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COURT OF APPEALS

STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

No. 25

BENNY GARAY,

Appellant.

PEOPLE,

Respondent,

-against-

No. 26

LEE CARR,

Appellant.

PEOPLE,

Respondent,

-against-

No. 27

WALTER CATES, SR.,

Appellant.

20 Eagle Street
Albany, New York 12207
February 10, 2015

1 Before:

2 CHIEF JUDGE JONATHAN LIPPMAN
3 ASSOCIATE JUDGE SUSAN PHILLIPS READ
4 ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
5 ASSOCIATE JUDGE JENNY RIVERA
6 ASSOCIATE JUDGE SHEILA ABDUS-SALAAM
7 ASSOCIATE JUDGE LESLIE E. STEIN
8 ASSOCIATE JUDGE EUGENE M. FAHEY

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Karen Schiffmiller
Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: Counsel, number 25,
2 26, and 27. You are on Garay?

3 MR. BERNSTEIN: That's correct, Your Honor.

4 CHIEF JUDGE LIPPMAN: And how much - - - do
5 you want any rebuttal time?

6 MR. BERNSTEIN: Two minutes, Your Honor.

7 CHIEF JUDGE LIPPMAN: Two minutes, go
8 ahead. You're on, counsel.

9 MR. BERNSTEIN: All right. My name is Adam
10 Bernstein from Paul, Weiss, Rifkind, Wharton &
11 Garrison on behalf of appellant, Benny Garay.

12 The right to counsel under the New York
13 Constitution guarantees that a criminal defendant's
14 attorney be present - - -

15 CHIEF JUDGE LIPPMAN: How is this a right-
16 to-counsel case? What - - - what went wrong here, in
17 your view?

18 MR. BERNSTEIN: Sure. The trial court held
19 a hearing whether to discharge a sworn and seated
20 juror in the middle of a trial. The trial court knew
21 that appellant's trial counsel was absent from the
22 courtroom.

23 CHIEF JUDGE LIPPMAN: But he had - - - had
24 this issue been discussed, though, with the - - -
25 with the counsel?

1 MR. BERNSTEIN: What - - - what the trial
2 court says on the record is that he had a telephone
3 conversation that morning to apprise counsel of the
4 juror being sick. That's all there is on the record.
5 And the trial court then decided to go forward with
6 the hearing - - -

7 CHIEF JUDGE LIPPMAN: And did he - - - did
8 counsel have an opportunity to contest this, you
9 know, when he came back in?

10 MR. BERNSTEIN: You mean, when he came back
11 to the courtroom - - -

12 CHIEF JUDGE LIPPMAN: Yeah.

13 MR. BERNSTEIN: - - - after the judge had
14 rendered his decision?

15 CHIEF JUDGE LIPPMAN: Yes.

16 MR. BERNSTEIN: We would - - - we would
17 contend that he did not a sufficient opportunity - -
18 -

19 CHIEF JUDGE LIPPMAN: What happened when he
20 came back? What stage were they at when he came back
21 in?

22 MR. BERNSTEIN: So - - -

23 CHIEF JUDGE LIPPMAN: And how does it
24 impact on this whole right - - -

25 MR. BERNSTEIN: On the - - -

1 CHIEF JUDGE LIPPMAN: - - - to counsel
2 issue?

3 MR. BERNSTEIN: So our view is that the
4 violation occurred because he was absent from the
5 hearing at which the court heard argument and
6 rendered a decision. When he came back to the
7 courtroom, after the decision had been rendered, and
8 the court said to the juror, okay, move from your
9 alternate seat to, you know, the regular juror seat,
10 the decision had already been effected - - -

11 CHIEF JUDGE LIPPMAN: Well, could he not
12 have objected at that time?

13 MR. BERNSTEIN: He certainly could have
14 objected, but it would have been futile. The right
15 to counsel means the right to - - -

16 CHIEF JUDGE LIPPMAN: How do we know it
17 would be futile?

18 MR. BERNSTEIN: Because the judge has
19 already rendered his decision and - - -

20 JUDGE READ: No, but judges change their
21 minds sometimes.

22 MR. BERNSTEIN: Well, in analogous context,
23 this court has said that in - - - in Evans and in
24 Favor, the court has said things along the lines of,
25 the right to participate means the right to

1 participate when that participation - - -

2 CHIEF JUDGE LIPPMAN: Oh, okay.

3 MR. BERNSTEIN: - - - is meaningful.

4 CHIEF JUDGE LIPPMAN: So in a nutshell,
5 your argument is that when the opportunity was there
6 for him to have a role in whether or not to excuse
7 the juror, you know, there was no opportunity - - -

8 MR. BERNSTEIN: Because he was - - -

9 CHIEF JUDGE LIPPMAN: - - - at that point,
10 because he wasn't there. And the judge has no
11 discretion to say, well, he's not here and he should
12 be here?

13 MR. BERNSTEIN: In the middle of trial,
14 certainly the judge does not have the discretion to
15 move forward with a critical stage. At a minimum,
16 the judge would need to make some inquiry, call the -
17 - - call the jurors - - -

18 JUDGE PIGOTT: But what Judge Read said,
19 though, I mean, couldn't - - - when he came back,
20 say, Judge, Judge, Judge, I got a different jury
21 today. I - - - what - - - what happened here and - -
22 - and I'm going to object.

23 And maybe the judge would - - - and as - -
24 - because counsel would have pointed out as you did
25 so articulately in your brief, that there is - - -

1 there's case law that says that you can't do this.
2 Maybe he'd say you're right, you know, I'll declare a
3 mistrial and we'll proceed from there or do something
4 else. But he didn't have that opportunity because
5 this - - - this lawyer didn't raise it.

6 MR. BERNSTEIN: The lawyer didn't raise it;
7 it's - - - it's correct that when the lawyer returned
8 to the courtroom, he didn't raise the issue. But
9 it's not clear that the lawyer even knew that he
10 missed the hearing and - - -

11 CHIEF JUDGE LIPPMAN: Counsel, what's the
12 rule? What's the rule in this kind of situation? If
13 the lawyer's not there, the judge can't excuse the
14 juror, period? Is that the rule?

15 MR. BERNSTEIN: The rule is - - -

16 CHIEF JUDGE LIPPMAN: What is the rule - -
17 -

18 MR. BERNSTEIN: The rule here is - - -

19 CHIEF JUDGE LIPPMAN: - - - going forward?

20 MR. BERNSTEIN: - - - if the - - - if the
21 attorney is not present, the judge needs to wait
22 before holding a hearing and hearing argument on
23 whether to retain or discharge the juror.

24 CHIEF JUDGE LIPPMAN: So the lawyer has to
25 be in the courtroom when the judge is making that

1 decision.

2 MR. BERNSTEIN: And - - -

3 CHIEF JUDGE LIPPMAN: That's - - - that's
4 in essence your argument.

5 MR. BERNSTEIN: Yes. Yes, Your Honor.
6 That's - - - that is precisely.

7 JUDGE RIVERA: But counsel, in - - - in
8 this case, in addition to the potential for
9 opportunity when counsel walked in with the jury - -
10 - in addition to knowing about this particular juror,
11 this attorney and the attorney for co-defendant
12 certainly were aware of the fact that this judge had,
13 in the past, in the same case, right, disqualified a
14 juror, moved - - - a juror for illness - - - excused
15 a juror, correct?

16 So it's not as if this particular lawyer
17 didn't have some sense that this is the way this
18 judge has in the past treated the exact same
19 scenario.

20 MR. BERNSTEIN: But we don't - - - we don't
21 think that the prior discharge has - - - has any
22 bearing on the question of whether the trial court,
23 in this instance, should have waited two, three
24 minutes, or made some inquiry to see whether counsel
25 would return to the courtroom.

1 JUDGE RIVERA: Well, no, no. Because that
2 happened in the past, and then he's got the lawyer
3 for the co-defendant, who says, "Your Honor, I spoke
4 to Mr. Conway. I believe he's agreeing to the
5 objection we're making to replacing the juror". I -
6 - - granted, that perhaps a judge should not rely on
7 another lawyer's comment that I believe he's agreeing
8 to the objection, but can't he rely on the fact that
9 the lawyer says I spoke to him, so that the other
10 counsel - - - the defendant's counsel is aware,
11 indeed, that this issue is going to come up?

12 MR. BERNSTEIN: We don't think that the
13 fact that there may or may not have been a
14 conversation between the counsel excuses the fact
15 that the court moved forward with the hearing.

16 JUDGE ABDUS-SALAAM: Counsel, do we - - -

17 MR. BERNSTEIN: If the trial court wanted -
18 - - yeah.

19 JUDGE ABDUS-SALAAM: I'm sorry, counsel.
20 You can go ahead, but I have a question.

21 MR. BERNSTEIN: Sure, Your Honor.

22 If the trial court wanted to find out
23 whether the co-defendant's counsel was going to
24 engage in a joint representation of appellant, he - -
25 - she would - - - he would have needed to, on the

1 record, ask whether there was any conflicts and
2 whether appellant, you know, waived any of those
3 conflicts and consented to a joint representation.

4 CHIEF JUDGE LIPPMAN: Okay, counsel.

5 MR. BERNSTEIN: But that's not what
6 happened.

7 CHIEF JUDGE LIPPMAN: Counsel, Judge Abdus-
8 Salaam.

9 JUDGE ABDUS-SALAAM: Do we - - -

10 MR. BERNSTEIN: Yes, Your Honor.

11 JUDGE ABDUS-SALAAM: Do we know of the
12 circumstances under which Mr. Conway or the
13 defendant's lawyer was not in the courtroom and about
14 what time of day this was, so that we could have - -
15 -

16 MR. BERNSTEIN: So - - -

17 JUDGE ABDUS-SALAAM: - - - some context for
18 why he wasn't there?

19 MR. BERNSTEIN: Sure, Your Honor. This was
20 in the morning, before the trial started for that
21 day. It's not in the record, but I spoke with both
22 defense counsel, and neither of them had any
23 recollection of this particular morning, or why Mr.
24 Conway was not - - -

25 CHIEF JUDGE LIPPMAN: Counsel - - -

1 MR. BERNSTEIN: Yes, sir.

2 CHIEF JUDGE LIPPMAN: - - - quickly, your
3 time is just about up. What about the closure of the
4 courtroom issue? What's your argument in a nutshell?

5 MR. BERNSTEIN: Our argument there is that
6 this court's decision in Echevarria is inconsistent
7 with the Supreme Court's decision in Presley - - -

8 JUDGE READ: So you're asking us to
9 overrule it?

10 MR. BERNSTEIN: Yes, Your Honor, we're
11 asking you to overrule it.

12 CHIEF JUDGE LIPPMAN: If we don't overrule
13 it, you can't prevail?

14 MR. BERNSTEIN: That's correct, Your Honor.
15 We - - - we believe that that decision - - -

16 CHIEF JUDGE LIPPMAN: Okay, so you straight
17 think Esk - - - Echevarria is wrong in your view?

18 MR. BERNSTEIN: Yes, Your Honor.

19 JUDGE FAHEY: Just to go back for - - - to
20 the juror's question a second - - -

21 CHIEF JUDGE LIPPMAN: Judge Fahey.

22 JUDGE FAHEY: Thank you, Judge. Just so I
23 have the facts right.

24 MR. BERNSTEIN: Sure.

25 JUDGE FAHEY: I haven't had as much time as

1 everybody else to study, as you all know, I'm sure.

2 MR. BERNSTEIN: Of course, Your Honor.

3 JUDGE FAHEY: So Judge Stein and I have
4 that disadvantage, but it - - - it seemed to me that,
5 when, in looking at the record, that there had been
6 an off-the-record discussion with Conway and the two
7 other lawyers in the court beforehand about the sick
8 juror question.

9 MR. BERNSTEIN: That's - - -

10 JUDGE FAHEY: Is that correct?

11 MR. BERNSTEIN: That's what the trial court
12 represents at the beginning of the on-the-record
13 hearing, Your Honor.

14 JUDGE FAHEY: Okay, that's all.

15 CHIEF JUDGE LIPPMAN: Okay. Oh, I'm sorry.
16 Judge Fahey - - -

17 JUDGE FAHEY: Thanks, that's - - - no,
18 that's all right. Just so I'm clear about the facts
19 here.

20 CHIEF JUDGE LIPPMAN: Oh - - -

21 JUDGE FAHEY: And on the Hinton hearing
22 issue, one other point on the Hinton hearing issue,
23 it's not preserved, right?

24 MR. BERNSTEIN: Well, we believe it - - -
25 it is preserved, because - - -

1 JUDGE FAHEY: Do you, okay?

2 MR. BERNSTEIN: - - - he - - -

3 JUDGE FAHEY: Then let's - - - let's set
4 that question for a second. Then on the merits, is
5 there a - - - an alternative procedure that you think
6 the court could have followed here? To follow
7 through on your logic, what - - - what would you
8 advocate to us is - - - is what this alterative
9 procedure would be in this circumstance?

10 MR. BERNSTEIN: Sure. All - - - all that
11 we're asking the court to do is to put on the record
12 the types of alternatives that it was considering.
13 So for example, it may say, well, I thought about
14 posting a guard outside the courtroom or we've
15 thought about putting a screen up, or something of
16 that sort, and said, I don't think that's appropriate
17 in this circumstance, and that would satisfy Presley.

18 JUDGE FAHEY: One last point, am I correct
19 in - - - in the record, that the defendant's family
20 was allowed to stay in the courtroom?

21 MR. BERNSTEIN: The trial court permitted
22 appellant's family to come; I don't believe that they
23 actually did. But that would go to the second prong
24 of the test, the closure being no broader than
25 necessary, not what - - -

1 JUDGE FAHEY: The Priestly (sic) test.

2 MR. BERNSTEIN: The Presley test, that's
3 right.

4 JUDGE FAHEY: Yeah, the Presley test.
5 Okay, thanks.

6 CHIEF JUDGE LIPPMAN: Okay, counsel, you'll
7 have your rebuttal time.

8 MR. BERNSTEIN: Thank you, Your Honor.

9 CHIEF JUDGE LIPPMAN: Counselor?

10 MS. CURRAN: Good afternoon, Your Honors.
11 My name is Patricia Curran, and I represent the
12 People on this appeal.

13 CHIEF JUDGE LIPPMAN: Counsel, how can the
14 judge remove the juror when the lawyer is not there?
15 How - - - how is that anything other than right to
16 counsel?

17 MS. CURRAN: The statute - - -

18 CHIEF JUDGE LIPPMAN: A violation of right
19 to counsel?

20 MS. CURRAN: The statute provides the court
21 give defense counsel an opportunity - - -

22 CHIEF JUDGE LIPPMAN: When the - - -

23 MS. CURRAN: - - - to be heard.

24 CHIEF JUDGE LIPPMAN: - - - when the court
25 is making that decision.

1 MS. CURRAN: Well, the record supports the
2 idea that the court advised both counsel and the
3 prosecutor about the ill juror. There's no
4 indication that he withheld the decision - - -

5 CHIEF JUDGE LIPPMAN: So you think that - -
6 -

7 MS. CURRAN: - - - from counsel at that
8 time.

9 CHIEF JUDGE LIPPMAN: - - - that there
10 could be a prior discussion about this - - - putting
11 aside the exact circumstance of what happened here,
12 you have a prior discussion about it. Then, at a
13 later point, the - - - the juror doesn't come in, and
14 the judge says, okay, that juror's gone; bring in the
15 alternate. That in a general, generic situation is
16 okay?

17 MS. CURRAN: Your Honor, in this instance -
18 - -

19 CHIEF JUDGE LIPPMAN: No, no, but what's
20 the answer to my question?

21 MS. CURRAN: Because counsel was present.

22 CHIEF JUDGE LIPPMAN: In the hypothetical
23 generic situation.

24 MS. CURRAN: Counsel was present for the
25 discussion about the ill juror. I know defendant is

1 claiming that the court didn't make the decision
2 about at - - - about it at that time, but that's not
3 - - -

4 CHIEF JUDGE LIPPMAN: So, you're - - - are
5 you arguing that in this case the judge made the
6 decision earlier and told them?

7 MS. CURRAN: Yes. But even if he didn't -
8 - -

9 CHIEF JUDGE LIPPMAN: Yes, you - - - that
10 is what happened?

11 MS. CURRAN: I believe the record supports
12 that.

13 CHIEF JUDGE LIPPMAN: That's what the
14 record supports? Show - - -

15 MR. BERNSTEIN: Let me read what the record
16 says.

17 CHIEF JUDGE LIPPMAN: Tell me where in the
18 record it supports that.

19 MS. CURRAN: This is what the court says,
20 and again, this - - -

21 CHIEF JUDGE LIPPMAN: Sure, go ahead,
22 counsel.

23 MS. CURRAN: - - - in referring to
24 something Judge Abdus-Salaam has - - - has noted.
25 This was something that happened before court opened

1 in the morning. And the court says, "All parties are
2 present except for Mr. Conway who has absented
3 himself again. This is the second time. As I
4 indicated when I spoke off the record with Mr.
5 Conway, and as well" - - -

6 CHIEF JUDGE LIPPMAN: What about those
7 words "off-the-record", that doesn't matter?

8 MS. CURRAN: No, Your Honor, because now
9 the court is doing an administrative function in
10 putting on the record what actually happened - - -

11 CHIEF JUDGE LIPPMAN: I see; go ahead.
12 Continue.

13 MR. BERNSTEIN: - - - when they discussed
14 this. "And the prosecution, one of the jurors has
15 called in sick, Mr. [Blank] says in no way can he
16 make it in today. I asked him, you know, if we put
17 off the morning, can you come in this afternoon and
18 he said no. So, I'm going to replace Mr. [Blank]
19 with the next alternative, which is, I believe, Mr.
20 [So-and-So]."

21 Now it is difficult to believe on that
22 record that the judge, particularly because he'd
23 already excused another sick juror under the two-hour
24 rule, did not inform all the parties at the time,
25 that he planned to - - -

1 CHIEF JUDGE LIPPMAN: So let me ask you the
2 same question I asked your adversary. So what's the
3 rule? What's the rule in these kinds of situations?

4 MS. CURRAN: The rule in this particular
5 situation - - -

6 CHIEF JUDGE LIPPMAN: The rule that, you
7 know, we have to deal with this case, knowing that -
8 - -

9 MS. CURRAN: He was - - -

10 CHIEF JUDGE LIPPMAN: - - - it will affect
11 other case. What's the rule in general?

12 MS. CURRAN: Counsel was not deprived - - -

13 CHIEF JUDGE LIPPMAN: What's the rule in
14 general?

15 MS. CURRAN: I'm not sure what you're
16 asking me when you say "the rule"?

17 CHIEF JUDGE LIPPMAN: All right. The cases
18 in this court affect - - - the reason why they're
19 here is they affect lots of other cases in our big
20 diverse state. If we decide for you, what is the
21 rule that we would be articulating to guide lawyers
22 and, you know, others in terms of what is the law in
23 our state?

24 MS. CURRAN: The statute provides here that
25 the lawyer be given an opportunity to be heard. He

1 had that opportunity so - - -

2 JUDGE RIVERA: What would - - - what would,
3 under these facts, not have been an opportunity?

4 MS. CURRAN: Well, ac - - -

5 JUDGE RIVERA: What would not satisfy the
6 rule as you are trying to articulate it?

7 MS. CURRAN: Actually, Judge, let's pretend
8 for a moment that there was no pre-discussion before
9 the record; I submit to you, that even if the lawyer
10 had come in at the end and saw or heard what the
11 judge was saying, nothing irrevocable had happened at
12 that point. So even at that point, pretending for a
13 moment that the off-the-record conversation had not
14 occurred, the lawyer had an obligation to say
15 something at that point. The fact that a juror was
16 being replaced is a major occurrence during a trial.

17 JUDGE RIVERA: Even when he walks in with
18 the jury, and the judge says he's going to seat the
19 alternate, at that moment, regardless of whatever
20 understanding or whatever conversation, and you say,
21 let's assume there had been no conversation - - - if
22 I'm just the lawyer and I walk in and this is going
23 on, I should raise my hand and say, wait a minute;
24 what's going on?

25 MS. CURRAN: Yes.

1 JUDGE RIVERA: At a minimum?

2 MS. CURRAN: Obviously, that's not this
3 case, because the lawyer - - -

4 JUDGE RIVERA: Yeah, but that didn't - - -
5 I don't know if that answered my question. My
6 question was, when would there not be an opportunity
7 under your rule? Because it sounds to me like you're
8 saying, if a lawyer walks in and sees the judge
9 replacing and seating an alternate, that you've got
10 to act.

11 MS. CURRAN: Because the seating doesn't
12 take place immediately. If the ju - - - if the
13 lawyer in this case had known nothing, that alone
14 should have alerted him. That's not this case - - -

15 JUDGE RIVERA: Okay, so I'm sorry. So then
16 - - - so then it - - - there would be no opportunity
17 if the lawyer happened to walk in five minutes later?

18 MS. CURRAN: Well, I would doubt that the
19 judge would - - -

20 JUDGE RIVERA: Is that what you're
21 suggesting?

22 MS. CURRAN: - - - replace an alternate
23 with a - - - a sworn juror with an alternate in the
24 absence of counsel.

25 JUDGE RIVERA: Right.

1 MS. CURRAN: But the law provides that he
2 have an opportunity to be heard. In this case, he
3 had that, but he could also have had another
4 opportunity to be heard when he comes back into court
5 and - - - and hears the court say, Mr. So-and-So, I'm
6 going to ask you to take the regular juror's seat.

7 JUDGE ABDUS-SALAAM: So counsel, could I
8 just follow up on Judge Rivera's question? So if - -
9 - if Mr. Conway had not walked in the courtroom
10 almost simultaneously with the jury, but two minutes
11 later, did you say that you don't think the court
12 would have seated the alternate before he came back
13 into the courtroom?

14 MS. CURRAN: Correct. Your Honor, the - -
15 - I know the record says that the lawyer comes in and
16 then the jury comes in, but I don't think that the
17 judge is bringing the jury in and we're all sitting
18 and waiting for the lawyer to come back. I read this
19 record as saying, the lawyer comes in and takes his
20 seat, and then the jury comes in and the judge tells
21 the alternate - - - I think it's the second alternate
22 - - - to take the place of the ill juror. I think it
23 was number 10.

24 I mean, this takes a minute or so. And if
25 anything, the fact that the lawyer says nothing here

1 indicates he knew all along what was happening, and
2 that the court had advised him of this, and that he
3 knew that the alternate was taking the place of the
4 sworn juror under the two-hour rule.

5 JUDGE ABDUS-SALAAM: And what's your
6 position on whether co-counsel was actually voicing
7 the objection of both parties, both defendants?

8 MS. CURRAN: Do you mean the joint
9 representation that the defendant mentioned?

10 JUDGE ABDUS-SALAAM: Right.

11 MS. CURRAN: The co-counsel was not
12 representing defendant here. All he was doing was
13 telling the court that defendant's counsel in this
14 case agreed with the objections the two of them are
15 raising. He was simply conveying that information to
16 the court. He was not representing the defendant in
17 this instance.

18 CHIEF JUDGE LIPPMAN: Counsel, let's switch
19 gears for a second.

20 MS. CURRAN: Certainly.

21 CHIEF JUDGE LIPPMAN: Are Presley and
22 Echevarria at variance with each other?

23 MS. CURRAN: No, Your Honor. This court
24 considered Echevarria not even two years ago. The
25 defendant in this case is asking the court to

1 overrule its own precedent from March of 2013.

2 CHIEF JUDGE LIPPMAN: No, no, but I asked
3 you a different question. What I asked you - - - do
4 you believe that Echevarria and Presley are at
5 variance with each other?

6 MS. CURRAN: No, I don't believe that - - -

7 CHIEF JUDGE LIPPMAN: You think that
8 Echevarria is consistent with Presley, is basically
9 what I'm asking?

10 MS. CURRAN: Correct. I think that in the
11 undercover officer context, which is what we have
12 here, that the judge in this case considered all the
13 appropriate factors under Waller and under Presley,
14 and even admitted the defendant's family should any
15 of his family show up. And in that instance - - -

16 CHIEF JUDGE LIPPMAN: Do we know that the
17 judge considered alternatives here that would be less
18 intrusive or narrower?

19 MS. CURRAN: Well, by considering the - - -
20 the amount or the - - - the reason for the closure,
21 and the compelling interest for the closure, and the
22 fact that in this particular case, he also considered
23 friends and family, there was no obligation for him
24 to consider other alternatives on the record.

25 CHIEF JUDGE LIPPMAN: He doesn't have to

1 put it on the record?

2 MS. CURRAN: Correct, Your Honor.

3 JUDGE STEIN: Speaking of the record,
4 counselor, can we go back to the replacement of the
5 juror - - -

6 MS. CURRAN: Certainly.

7 JUDGE STEIN: - - - because what concerns
8 me is - - - as I read what is on the record, it does
9 not even clearly indicate, even if we would agree
10 that the rule should be what you say it is, it does
11 not clearly indicate that counsel was given an
12 opportunity in the off-the-record discussion, to - -
13 - to make arguments or - - - or to try to persuade
14 the judge to do anything other than what he did.

15 Does the - - - is there anything in the
16 record that - - - well, clearly there is no record of
17 that discussion, so isn't that in itself a problem?

18 MS. CURRAN: No, Your Honor, and I - - -
19 with all due respect, I believe that - - - first of
20 all, there's not a silent record here. The - - - the
21 court did make a record of what happened. He - - -

22 JUDGE STEIN: But the record says, I - - -
23 I indicated off the record, that this is - - - the
24 juror had called in sick, and he says he can't make
25 it in today, and I asked him if we could put it off

1 in the morning; can you come in in the afternoon?
2 And he said no. That's as far as it goes. If he - -
3 -

4 MS. CURRAN: It does - - -

5 JUDGE STEIN: Go ahead.

6 MS. CURRAN: I'm sorry. But just before
7 that, Your Honor, the court says, "As I indicated
8 when I spoke off the record with Mr. Conway, as well
9 as with Mr. Jaffe". That's - - -

10 JUDGE STEIN: But it sounds to me like he
11 simply related - - - the court simply related that
12 this is - - - this is the situation that we find
13 ourselves in. It doesn't indicate that in that
14 previous off-the-record discussion, there was any
15 opportunity for counsel to be heard on the subject of
16 what the - - - the judge would do about it.

17 MS. CURRAN: Respectfully, Your Honor, it
18 is our position that the court's telling the attorney
19 that the juror is ill and he plans to replace him
20 gives the lawyer the opportunity to be heard. The
21 fact that the judge didn't pull out and the - - - and
22 find nuance and repeat the wording of the statute
23 doesn't mean that the lawyer didn't have the
24 opportunity to be heard in this instance.

25 JUDGE RIVERA: But even if we disagree that

1 - - - I took your position to be when the lawyer
2 walks in with the jury, that that's the opportunity.

3 MS. CURRAN: In this case, he had an off-
4 the-record opportunity.

5 JUDGE READ: You're saying that's the
6 second opportunity.

7 MS. CURRAN: Correct, Your Honor.

8 JUDGE RIVERA: He had more than one.

9 MS. CURRAN: Correct, Your Honor. And
10 obviously, as we argue in our brief, it's our view
11 that - - - that defendant didn't preserve his claim,
12 because, even assuming for a moment he wasn't present
13 at the off-the-record conversation, he had an
14 opportunity to protest when he comes back and the
15 juror's replaced.

16 CHIEF JUDGE LIPPMAN: Okay, thanks,
17 counsel.

18 MS. CURRAN: Are there other questions?
19 Thank you very much.

20 CHIEF JUDGE LIPPMAN: Thank you, counsel.
21 Appreciate it.

22 Counsel, rebuttal?

23 MR. BERNSTEIN: Yes, yes, Your Honor.

24 CHIEF JUDGE LIPPMAN: Counsel, your
25 adversary's talking about two opportunities and that

1 neither of them are taken. What is your response to
2 that?

3 MR. BERNSTEIN: So there are several
4 responses. First, there's a difference between, in
5 our view, the right to counsel and the requirement
6 under the statute for an attorney to have no - - -
7 input into the decision.

8 CHIEF JUDGE LIPPMAN: Well, let's take the
9 first one, the off-the-record - - - what's the
10 significance of that?

11 MR. BERNSTEIN: Our view is that the off-
12 the-record phone call that morning has no
13 significance and no relevance to the analysis of
14 whether a violation occurred because the trial court
15 moved forward with a hearing on the record, heard
16 argument, and rendered a decision - - -

17 CHIEF JUDGE LIPPMAN: So the judge was - -
18 - is your argument the judge was not making the
19 decision at that point in the off-the-record
20 conversation?

21 MR. BERNSTEIN: Our argument is whether or
22 not the judge made a decision, and as Judge Stein,
23 you know, noticed, the record is very unclear on what
24 happened in that conversation - - -

25 CHIEF JUDGE LIPPMAN: So you got to go on

1 the record to see what really happened. And your
2 position on what your adversary says is the second
3 opportunity is that there was no opportunity?

4 MR. BERNSTEIN: That's correct, Your Honor.

5 JUDGE PIGOTT: Well, if I understand my
6 notes, and I don't always trust them, but it seemed
7 to me at some point, Jaffe said that he had spoken
8 with Conway, and they both objected, and the court
9 denied the motion because a number of the jurors said
10 they could not be there on Friday, and there was a
11 fear of losing jurors if - - - if the trial went
12 beyond the promised time.

13 So the judge, whether you liked it or not,
14 had reasons articulated on the record as to why - - -
15 why the decision was made and Conway did not object
16 when he returned, right?

17 MR. BERNSTEIN: So, it's correct that when
18 Conway returned, he did not object. We're not
19 challenging the propriety of the discharge. We're
20 challenging the trial court's moving forward with a
21 hearing on the record in the absence of trial
22 counsel.

23 JUDGE PIGOTT: But did he move - - - well,
24 when you say moved forward with a hearing, you're not
25 saying testimony was being taken and Conway was out

1 in the hall.

2 MR. BERNSTEIN: No, no, no. That is - - -
3 that is not what we are saying. That there were
4 arguments and there was a decision rendered. That's
5 - - - that's what I mean when I say a hearing, Your
6 Honor.

7 CHIEF JUDGE LIPPMAN: But your - - - your
8 adversary is arguing, essentially, I think, that the
9 judge was waiting for him to come back in.

10 MR. BERNSTEIN: Well, actually we would
11 disagree with that. If you look at - - -

12 CHIEF JUDGE LIPPMAN: Yeah, tell us why.

13 MR. BERNSTEIN: - - - at page A - - - A192
14 of the appendix. If you'll see, after the judge
15 renders his decision, the judge says, "All right,
16 bring in the jurors". And Mr. Jaffe actually says,
17 "Judge, are we waiting for Mr. Conway?" And then - -
18 - whereupon Mr. Conway entered the courtroom and then
19 the jury entered.

20 JUDGE PIGOTT: But the judge said before
21 that he's absent again, and I got the impression - -
22 - maybe it's an incorrect one - - - that if we find
23 in the - - - in the manner in which you're
24 suggesting, that it would be a very good strategy for
25 attorneys to absent - - - absent themselves from the

1 courtroom from time to time, because - - - I mean, he
2 had a pretty good jury verdict here.

3 And now he's only got one thing left and -
4 - - and he can say, well, I - - - I went to the john,
5 and the judge, you know, went on and excused the
6 jurors, in fact, talked to the foreman, and I'm
7 entitled to a new trial. And that's not the rule we
8 want, correct?

9 MR. BERNSTEIN: Well, I would disagree. I
10 mean, trial courts have a variety of tools at their
11 disposal. If counsel are intentionally absenting
12 themselves, they can sanction attorneys. There's a
13 number of things they can do to insure that attorneys
14 show up to trial on time.

15 JUDGE PIGOTT: Right, but shouldn't the
16 lawyer also do what a lawyer is supposed to do, which
17 is when you come back, object. I mean, he can get
18 sanctioned later; that's fine. I - - - I'm not a fan
19 of sanctions, but - - - but that's not the argument
20 here. The argument here is that he had an
21 opportunity, it seems, from the record to say, Judge,
22 I was out in the hall; I come back and I got a new
23 juror, and - - - and, you know, I - - - I move for a
24 mistrial.

25 MR. BERNSTEIN: In - - - he certainly had -

1 - - he could have done that. But we don't believe
2 that his - - - that him not doing that changes the
3 analysis, changes the fact that there was a violation
4 and that's our position.

5 JUDGE RIVERA: Do - - - do you also take
6 the position of - - -

7 CHIEF JUDGE LIPPMAN: Judge Rivera?

8 JUDGE RIVERA: - - - of the People that if
9 - - - if your client's counsel had not been in the
10 room, the court could not have moved forward with
11 replacing the juror? It's only his presence in the
12 room that then allows the judge to move forward with
13 what had been his original determination?

14 MR. BERNSTEIN: So, we don't believe that
15 the court should have started that morning, until the
16 attorney was there. We don't believe that the
17 hearing should have been held, and we don't believe
18 that the court should have been - - -

19 CHIEF JUDGE LIPPMAN: Oh - - -

20 MR. BERNSTEIN: - - - been doing anything
21 outside the presence of appellant's counsel.

22 CHIEF JUDGE LIPPMAN: Okay, counsel. Thank
23 you, counsel.

24 MR. BERNSTEIN: Thanks very much, Your
25 Honors.

1 CHIEF JUDGE LIPPMAN: All right, let's - -
2 - let's move to Carr and Cates.

3 Counsel?

4 MR. FINE: Yes, so, Your Honor, Andrew
5 Fine, representing Lee Carr.

6 CHIEF JUDGE LIPPMAN: Do you want any
7 rebuttal time, counsel?

8 MR. FINE: One minute, please, Your Honor.

9 CHIEF JUDGE LIPPMAN: One minute out of
10 your six, go ahead.

11 MR. FINE: Yes. This court has recognized
12 that the exclusion of defense counsel from court
13 proceedings should only take place under most unusual
14 and exceptional circumstances.

15 CHIEF JUDGE LIPPMAN: This is a little
16 different right-to-counsel scenario than the last
17 case, right?

18 MR. FINE: This is a different right-to-
19 counsel scenario - - -

20 CHIEF JUDGE LIPPMAN: Explain how - - -
21 what - - - what is the deprivation of right to
22 counsel here?

23 MR. FINE: The deprivation of right to
24 counsel here is that the judge conducted two
25 conversations with the prosecution's chief witness

1 without counsel present when, on two different
2 occasions, the witness was brought into court. The
3 prosecutor said he was unable physically to testify,
4 and the witness himself was described by the judge as
5 being, "in bad shape". There were two conferences
6 held - - -

7 CHIEF JUDGE LIPPMAN: What happened at
8 those conferences?

9 MR. FINE: What happened at those
10 conferences is unclear. The judge refused to
11 transcribe them, for one thing. For another thing,
12 whatever - - - whatever - - -

13 JUDGE RIVERA: Why isn't the judge's
14 summary good enough?

15 MR. FINE: The judge's summary is very
16 incomplete. The judge basically said - - - and - - -
17 and the judge's summary actually makes - - - makes it
18 even more apparent what - - - what role counsel could
19 have played.

20 JUDGE RIVERA: Well, if the judge took the
21 position there was no legal requirement to put this
22 on the record; there was a request.

23 MR. FINE: There was a request.

24 JUDGE RIVERA: Was there a legal
25 requirement to put it on the record?

1 MR. FINE: Generally speaking, I believe
2 that the law requires a judge to transcribe
3 proceedings in a - - - in a courtroom.

4 JUDGE PIGOTT: Yeah, but you've been around
5 long enough to know. I mean, if - - - if a juror
6 comes in and says, you know, my - - - my child just
7 got dismissed from school and I can't find him; I've
8 got to go, that because that wasn't put on the
9 record, that somehow the whole trial falls - - -
10 falls apart. I mean, it - - - there is a certain
11 amount of discretion, you know, within - - - within
12 propriety as to what was going on with a juror that
13 can then be summarized diplomatically or - - -

14 MR. FINE: Yeah.

15 JUDGE PIGOTT: - - - jurisprudentially on
16 the record, and that would be fine. And, and if - -
17 - and if there was an objection at that point, it
18 could be handled, right?

19 MR. FINE: Yes, this wasn't a juror, Your
20 Honor. This is a prosecution witness, the chief
21 witness - - -

22 JUDGE PIGOTT: Right, I know.

23 MR. FINE: - - - in the case. The only
24 witness linking the defendant to the commission of
25 the crime, who the prosecutor herself acknowledged

1 was unable to testify on two different occasions when
2 he's shown up in court.

3 CHIEF JUDGE LIPPMAN: How did it hurt you
4 that you didn't know exactly what - - - what happened
5 there? How did that hurt your - - - your client?

6 MR. FINE: How did that - - - how did that
7 hurt our client? First of all, it gave raise - - -
8 it gave rise to a partic - - - to a potential, at
9 least, for an issue regarding a determination of the
10 witness' competency to testify. Now this court held
11 in People against - - -

12 JUDGE FAHEY: So - - - so why isn't that
13 tested by cross-examination? Credibility is, so I
14 can - - - I suppose you could draw a distinction
15 between credibility and competence here. That would
16 be a fair disting - - - distinction to draw.

17 MR. FINE: Okay, two - - - two things,
18 Judge. Regarding cross-examination, if counsel had
19 been present at these conversations, he could have
20 seen the jurors - - - basically could have determined
21 the witness' credibility. He could have determined
22 by whether or not he was actually capable of taking
23 the stand, whether or not he was - - - seemed drunk,
24 seemed disorderly, seemed as though he couldn't - - -

25 JUDGE FAHEY: Well, as I - - - slow down.

1 As I understand your theory, this witness supposedly
2 had drug problems or he could be withdrawing from
3 drug problems. He came in and said he had migraines
4 and that the court excused him from testifying on
5 that day. As I understand your theory is, we should
6 have been able to test whether or not he was lying
7 when he said he had migraines, or examine - - - at
8 least, observe him and decide what you want to do
9 about that for his - - -

10 MR. FINE: That's the issue.

11 JUDGE FAHEY: - - - for a medical
12 condition.

13 MR. FINE: The judge could have - - - the
14 judge - - - with counsel's - - - with counsel's
15 assistance could have evaluated this witness and said
16 that the issue isn't whether or not he's on migraines
17 or whether he has drug problems. The issue is A, is
18 he competent to serve as a witness; is he competent
19 to take the stand and be sworn, and B, assuming that
20 he is, this is - - - this would be an invaluable
21 opportunity for the lawyer to look at this witness,
22 to see how he behaved when - - - in response to the
23 judge's question, and to see whether or not, A, he
24 really was a kind of a - - -

25 JUDGE FAHEY: Well, here's the thing.

1 Somebody comes in and says they're sick; now, you
2 know, I don't expect defense counsel to be able to
3 say, well, I - - - I'm going to be able to evaluate
4 the quality of his illness. I - - - I can't say that
5 I find that a particularly compelling argument.

6 Here's a little bit different - - - you've
7 got a point - - - in that this witness, I guess, was
8 a thirty-year habit of drugs, and - - - and so that
9 may go to his credibility under the circumstances of
10 what he's going to testify to.

11 But his particular condition on that day, I
12 just - - - I'm having a hard time seeing how it's
13 relevant, since the next day, you can ask him all
14 those questions about his medical history. Was he
15 having a problem? Any of those things could have
16 been brought up the next day when he testifies.

17 MR. FINE: Well, Your - - - Your Honor, a
18 witness' ability to testify on a particular day is
19 not something which can be looked at in a vacuum. If
20 he wasn't able to testify on two consecutive
21 occasions, the court may well have decided, with
22 counsel's assistance, that he might not be willing to
23 test - - - he might not be able to testify at all.
24 He may not have testimony of capacity.

25 The judge asked this witness during the - -

1 - during the questioning, according to the judge's
2 summary, this is some of the - - - these are some of
3 the things that the judge apparently thought were
4 necessary to ask. Are you on drugs? Are you
5 suffering from any alcohol problems? Are you on
6 crack?

7 JUDGE FAHEY: Um-hum.

8 MR. FINE: The witness had already admitted
9 under oath that he was a lifetime drug addict. And
10 the - - - and the prosecutor had already admitted
11 that on both occasions he was not able to testify.
12 It wasn't simply a migraine problem. But even if it
13 was, the prosecutor herself acknowledged, this is
14 somebody who should not even have been in this
15 courtroom.

16 CHIEF JUDGE LIPPMAN: But what about the
17 medical records aspect that - - - that you wanted?
18 How does that play into it?

19 MR. FINE: It would have been a - - - it
20 would have been a - - - very, very helpful to the
21 defense if, in fact, medical records had been turned
22 over to determine, A, whether or not this witness was
23 competent to testify, but also whether or not he had
24 the - - - had the capacity to make an observation
25 about - - - at the time of the crime as to what he

1 thought he saw. That - - - that's directly relevant
2 to a witness' competency is basically whether or not
3 his - - - his medical condition, his medical
4 circumstances - - -

5 CHIEF JUDGE LIPPMAN: Okay.

6 MR. FINE: - - - impair his ability to
7 testify properly.

8 CHIEF JUDGE LIPPMAN: Okay, counsel. Thank
9 you, appreciate it.

10 Counsel, you represent Cates?

11 MR. AUSTERN: Yes, good afternoon, Your
12 Honors. Bruce Austern for Appellant Cates, and one
13 minute for rebuttal, please.

14 CHIEF JUDGE LIPPMAN: Sure, you have it.
15 Go ahead.

16 MR. AUSTERN: There should be a good reason
17 to exclude counsel from any conversation with a
18 witness.

19 CHIEF JUDGE LIPPMAN: What - - - what about
20 the argument that nothing substantive was going on
21 there?

22 MR. AUSTERN: Your Honor, we know - - -

23 CHIEF JUDGE LIPPMAN: This is - - - or
24 Judge Pigott's argument before that - - - the
25 question about, well, doesn't the judge have some

1 discretion? What - - - when do you - - -

2 MR. AUSTERN: How - - -

3 CHIEF JUDGE LIPPMAN: When does the judge
4 not have discretion? Does he always - - - does the
5 lawyer always have to be in on a - - - on a
6 conversation of this kind?

7 MR. AUSTERN: What we are saying is the
8 judge - - - yes, the lawyer always - - - the
9 defendant has the right to counsel. He - - - the def
10 - - - defense counsel always has to be there, unless
11 - - -

12 CHIEF JUDGE LIPPMAN: The judge - - - the
13 judge can never go in camera?

14 MR. AUSTERN: Unless the - - - the rule is
15 never. I think the right to counsel, I think - - -

16 CHIEF JUDGE LIPPMAN: What's the rule?
17 What's the rule?

18 MR. AUSTERN: The rule is that counsel
19 should be at a discussion with a witness. That
20 counsel should certainly be at a substantive - - -

21 CHIEF JUDGE LIPPMAN: Because this is an
22 important witness?

23 MR. AUSTERN: Well, this is their key
24 witness in the case that testified - - -

25 JUDGE READ: Is that - - - is that the

1 critical factor or does the rule that you're talking
2 about pertain to every witness?

3 MR. AUSTERN: Well, I'm missing - - - to
4 any witness. I'm missing part - - - I didn't get to
5 the part of the rule, which is, if there is a reason
6 - - - certainly the sick juror - - - we were just
7 discussing the - - - there being a sick juror - - - a
8 sick juror comes - - - a sick witness, I'm sorry, or
9 a sick juror - - - comes into the room and has an
10 emergency, has some sort of exigency, that is a
11 reason.

12 Certainly if a - - - you know, the - - -
13 the witness is, you know, grabbing his chest and is
14 in trouble and needs medical attention, that is a
15 reason. Certainly less than that could be a reason.

16 JUDGE STEIN: Could it be any reason, or
17 does it have to be an extraordinary or exigent
18 reason?

19 MR. AUSTERN: It has to be a reason - - - a
20 good reason. In all of the case law, I mean, this
21 court has already ruled in - - - in Frost, in Ortega,
22 in our brief that this should be - - - that there
23 should be no ex parte conversations between the court
24 and a witness, that it just makes no sense that the -
25 - - without access by counsel to all - - -

1 CHIEF JUDGE LIPPMAN: Unless there's good
2 reason.

3 MR. AUSTERN: Unless there's a good reason,
4 and I think there's - - -

5 JUDGE READ: Illness - - - illness - - -

6 MR. AUSTERN: - - - and here - - -

7 JUDGE READ: - - - illness is not a good
8 reason.

9 MR. AUSTERN: Illness could be a good
10 reason, but that's not what the court said here.
11 This is a life-long, criminal drug addict, a very
12 troubled witness. This is the only witness to the
13 murder. This - - - the whole case rested on the fact
14 of whether this person was truthful, whether he was a
15 part of this murder, whether he was mistaken, whether
16 he was confused - - -

17 JUDGE ABDUS-SALAAM: Counsel, on the first
18 day that the witness failed to appear on time, and he
19 showed up and came in late, the jury had already been
20 excused and, I believe, the lawyers had left the
21 courtroom by then. So what was the judge supposed to
22 do at that point? Is it your position that the judge
23 should call the lawyers - - - hold the witness, and
24 call the lawyers back?

25 MR. AUSTERN: The jur - - - the judge could

1 make an effort. Here, the unique factor - - - we
2 seem to be speaking about this as if the judge did
3 think through whether there was a reason or not. The
4 judge here told counsel, after the fact, I don't have
5 to make a transcript of this, and I don't have to
6 have a reason. That is essentially what the court's
7 ruling was on page 1770 of - - - of the appendix. He
8 - - - he talks about the fact that there is - - - he
9 has the absolute right to speak with this witness
10 without counsel.

11 We have, I should say, the - - - the main -
12 - -

13 JUDGE ABDUS-SALAAM: So you would like us
14 to reaffirm Frost, is that - - -

15 MR. AUSTERN: I would like this court to
16 reaffirm Frost and to look to, also, People v.
17 Ortega, a 1991 case, if there's - - - there certainly
18 are many reasons; I think the biggest reason could be
19 the - - - in Frost, the witness has fear. The
20 witness needs some sort of protective custody. The
21 witness just says I don't want to talk with him in
22 the room. Certainly that's a reason.

23 But that's not what happened here. The
24 sickness, you know - - - it's certainly
25 understandable that sickness could be a reason that

1 counsel should be speaking to a witness. That's not
2 what happened here. What happened here was that a -
3 - - a substantive conversation about his exact
4 testimony the following week - - - the testimony that
5 the jury was certainly discussing: what was this guy
6 up to? Was he on drugs? Was he drunk at the time?
7 Was he on drugs or drunk at the time of the crime?

8 I - - - you know, I should add, too, that,
9 the - - - the main rea - - -

10 JUDGE RIVERA: Counsel, are you saying that
11 was the substance of the discussion with the judge?

12 MR. AUSTERN: No, I'm saying the jury was -
13 - - I'm sorry - - - was certainly deliberating about
14 that. This was a very troubled person. This was the
15 only witness to the crime. The jury - - -

16 CHIEF JUDGE LIPPMAN: So your view was that
17 the judge was being cavalier here in terms of - - -

18 MR. AUSTERN: This is the right to coun - -
19 -

20 CHIEF JUDGE LIPPMAN: - - - in rel - - - in
21 regard to the right to counsel?

22 MR. AUSTERN: Your Honor, this is the right
23 to counsel. The - - - the main reason the wrong
24 people are convicted in our system is a lack of
25 access to information, a lack of access to witnesses.

1 If there's no reason to not have counsel, this court,
2 as it has stated, you know, should - - - counsel
3 should always be there. And if there is a good
4 reason, if there is something unusual - - -

5 CHIEF JUDGE LIPPMAN: What could you have
6 done - - - what could you done with the information
7 that maybe you would have gained?

8 MR. AUSTERN: We could have done a world of
9 good, or we could have done nothing. You know, I
10 don't really know, but we might have seen something
11 in that witness. There are different roles in that
12 courtroom. The trial judge has a role. The trial
13 judge's role is to run that courtroom - - - assuming
14 this trial judge was doing, you know, its best, it
15 was not defense counsel. Single - - - you know,
16 single-minded counsel for the accused is the advocate
17 - - -

18 CHIEF JUDGE LIPPMAN: Okay, counsel.

19 JUDGE RIVERA: So - - -

20 CHIEF JUDGE LIPPMAN: I'm sorry.

21 JUDGE RIVERA: I'm sorry, so - - - so your
22 - - -

23 CHIEF JUDGE LIPPMAN: Judge Rivera?

24 JUDGE RIVERA: Yeah, so your point is you
25 wanted to be in the room because you might have

1 observed that he looked like he was strung out on
2 drugs as opposed to had a migraine?

3 MR. AUSTERN: He might have mentioned the
4 name of a witness. He might have - - -

5 JUDGE RIVERA: And so - - - and so - - -

6 MR. AUSTERN: - - - in his conversation, he
7 might have mentioned Joe, or - - -

8 JUDGE RIVERA: - - - and so you say we
9 can't rely on the judge's summary. We go back to the
10 - - -

11 MR. AUSTERN: We can rely on his summary as
12 - - -

13 JUDGE RIVERA: - - - the failure to have a
14 record.

15 MR. AUSTERN: We can rely on it being
16 accurate - - -

17 JUDGE RIVERA: Wouldn't the judge have put
18 that on the summary?

19 MR. AUSTERN: But it's not - - - the
20 judge's role is not to be an advocate. The judge is
21 not fully familiar with all of the material - - -

22 JUDGE RIVERA: Well, we talked about that,
23 but you - - - you've just said, well, he might have
24 mentioned this, he might have mentioned that. And
25 then - - -

1 MR. AUSTERN: Right, he might have - - -

2 JUDGE RIVERA: - - - so then you're putting
3 into contention the summary of the judge - - -

4 MR. AUSTERN: Right, and I'm saying - - -

5 JUDGE RIVERA: - - - which sounds to me
6 like you're getting back to without a record, we
7 can't really make a determination as to what went on
8 and what was said.

9 MR. AUSTERN: You can - - - without a
10 record, it's difficult to figure out. But beyond
11 that, even if there was a transcription, we - - -
12 counsel should have the right to - - - to access to
13 this information because counsel is the advocate.
14 Counsel is fully familiar - - -

15 CHIEF JUDGE LIPPMAN: Okay, counsel.

16 MR. AUSTERN: - - - with what the defense
17 says and - - -

18 CHIEF JUDGE LIPPMAN: Counsel, your basic
19 argument is the judge's summary is not nuanced enough
20 in terms of your right to see it and to draw your own
21 conclusions.

22 MR. AUSTERN: The judge is not defense
23 counsel, Your Honor.

24 CHIEF JUDGE LIPPMAN: Okay.

25 MR. AUSTERN: Thank you.

1 CHIEF JUDGE LIPPMAN: Let's hear from your
2 adversary and then you'll have rebuttal.

3 Counsel?

4 MS. SARVER: Good afternoon, Your Honors.
5 May it please the court, Melanie Sarver for the Bronx
6 District Attorney's Office.

7 CHIEF JUDGE LIPPMAN: Counsel, wouldn't the
8 judge had been better advised to allow counsel to be
9 in at that meeting?

10 MS. SARVER: Your Honor, Justice Carter
11 didn't explicitly put his reasons for doing what he
12 did on the record. However - - -

13 CHIEF JUDGE LIPPMAN: But I'm asking you,
14 wouldn't the judge have been better advised to have
15 let counsel be there and to draw their own
16 conclusions?

17 MS. SARVER: If his reason for not doing so
18 was to protect the private health information of Gary
19 Rose, then no, it would not - - -

20 JUDGE PIGOTT: I disagree. Let me ask you
21 a couple of questions. I - - - when - - - what was
22 going through my mind on this thing, number one, was
23 would they - - - would a judge do this for the
24 defense? And I'm - - - and I - - - and I lean toward
25 doubting it, but I don't necessarily mean that every

1 judge - - - you know, if a defense counsel, you know,
2 says my witness is supposed to be here, and he's not
3 here and I need time, won't say, we know what your
4 witness is going to say; sum up, although that has
5 happened.

6 But what's the DA doing calling the judge?
7 I - - - it strikes me that if there was a problem
8 with the witness, you should be calling defense
9 counsel and saying, I'm going to be over asking for
10 adjournment because I've got a witness who can't take
11 the stand this morning, and then the two of you would
12 go over and tell the judge. It - - - it strikes me
13 as troubling when a judge says, well, I talked to the
14 DA and I ordered the DA to bring this witness over.
15 Well, why are you talking to the DA?

16 MS. SARVER: Admittedly, this had been a
17 witness who was supposed to testify first on April
18 22nd and then on April 27th. This had been a trial
19 that was being elongated due to these unnecessary
20 delays - - -

21 JUDGE PIGOTT: Not an unusual circumstance
22 for either side to have witness trouble. I just - -
23 -

24 MS. SARVER: No.

25 JUDGE PIGOTT: - - - don't know why the

1 judge is getting involved.

2 MS. SARVER: The judge was getting involved
3 because he felt that this was a situation, presumably
4 - - - again, his reasons were not on the record - - -
5 where he wanted to use the majesty of the robe to
6 enforce the - - - the order to appear in court to
7 testify. He felt that this was a witness who, as
8 none of the parties contested at the time, had the
9 capacity to testify, and the issue was purely one of
10 scheduling. It was an administrative, ministerial
11 conversation to ensure - - -

12 CHIEF JUDGE LIPPMAN: Nothing could have
13 happened at that conversation that would have been
14 helpful in terms of the right to counsel and counsel
15 for the defendant hearing what was going on? You
16 think nothing would - - - would - - - would impact on
17 that right to counsel?

18 MS. SARVER: No, since it was just a
19 conversation about scheduling, it's highly un - - -

20 CHIEF JUDGE LIPPMAN: How do you know what
21 it's just a conversation about if you all get is a
22 summary that doesn't give any real context or any
23 fabric to what happened?

24 MS. SARVER: Because Justice Carter's
25 summary of the conversation was moments after he had

1 the conversation that he was - - -

2 JUDGE PIGOTT: Why can you call the judge?
3 I'm - - - I'm still stuck there. Why - - - why can -
4 - - why can you, as the People, call a judge, and
5 say, Judge, I know we're supposed to be in there
6 today; I've got a witness; he's a loser. I don't
7 know what I'm going to do with him; I'm going to need
8 some help here, Judge. You know, maybe you ought to
9 call him in and talk to him and see what you can do.
10 And maybe we're going to need an adjournment.

11 In the meantime, the defense is sitting
12 over there getting ready to - - - to cross-examine
13 this person. And then he walks in and says, well, I
14 - - - you know, the judge says, I talked to him, and
15 he's sick; he's not coming and we're done.

16 MS. SARVER: I think this was a situation
17 where the judge himself was injecting himself into
18 the - - - the procedure to ensure that the trial
19 moved along smoothly. On April 22nd, which was the
20 first time - - -

21 JUDGE PIGOTT: You would understand that
22 the defense may not want the trial to move along
23 smoothly. I mean, they have - - - they have a client
24 to represent as well, right?

25 MS. SARVER: Well, yes, but all parties

1 involved do benefit from a smooth and speedy trial to
2 - - -

3 JUDGE PIGOTT: Well - - -

4 MS. SARVER: - - - to ensure justice as
5 judiciously - - -

6 JUDGE PIGOTT: The def - - - the definition
7 of justice varies from one side of the room to the
8 other.

9 MS. SARVER: Yes, Your Honor.

10 CHIEF JUDGE LIPPMAN: But what about Judge
11 Pigott's question before. What - - - you think that
12 same kind of conversation would go on with the
13 defense?

14 MS. SARVER: Yes, Your Honor, because it
15 was simply to - - -

16 CHIEF JUDGE LIPPMAN: You think the judge
17 was totally - - - oh, you call me or you call me; I'm
18 going to - - - I'm going to make sure that things go
19 smoothly?

20 MS. SARVER: Yes, because the - - - the
21 record indicates - - -

22 CHIEF JUDGE LIPPMAN: Or would it be more
23 appropriate to get the lawyers in there, let everyone
24 have a fair chance to see what this is all about,
25 because maybe it would help them, and then maybe

1 that's why they have counsel, to - - - to represent
2 their client, to see all the nuances, and to see what
3 things might help them in their defense of their
4 client.

5 MS. SARVER: When Justice Carter commenced
6 the in camera examination, he believed that he was
7 dealing with an ill witness, which he was, and he - -
8 - admittedly it turned out to be a situation where it
9 was a migraine, although it's debilitating - - -

10 CHIEF JUDGE LIPPMAN: Does it matter
11 whether it's a migraine or a drug addict? Could it
12 matter to the defense whether it's a migraine or a
13 drug addict?

14 MS. SARVER: No, our position is that it's
15 - - -

16 CHIEF JUDGE LIPPMAN: It wouldn't matter at
17 all to the defense to know that?

18 MS. SARVER: No, our position is that it's
19 - - - it's a - - -

20 CHIEF JUDGE LIPPMAN: This is a purely
21 logistical issue, when this is the key witness in the
22 case - - -

23 MS. SARVER: It's - - -

24 CHIEF JUDGE LIPPMAN: - - - and it doesn't
25 matter whether the witness is a drug addict or has a

1 migraine headache?

2 MS. SARVER: No, because at the time of the
3 conversation, it was about his medical condition,
4 which was private.

5 CHIEF JUDGE LIPPMAN: But if his medical
6 condition is caused - - -

7 MS. SARVER: And then - - -

8 CHIEF JUDGE LIPPMAN: - - - because he's a
9 drug addict as opposed to if he has a migraine
10 headache that day.

11 MS. SARVER: It turned out that it was a
12 migraine headache, but even if it had been a drug
13 condition or a withdrawal situation - - -

14 CHIEF JUDGE LIPPMAN: No medical records,
15 no anything, we know it's a migraine?

16 MS. SARVER: He - - - the - - - the judge
17 had the same - - - the same kind or lack thereof of
18 medical training that the defense attorneys would
19 have had and in the best assessment of a layperson -
20 - -

21 CHIEF JUDGE LIPPMAN: So they're always
22 going to conclude the same thing from - - - from
23 listening to the witness? And would you say, well,
24 the judge is the one we rely on, so we don't care
25 what you think?

1 MS. SARVER: Of course, different - - -

2 CHIEF JUDGE LIPPMAN: I'm just trying to
3 get across to you that that - - - that I know what
4 the judge thinks. But do they have a right - - -
5 right to counsel is a very serious issue and a
6 violation of that violates the most fundamental
7 premise of our justice system, so why don't we let
8 the attorney for the defendant represent their client
9 in the best way they can?

10 MS. SARVER: Because there's nothing - - -

11 CHIEF JUDGE LIPPMAN: That's not a
12 rhetorical question. What's the answer?

13 MS. SARVER: There's nothing that the
14 defense attorneys would have done differently, had
15 they been a part of this in camera examination. They
16 had unfettered access to cross-examination, and in
17 fact, this was an incredibly forthcoming witness who
18 talked - - -

19 CHIEF JUDGE LIPPMAN: Maybe it would have
20 helped them in the cross, no, if they knew - - - if
21 they had been there?

22 MS. SARVER: It's hard - - -

23 CHIEF JUDGE LIPPMAN: Maybe they have a
24 right to impeach the witness - - -

25 MS. SARVER: It's hard - - -

1 CHIEF JUDGE LIPPMAN: - - - based on what
2 they learned from that conversation.

3 MS. SARVER: They - - - they had the
4 information that came across in that conversation.
5 They had the - - -

6 CHIEF JUDGE LIPPMAN: From what - - - from
7 how?

8 MS. SARVER: From Justice Carter's - - -

9 CHIEF JUDGE LIPPMAN: The summary?

10 MS. SARVER: From his summary. He - - - he
11 admitted he asked about - - - because the witness has
12 a history of drug abuse, he admitted that he did ask
13 about drugs, crack and alcohol. And this was a
14 witness who did not hesitate to talk about his
15 twenty-five year lack of employment history, his
16 history of heroin and cocaine, and the fact that he
17 was using - - - using cocaine at the time of the
18 crime.

19 JUDGE ABDUS-SALAAM: Counsel, are you - - -
20 are you saying that the defense counsel knew that
21 before the witness testified and that cross-
22 examination, essentially, of the witness on those
23 matters, when he did testify, was sufficient?

24 MS. SARVER: Yes, they had the information
25 that - - - that he had - - - he had made a statement

1 previously, soon after the arrest of the defendants,
2 and they had the information about the witness' drug
3 history, which is why - - - why they were so - - -
4 why the concern at trial, and they were able to use
5 that and Justice Carter's summary to thoroughly
6 cross-examine him. And in fact, when they asked him
7 why he was unable to testify on the 22nd and the
8 27th, they - - - they were able to ask all of these
9 questions, since they weren't - - -

10 JUDGE RIVERA: Why do - - - counsel, I
11 thought in part their argument is that they - - -
12 they think there's some value as defense counsel to
13 determine whether or not observing him and hearing
14 him actually say whatever it is he - - - he says to
15 the judge, when the judge is asking him about why - -
16 - why were you not able to be here; are - - - are you
17 so sick, whatever it is he's asking, that it's their
18 role, not the judge's, to make an assessment as to
19 how they might be able to use that information, that
20 they might be able to use information that suggests
21 to them, it's not a migraine.

22 MS. SARVER: Except that that - - -

23 JUDGE RIVERA: That that's not the same as
24 on cross, drawing out of a witness that they are a
25 long time drug user.

1 MS. SARVER: Except that to the extent that
2 this was not a material part of trial because it was
3 simply a scheduling conversation to ensure that Gary
4 Rose took the stand at some point to testify - - -

5 JUDGE PIGOTT: How - - -

6 JUDGE RIVERA: So how is that scheduling if
7 they're - - - if - - - if he goes around - - - if the
8 judge is asking him, are you on drugs, are you on
9 alcohol? It - - - that doesn't sound like scheduling
10 to me. What's the scheduling part?

11 MS. SARVER: In - - - in furtherance of - -
12 - of clarifying exactly what the - - - the situation
13 was, what - - -

14 JUDGE RIVERA: It sounds like he's trying
15 to confirm whether or not he's being lied to about
16 the migraine. And why shouldn't they be present
17 during that?

18 MS. SARVER: Because it - - - because in
19 preservation of this individual's medical privacy, it
20 would have chipped away at that privacy right to have
21 a court reporter or a defense attorney, and it was
22 unclear what was - - -

23 JUDGE RIVERA: Well, I don't know what's
24 the privacy, when the judge is summarizing, and - - -
25 either the summary is accurate and of sufficient

1 substance that it matters, or it's not.

2 MS. SARVER: It is - - -

3 JUDGE RIVERA: So where's the privacy?

4 MS. SARVER: The privacy is if something
5 had come forward in that conversation that was - - -
6 that did entitle the witness to a more thorough
7 privacy or under a more comprehensive right, then
8 that would have been something that needed to be
9 dealt with by Justice Carter, but in fact, the facts
10 were facts that he was able to relate.

11 CHIEF JUDGE LIPPMAN: Counselor, Judge
12 Pigott.

13 JUDGE PIGOTT: Assuming all of that - - -
14 I'm not - - - would it - - - would it have been
15 appropriate on examination of this witness to say,
16 isn't it true that five days ago, you and the judge
17 got together and had a conversation and none of the
18 lawyers were there? And what - - - what did the
19 judge say to you? And isn't it true that - - - that
20 the judge talked to you about this case and about
21 what was going on in this case? And isn't it true
22 that after that you - - - the judge excused you and
23 told you you didn't have to come to court anymore?
24 And isn't it also true that you met with him again
25 today and now you're prepared to testify after having

1 had two meetings with the judge when we weren't
2 there? Would that be appropriate cross-examination?
3 I don't know the answer. I'm only asking because it
4 just seems to me that that's the kind of the morass
5 you can get into with this type of stuff.

6 MS. SARVER: Perhaps counsel could have
7 asked those questions, but the answers would not have
8 been in the affirmative. In fact, Gary Rose answered
9 very accurately exactly what - - -

10 JUDGE PIGOTT: No, I didn't talk to the
11 judge. No, we didn't talk about my testimony. No,
12 we didn't talk about how I was feeling. No, he
13 didn't excuse me for the day.

14 MS. SARVER: He said I have a migraine.
15 Justice Carter relayed that he had a migraine. He
16 said, I had a migraine. They were both consistent
17 with the needing twelve hours of pitch black and
18 complete silence. They were both consistent in the
19 fact that - - - that the witness was not still using
20 drugs at the time of trial.

21 And in fact, had the defense attorneys been
22 present in the in camera examination, asked Gary Rose
23 if he was still using, and he - - - and Rose denied
24 it, they would have been bound by that answer - - -

25 CHIEF JUDGE LIPPMAN: Okay, counsel.

1 MS. SARVER: - - - outside the presence.

2 CHIEF JUDGE LIPPMAN: Thanks, counsel.

3 Appreciate it.

4 MS. SARVER: Thank you, Your Honors.

5 CHIEF JUDGE LIPPMAN: All right. Let's get
6 rebuttal.

7 Counselor?

8 JUDGE PIGOTT: Mr. Fine, is not unknown for
9 you to get - - - you to get to court and the court
10 says, Officer So-and-so called in sick today and so
11 he's not going to testify. Is that a violation of
12 what you're - - - of the rule that you're trying to
13 promote today?

14 MR. FINE: No, I don't believe so, Judge.
15 If the - - - if the judge - - - if there was some
16 issue regarding his - - - his health, if there was
17 actually a legitimate question about his health, if
18 he was not a chief witness in the case, if he was
19 just basically going to be saying those - - - laying
20 the groundwork to talk about the police
21 investigation, I don't think it would be a
22 particularly important stage of the proceedings.

23 Just one question that I'd like to - - -
24 which was what Judge Rivera asked my colleague, I'd
25 like to address. And that is, are we challenging the

1 summary? And you know, yes, we are challenging the
2 summary. The judge refused to have the record
3 transcribed of his conversation with the witness.
4 People v. - - -

5 JUDGE STEIN: What would a record have - -
6 - have - - - have made a difference? In other words,
7 if there's - - - if there's a cold record, can you -
8 - - you don't get an opportunity to observe the
9 witness, and you're talking about trying to assess
10 credibility. Obviously, a record would be better
11 than no record, but is that enough?

12 MR. FINE: It is not enough, I agree. I
13 would - - - the only thing that would have sufficed
14 here was to have counsel present. But when - - -
15 when you - - - when you take into account the fact
16 that the judge didn't even want transcription, just -
17 - -

18 CHIEF JUDGE LIPPMAN: You're saying a
19 record is better than no record, but not - - - but
20 still a violation of right to counsel?

21 MR. FINE: That's right. I'd just like to
22 point out, People v. Harrison, which is a case cited
23 in our brief, is a case in which the judge refused to
24 transcribe the voir dire. This court reversed the
25 conviction based on the refusal to transcribe,

1 because there had been something that it was like - -
2 - that acknowledged was to have happened during the -
3 - - during the voir dire; there was a legal
4 discussion, and a dispute arose, so the judge made a
5 ruling. And the court held that without a
6 transcript, with the court refusing to allow the
7 transcription, this was sufficient to justify
8 reversal.

9 CHIEF JUDGE LIPPMAN: Okay, counsel.

10 MR. FINE: And we believe the same result
11 is required here.

12 CHIEF JUDGE LIPPMAN: Thanks, counsel.

13 MR. FINE: Thank you.

14 CHIEF JUDGE LIPPMAN: Appreciate it.
15 Counsel, rebuttal?

16 MR. AUSTERN: Yes, Your Honor. Your
17 Honors, if you talk to defense counsel, if you look
18 at wrongful convictions in this state and elsewhere,
19 if you - - - if you watch Sherlock Holmes, it's the
20 littlest things that can change the case. And we
21 maintain - - -

22 JUDGE PIGOTT: Yeah, we can't - - - we
23 can't do that for everything. I mean, you - - -
24 you're absolutely right, of course. And there are -
25 - - there are many a slip twixt cup and the lip, but

1 I - - - the wi - - - I gave the example before if a
2 cop calls in sick, I mean, why isn't anybody getting
3 excited? He's calling in sick. He can't - - -
4 there's nothing you can do about it.

5 MR. AUSTERN: We are not asking for
6 anything unreasonable - - -

7 JUDGE PIGOTT: You want the Frost rule.

8 MR. AUSTERN: - - - regarding the decorum
9 of - - - what?

10 JUDGE PIGOTT: You want the Frost rule, I
11 assume?

12 MR. AUSTERN: I want the Frost rule, right.
13 We want the - - - counsel should be there. If
14 there's a reason, if it's unusual, if it's
15 exceptional, if the sickness - - - if someone calls
16 and doesn't have time - - - there's no time to get
17 counsel - - -

18 CHIEF JUDGE LIPPMAN: If he's going to meet
19 with him, you have to be there?

20 MR. AUSTERN: Yes. Unless there's - - -
21 unless there's a good reason. There's nothing un - -
22 - we are not asking for anything unreasonable. If
23 you read the judge - - - the trial judge - - - here,
24 he was saying I have this absolute right. We
25 maintain today that it's a bad idea for him to

1 diminish the right to counsel.

2 CHIEF JUDGE LIPPMAN: He's got to have a
3 good - - - no absolute right. He's got to have a
4 good reason. That's the rule.

5 MR. AUSTERN: He's got to have a good
6 reason.

7 CHIEF JUDGE LIPPMAN: Okay.

8 MR. AUSTERN: And any other rule will
9 diminish the right to counsel - - -

10 CHIEF JUDGE LIPPMAN: Okay, counselor.

11 MR. AUSTERN: - - - and will permit a - - -
12 a lesser right.

13 CHIEF JUDGE LIPPMAN: Thank you, counsel.

14 MR. AUSTERN: Thank you.

15 CHIEF JUDGE LIPPMAN: Appreciate it. Thank
16 you all.

17 (Court is adjourned)

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

I, Karen Schiffmiller, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Benny Garay, No. 25, and People v. Lee Carr, No. 26, and People v. Walter Cates, Sr., No. 27, was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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