

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

COURT OF APPEALS

STATE OF NEW YORK

PEOPLE,

Respondent,

(Papers Sealed)

-against-

No. 10

URSELINA KING,

Appellant.

20 Eagle Street
Albany, New York 12207
January 07, 2016

Before:

ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY

Appearances:

KENDRA L. HUTCHINSON, ESQ.
APPELLATE ADVOCATES
Attorneys for Appellant
111 John Street, 9th Floor
New York, NY 10038

SOLOMON NEUBORT, ADA
KINGS COUNTY DISTRICT ATTORNEY'S OFFICE
Attorneys for Respondent
350 Jay Street
Brooklyn, NY 11201

Sara Winkeljohn
Official Court Transcriber

1 JUDGE PIGOTT: People v. King.

2 Ms. Hutchinson, welcome back.

3 MS. HUTCHINSON: Good afternoon; thank you,
4 Your Honor. May it please the court, my name is
5 Kendra Hutchinson, and I'm here representing the
6 defendant-appellant in this matter, Mrs. Urselina
7 King. There's three reasons why this case should be
8 reversed, so I'm going to get right to it
9 immediately.

10 JUDGE PIGOTT: Would you like some - - -
11 would you like some rebuttal time though?

12 MS. HUTCHINSON: Oh, pardon me, Your Honor.
13 Yes, two minutes please.

14 JUDGE PIGOTT: Two minutes, okay.

15 MS. HUTCHINSON: Yes. Starting right with
16 the first issue, in this case, a particular
17 proceeding had commenced concerning a particular
18 defendant, my client, Ms. King. The panel had been
19 sworn, the proceeding had been named to the panel,
20 the parties were introduced.

21 JUDGE RIVERA: So was this voir dire or
22 pre-voir dire?

23 MS. HUTCHINSON: Your Honor, this is pre-
24 voir dire. However, this proceeding had - - -

25 JUDGE RIVERA: It's pre-voir dire if - - -

1 if they were sworn, they were upstairs - - - they - -
2 - they were in the courtroom.

3 MS. HUTCHINSON: They were in the
4 courtroom. They had been sworn.

5 JUDGE RIVERA: They were sworn.

6 MS. HUTCHINSON: They were sworn. The
7 proceeding had been named to the parties. My client
8 had been introduced. Ms. King had a right at this
9 time to the supervision of a judge.

10 JUDGE RIVERA: Okay, but - - - so I just
11 want to clarify. So why - - - why is it still pre-
12 voir dire?

13 MS. HUTCHINSON: Why during pre-voir dire
14 does she?

15 JUDGE RIVERA: Why is that pre-voir dire?
16 What - - - what's - - - at what point is it no longer
17 pre-voir dire? Let me put it that way.

18 MS. HUTCHINSON: I see, Your Honor. Twelve
19 - - - or jurors had not been called and put into the
20 box at that point.

21 JUDGE RIVERA: Okay.

22 MS. HUTCHINSON: That is correct. My
23 adversary points that out. So jurors had not been
24 called - - -

25 JUDGE RIVERA: Um-hum.

1 MS. HUTCHINSON: - - - and sworn to answer
2 questions in the more formal voir dire part of the -
3 - - you know, the Article 270 portion of this jury
4 selection. So this is what the court considered in
5 People v. Velasco.

6 JUDGE PIGOTT: One of the questions that
7 occurred to me - - - do we know how many people went
8 up to talk to the clerk?

9 MS. HUTCHINSON: No.

10 JUDGE PIGOTT: So I mean, it could have
11 been two.

12 MS. HUTCHINSON: Could have two, and it
13 could have been twenty-two, Your Honor. Yes, that's
14 precisely why the supervision of a judge is
15 necessary.

16 JUDGE PIGOTT: No, and he was there, right?
17 He was in the courtroom.

18 MS. HUTCHINSON: He was in the courtroom.

19 JUDGE PIGOTT: He said talk to the clerk,
20 and - - - and we don't know that maybe - - -
21 obviously, I think we can assume that somebody did,
22 otherwise you wouldn't be here. But when I was
23 looking at it, I - - - you know, if - - - if two
24 people go up, I mean, what's the loss? You - - - you
25 know, and if - - -

1 MS. HUTCHINSON: Well, Your Honor, the
2 issue here is not about whether or not a juror was -
3 - - this is - - - the issue here is not a challenge
4 issue or, you know, an incorrectly granted hardship
5 issue. The issue here is that the judge allowed the
6 jurors to decide that for themselves.

7 JUDGE STEIN: How is this distinguished
8 from Velasco? You started to mention Velasco.

9 MS. HUTCHINSON: Yeah, Velasco does - - -

10 JUDGE STEIN: I thought Velasco sort of
11 tipped the other way.

12 MS. HUTCHINSON: Velasco's actually very
13 helpful for us, Your Honor. Now, while on - - - on
14 the one hand that does hold that a defendant does not
15 have a personal right to be present during that
16 hardship discussion - - -

17 JUDGE STEIN: Well, doesn't that indicate
18 sort of the - - - the nature of the proceeding at
19 that point?

20 MS. HUTCHINSON: Well, the court cites very
21 favorably the fact that defendant was represented by
22 counsel at that time.

23 JUDGE RIVERA: Well, but the court says
24 this is a matter for the judge.

25 MS. HUTCHINSON: Yes.

1 JUDGE RIVERA: And it's clear in Velasco
2 that the court is deciding or this court has decided
3 that this is the judge's responsibility and the
4 defendant need not be present.

5 MS. HUTCHINSON: Exactly, Your Honor.
6 You've - - - you've said it exactly. It's a
7 determination that a prospective juror was
8 disqualified before voir dire was a matter for the
9 court.

10 JUDGE FAHEY: But the actual determination
11 here was made by the judge who just was - - - as the
12 way I understand it was a nonexistent examination by
13 the judge. The actual dismissal is by the judge.

14 MS. HUTCHINSON: Well, the judge said that
15 he was excusing - - -

16 JUDGE FAHEY: All right, so - - - so - - -

17 MS. HUTCHINSON: - - - excusing - - - I
18 mean - - -

19 JUDGE FAHEY: - - - the actual dismissal
20 was by the judge. The clerk didn't sign a form and
21 say you're dismissed, you don't have to go in. No,
22 the judge dismissed the person.

23 MS. HUTCHINSON: We don't know that, Your
24 Honor. The juror - - - in - - - in essence here what
25 happened was a self-dismissal by the juror. The

1 juror walked out into the hallway, and subject to a
2 conversation with a clerk, got to either walk away or
3 come back in.

4 JUDGE ABDUS-SALAAM: Is there any - - - any
5 requirement, counsel, that the judge actually
6 question a juror who says they have a hardship?

7 MS. HUTCHINSON: You know, that's - - -
8 that's not this case here, because none of that
9 happened. But I think - - - you know, I think the
10 Appellate Division cases - - -

11 JUDGE ABDUS-SALAAM: Isn't that what you're
12 asking us to say, because the judge said here's - - -
13 here are the criteria for hardship, and if you have
14 that problem, raise your hand, and then you line up
15 in the center and go out and talk to the clerk.

16 MS. HUTCHINSON: Well - - - well, Your
17 Honor, here the - - - the criteria for hardship was
18 not exactly what the criteria for hardship would be.
19 "The amount of time may be a hardship because of
20 family obligations or business commitments. I'm not
21 talking about a hardship to your boss; I'm talking
22 about a hardship to yourself." That's hardly setting
23 forth what a hardship would be some - - - such that,
24 you know, it would qual - - -

25 JUDGE PIGOTT: Didn't you object then? I

1 mean - - -

2 MS. HUTCHINSON: No. No, Your Honor, and -
3 - -

4 JUDGE PIGOTT: Well, let me finish. I
5 mean, I've picked many juries and this is the stuff
6 that goes on and somebody says I - - - you know, I
7 think if you're arrested, you're guilty. You know
8 they want to get off the case, you know, and I'm not
9 about to argue with a wit - - - with a - - - with a
10 juror if he's a moron and decides that he's - - -
11 he's going to leave. And - - - and it seems to me
12 that when some of these people, you know, do what
13 they do, if they don't want to be there - - - and
14 some say they got vacations and some say they got,
15 you know, doctors' appointments and they get - - -
16 they get thrown off. I - - - there's not much I can
17 do about that.

18 MS. HUTCHINSON: True. And I can
19 understand what you're saying, Your Honor, but isn't
20 this - - - imagine this; imagine - - - imagine that
21 the judge had said, you can get off this - - - this
22 case if you have a hardship. I'm going to go into
23 the other room while the clerk decides if you have a
24 hardship, talk to the clerk. Isn't that Toliver?
25 Isn't that exactly what happened in Toliver which is

1 that the judge absented himself - - -

2 JUDGE STEIN: Well, that was during the
3 voir dire proceedings.

4 MS. HUTCHINSON: Um-hum.

5 JUDGE STEIN: To me that's a significant
6 difference.

7 JUDGE ABDUS-SALAAM: Yeah.

8 JUDGE FAHEY: Yeah, that seemed to be a
9 major - - -

10 JUDGE PIGOTT: That's - - - yeah, that's
11 when you're picking.

12 MS. HUTCHINSON: But - - - but in Toliver
13 the court cited the fact that it - - - it didn't
14 matter that nothing happened during this, that no
15 objectionable conduct happened, and at a least at
16 this point, at least one juror was kicked off - - -
17 or walked off of this jury just because they did not
18 want to - - -

19 JUDGE RIVERA: Well, why - - - why don't
20 you respond to this; why - - - why shouldn't it
21 matter that - - - because you're saying this is pre-
22 voir dire, that's the position you've taken. Why
23 shouldn't it matter - - -

24 MS. HUTCHINSON: Because this - - -

25 JUDGE RIVERA: - - - that it's pre-voir

1 dire versus voir dire?

2 MS. HUTCHINSON: Because the - - - the
3 jurors had walked in, they'd been sworn to this
4 proceeding, because the judge had begun to preside
5 over this trial, and because in People Velas - - - v.
6 Velasco this court held that pre-voir dire
7 disqualification is a matter for the court. That's
8 why. So at that point, the court had the
9 responsibility to control the courtroom, and it could
10 not - - -

11 JUDGE RIVERA: You're saying the
12 determination - - - let me get back to I think a
13 point Judge Abdus-Salaam made. The - - - the
14 determination of whether or not a hardship exists, is
15 that an action that requires discretion on the part
16 of the judge? There's something the judge is going
17 to assess and make a determination on?

18 MS. HUTCHINSON: Yes, Your Honor, exactly.
19 The Appellate Divisions routinely review a judge's
20 exercise of discretion as to hardship.

21 JUDGE STEIN: But - - - but that's not
22 solely the function of the judge. There are
23 certainly circumstances under which clerks,
24 commissioners of jurors can - - - can make those
25 decisions without the - - - the prospective juror

1 ever even seeing a judge. So the question is is at
2 what point does the line get crossed between when
3 that's permissible and when it's not.

4 MS. HUTCHINSON: And - - - and that's a
5 great question, Your - - -

6 JUDGE RIVERA: Isn't the line when you walk
7 upstairs and you're in the courtroom?

8 MS. HUTCHINSON: I think the line is when
9 you're in the courtroom, Your Honor, because you
10 cannot have two concurrent authorities to dismiss the
11 judge (sic) at that point. When they - - - when
12 those jurors walk in and are sworn and the judge
13 announces hi, I'm Justice Goldberg, this is People v.
14 Urselina King, at that point that court is in charge
15 of my client's trial. She has a right to the
16 supervision of a judge over everything that happens.

17 JUDGE FAHEY: Course - - -

18 JUDGE STEIN: And then the next question is
19 is does it have to be a preserved objection.

20 MS. HUTCHINSON: It does not have to be;
21 not under Toliver. And - - - and that's the issue
22 here, right. I mean, you know this - - - I - - - I
23 think we can all agree this is error, but the
24 question is what the error here is. And - - - and
25 we're arguing that the error is not - - -

1 JUDGE ABDUS-SALAAM: I'm not sure we can
2 all agree it's error.

3 MS. HUTCHINSON: Oh.

4 JUDGE STEIN: Yeah.

5 MS. HUTCHINSON: Okay. Well, assuming that
6 it's error, Your Honor, no, this does not need to be.
7 I mean, even in People v. Bayes - - - a more recent
8 abdication delegation case from this court - - - in
9 that case, the defense attorney participated in the -
10 - - the prosecutor participated in the judge's
11 instructions of the jury. This court found that the
12 participation did not bar - - - did not waive it
13 because it is un-waivable.

14 JUDGE PIGOTT: I don't what you to miss
15 your other two points - - -

16 MS. HUTCHINSON: Thank you, Your Honor.
17 Moving on to the second point about the third-party
18 culpability, the only issue in this case was whether
19 Ms. King was one of the assailants. She had a
20 witness, a defense witness that she wished to call to
21 testify about hearing - - - about hearing two men who
22 came up to her who threatened to get the complainant
23 based on a drug-theft-related motive. This witness
24 was precluded entirely and this was error for a
25 number of reasons.

1 First, it was admissible under Ms. King's
2 right to present a defense.

3 JUDGE PIGOTT: No matter what?

4 MS. HUTCHINSON: Subject to - - - subject
5 to this - - - the rules set forth - - - this court
6 set forth in People v. Robinson, and set forth in
7 Chambers and Holmes: sufficient indicia of
8 reliability, the witness must be unavailable, and it
9 may not be collateral. So - - -

10 JUDGE RIVERA: Well, isn't that
11 speculative? I mean, what really connects the - - -
12 the two men who say - - - allegedly say these things
13 to LaShay (ph.) to this actual assault?

14 MS. HUTCHINSON: And that's really the crux
15 of the case here, Your Honor, as to all of the
16 reasons that it should have been admitted. Was it
17 speculative? It boils down to was it probative and
18 was it speculative and/or was it sufficiently
19 reliable. And absolutely, and any - - - any doubts
20 in this regard should have been resolved to the favor
21 of the defense. This is - - -

22 JUDGE PIGOTT: Why? Why is that? I can
23 think of things that my clients used to say to me
24 that were just absolutely absurd, and - - - and, you
25 know, I suppose I could make the same argument. I'm

1 not suggesting this is absolutely absurd, but you got
2 a woman who knew her assailant; I mean, they - - -
3 they knew each other intimately. This is the lady
4 that beat me up. And she wants to say, that's just
5 not true, and I've got a guy who knows a guy who
6 said, you know, that there was drugs involved and
7 that's why.

8 MS. HUTCHINSON: Well, Your Honor, in - - -
9 in your - - - this court's most recent case, Negrón,
10 for example, there is a very good example of the - - -
11 - the types of facts that can - - - that are extra of
12 the statement that can corroborate it; there in
13 People v. Negrón, the - - - the person bore the
14 resemblance to the perpetrator, lived in the same
15 buil - - - building, was arrested in close proximity,
16 and - - -

17 JUDGE RIVERA: But here, aren't a couple of
18 things going on? One is they - - - these two men
19 seem to say that they know Rodríguez (ph.), and yet
20 she doesn't claim to recognize any of these other
21 people other than the defendant. That's number one.
22 Number two, isn't the - - - the chrono - - - the time
23 frame off when they say it's ten days before and
24 they're alleging that man is unavailable because he's
25 in jail, and that's not the time when he's in jail?

1 Doesn't that go to the reliability?

2 MS. HUTCHINSON: Counsel made two proffers
3 of - - - of proof as to this witness, Your Honor. In
4 the first one, he said about ten days. The second
5 one there was - - - he just said days around the time
6 of. And, I mean, to the extent that - - - you know,
7 that if he was mistaken or - - - or misspeaking about
8 the days, this should have been resolved in the favor
9 of the jury. Now, the - - - this - - - and this
10 should have gone before the jury and it would have
11 been easily discounted if this were a problem. I
12 mean, it's like putting on an alibi that doesn't
13 work. So when the People claim prejudice about this,
14 about how they wouldn't have been able to discount
15 it, that rings rather hollow because if they're - - -
16 you know, if this ten-day thing were so fatal, then
17 it wouldn't have been - - -

18 JUDGE RIVERA: You're red light went on.

19 MS. HUTCHINSON: - - - a problem.

20 JUDGE RIVERA: Can you just quickly men - -

21 -

22 MS. HUTCHINSON: Yes.

23 JUDGE RIVERA: - - - talk about the

24 summation - - -

25 MS. HUTCHINSON: Absolutely.

1 JUDGE RIVERA: - - - and the ineffective
2 assistance of counsel?

3 JUDGE FAHEY: I just want to - - - before
4 you get to that - - -

5 MS. HUTCHINSON: Sure.

6 JUDGE FAHEY: - - - can we talk about
7 third-party culpability? Just - - - I - - - I just
8 don't want to leave it for a second, because it's the
9 issue of the day. It seems that Primo and Schulz are
10 two cases that offer a continuum in our analysis of
11 that issue. And if - - - if we take Primo at the
12 floor, it's hard - - - which is - - - that's where
13 there's a ballistics report that comes into it.

14 MS. HUTCHINSON: Um-hum.

15 JUDGE FAHEY: How - - - how does this even
16 come close to that?

17 MS. HUTCHINSON: Well, I think Negrón is a
18 - - - is a more - - - is a closer case, right. In
19 that case - - - and that's a recent case of this
20 court and the court said that it would have been
21 permissible, right, and it should - - - and that - -
22 - and that it would have been permissible. Here, we
23 have a specific drug-theft-related motive and we know
24 that Tony Man (ph.), the central figure in this case,
25 had a federal narcotics conviction, had been in for a

1 drug dealer. The - - - the - - -

2 JUDGE STEIN: But the drug-theft-related
3 motive didn't have anything to do with the victim,
4 did it?

5 MS. HUTCHINSON: Well, the - - - the third
6 parties said that Tony Man was in jail, which was
7 true, around the time. They said that they knew the
8 complainant and that she worked at a particular bar.
9 And they said that the complainant had set them up
10 for this drug theft and that they were going to get
11 her. So yes, arguably the - - - what - - - what
12 LaShay would have - - -

13 JUDGE RIVERA: Well, get - - - straighten
14 it out.

15 MS. HUTCHINSON: And straighten it out with
16 her.

17 JUDGE RIVERA: Which doesn't necessarily
18 mean going to beat her up.

19 MS. HUTCHINSON: And it meshed with some
20 very puzzling aspects of this case. Thomas, who had
21 no motive to lie, was adamant about the complainant
22 saying "they" - - - not naming my client - - - "got
23 her", even when he queried. And the drug and money
24 motive fit with this ransacking and stealing in the
25 apartment.

1 JUDGE PIGOTT: Mean - - - meaningful
2 representation.

3 MS. HUTCHINSON: And meaningful
4 representation, Your Honor.

5 JUDGE RIVERA: The red light is off. Can
6 you just - - - thirty seconds on the summation?

7 MS. HUTCHINSON: Absolutely. Yes. This
8 was a highly objectionable, biased summation. You
9 know, it - - - it was very difficult for me to
10 research this case because it is very rare to see
11 comments that are so sexist and gender motivated.
12 The People concede that these comments - - - that,
13 you know, this was not the only objectionable part.

14 JUDGE RIVERA: There's a high standard to
15 show ineffective assistance.

16 MS. HUTCHINSON: Yes, it is.

17 JUDGE RIVERA: Prosecutorial misconduct is
18 a different story right now - - -

19 MS. HUTCHINSON: Yes. Well, Wright - - -

20 JUDGE RIVERA: - - - than ineffective
21 assistance.

22 MS. HUTCHINSON: - - - People v. Wright,
23 decided earlier this summer, which Your Honor wrote,
24 I think is very, very instructive. You cited
25 favorably that it was defense counsel's serial

1 failure. That is exactly what we have here. We have
2 two objections, numerous improprieties.

3 JUDGE STEIN: But in - - - in People v.
4 Wright, as I recall, the - - - the misstatement went
5 directly to - - - I mean, it was contrary to the
6 proof that was given and went directly to a core
7 issue.

8 MS. HUTCHINSON: Yes. Well, I mean, I
9 think the - - - the bias - - - there's just no room
10 for bias, particularly when it's - - - when it's
11 targeted right at the defense.

12 JUDGE STEIN: Well, that may be, but
13 couldn't - - - couldn't it have been a strategy here?
14 I mean, if it was so outrageous, couldn't defense
15 counsel have thought to himself, gee, I think this is
16 going to really turn off the jury here.

17 MS. HUTCHINSON: I - - - I - - -

18 JUDGE STEIN: I'm just going to let it - -
19 - I'm just going to let it go.

20 MS. HUTCHINSON: I think that's a very
21 perverse logic here, Your Honor, because it meshed so
22 well with what the trial - - - what the prosecutor
23 could have done, which is this is a jealousy-induced
24 motive. It meshed so well with that and the
25 prosecutor could have commented on that favorably.

1 So I think that that is not a reasonably strategy.

2 JUDGE PIGOTT: Well, he could have said
3 jilted lover, instead of, you know, making it a - - -
4 you know, what appears to be an antifeminist thing.

5 MS. HUTCHINSON: Exactly. I mean the
6 gender was irrelevant really. I mean, this was just
7 about the romantic paramour aspect.

8 JUDGE PIGOTT: But because - - - but
9 because it's irrelevant, does it rise to the level
10 that you're - - - you're arguing that in - - -

11 MS. HUTCHINSON: Yes, because it meshes so
12 carefully with the prosecution's - - -

13 JUDGE RIVERA: But no, no, no. But - - -
14 but I thought your point was, when the prosecutor
15 argues that this is the kind of a crime a woman would
16 commit.

17 MS. HUTCHINSON: Um-hum, yes.

18 JUDGE RIVERA: That he's specifically
19 targeting that this relationship and this woman - - -

20 MS. HUTCHINSON: Yes.

21 JUDGE RIVERA: - - - as a scorned harpy if
22 you will.

23 MS. HUTCHINSON: Exactly. And he - - - he
24 interwove it with the facts of the case. This crime
25 is a woman.

1 JUDGE ABDUS-SALAAM: What - - - what was -
2 - -

3 MS. HUTCHINSON: That's why she did it in
4 the complainant's home.

5 JUDGE ABDUS-SALAAM: Was that a response to
6 something that defense counsel said that there were
7 two men? Wasn't the theory - - - the defense's
8 theory that these were two men who assaulted this
9 complainant?

10 MS. HUTCHINSON: The defense's theory was
11 that it was just two people off the street. It was
12 not based on their gender. I mean, it could have
13 been anybody. It was just that there were two people
14 who were looking for the drugs that Tony Man had who
15 came in here.

16 JUDGE RIVERA: Yeah, but even if it was,
17 what was the evidence that - - - that shows some
18 gender difference in the commission of this crime?

19 MS. HUTCHINSON: Exactly. Anybody - - -

20 JUDGE PIGOTT: No.

21 MS. HUTCHINSON: - - - can slash someone's
22 face.

23 JUDGE PIGOTT: No, no. I mean it - - - it
24 was clearly - - - I mean - - -

25 MS. HUTCHINSON: Yes.

1 JUDGE PIGOTT: - - - they were saying that
2 the victim is a woman - - -

3 MS. HUTCHINSON: Yep.

4 JUDGE PIGOTT: - - - and the person that
5 was beating her up was the former paramour of the
6 guy.

7 MS. HUTCHINSON: Right. But I mean, that -
8 - - that doesn't - - -

9 JUDGE FAHEY: The way I understand it is
10 what they're saying is only a woman could commit this
11 kind of crime.

12 MS. HUTCHINSON: Yes.

13 JUDGE FAHEY: I mean that's what's
14 objectionable.

15 JUDGE PIGOTT: Right.

16 JUDGE FAHEY: The question is - - - clearly
17 it is. It's a boorish behavior and objectionable.

18 MS. HUTCHINSON: Yes.

19 JUDGE FAHEY: But leaving that aside, does
20 it rise to the level of ineffective assistance - - -

21 MS. HUTCHINSON: Yes.

22 JUDGE FAHEY: - - - not to object.

23 MS. HUTCHINSON: It does.

24 JUDGE FAHEY: I - - - we understand that.

25 MS. HUTCHINSON: Serial failure in this

1 instance, Your Honor - - -

2 JUDGE FAHEY: Right.

3 MS. HUTCHINSON: - - - is a clear-cut
4 error, not one failure, and counsel allowed an
5 avalanche of improprieties. Yes, it was. There was
6 no reason for this.

7 JUDGE PIGOTT: Thank you, Ms. Hutchinson.

8 MS. HUTCHINSON: Thank you.

9 JUDGE PIGOTT: Mr. Neubort, welcome.

10 MR. NEUBORT: May it please the court - - -
11 thank you, Your Honor. May it please the court, as
12 Judge said, my name is Solomon Neubort. I represent
13 the People. With relation to the jury selection
14 issue, that this was pre-voir dire is pertinent for
15 two different reasons. First of all, under 270.15,
16 formal jury selection begins and the judge takes sole
17 charge with relation to discharging of jurors at that
18 point. Prior to that - - -

19 JUDGE PIGOTT: Are you saying this is okay?

20 MR. NEUBORT: I am saying that this was
21 okay, yes. Because first of all, the - - - not only
22 did the judge have authority until - - - at that
23 point to dismiss, if one of the people in the
24 courtroom had raised his hand or her hand and said
25 can I go downstairs to the clerk for a moment, and

1 the judge said sure, and went to the clerk and said
2 can I be excused or can I have a delay, can I have a
3 postponement, that would have been fine, because
4 270.15 of the CPL hadn't commenced yet. That part of
5 the proceeding hadn't commenced. It was - - -

6 JUDGE RIVERA: How is that? I mean, how is
7 that? The judge had sworn them in, had introduced
8 the parties, had introduced the lawyers, described
9 what the case - - - how was that?

10 MR. NEUBORT: Well, Your Honor, I think
11 that - - - that's not - - -

12 JUDGE RIVERA: I just read 270. To me it
13 looks - - -

14 MR. NEUBORT: No, I think - - -

15 JUDGE RIVERA: - - - exactly like the
16 language in that statute.

17 MR. NEUBORT: No, Your Honor. I think - -
18 - I think that - - - that you're slightly mistaken
19 with regard to the facts. The - - - the judge did
20 swear them to tell the truth - - -

21 JUDGE RIVERA: Um-hum.

22 MR. NEUBORT: - - - but didn't put them
23 into the box.

24 JUDGE RIVERA: True.

25 MR. NEUBORT: And more - - - more

1 importantly, while he did introduce the parties, he
2 didn't say anything about the case. And the statute
3 says you have to talk about the case, and there was
4 nothing talked about the specifics of the case. The
5 jurors did not know what this case was about.

6 JUDGE PIGOTT: I - - - I - - -

7 MR. NEUBORT: Then - - -

8 JUDGE PIGOTT: - - - get your argu - - -
9 you know, when you get your jury notice, you know,
10 you can call up this commissioner and you can get out
11 and nobody knows it. I mean, the commissioner - - -

12 MR. NEUBORT: Correct.

13 JUDGE PIGOTT: - - - just says fine, you're
14 going on vaca - - - you know, then you're out of jury
15 duty or - - - or something like that. This is
16 similar to that in the sense that these are the
17 people who always handed their papers in late in high
18 school and they get to - - - they get to the
19 courthouse. They - - - now they're sworn in and now
20 they want to get out and they're going to use the
21 same excuses.

22 But if you're the - - - if you're the
23 defense counsel and you see all the young people
24 leaving, for example, or you see a particular juror
25 or two that you think is going to fit your profile,

1 you might want to have the judge challenge them a
2 little bit more because every - - - nobody - - - you
3 know, they call it jury duty, but then people treat
4 it that way as - - -

5 MR. NEUBORT: And, Your Honor, it's
6 precisely that. And - - - and I would - - - one - -
7 - I would point out that this is not the first time
8 that this has been presented this - - - this
9 procedure that Judge Goldberg engaged in was
10 challenged in the Appellate Division. There are - -
11 - my understanding is at least ten, and I think there
12 are three more. And not one time, not a single time
13 to my knowledge, did the trial attorney object
14 because after all, attorneys want on the jury - - -

15 JUDGE RIVERA: Is this a widespread
16 practice or is this unique to one or two judges?

17 MR. NEUBORT: As far as I know, it's unique
18 to Judge Goldberg. I haven't seen it raised with any
19 - - - and Judge Goldberg has just retired, so I
20 believe that it's now come to an end.

21 JUDGE STEIN: So are you saying that - - -
22 that if - - - if the - - - an objection were made,
23 then we - - - we would look at this issue and - - -
24 and make a determination, but because no objection
25 was made, it's not properly before us? Is that your

1 - - - is that your argument?

2 MR. NEUBORT: There - - - there were two
3 different issues before this court, whether it's an -
4 - - whether it's an error at all and whether if it is
5 it's a mode of proceedings because it's unpreserved.
6 The point being that defense attorneys are not upset
7 about this. They don't object to this procedure
8 because after all, attorneys want to have jurors who
9 want to be there and especially so, I would point
10 out, with criminal defense attorneys. Criminal
11 defense attorneys want to have at least one juror
12 who's patient - - -

13 JUDGE RIVERA: I understand. But it's the
14 - - -

15 MR. NEUBORT: - - - and can - - -

16 JUDGE RIVERA: Excuse me. I understand but
17 it's the defendant's right to a jury, and that's the
18 argument of your adversary. It's the right to the
19 jury.

20 MR. NEUBORT: But - - -

21 JUDGE RIVERA: Right. And the question
22 then becomes whether or not this is an integral part
23 of the right to a jury - - - Constitutionally
24 protected right to a jury trial.

25 MR. NEUBORT: Had three min - - - had three

1 minutes before, they walked into the courtroom, that
2 same prospective juror would have walked over to the
3 county clerk and said can I get a postponement - - -

4 JUDGE RIVERA: But that's not what
5 happened. They're upstairs in front of the judge.
6 The judge has them sworn in by the clerk.

7 MR. NEUBORT: Correct, but there was
8 nothing known - - - it's not like where they were put
9 into the jury box, they were told about the - - -
10 about the case, and now - - - the parties are now
11 looking at and studying the demeanor of individuals
12 jurors in the box. This is - - -

13 JUDGE RIVERA: Does - - - does the judge
14 have to make a discretionary determination about
15 hardship?

16 MR. NEUBORT: No, Your Honor, because - - -

17 JUDGE RIVERA: So - - - so anyone could say
18 I have a hardship, and the judge doesn't have to
19 assess it?

20 MR. NEUBORT: The under - - -

21 JUDGE RIVERA: Is that your position?

22 MR. NEUBORT: Under the Judiciary Law - - -
23 it just happened to be that Judge Goldberg spoke
24 about hardship, but under Judiciary Law Section 500,
25 at that point, prior to formal voir dire commencing,

1 the judge could say look, if anyone doesn't want to
2 serve on this jury for any purpose, if you want a
3 postponement, up to six months - - -

4 JUDGE RIVERA: But it's not a postponement.
5 It's not a postponement. It's about the
6 qualifications. It's about whether or not you have a
7 hardship excuse.

8 MR. NEUBORT: No, no, but the - - -

9 JUDGE RIVERA: It's not about an
10 adjournment.

11 MR. NEUBORT: No, no. But the - - - but
12 the point was they weren't - - - they weren't being
13 excused anyway. They were being sent back to the
14 jury room.

15 JUDGE RIVERA: They were being excused from
16 that particular trial - - -

17 MR. NEUBORT: That particular trial.

18 JUDGE RIVERA: - - - and that's a hardship
19 excuse.

20 MR. NEUBORT: But - - - but the Judiciary
21 Law talks about the judge at the trial granting the
22 very same rights that the commissioner of jurors has.
23 And so it cannot be the case - - -

24 JUDGE RIVERA: And - - - I'm sorry. Are
25 you saying that the current law and - - - and the

1 regs do not set out a basis to make a determination
2 of hardship, that that is a standardless assessment
3 or no assessment at all?

4 MR. NEUBORT: No, no. There - - -

5 JUDGE RIVERA: Is that your position?

6 MR. NEUBORT: There are standards for - - -
7 for hardship. But the point being - - - was, it just
8 happened to be that Judge Goldberg spoke about
9 hardship, but he might very well have said - - -

10 JUDGE RIVERA: Isn't that the reason he
11 said? If you have a hardship, raise your hand, that
12 - - - that's why these people walk out of the room;
13 is that not right?

14 MR. NEUBORT: Well, it's - - - it's true
15 because he didn't want to have wholesale people
16 walking out of the courtroom. But the point is - - -
17 the question before this court is, was this something
18 so essential, was this proceeding so essential that
19 we should say that not only is error it's mode of
20 proceedings error. It's - - -

21 JUDGE PIGOTT: Well, what - - - I - - - I
22 think what you're saying, when - - - when they're
23 sworn, they're not sworn in as a juror in People v.
24 King. They're sworn in for the purpose of voir dire
25 - - -

1 MR. NEUBORT: Correct.

2 JUDGE PIGOTT: - - - and - - - and they got
3 to tell the truth, as you said.

4 MR. NEUBORT: That's - - - that's
5 absolutely correct, Your Honor.

6 JUDGE PIGOTT: And - - -

7 JUDGE RIVERA: No, you're saying it's pre-
8 voir dire.

9 MR. NEUBORT: Well, I - - - I - - -

10 JUDGE RIVERA: Not voir dire.

11 JUDGE PIGOTT: I was almost done. Wait,
12 wait, wait - - -

13 MR. NEUBORT: I - - - what I meant is
14 they're not sworn jurors - - -

15 JUDGE PIGOTT: Well, what I'm - - -

16 MR. NEUBORT: - - - and they're not - - -

17 JUDGE PIGOTT: I was halfway through my
18 sentence.

19 MR. NEUBORT: I'm sorry.

20 JUDGE PIGOTT: So they - - - they do that
21 and then - - - and then you try to call out, you
22 know, the people that for one reason or another - - -
23 vacations, doctors' appointments, and everything else
24 - - - say they can't sit on a five or six-day trial
25 or whatever. Then you start picking the jury itself

1 out of the array, and the array is forty and you got
2 to end up with twelve, that's what you deal with,
3 right?

4 MR. NEUBORT: Correct.

5 JUDGE PIGOTT: Okay.

6 JUDGE ABDUS-SALAAM: By the way, counsel,
7 maybe Judge Goldberg was the only one in Kings County
8 who did that, but there are judges in Manhattan who
9 do that, and there are two cases in the First
10 Department assessing this very same - - -

11 MR. NEUBORT: I'm sorry. I was unaware and
12 - - -

13 JUDGE ABDUS-SALAAM: Yeah.

14 MR. NEUBORT: But if there were no - - -

15 JUDGE ABDUS-SALAAM: Casanova - - -

16 MR. NEUBORT: I'm sorry.

17 JUDGE ABDUS-SALAAM: Casanova is one of
18 those cases as well as People v. Gonzalez.

19 MR. NEUBORT: I - - - I think those were
20 slightly different situations. They're similar but
21 not exactly the same procedure.

22 JUDGE RIVERA: What about Roblee, Third
23 Department?

24 MR. NEUBORT: I'm sorry?

25 JUDGE RIVERA: What about Roblee from the

1 Third Department?

2 MR. NEUBORT: I'm sorry. I - - - I - - -

3 JUDGE ABDUS-SALAAM: The point is - - - the
4 point is that - - -

5 MR. NEUBORT: Again, I don't think it was
6 exactly the same.

7 JUDGE ABDUS-SALAAM: The point is that the
8 judge doesn't speak to every individual who says I
9 want to get off this case. And - - - and that's what
10 I'm trying to understand.

11 MR. NEUBORT: Right.

12 JUDGE ABDUS-SALAAM: What is - - - what is
13 the rule that you're looking for us - - - not you
14 particularly, but defendant here - - - looking for us
15 to say - - -

16 MR. NEUBORT: I - - - I think under Toliver
17 where - - - where you're talking about a challenge, a
18 peremptory challenge, or you're talking about a
19 challenge for cause, then certainly you need to have
20 the judge to preside and to make the decision. But
21 here we're not talking about - - - we're just talking
22 about a ministerial decision that's shared moments
23 before by the - - - by the clerk of the court or - -
24 - or by the commissioner of jurors, and so the fact
25 that it just happens to be by circumstance that this

1 occurs two minutes later and it suddenly becomes not
2 only judicially reviewable but a mode of proceedings
3 error if there's - - - if the - - - the exact
4 procedure isn't followed.

5 JUDGE PIGOTT: You want to be heard on the
6 other - - -

7 JUDGE RIVERA: So if they don't get in the
8 box - - - if - - - if one of these people walked out
9 and - - - and the clerk told them go downstairs, if -
10 - - if they had been in the box at that point - - -
11 not yet sworn to be a juror but they've done this
12 preliminary swearing in, they now get in the box and
13 they say, I have a hardship.

14 MR. NEUBORT: That would be - - -

15 JUDGE RIVERA: You can say okay, you can
16 leave?

17 MR. NEUBORT: Well, it would certainly be a
18 closer question because then the - - - the formal
19 proceedings under 270.15 has commenced, but I still
20 don't think - - -

21 JUDGE RIVERA: And do those attorneys get a
22 chance to ask any questions?

23 MR. NEUBORT: No, I don't think so.

24 JUDGE RIVERA: That would - - - no.

25 MR. NEUBORT: I think it's really - - - I

1 think - - - I think that my adversary is - - - is
2 citing Velasco for the wrong - - - wrong - - -

3 JUDGE PIGOTT: I think, actually, if
4 they're in the box and they're about to be
5 questioned, I mean, you can stip them off. I mean,
6 sometime - - - sometimes you get in trouble because
7 you're stipulating too many people off. But I - - -
8 I would think by that point, you know, the - - - the
9 lawyers ought to be heard, because you're looking at
10 the array, you know, of what you've got to deal with.

11 MR. NEUBORT: It's not a challenge for
12 cause and it's not - - - and it doesn't relate to the
13 peremptory challenge. If - - - if the - - - if the
14 judge says look, I think that this is a true
15 hardship, I'm not sure that there's really anything
16 that the - - -

17 JUDGE RIVERA: Is the judge responsible for
18 determining whether or not a juror is fit to sit on
19 the - - - on the case?

20 MR. NEUBORT: Absolutely. But this is not
21 really about - - -

22 JUDGE RIVERA: Why isn't this about
23 fitness?

24 MR. NEUBORT: Well, this is not about - - -
25 sure, in a very broad sense, it is about fitness, but

1 we're not talking about sworn jurors. The fitness
2 really is when you're talking about a sworn juror and
3 that's when you're talking about - - - or you're
4 talking about by peremptory challenges or challenges
5 for cause. We're not talking about that.

6 JUDGE RIVERA: Could the judge have told
7 all women to walk out and go back downstairs?

8 MR. NEUBORT: If - - - if the judge - - -

9 JUDGE RIVERA: Before - - - before putting
10 anybody in the box?

11 MR. NEUBORT: Under - - - under 270.10,
12 that would be objectionable and - - - and the defense
13 attorney would have to object. And in fact, the - -
14 - the statute provides that if you don't like the way
15 the - - - the pool, the general pool, is being
16 selected - - -

17 JUDGE RIVERA: So does that apply to the
18 group that came up or the group that gets called by
19 the judge?

20 MR. NEUBORT: No, no. The - - - the group
21 that's - - - in fact, the community at large. In
22 fact, if you say that the voter pool is being
23 selected from - - -

24 JUDGE RIVERA: You're right.

25 MR. NEUBORT: - - - too narrow a pool, you

1 can put it in writing and - - - and object.

2 JUDGE RIVERA: Yes.

3 MR. NEUBORT: But anytime you don't do that
4 - - - the statute expressly provides that if you
5 don't do that, it's waived. And so here if - - - to
6 the sense it's similar - - -

7 JUDGE RIVERA: So if the judge had - - -
8 had told all the women to leave and no counsel had
9 objected, Ms. King's appellate counsel now has no
10 claim?

11 MR. NEUBORT: Well, that's a very different
12 claim because there you're talking about - - - about
13 - - - you're starting to get into bias and - - - and
14 gender discrimination. Here, we're just talking
15 about undifferentiated people's - - -

16 JUDGE PIGOTT: Did you want to be heard on
17 the other - - - I don't mean to interrupt you but - -
18 -

19 MR. NEUBORT: - - - and not a protected
20 class.

21 JUDGE PIGOTT: - - - did you want to be
22 heard on the other two issues that Ms. Hutchinson
23 raised?

24 MR. NEUBORT: Yes, I do, Your Honor. If I
25 can - - -

1 JUDGE PIGOTT: Your time is getting close.

2 MR. NEUBORT: With respect to the two - - -
3 the third-party culpability, very simply, this was
4 hearsay and it didn't qualify under any exception to
5 the hearsay rule. It wasn't - - - didn't qualify as
6 a statement against penal interest for several
7 different reasons. First of all, in order to qualify
8 as a statement against penal interest, it actually
9 has to be against your penal interest. These were
10 two - - - ostensibly two unidentified men saying
11 something to civilians about some amorphous
12 possession of some unnamed drug at - - - in some
13 unnamed location at some unnamed time, and then about
14 some - - -

15 JUDGE PIGOTT: Well, wait. LaShay - - -
16 LaShay was the one who was going to testify, right?

17 MR. NEUBORT: Right, LaShay was going to
18 test - - -

19 JUDGE PIGOTT: So the question then is - -
20 - is his hearsay against his penal interest, right?
21 It - - - it has no - - -

22 MR. NEUBORT: No, no, not LaShay's penal
23 interest. LaShay was going to testify as to the
24 statements against penal interests that the two
25 unidentified men made to her.

1 JUDGE PIGOTT: Oh, okay.

2 MR. NEUBORT: So LaShay says that these two
3 un - - - people who I don't know and couldn't
4 identify and couldn't tell the police who they are, I
5 have no idea who they are, said that they had - - -
6 at some point had something that would not be
7 prosecutable. So there was - - - they didn't say
8 anything, these two men, even according to LaShay,
9 that was against their penal interest.

10 Not only that, in order to be a statement
11 against the penal interest, even if somehow you can
12 craft some crime that they did possibly confess to,
13 that they'd have to know, they'd have to be aware,
14 they'd have to believe that it's against their penal
15 interests. Make them - - -

16 JUDGE RIVERA: What - - - what would have
17 removed this from - - - because, right, the judge
18 says it's just too speculative. What would have made
19 this not speculative? What - - -

20 MR. NEUBORT: Well, if they had said - - -

21 JUDGE RIVERA: What would the proffer have
22 to have been to allow this to come in?

23 MR. NEUBORT: Suppose they had said, you
24 know, oh, Rodriguez, we're going ~~right~~-there right
25 now. We're going to go to her apartment and we're

1 going to bash her head in and we're going to stab
2 here. And within an hour, there they - - -

3 JUDGE RIVERA: Case law required that level
4 of detail?

5 MR. NEUBORT: No, it doesn't re - - - well,
6 it's - - - you - - - let - - - let's see - - - it has
7 nothing. You have to have - - - in order to - - - in
8 order - - - a statement against penal interest, you
9 also have to have something outside of the statement
10 that connects the two and gives you some confidence
11 that these statements are - - - are reliable. There
12 was nothing connecting them.

13 JUDGE STEIN: So on the continuum that - -
14 - that Judge Fahey referred to, where - - - where is
15 this on that continuum and why?

16 MR. NEUBORT: This was ten days earlier.
17 They didn't say what they were going to do, when they
18 were going to do it, where they were going to do it,
19 or what - - - what they even meant when they said
20 we're going to get - - - get her and straighten this
21 out.

22 JUDGE RIVERA: Is there anything - - - is
23 there anything independent of the - - - of what
24 LaShay says they said that would connect them?

25 MR. NEUBORT: There is absolutely nothing.

1 In fact, the only witness to the crime, the only
2 evidence about what happened in this crime, is again,
3 the victim who says it wasn't them, it was the
4 defendant. That's not a question of mistaken
5 identity. I am absolutely certainly know - - -

6 JUDGE RIVERA: Did she ever identify the
7 male - - -

8 MR. NEUBORT: I'm sorry?

9 JUDGE RIVERA: Did she ever identify the
10 male with the mask?

11 MR. NEUBORT: No, no. She didn't identify
12 the male with the mask. But you can't put the - - -

13 JUDGE RIVERA: That could have been one of
14 those two men, correct?

15 JUDGE PIGOTT: Well, the point is the - - -
16 the judge made a judgment and what is the standard
17 that he either violated or did not violate in terms
18 of determining whether or not this third-party
19 evidence can come in?

20 MR. NEUBORT: So - - - so first of all, in
21 order to bring in third-party evidence, it first has
22 to be competent evidence, so it has to pass the - - -
23 the hearsay test. So if it doesn't pass the hearsay
24 test, you don't even get to whether or not - - - the
25 Primo test. Now, even if assuming that somehow this

1 was admissible evidence, it has - - - and it's
2 competent evidence, not all competent evidence has to
3 be admitted at trial.

4 JUDGE FAHEY: I don't agree with you. I
5 don't think - - - I don't think the evidence has to
6 be admissible but there has to be sufficient proof of
7 corrob - - - of corroboration to make it admissible,
8 the fourth prong on that test. But I don't think it
9 has to be admissible. The court could find that it
10 comes in and then make a determination as to
11 admissibility later.

12 MR. NEUBORT: The - - -

13 JUDGE FAHEY: So that's not exactly - - - I
14 disagree with that.

15 MR. NEUBORT: I'm - - - I'm sorry, Your
16 Honor. That - - - that is correct that the judge
17 could make a determination, but here it was hearsay
18 that wasn't particularly reliable on any other
19 ground.

20 JUDGE FAHEY: Happen to agree with you
21 about that in this particular instance but I - - - I
22 didn't want to let that pass.

23 MR. NEUBORT: I'm sorry, Your Honor.

24 JUDGE PIGOTT: Why don't you move on to the
25 - - -

1 MR. NEUBORT: But under Primo - - -

2 JUDGE PIGOTT: - - - okay.

3 MR. NEUBORT: Just if I could speak for two
4 minutes about the Primo, it has to be, you take the
5 competent evidence, you weigh it against the
6 probative - - - the risk of - - - of the prejudice to
7 the - - - to the People, the risk of delay, and the
8 confusion that it would cause, and in this case, it
9 would cause all three.

10 It would be prejudice - - - prejudicial for
11 the People for two different reasons. First it would
12 be prejudicial because these two people were not
13 identified. There was no way for them - - - for the
14 People to investigate this. And more importantly
15 this is not like under Chambers v. Mississippi or
16 under - - - as this court just had in Soto where you
17 have a signed confession. It's - - -

18 JUDGE PIGOTT: You want to hear - - - you
19 want - - - you want to get onto your summation or do
20 you just want to waive that part and concentrate on
21 Primo?

22 MR. NEUBORT: I would like - - -

23 JUDGE PIGOTT: I'll give you a choice.

24 MR. NEUBORT: - - - twenty seconds for the
25 summation if I can just finish off with the Primo for

1 fifteen seconds and then twenty seconds for that.

2 JUDGE PIGOTT: Okay.

3 MR. NEUBORT: Okay.

4 JUDGE PIGOTT: Yep.

5 MR. NEUBORT: So there was the risk of - -
6 - of prejudice to the People in that they - - - they
7 can't even cross-examine anyone about - - - about
8 this. What did you mean about that - - - that there
9 was a set up or that there was a drug sale or maybe
10 you - - - did you have an alibi to these two people?
11 Maybe they could - - - could show that they weren't
12 even at - - - they were in California on that date.

13 With respect to the prejudi - - - the
14 confusion, the jury was going to hear about the ten
15 days, the five days and the court offered the defense
16 attorney to bring in LaShay and make an in camera
17 statement.

18 JUDGE PIGOTT: Do you want to be heard on
19 the summation?

20 MR. NEUBORT: Yes, Your Honor.

21 JUDGE PIGOTT: Okay.

22 MR. NEUBORT: With respect to the
23 summation, I - - - I would just echo what this court
24 said in Taylor. In fact, if possible, I'll just
25 quote one sentence. They said with respect to a - -

1 - this court said with respect to a - - - a remark -
2 - - with respect to prosecutorially - - -
3 prosecutorial misconduct on summation where they said
4 offensive remarks, this court said that it wasn't
5 ineffective for not objecting, because, quote, "To
6 the extent the trial prosecutor's acts were as
7 offensive as defendant now claims" - - - and in
8 parenthesis, this court said, "and some were" - - -
9 "defense counsel might have reasonably calculated
10 that if allowed sufficient latitude he, the
11 prosecutor, would alienate the jury." And so this
12 court has already concluded that it's a - - -

13 JUDGE PIGOTT: Well, let me ask you this;
14 do - - - do you think that's what applies here?

15 MR. NEUBORT: Sure.

16 JUDGE PIGOTT: All right, so you - - - you
17 agree that this was pretty offensive?

18 MR. NEUBORT: Well, I - - - I think that
19 this was - - - that this was offensive, but this is
20 not a pros - - - but this is not a prosecut - - - but
21 this is not a prosecutorial misconduct claim. This
22 is a claim about ineffective assistance of counsel.

23 JUDGE PIGOTT: I understand. But what I -
24 - - the reason I'm asking is we seem to keep getting
25 these. And in - - - and I used to say when I was on

1 the Appellate Division, if, you know, appellate
2 counsel comes up and says yeah, they really messed
3 up, and then if it gets reversed the - - - the trial
4 judge - - - or the trial lawyer says well, you messed
5 up the appeal.

6 MR. NEUBORT: I - - -

7 JUDGE PIGOTT: And - - - and the word never
8 seems to get down to some of these trial lawyers that
9 they can't do this kind of stuff.

10 MR. NEUBORT: I - - - I believe the
11 prosecutor's no longer in our office and is no longer
12 a prosecutor.

13 JUDGE PIGOTT: But that's not - - - that's
14 not - - - that's fine. I mean, don't care about him.
15 What I'm trying to say is, you know, does it ever get
16 through to - - - and this is an unfair question, but
17 will somebody make sure that this doesn't happen if
18 you agree?

19 MR. NEUBORT: We - - - yes, we have ongoing
20 training for summation, and we try. Some - - -
21 hopefully we're more successful than we're not.

22 JUDGE PIGOTT: You want - - - you want
23 another case to rely on?

24 MR. NEUBORT: But be that as it may - - -

25 JUDGE RIVERA: Counsel, let me just ask you

1 - - - let me just ask you - - - I understand your
2 point about - - - or - - - or the point about it
3 being offensive, but I thought the - - - your
4 adversary was also arguing that beyond offensiveness,
5 it's not grounded in any facts or any evidence
6 presented, right, this gender difference of the way
7 crimes get committed, and that in addition to sort of
8 this stereotyping and that part of it, the offensive
9 language in it, it's at the heart of it that you're
10 not relying on the evidence at the trial and - - -
11 and that's where I thought your adversary was also
12 arguing, that this is - - - this is like Ashwal.
13 This is like these other cases.

14 MR. NEUBORT: But, Your Honor, if - - - if
15 I may just respond.

16 JUDGE RIVERA: Yeah.

17 MR. NEUBORT: The heart - - - the heart - -
18 - as Judge Pigott pointed out, the heart of this
19 argument might very well have been switched with one
20 word.

21 JUDGE RIVERA: Um-hum.

22 MR. NEUBORT: And in fact, if defense
23 counsel had objected and the objection was sustained,
24 undoubtedly that's what the prosecutor would have
25 said. Okay, let's not talk about a woman but let's

1 talk about a scorned lover, and this is the type of
2 crime, the deeply personal type of crime, that wasn't
3 the type of - - - of - - - the injuries weren't the
4 type that you would expect from a push-in burglary.
5 These are the type of crimes that you expect from a
6 deeply jealous spurned lover.

7 JUDGE PIGOTT: We have to let you - - -

8 MR. NEUBORT: And so had they left that - -
9 - I'm sorry.

10 JUDGE PIGOTT: We have to let you go at
11 that point, because we still have to hear from Ms.
12 Hutchinson.

13 MR. NEUBORT: Thank you.

14 MS. HUTCHINSON: Very briefly, Your Honor.
15 I want to start with the - - - the ineffectiveness
16 point. Judge, you were asking who's going to guard -
17 - - who's going to guard against this, why does it
18 keep happening. Well, counsel didn't guard against
19 this. The People have conceded it's offensive. The
20 Appellate Division majority and def - - - and dissent
21 found it offensive. Bias has zero place in
22 summation. I mean, this is - - - this is abhorrent.
23 This was an abhorrent summation, actually. And it
24 fits all the criteria that this court has applied in
25 ineffectiveness claims, which it has recently been

1 looking with an eye towards summation, serial failure
2 of defense counsel.

3 As Judge Rivera was pointing out,
4 misstating and sort of becoming an unsworn witness as
5 to crime patterns, et cetera, that was not evidence
6 as trial. This was clear-cut. Everyone's conceded
7 it. And there could be no possibly strategy for
8 allowing your client to - - - to have this like ad
9 hominem gendered baseless kind of offense.

10 JUDGE PIGOTT: Yeah, the argument, though,
11 on the other side is that, as Mr. Neubort is saying,
12 is that it's not - - - you're arguing ineffective
13 assistance of counsel.

14 MS. HUTCHINSON: Yes.

15 JUDGE PIGOTT: You're not arguing
16 prosecutorial misconduct. And in the context of this
17 where the point was trying to be made is that it was
18 - - - it was this jilted lover concept - - - bad
19 language, I mean, it - - - it was just, you know, too
20 thick. But it was - - - but we're still not talking
21 about prosecutorial misconduct, we're talking about
22 ineffective assistance of counsel, right?

23 MS. HUTCHINSON: Yes.

24 JUDGE STEIN: And one of the things I look
25 at in ineffective assistance is if - - - if you have

1 an otherwise meaningful representation throughout the
2 trial and here, there are no allegations of
3 ineffective assistance except in the summation. You
4 have to - - - I question - - - I look at very
5 carefully, you know, whether this could have been a
6 strategic decision or not. So that's - - -

7 MS. HUTCHINSON: Well, you know, the sexist
8 comments were not the only part of this, Your Honor.
9 It was also allowing to impugn the - - - the alibi
10 witnesses in a very sarcastic manner as well, you
11 know, allowing - - -

12 JUDGE STEIN: Doesn't it say something if
13 it's otherwise, you know, a very good representation
14 and then - - - you know, and then there - - - there
15 may be - - - and - - - and if I recall correctly,
16 there were objections made during summation.

17 MS. HUTCHINSON: There was one objection
18 made that counsel made on his own, and the other one
19 he just bandwagoned after the court, and the court
20 actually just poo-pooed him.

21 JUDGE PIGOTT: Yeah.

22 MS. HUTCHINSON: Shall I sit down or shall
23 I address any other rebuttal arguments?

24 JUDGE PIGOTT: Take a shot.

25 MS. HUTCHINSON: Pardon? Take a shot.

1 JUDGE PIGOTT: Go ahead.

2 MS. HUTCHINSON: Okay. Thanks. At the end
3 of the day, the - - - the big problem with the - - -
4 the third-party culpability issue is that the - - -
5 the People in their arguments and the judge below are
6 failing to apply the defense favorable standard that
7 this court has recently reaffirmed. We're focusing
8 on this sort of quarterbacking. You know, we - - -
9 do we believe LaShay? Do we think that what she was
10 saying was right or not? But, I mean, this court
11 said it in Settles before. "If the proponent of the
12 statement is able to establish this possibility of
13 trustworthiness, it is the function of the jury alone
14 to determine whether the declaration is sufficient to
15 create it." This should have gone before the jury
16 under the lenient defense standard that this court
17 has explained.

18 And as far as point one, the juror
19 selection issue, I mean, the People are poo-pooing
20 this as - - -

21 JUDGE RIVERA: What - - - what about
22 Greenfield though? Don't you have to have some
23 connection? And that's the problem. It's so
24 speculative - - -

25 MS. HUTCHINSON: Well - - -

1 JUDGE RIVERA: - - - that you don't get
2 that train of facts that gets you connected to the
3 crime?

4 MS. HUTCHINSON: And that's what the People
5 argue. But you - - - you know, Your Honors are
6 looking for this line, where does it - - - where does
7 it get allowed in. And the People proffered - - - my
8 adversary proffered an example of if they had come up
9 and said I know Rodriguez, I'm going to bash her head
10 in, and then an hour later it happened. Well, that's
11 - - - everything happened except for the hour later
12 here. They said we know her, she works at Lorri's
13 (ph.), she's a barmaid, she set you up.

14 JUDGE PIGOTT: Just have to - - - yeah.

15 MS. HUTCHINSON: We're going to get her.

16 JUDGE PIGOTT: The - - - the thing you look
17 at is, I mean, you got a judge that's making a
18 determination. It wasn't like he ignored it. You
19 know, I mean, he - - - he weighed whatever, and your
20 argument is that however he weighed it, he didn't
21 weigh it within the con - - - confines of what our
22 precedent sets.

23 MS. HUTCHINSON: Exactly, Your Honor, and
24 he should have applied the - - - the defense
25 favorable standard at least for the declaration

1 against interest.

2 And as for - - - for the first point, the -
3 - - the People have brought up this issue of sort of
4 gamesmanship by - - - by defense counsel or allowing
5 this to happen; that's not at issue in this case,
6 Your Honor. That really isn't. This court has made
7 it clear; this is a clear application of a rule
8 that's already - - - already set forth.
9 Disqualification before voir dire is a matter for the
10 court.

11 And - - - and in Toliver, regardless of
12 defense counsel's protest, this court held that it
13 deprived her of the right to a jury trial.

14 JUDGE RIVERA: Is it determination of the
15 fitness of these prospective jurors? Is that - - -

16 JUDGE PIGOTT: No, it's - - - well, I'm
17 sorry. Go ahead.

18 JUDGE RIVERA: Go ahead.

19 JUDGE PIGOTT: It's people that don't want
20 to sit for any number of reasons - - -

21 MS. HUTCHINSON: Yeah, and - - -

22 JUDGE PIGOTT: - - - who may be otherwise
23 qualified.

24 JUDGE RIVERA: It's not about statements -
25 - -

1 MS. HUTCHINSON: This is a bad - - - this
2 is a bad policy to follow.

3 JUDGE PIGOTT: But you're not saying that
4 he's letting unqualified jurors get away without
5 making - - - trying to requalify them. You're saying
6 they're probably qualified and they're just either
7 lazy or they don't want to - - -

8 MS. HUTCHINSON: Yes, this - - -

9 JUDGE PIGOTT: - - - or they're afraid or
10 they have - - - you know, and that there ought to be
11 some inquiry of that before they just get off.

12 MS. HUTCHINSON: In People v. Michael, this
13 court recognized how nobody likes to sit on juries,
14 but it's - - - it's a responsibility and we cannot
15 allow a juror to just say, you know what; I think I
16 have a hardship, I'm not going to sit on this trial.
17 And - - - and for that reason, conviction should be
18 reversed.

19 JUDGE PIGOTT: Thank you, Ms. Hutchinson.

20 MS. HUTCHINSON: Thank you.

21 (Court is adjourned)
22
23
24
25

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

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

I, Sara Winkeljohn, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Urselina King, No. 10 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



Signature: _____

Agency Name: eScribers

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

Date: January 11, 2016