a single witness complain about

1 feeling intimidated or threatened or uncomfortable on the
2 stand. Not a single juror complained about anything
3 untoward going on in the audience - - -

4 JUDGE RIVERA: What if the - - -

5 MR. GREENBERG: - - - of this courtroom.

6 JUDGE RIVERA: - - - the intimidation is only
7 targeted towards the judge?

8 MR. GREENBERG: Well, how do we know that?
9 That's part of the reason why we have appellate courts, is
10 that you can review what happened in the trial court.

11 JUDGE RIVERA: Well, what else is the judge - - -

12 MR. GREENBERG: If the judge just - - -

13 JUDGE RIVERA: - - - what else is the judge to do
14 other than say they're staring me down? And I - - - and
15 there's a chill in the air, in the courtroom?

16 MR. GREENBERG: Well, for one thing, she could
17 identify on the record - - -

18 JUDGE RIVERA: Um-hum.

19 MR. GREENBERG: - - - those individuals who are
20 doing that. And if, in fact, it rises to the level where
21 it's interfering with the procedures and - - - and
22 rendering the - - - the trial somewhat less than fair, then
23 she can perhaps remove that person or those persons. She
24 cannot close the courtroom to the entire public and press
25 for four days of a trial for five witnesses, two

1 summations, the court's charge to the jury - - -

2 JUDGE HALLIGAN: Do we not have to - - -

3 MR. GREENBERG: - - - and the verdict.

4 JUDGE HALLIGAN: - - - do we not have to defer at
5 all to her finding that no lesser remedy was available?
6 She said, to address this intimidation, no lesser remedy
7 was available.

8 MR. GREENBERG: No, you do not have to defer.
9 That's clearly - - -

10 JUDGE HALLIGAN: So why not?

11 MR. GREENBERG: - - - an erroneous ruling. The
12 judge failed to follow the protocol set out in Waller.
13 There's a four-step protocol. The judge is supposed to
14 make a finding that there's a compelling governmental
15 interest that is likely to be threatened and prejudiced
16 absent closure. She never found - - -

17 JUDGE HALLIGAN: But that set of - - -

18 MR. GREENBERG: - - - that here.

19 JUDGE HALLIGAN: That set of points, right,
20 whether or not she went through the four Waller factors,
21 that seems distinct, perhaps, to whether we - - - we need
22 to defer to her specific determination under factor three,
23 that there was no other remedy available that would
24 suffice.

25 MR. GREENBERG: But it's clear that there were -

1 - - were other remedies, Your Honors. And I think this
2 court can take notice that one remedy was to only reject -
3 - - only eject or remove those individuals who were doing
4 something wrong, and not everyone. That's a lesser remedy
5 right there. The judge has a requirement under the
6 Constitution, and under Supreme Court law, to make as
7 narrow a ruling as possible to effectuate the right to a
8 public trial and to do everything the court can to make
9 sure that right is - - - is upheld.

10 And in this case, the judge did the exact
11 opposite. She closed the courtroom to everybody
12 immediately without really thinking it through, I think.
13 You know, interestingly, when you talk about reasonable
14 alternatives, defense counsel requested, as an alternative,
15 well, if you're worried about people taking pictures in the
16 courtroom, why don't you make them leave their cell phones
17 outside the door and not bring them in? That was a
18 reasonable suggestion. That's what happens in federal
19 court.

20 JUDGE RIVERA: Yes, but again - - -

21 MR. GREENBERG: That's what happened in the - - -

22 JUDGE RIVERA: As I - - - as I - - -

23 MR. GREENBERG: - - - Muhammad case, that's - - -

24 JUDGE RIVERA: Yes. I've - - - yes, it's an
25 excellent point you make. But the judge is going beyond

1 the photos, as I said, right? She's saying that this is
2 the last thing, that it's this other problem that has gone
3 on for some time, and the court reporter's been
4 intimidated.

5 MR. GREENBERG: I just don't see how a court can
6 say, I find that these people are acting in an intimidating
7 fashion when not a single other person, for days of trial,
8 were there - - -

9 JUDGE RIVERA: What if - - - what if she had
10 closed the courtroom for one hour?

11 MR. GREENBERG: Well - - -

12 JUDGE RIVERA: Just, like, a cooling-off period?

13 MR. GREENBERG: Well, I think that would have - -
14 -

15 JUDGE RIVERA: And then called them back in - - -

16 MR. GREENBERG: That would have - - -

17 JUDGE RIVERA: - - - and said if it happens
18 again, I'm done.

19 MR. GREENBERG: Well, I think that would have
20 been a better remedy than what she did. And I think it
21 would have been even better if those people that she
22 removed from the courtroom were only the people who were
23 responsible for doing something wrong.

24 Here, she just wholesale - - - if today - - - it
25 was like using a sledgehammer to kill a fly. She just had

1 a problem on her hands, and she didn't appear to know how
2 to deal with it.

3 JUDGE TROUTMAN: So you do agree that the court
4 has broad discretion to control the trial - - -

5 MR. GREENBERG: Oh, absolutely.

6 JUDGE TROUTMAN: - - - and what's going on in the
7 courtroom?

8 MR. GREENBERG: Absolutely. And if anyone is
9 acting in violation of court decorum, or acting out, or
10 doing anything untoward, the court certainly has the right
11 to take action and, in some cases, remove that person.

12 That's not what happened in this case, though.
13 Thank you.

14 MS. BOND: Good afternoon, may it please the
15 court, Rachel Bond for the People.

16 Only after the spectators in this trial had been
17 creating an intimidating environment that put a chilling
18 effect on the courtroom, had been staring people down,
19 including the judge, herself, and then posted photos - - -

20 JUDGE TROUTMAN: What is their evidence - - -
21 what evidence here, in the record, shows that the court
22 balanced interests before excluding all of the public?

23 MS. BOND: So when the court was making her
24 decision, after the prosecutor said, I would be applying to
25 close the courtroom, she - - - the court actually brought

1 up the intimidating nature of the environment in the
2 courtroom.

3 JUDGE TROUTMAN: Was there a hearing?

4 MS. BOND: There was an inquiry. There was not a
5 full evidentiary hearing. And I think that's important to
6 note here, that the defendant did not dispute any of the
7 factual characterizations that the judge gave on the
8 record.

9 CHIEF JUDGE WILSON: Is there any indication of
10 the number of people who were staring the - - - the judge
11 down, or were taking photographs, or anything like that?

12 MS. BOND: Unfortunately, there is not. The
13 judge did refer to a group in the courtroom being very
14 intimidating. And - - -

15 CHIEF JUDGE WILSON: But does that suggest that
16 there is something other than the group, that there were
17 people who were in the courtroom who were not in the group?

18 MS. BOND: I - - - I suppose it does suggest
19 that, but unfortunately, there's no more on the record
20 about whether it was everyone on the courtroom or - - -

21 JUDGE SINGAS: Well, why not do what counsel is
22 suggesting? Why not say, you three are excluded, let me
23 have your phones? Like, there were other things to do and
24 other records to be made before this drastic remedy.

25 MS. BOND: So what's important to note, again, is

1 that the - - - the defense didn't dispute the
2 characterizations by the judge, saying that there were
3 these people being intimidating in the courtroom. He
4 didn't dispute that there were these photos posted, and the
5 judge made it clear that - - -

6 JUDGE TROUTMAN: So are you saying the rule is
7 that the defense had to establish they weren't doing what
8 the judge said, and - - - instead of there being a hearing
9 establishing specifically who did what?

10 MS. BOND: Not that it's up to the defense, but
11 that the defense - - - it's incumbent upon the defendant to
12 raise objections that they have at the time and - - - so
13 that there is a fuller record. To the extent that this
14 record is not as detailed as we might like - - -

15 JUDGE TROUTMAN: So it's not the court's
16 responsibility?

17 MS. BOND: I think the court's responsibility is
18 to make sure there are adequate findings of fact on the
19 record. And for counsel - - -

20 JUDGE CANNATARO: Didn't Defendant object to the
21 closure of the courtroom?

22 MS. BOND: The defendant objected to the alter -
23 - - or to the full closure, and suggested an alternative
24 remedy. But he did not object to, again, the - - - the
25 facts that were put on the record by the court or by the

1 prosecutor.

2 JUDGE HALLIGAN: Counsel, what's the record
3 evidence specifically about intimidation of witnesses or
4 jurors?

5 MS. BOND: So there were - - - there was the
6 judge's own observations that people had been staring
7 witnesses and herself down in the courtroom. And I think
8 her - - -

9 JUDGE HALLIGAN: What does that mean?

10 MS. BOND: I think her words are actually really
11 important here, because the difference between staring and
12 staring down indicates a more aggressive, albeit nonverbal,
13 action on the part of the spectators at the trial.

14 JUDGE TROUTMAN: Can't you misinterpret what
15 someone is doing, and wouldn't it have been better for
16 those people to be identified, have them brought to the
17 stand, and have an inquiry done?

18 MS. BOND: Again - - - yes, it can be
19 misinterpreted. However, again, the court was not asked to
20 expand on this. There was no need for a fact - - -
21 factfinding hearing here because the defendant didn't
22 dispute when she said, they're staring people down; it's
23 been very intimidating.

24 So there was no - - -

25 JUDGE TROUTMAN: So all the court has to do is

1 just unilaterally say they're staring; the entire
2 courtroom's closed?

3 MS. BOND: Well, so she said more than that. She
4 said that they were staring her down, and that they were
5 staring down the - - - the witnesses. Which again, is - -
6 - is important - - -

7 JUDGE HALLIGAN: But did she specify anyone other
8 than - - - I know there was some testimony from one witness
9 and - - - and you could read it, I think, in different
10 ways. But did she specify any witnesses that she thought
11 might be subject to intimidation?

12 MS. BOND: She did not. And again, I think
13 that's because there was no - - - there was no dispute that
14 that was what the spectators at this trial were engaging
15 in, was in - - - was intimidating conduct.

16 JUDGE RIVERA: If only the judge senses this
17 intimidation, would that have been enough? Let's say no
18 witnesses - - - no one else had this same reaction. If
19 it's just the judge, would that have been enough?

20 MS. BOND: I think if it's just this kind of
21 staring down that the judge is - - - is observing herself,
22 and there's nothing else - - -

23 JUDGE RIVERA: Yes.

24 MS. BOND: - - - maybe not. But that's not all
25 that we had here. The judge observed it, but there was

1 also the Instagram photos. There was, the one witness
2 mentioned, that someone had been staring a couple times - -
3 -

4 JUDGE TROUTMAN: But with respect to the photos,
5 and the photos showed the defendant, they didn't show a
6 witness, correct?

7 MS. BOND: The one - - - at least one of the
8 photos did show two court officers handcuffing the
9 defendant.

10 JUDGE TROUTMAN: Officers?

11 MS. BOND: But - - - yes.

12 JUDGE TROUTMAN: And the defendant?

13 MS. BOND: Yes.

14 JUDGE TROUTMAN: No witnesses? So the reason I'm
15 asking you that, because certainly taking pictures of
16 witnesses, one could feel that they're being intimidated.
17 But again, the remedy seems, take phones. And if I wasn't
18 taking a picture, why should I be removed from the
19 courtroom?

20 MS. BOND: And I think that remedy of taking the
21 phones would have worked if that had been the only thing
22 that happened here. But again, the Instagram photos were,
23 as Judge Rivera - - -

24 JUDGE TROUTMAN: Again, I'm not understanding why
25 everybody's out.



1 MS. BOND: So part of the reason for that was the
2 judge specifically stated that the reason it was everyone,
3 and not just people who were presumably on - - - there
4 supporting the defendant, was because she didn't want - - -
5 this was halfway through the trial. She didn't want the
6 jury to draw a negative inference against the defendant.
7 You know, suddenly, they come in after lunch break and all
8 the defendant's supporters are gone, and yet all of the
9 victim's supporters are there.

10 JUDGE RIVERA: Isn't that a basis - - -

11 JUDGE TROUTMAN: Is there anything else - - -

12 JUDGE RIVERA: Is that - - - is that a basis to
13 exclude people from the courtroom? I mean, I'm reading the
14 language from the transcript when the judge says, I've
15 closed the courtroom to the victim's family as well, in
16 fairness so that the jury will not see anybody here in the
17 courtroom.

18 I mean, is that a basis to exclude people who
19 have not in any - - - let - - - let's assume for one
20 moment, we'll go with it, just - - - not even going to
21 challenge it. That the judge has properly assessed,
22 there's an appropriate record, and we defer, whatever you
23 want to call it, to the fact that, let's just say that - -
24 - that there are people in the courtroom who are
25 defendant's supporters, and she's going to order all of

1 them out.

2 But where in the law are you ordering everybody
3 else out? Where is that support? I'm going to get
4 everybody out because I want just a few people in.

5 MS. BOND: So the - - - again, the reason the
6 judge did that was to try to preserve the Defendant's fair
7 trial here, to ensure that he continued - - -

8 JUDGE RIVERA: But how can that be?

9 MS. BOND: - - - to receive - - -

10 JUDGE RIVERA: The public has access to the
11 courtroom, to have people in the courtroom.

12 MS. BOND: I understand, Your Honor. I - - - but
13 what she was getting at was that she didn't want the jurors
14 to identify - - -

15 JUDGE TROUTMAN: Well, let me ask you this.
16 There are some jurors who might wonder, there were family
17 members of the defendant; suddenly, they're gone. That
18 they now believe he's guilty. Wouldn't that adversely
19 affect him?

20 MS. BOND: Well, I think that was what the judge
21 was trying to combat here, was so that there would be no
22 one else in the courtroom, no supporters on either side.

23 CHIEF JUDGE WILSON: Well - - -

24 MS. BOND: So that - - -

25 CHIEF JUDGE WILSON: - - - so in a lot of

1 circumstances, we say, the court can give a curative
2 instruction. And for things that are a lot more directly
3 related to guilt or innocence than who's sitting in the
4 courtroom watching.

5 So why wouldn't the - - - why wouldn't an
6 instruction to the jurors, you know, that I've excluded
7 some people from the courtroom because I think that they
8 were staring down - - - staring me down, and you shouldn't
9 take any inference from that; it has nothing to do with the
10 guilt or innocence of the defendant - - -

11 Why wouldn't that work?

12 MS. BOND: I think certainly that - - - that's an
13 option under certain circumstances, but here, the judge
14 specifically found that there was no lesser remedy that she
15 felt would be adequate at that time.

16 CHIEF JUDGE WILSON: And how do we know that? I
17 mean, she said that, but how do we know that she even
18 considered remedies like that?

19 MS. BOND: Well, she explicitly stated, for one
20 thing, that she was rejecting the Defendant's alternative
21 remedies, so she at least - - -

22 JUDGE TROUTMAN: What did she offer as an
23 alternative?

24 MS. BOND: She did not offer a specific remedy.
25 But she is not required to list - - -

1 JUDGE TROUTMAN: Waller doesn't require that she
2 do so?

3 MS. BOND: It does not require that she list
4 remedies on the record. All it requires that - - - is that
5 the record is clear that she did consider alternatives.
6 And here - - -

7 JUDGE TROUTMAN: Where in the record is it clear
8 she considered alternatives?

9 MS. BOND: Well, again, she specifically - - -
10 she listened to the defendant's reasonable alternative here
11 that he offered up. And she said, I don't think a lesser
12 remedy is adequate here.

13 JUDGE RIVERA: Wasn't that alternative - - -

14 MS. BOND: So - - -

15 JUDGE RIVERA: - - - only with respect to the
16 cameras?

17 MS. BOND: Yes. And again, that - - - that
18 alternative, while - - -

19 JUDGE RIVERA: What alternative to having
20 everyone kept out, to closing the courtroom, what - - -
21 what other alternatives? That are not about cameras in the
22 courtroom being used, right, to take photos?

23 MS. BOND: So the - - - I think, again, the
24 judge's observations here, and the fact that the spectators
25 had in - - - had engaged in intimidating conduct, meant

1 that the judge was making a reasonable decision here and
2 finding that there was no lesser remedy than full closure
3 of this courtroom.

4 It's a - - - it's certainly an extraordinary
5 case; I'm not saying that this should be routine. But this
6 was a case where this judge specifically found that the
7 spectators at this trial were engaging in very intimidating
8 conduct - - -

9 CHIEF JUDGE WILSON: The difficult - - -

10 JUDGE SINGAS: Are we certain that the people in
11 the elevator were actually the people in the courtroom?

12 MS. BOND: So the - - - the judge, and the court
13 reporter to the judge, described them as spectators from -
14 - - from this trial, so - - -

15 JUDGE TROUTMAN: But how do we know they were?

16 MS. BOND: From the record here, it - - - it's -
17 - -

18 JUDGE TROUTMAN: Because the judge said so?

19 MS. BOND: And I think the judge had - - - I
20 think her - - -

21 JUDGE TROUTMAN: And the judge said what she said
22 based on hearsay, right?

23 MS. BOND: Yeah, it - - - it is based on what the
24 court reporter told her. But again, the defendant did not
25 dispute that characterization of the court reporter's.



1 JUDGE TROUTMAN: How - - - how we could defend
2 and know who these people were, whether they were related
3 to the trial or not?

4 MS. BOND: Well, but again, when the - - - when
5 the court mentioned that on the record, the defendant
6 didn't say, hey, what are you talking about; I have not
7 heard about this. He just said, actually, can we just have
8 people not bring phones into the courtroom? He didn't
9 express any sort of concern or surprise over - - - over
10 this issue.

11 I see my time is up. If there are no further
12 questions? Thank you.

13 CHIEF JUDGE WILSON: Thank you.

14 MR. GREENBERG: With respect to the elevator
15 incident, it's worth noting that the judge never mentioned
16 that either at the time she was told by the court reporter
17 or at the time she closed the courtroom. She only
18 mentioned it after the courtroom was closed, subsequently
19 when she tried to buttress her reasoning, and she threw
20 that out as - - - as an incident.

21 Defense counsel had no opportunity to object to
22 it or to - - - or to even contradict it.

23 JUDGE SINGAS: Counsel, I mean, granted, there's
24 a dearth of information here about what happened. But
25 should we not credit at all, or give any weight, to the

1 impressions of the judge who is in the courtroom,
2 observing, looking out at the audience? Don't we have to
3 give her some benefit of the doubt? Do we or don't we,
4 like what - - - what kind of weight do we give to the judge
5 who is in the best position to assess what's going on in
6 her courtroom?

7 MR. GREENBERG: I think you have to look at it in
8 the context of the record as a whole. And when we have a
9 record where no one else complained about anything, not
10 once throughout the whole trial, the judge's impressions
11 may be based on some kind of implicit bias. We don't know.
12 As Judge Troutman pointed out, we - - - somebody who's
13 looking, staring down, staring intently, may look fine to
14 someone else. It may be misinterpreted; I think that's
15 what Judge Troutman said. And I think that's the problem
16 here when you just rely on atmospherics - - -

17 JUDGE RIVERA: Well - - -

18 MR. GREENBERG: - - - and impressions, and not
19 facts.

20 JUDGE RIVERA: Let - - - let - - - let's say,
21 we're persuaded - - - we're persuaded that there's a
22 violation of the public trial right. Could we decide this
23 on the narrow ground that, again, not - - - perhaps,
24 deferring, perhaps, seeing it a different way regarding the
25 judge's impression about the intimidation, the photographs,

1 that it was not an appropriate remedy for that problem, for
2 that concern? To exclude, not just whoever she believed
3 was staring - - - staring her and others down, or involved
4 in some kind of body language to intimidate. What if she
5 says, I'm going to keep out the family also just to be
6 fair.

7 Could we not decide on that issue?

8 MR. GREENBERG: Yes, you can.

9 JUDGE RIVERA: That that is just wrong?

10 MR. GREENBERG: I think one of the prongs of
11 Waller is that any closure order must be narrowly tailored
12 as - - - as much as possible to preserve the right to a
13 public trial. And this court could certainly hold that by
14 excluding everyone from the courtroom; the court failed to
15 narrowly tailor her order to match whatever the conditions
16 were that led to the order in the first place.

17 JUDGE TROUTMAN: So for instance, if a fight had
18 broke out in the courtroom, and the judge then said,
19 everybody out; would that be okay?

20 MR. GREENBERG: Well, of course, not. No. And
21 that's essentially what - - - what happened here.

22 And I think the fact that the judge removed the
23 family members of the deceased, other people who were not
24 involved in any of the staring, she may have meant it as a
25 way to deflect prejudice from - - - from Mr. Reid, but it

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showed a misunderstanding by the judge of what the law is, and what the requirements are, and how she should narrowly tailor any remedy.

I just want to conclude by saying, if this court were to affirm in this case, there would be a deep erosion of the right to a public trial. It would send a signal to judges that they can close courtrooms based on atmospherics and impressions, rather than a factual record. It - - - the court, the Supreme Court, and this court have said, there needs to be specific reasons why the judge's finding that a fair trial can't proceed in an open courtroom. And the judge made no findings like that in this case.

Thank you very much.

CHIEF JUDGE WILSON: Thank you, Counsel.

(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 Dwight Reid v. The People of the State of New York, No. 41 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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