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COURT OF APPEALS
STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

NO. 12

ALBA (DARLING),

Appellant.

20 Eagle Street
Albany, New York
January 8, 2026

Before:

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

Appearances:

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Official Court Transcriber

1 CHIEF JUDGE WILSON: Next case on the calendar is
2 People v. Alba.

3 MR. ZENO: Good afternoon, Your Honors. My name
4 is Mark Zeno, and I represent appellant, Darling Alba. May
5 I reserve three minutes for rebuttal, please?

6 CHIEF JUDGE WILSON: Yes.

7 MR. ZENO: May it please the court. Mr. Alba did
8 not waive his right to attend all prospective juror sidebar
9 conferences.

10 JUDGE RIVERA: Before - - - before you get to
11 that, can you just quickly address what, if any, impact in
12 your view the deportation has on this appeal?

13 MR. ZENO: Right. So the deportation - - - my
14 client's deportation gives this court the discretion to
15 dismiss the appeal. This court should not exercise that
16 discretion here. Despite notice and an opportunity,
17 respondent did not request dismissal of this appeal until
18 last Friday. And when they did, they provided no
19 explanation for why they had delayed in doing so despite
20 notice when the brief was filed.

21 JUDGE SINGAS: I mean, regardless, why shouldn't
22 we use our - - - our discretion in this case. I mean, he
23 cannot obey the mandate of the court. If we were to
24 reverse, then what?

25 MR. ZENO: Right. So Mr. Alba raises two issues.

1 One is a dismissal issue. So if the court agrees with us
2 on the dismissal issue, the case would be dismissed. So
3 there would be no opportunity or reason for him to appear
4 again.

5 JUDGE CANNATARO: What happens if a remand is
6 required in this case?

7 MR. ZENO: Right. If - - - if there is a
8 reversal on if - - - or if the court agrees with us on the
9 Antommarchi issue, but not the dismissal issue, it would
10 require a new trial. If the People wanted to proceed to a
11 new trial, I would say that my client has already served
12 five years in prison for this offense.

13 JUDGE CANNATARO: A dismissal based on the
14 deportation would, I think, in our - - - in our custom and
15 practice would be a non - - - would be without prejudice,
16 right?

17 MR. ZENO: Without prejudice, but essentially - -
18 -

19 JUDGE CANNATARO: So we could pick this up again
20 when he returns.

21 MR. ZENO: Could pick this up again, but however
22 many years that would be down the line. My client would
23 still have this New York State conviction that he feels was
24 unfair for the reasons we've articulated, for which he
25 served a five year prison term, and then another six months

1 in ICE detention because of the conviction.

2 JUDGE RIVERA: Would - - - would it affect his
3 opportunity to seek reentry?

4 MR. ZENO: That's a little unclear, Your Honor.
5 It was not the basis for his - - - this conviction was not
6 the basis for his deportation. That seems pretty clear.
7 The records that have been obtained in - - - in the two
8 weeks or three weeks since we were alerted to the issue are
9 partially redacted, and it's not entirely clear what - - -

10 JUDGE RIVERA: The government looks at an entire
11 criminal record.

12 MR. ZENO: Yes.

13 JUDGE RIVERA: Not merely what may have been the
14 crimes.

15 MR. ZENO: Yes.

16 JUDGE RIVERA: Conviction at the time.

17 MR. ZENO: Correct. And - - - and you know,
18 three, five, seven, ten years down the line, we don't know
19 what the immigration laws will be.

20 JUDGE SINGAS: But that's not true. They look at
21 the specific crime to make a determination about
22 deportation. And they made a determination about
23 deportation in this case on cases that were unrelated to
24 this one, correct?

25 MR. ZENO: That's right, Your Honor.

1 JUDGE TROUTMAN: Is there any statewide
2 importance beyond your client?

3 MR. ZENO: Well, that - - - thank you, Judge
4 Troutman. That's the other issue here. This court, a
5 judge of this court, has found that there was an issue of
6 statewide importance. So in addition to my client's
7 interest in getting a resolution of the charges at the very
8 least - - -

9 JUDGE RIVERA: You mean resolving the Antommarchi
10 issue?

11 MR. ZENO: Right. The Antommarchi issue, which
12 is fully briefed and - - -

13 JUDGE HALLIGAN: So why is that an issue of
14 statewide importance as opposed to the application of law
15 to specific facts?

16 MR. ZENO: It's an - - - it's - - -

17 JUDGE HALLIGAN: It strikes me as different. For
18 example, like if you look at Diaz, as I recall, there's a
19 Crawford issue there, right? And - - - and I think that
20 case was being considered shortly after Crawford came down.
21 There were a lot of open issues following Crawford. And
22 there it seems to me that there was a decent argument that
23 there was a novel question of statewide importance. I'm
24 not sure I see how that's true here. So what's your view?

25 MR. ZENO: Well, jury trials and Antommarchi

1 waivers happen every day.

2 JUDGE HALLIGAN: I'm not saying they're not
3 important. I'm just asking, how is this not just a
4 specific iteration?

5 MR. ZENO: Right. And the meaning of and the
6 scope of an Antommarchi waiver is crucial to what - - -

7 JUDGE HALLIGAN: But wouldn't that be true in any
8 case with a colorable allegation of an Antommarchi error?

9 MR. ZENO: Well, it's - - -

10 JUDGE TROUTMAN: Let me help you here and ask
11 this question. Is it settled whether or not, once you
12 waive that you forever waive, that you can't seek for the
13 court to use its discretion to allow you now to participate
14 or has it been determined that there's clarity as to the
15 scope of what that waiver means? What are you giving up?

16 MR. ZENO: Right. So it is - - - it is not clear
17 under this court's precedence when a discretionary decision
18 to allow rescission of a waiver is appropriate. Twenty
19 years ago, twenty-five years ago, in Williams, the court
20 said it was a discretionary determination. Since then, the
21 court has not explored - - -

22 JUDGE CANNATARO: So let's get into that. Was
23 there - - - was there a articulated rescission or
24 withdrawal of the Antommarchi waiver on the record in this
25 case?

1 MR. ZENO: Well, there was either an objection to
2 the Antommarchi waiver, the scope of the Antommarchi - - -
3 Antommarchi waiver, or there was a request to rescind it.

4 JUDGE CANNATARO: I missed that. Where do you
5 see that in the record?

6 MR. ZENO: So there was - - - we - - - we - - -
7 we agree that there was an Antommarchi waiver. We disagree
8 about the scope of the Antommarchi waiver.

9 JUDGE SINGAS: So isn't that a - - - isn't that
10 an issue that goes to preservation? If we can't figure out
11 if he's objecting to the scope of the waiver or whether or
12 not he's rescinding the waiver, doesn't that really prove
13 the point?

14 MR. ZENO: Well, Antommarchi said that no
15 objection is required to - - - to an Antommarchi violation.
16 So it's our argument that we don't even get to the need to
17 object. I was trying to respond to - - - to Judge
18 Cannataro's question - - -

19 JUDGE RIVERA: But that - - - that is with
20 respect to whether or not there's been an Antommarchi
21 violation, not about once an individual has waived and they
22 seek to rescind that waiver.

23 MR. ZENO: Right.

24 JUDGE RIVERA: Whether or not they've articulated
25 a basis for that request.

1 MR. ZENO: Right. There are two separate but
2 very interrelated questions, particularly in this case. In
3 this case, we had a judge that tells my client that he's -
4 - - he's being asked to waive his right to be present at
5 sidebar conferences with prospective jurors who want to
6 speak in private. He then signs a written waiver that has
7 no such limitation. The court then invites a row of jurors
8 up to the bench to discuss their qualifications.

9 JUDGE TROUTMAN: Was an objection made as to that
10 process?

11 MR. ZENO: There was an objection made to that
12 process.

13 JUDGE TROUTMAN: And does it matter as to when
14 that objection was made if it had occurred at the
15 beginning, near the end of jury selection, how, or if at
16 all, does any of that come into - - -

17 MR. ZENO: Well, it matters - - - getting back to
18 Judge Cannataro's question with respect to the rescission
19 of the waiver issue. If it's done promptly before any
20 questioning takes place at sidebar. That's a reason that
21 the court should take into account in allowing the - - -
22 the - - -

23 JUDGE TROUTMAN: Is there any question that the
24 court knew that the defense attorney was calling into
25 question the Antommarchi waiver?

1 MR. ZENO: No, there isn't any question because
2 in response - - -

3 JUDGE TROUTMAN: Why is that?

4 MR. ZENO: When - - - when the jurors lined up to
5 be questioned at sidebar, the lawyer said my client should
6 hear what they have to say. There are so many of them.
7 And the court said you've waived Antommarchi. The court
8 understood the lawyer's protest to be an objection to the
9 process at which my client was being excluded from those
10 sidebar conferences.

11 JUDGE SINGAS: But how do we know that for
12 certain? What if it's just the process of having everybody
13 line up and not separating out the more scheduling veneers
14 versus the, you know, people who have something substantive
15 to say. I mean, because his - - - his reaction is, oh,
16 there's so many. He's not saying, oh, my God, my client
17 now sees that there's so many and we'd like to rescind
18 this. Like maybe it is a process question. I don't like
19 the way this looks. All these guys lined up. That's not
20 how I anticipated it was going to happen.

21 MR. ZENO: Right. And at that point, the court
22 could have and should have inquired, what is your - - -
23 what is your complaint? Instead, the court said you waived
24 Antommarchi. And twice he said - - - the court said that.

25 JUDGE TROUTMAN: With respect to the process that

1 this judge engaged in, was the judge engaging in voir dire
2 in total at the bench, or was the judge doing discrete
3 questioning with respect to embarrassing or sensitive
4 matters, or does that matter at all?

5 MR. ZENO: Well, it does matter. And the answer
6 is somewhere in between the two of those. It wasn't - - -
7 he didn't conduct all voir dire at the sidebar, and it
8 wasn't limited to - - - to issues that the - - - the jurors
9 had privacy concerns about. The court invited any
10 prospective juror who was familiar with the neighborhood of
11 the offense, or could not serve for one reason or another.
12 Those were the court's words. And in response to that
13 question, a number of jurors raised their hand and lined up
14 to have those discussions at the bench.

15 As soon as the lawyer saw that, the lawyer
16 protested. Whether you want to - - - whether we call that
17 an objection or a request to rescind the waiver, it was
18 clear to the court that at the earliest opportunity, the
19 defendant had second thoughts about - - - about his waiver.
20 And it was clear that the lawyer in what he - - - there was
21 an on-the-record - - - off-the-record, I'm sorry,
22 conversation between the lawyer and the client about the
23 waiver.

24 And the lawyer's immediate objection showed that
25 there was no - - - the client did not understand what was

1 going to happen. The fact that the lawyer immediately
2 said, my client should hear, there are so many of them,
3 that showed that the defendant, Mr. Alba, did not
4 understand what he was waving. And - - - and whether - - -
5 again, whether it's - - - we talk about it as an objection
6 or as a request to rescind the waiver. It's - - - it
7 wasn't - - - neither of those two words were used.

8 JUDGE RIVERA: Let's assume for one moment we - -
9 - we say it's a - - - it's a request to rescind the waiver,
10 what should be the standard for us to determine whether or
11 not the court abused its discretion in refusing to rescind
12 the waiver?

13 MR. ZENO: Right. Well, it's - - - it's a
14 discretionary determination, and any number of factors are
15 appropriate. The first of which is what time it happens,
16 if it's immediate, and if the client isn't waffling about
17 it going back and forth wanting to attend some conferences
18 but not others. If there's - - -

19 JUDGE TROUTMAN: Is there a reason cited on the
20 record as to why the court wouldn't entertain or withdraw -
21 - - allowed the waiver to be withdrawn?

22 MR. ZENO: The only reason is you waived
23 Antommarchi. That's the reason. And - - - and here there
24 is an explanation for why the lawyer and his client wanted
25 to rescind the waiver that he didn't understand. There

1 were going to be, quote, "so many" people that were going
2 to be questioned at the bench. And - - - and that's what
3 an - - -

4 JUDGE SINGAS: Do you think that that's that - -
5 - that should enter our assessment of this case, that he
6 didn't realize how many people were going to line up? So
7 if only three people lined up, that would have been okay.
8 It wouldn't have been rescission worthy. But because it
9 was twenty, you know?

10 MR. ZENO: Well, again, going back to what the
11 lawyer and the client were told, they were told it was only
12 going to be jurors who expressed a desire to speak
13 privately that were going to be questioned at sidebar.

14 JUDGE SINGAS: Yeah, but sometimes that depends
15 on the nature of the case. If you're trying a sex case,
16 sometimes you get, you know, fifty people lining up.

17 MR. ZENO: And that's absolutely true. But - - -
18 and that's a good reason to conduct - - - for someone to
19 waive their right to - - - to be present so that jurors
20 will be candid when they have discussions about their
21 qualifications and about their ability to be fair. Those
22 are good reasons to waive Antommarchi, but there wasn't - -
23 -

24 JUDGE SINGAS: I guess I'm just trying to get to
25 why is the number of jurors that are lining up a good

1 reason?

2 MR. ZENO: Well, the number of jurors is a
3 function of not following what the court said it was going
4 to do. The court said it was going to limit it to those
5 jurors who wanted to speak privately.

6 JUDGE TROUTMAN: How does that impact on the voir
7 dire process, if at all?

8 MR. ZENO: Well, it - - - it- - -

9 JUDGE TROUTMAN: That is the court having those
10 discrete jurors come up outside the hearing of the
11 defendant?

12 MR. ZENO: Well, obviously it's a better system
13 if - - - if the defendant is actually present. That's what
14 motivated - - - motivated Antommarchi and has an
15 opportunity to hear what the jurors say. Hear the tone of
16 their voice, see their facial expressions when they give
17 answers. That's a better system. That's why Antommarchi
18 says what Antommarchi says.

19 There are reasons to waive Antommarchi to
20 encourage prospective juror candor. But when you do an end
21 around you tell - - - you tell the client that it's, you
22 know, these conferences are going to be limited to jurors
23 who want to speak privately, but then wholesale invite the
24 jurors to approach the bench.

25 JUDGE TROUTMAN: So are you suggesting that based

1 on the record that exists here, there is some suggestion
2 that when the defendant waived, it was with the
3 understanding that waiver was limited in scope and that
4 otherwise the normal voir dire process wherein he could
5 participate was going to be fully in place?

6 MR. ZENO: Yes.

7 JUDGE RIVERA: I'm a little confused by your
8 argument about this privacy, because they're coming up to
9 speak in private. I don't know how that contradicts what
10 the judge says. You have a right to be present at the
11 stage of the trial, and that includes conferences and where
12 jurors want to discuss in private. And then the court
13 invites prospective jurors with concerns about serving or
14 private matters to approach the bench. That's to come up
15 and speak in private.

16 I don't understand what the confusion is or why
17 that appears outside the scope. I get your argument about
18 the rescission. I'm not talking about that. But I mean,
19 this strikes me as not a problem of misunderstanding the
20 scope. They are going up to speak in private. Am - - - am
21 I missing something in the record?

22 MR. ZENO: Well, the - - - the court says you're
23 waiving your right to be present when jurors want to speak
24 privately.

25 JUDGE RIVERA: Right.

1 MR. ZENO: When jurors want to speak privately.
2 These jurors did not express a desire to speak privately.
3 It was the court's decision that that it would be private.
4 It wasn't the jurors who decided - - -

5 JUDGE RIVERA: Well, the invitation is to come up
6 and speak at the bench in private.

7 MR. ZENO: Well, everyone - - -

8 JUDGE RIVERA: Including about private matters.

9 MR. ZENO: I guess I'm not being clear. I - - -
10 the invitation - - - the - - - the waiver was limited to
11 those situations when the jurors indicated they wanted to
12 talk privately, when the jurors want to talk privately.
13 And the court then invited - - - anyone who had raised
14 their hand in response to - - - to those questions, to
15 approach the bench without regard to whether they - - -

16 JUDGE SINGAS: But that - - - that was during the
17 oral colloquy, right? And then the written colloquy says
18 the above named defendant has been advised of his right to
19 be present at sidebar conferences during the course of this
20 trial. After consulting blah, blah, blah, he waives his
21 right to be present at such conferences and agrees he will
22 remain in his seat during all such sidebar conferences.

23 Right. So there's a distinction between the oral
24 admonitions and what he signed. So that's what I'm saying.
25 Like, how do I - - - how do we know what counsel is

1 objecting to? He might be like, well, you didn't say. You
2 only said private. And I don't know what the objection is
3 versus I'm - - - I'm looking to rescind my entire
4 Antommarchi.

5 MR. ZENO: We can't tell with precision what the
6 objection was to.

7 JUDGE SINGAS: Okay.

8 MR. ZENO: I think that's clear. He was
9 objecting to what had happened. Whether, you know, we
10 can't answer that question with precision. But at the
11 earliest opportunity, he expressed the desire to have his
12 client hear - - - to hear what was happening at the bench.

13 CHIEF JUDGE WILSON: Thank you.

14 MR. GAGNE: May it please the court, David Gagne
15 for the People.

16 Judge Rivera, in response to your question,
17 defendant's conviction in this case is irrelevant to his
18 ability to return to the United States. He was - - -

19 JUDGE TROUTMAN: Does this case have interest
20 beyond this particular defendant?

21 MR. GAGNE: I don't believe it does.

22 JUDGE TROUTMAN: Why not?

23 MR. GAGNE: Well, this is a case specific
24 inquiry.

25 JUDGE TROUTMAN: Antommarchi affects trials had

1 on a daily basis in this state, does it not?

2 MR. GAGNE: It definitely does.

3 JUDGE TROUTMAN: And if there's a question as to
4 how judges are using these waivers, that is, to conduct
5 essentially the whole voir dire process at the bench versus
6 a finite number of people, or whether the scope of that is
7 called into question. Is that something we - - - isn't
8 that something we should resolve?

9 MR. GAGNE: I don't think that would have to be
10 resolved in this case, because that didn't happen in this
11 case. The entire voir dire was not conducted at sidebar.

12 CHIEF JUDGE WILSON: Do you know of a Antommarchi
13 case where a court declined to allow a rescission when no
14 juror had been questioned yet?

15 MR. GAGNE: When no juror had been questioned
16 yet? No. There's only been one case that this court has
17 looked at a court's decision to deny a request for an
18 Antommarchi waiver. And in that decision, there had been
19 one robing room conference, I believe, and the court's - -
20 -

21 CHIEF JUDGE WILSON: And the examination of some
22 other jurors in open court?

23 MR. GAGNE: Yes, I believe so. And the court's
24 reasoning in that case was that the court was afraid that
25 the defendant was flip flopping. And so there's really - -

1 -

2 JUDGE TROUTMAN: How is that a - - - how is that
3 a problem here when the process had just started?

4 MR. GAGNE: Well, the process hadn't just
5 started. The court had asked a number of preliminary
6 questions and asked the jurors to approach who answered,
7 yes.

8 JUDGE TROUTMAN: Was - - - was it days into voir
9 dire? Had jurors been seated? How far into the selection
10 process had this occurred?

11 MR. GAGNE: So there had been a series of
12 questions asked.

13 JUDGE TROUTMAN: Not series of questions. What
14 I'm concerned about is the timing in the proceedings. The
15 trial starts. There's jury selection. How far into that
16 process had this occurred? Defendant waived, but then the
17 people lined up. There is some objection, or concern
18 raised if you don't want to use objection, by the defense
19 attorney? How much time had passed? Had days passed? Had
20 hours passed?

21 MR. GAGNE: No, no. It had been - - -

22 JUDGE TROUTMAN: So it's early in the process,
23 correct?

24 MR. GAGNE: It was early in the process,
25 certainly.

1 JUDGE TROUTMAN: So how does that adversely
2 impact unlike a case where a time has passed, the process
3 has proceeded, and there is, as you suggest, flip-flopping
4 by the defense or defendant?

5 MR. GAGNE: Well, the - - - the flip-flopping was
6 the court's reasoning in - - - in a different case.

7 JUDGE TROUTMAN: Was there flip-flopping here?

8 MR. GAGNE: There wasn't really flip-flopping
9 because there wasn't really a legible objection to the
10 defendant's - - -

11 JUDGE TROUTMAN: Did the court not state,
12 Antommarchi, you waived?

13 MR. GAGNE: That's right. I think the court was
14 - - -

15 JUDGE TROUTMAN: So what is the - - - what is the
16 what is the problem with the court not understanding when
17 the court said - - - curtly said, and not expounding
18 itself. The court seemed clear to understand that the
19 defendant was - - - was asking to now participate.

20 MR. GAGNE: I think the court wasn't entirely
21 clear what - - - what the objection was, if there was any.
22 So the court reminded counsel, this is Antommarchi. You
23 waived Antommarchi. And if defense counsel was trying to
24 rescind the waiver, which I don't think he even could have
25 done unilaterally, because this was something that he was

1 doing without any input from his client. But even if the
2 court understood - - -

3 JUDGE TROUTMAN: But if he says, my client should
4 hear, then isn't that an invitation that the jury be
5 excused, that counsel then be allowed to address the court
6 in the presence of the defense?

7 MR. GAGNE: Well - - -

8 JUDGE TROUTMAN: Isn't that how those proceedings
9 normally take place?

10 MR. GAGNE: Well, appellate courts provide wide
11 latitude to trial courts in terms of how they manage their
12 courtrooms, and particularly during voir dire.

13 JUDGE TROUTMAN: Understood. But you just stated
14 early in the process, so I don't - - - I - - - I'm having
15 difficulty understanding when a court does not allow even
16 discussion, just curtly says Antommarchi waived, and I'm
17 going on with what I'm doing. And there is no - - - this
18 court has no responsibility to clarify if there's any
19 misunderstanding at that point. Or are you just saying the
20 court - - -

21 MR. GAGNE: The - - -

22 JUDGE TROUTMAN: - - - once the waiver has
23 occurred, it's final and there is nothing else that the
24 defendant can do?

25 MR. GAGNE: No, of course not. The - - - once

1 there is a waiver, the defendant can seek to rescind the
2 waiver, and it's up to the court's discretion whether or
3 not - - -

4 JUDGE HALLIGAN: Are there are any limits on that
5 discretion?

6 JUDGE RIVERA: It's a - - - we've said it's a
7 fundamental right. Does that inform the analysis?

8 MR. GAGNE: I think so. I think there are
9 certainly some limits. I can envision a scenario in which
10 there could be an abuse of discretion. I'm not saying
11 every scenario would not be an abuse of discretion, but in
12 this case, I think - - -

13 JUDGE HALLIGAN: What might - - - what might
14 constitute an abuse of discretion, for example?

15 MR. GAGNE: Perhaps if - - - if to Judge
16 Troutman's point that the court decided to conduct the
17 entire voir dire at sidebar, that could - - - could
18 potentially be an abuse of discretion to not allow the
19 defendant to rescind his waiver. But that's just not what
20 happened here. There was only - - -

21 JUDGE RIVERA: Why is that? Why would that
22 matter?

23 MR. GAGNE: Well, I think typically, voir dire,
24 there's a portion that's in open court and there's a
25 portion that's at sidebar. So if a judge were to take that

1 to the extreme and just conduct everything pursuant to - -
2 -

3 JUDGE TROUTMAN: But isn't it true that at times
4 the court will - - - will allow people because they asked
5 to speak in private to come address the court. And then
6 when it's determined after they approach, that it really
7 isn't a private matter, it requires further discussion,
8 they're invited back to the jury box, right?

9 MR. GAGNE: I - - - I don't think I understand
10 your question, Judge Troutman.

11 JUDGE TROUTMAN: If a matter really affects one's
12 fitness to serve in a generalized sense, and there's no
13 sensitive matters or the like, and it is something that is
14 more appropriately explored in the open process, are you
15 saying where you hail from that doesn't happen, that they
16 hold voir dire as to that individual, even if it's found
17 that there's nothing to disqualify? It's just they're
18 completely explored right then and there. That is the
19 standard?

20 MR. GAGNE: Well, I think - - - I think there's -
21 - - I think the court had reason to have jurors who had
22 scheduling issues, which is not, you know, doesn't go to
23 potential bias, which implicated Antommarchi, I think the
24 judge had reason to have those jurors approach the bench
25 and discuss their answers.

1 JUDGE TROUTMAN: What were those reasons?

2 MR. GAGNE: Well, I mean, obviously this isn't in
3 the record because there was no objection. There was no
4 attempt to rescind the waiver. But certainly if - - - if
5 jurors could hear - - -

6 JUDGE TROUTMAN: And what was the attorney doing
7 when he says, my client should hear this? And the
8 defendant, himself, is not present, so he can't personally
9 - - - and he has counsel, shouldn't counsel be allowed to
10 speak for him?

11 MR. GAGNE: I don't think counsel should be able
12 to unilaterally rescind a waiver that the defendant himself
13 had to personally agree to in the first place.

14 JUDGE TROUTMAN: But isn't the - - - he cuing the
15 court that there should be an inquiry outside the presence
16 of the jury with respect to the continuation of the waiver?

17 MR. GAGNE: It's - - - it's not - - - I'm not
18 saying that the judge couldn't have inquired further, but
19 once - - - once the judge clearly did not understand - - -
20 once it was clear that the judge didn't - - -

21 JUDGE TROUTMAN: But didn't the judge understand
22 when the judge said, Antommarchi, you waived? What is the
23 misunderstanding on the part of the court?

24 MR. GAGNE: That there was a - - - that there was
25 an attempt at a rescission. I think if - - - if the judge

1 had understood there to be a rescission request, then they
2 would have decided it one way or the other.

3 JUDGE TROUTMAN: So you're saying the court did
4 not understand it to be a rescission?

5 MR. GAGNE: That's correct.

6 CHIEF JUDGE WILSON: Is that because it was made
7 unilaterally by the lawyer?

8 MR. GAGNE: I think that's certainly a part of
9 it. It's also the - - - the particular words that - - -

10 JUDGE TROUTMAN: But isn't the only way you can
11 ascertain if that is in fact something the defendant wants
12 to do is to excuse the jury and in open court make a
13 further inquiry, especially when you're only at the
14 beginning stages of the proceedings?

15 MR. GAGNE: That is certainly something that the
16 judge could have - - - that the judge could have done. But
17 when - - - the defense attorney knew that the court was not
18 understanding what he was saying to be a rescission
19 request, if what he was really trying to do was rescind the
20 waiver, then it was incumbent on defense counsel to make
21 his position known. To preserve a claim, the party has to
22 make their position known to the court so that the court
23 can actually understand and rule on it.

24 CHIEF JUDGE WILSON: So he should hear - - -
25 doesn't make that clear? He should hear what they're

1 saying?

2 MR. GAGNE: I don't think so Judge, because
3 again, the court said that, I prefer, so he was speaking on
4 his own behalf, not on behalf of his client. And his
5 client was the one who had personally waived the
6 Antommarchi right.

7 CHIEF JUDGE WILSON: Yeah. But it's - - - it's -
8 - -

9 JUDGE TROUTMAN: But who could speak at sidebar
10 if - - - but counsel when that waiver is in fact in force
11 in effect at that time?

12 JUDGE RIVERA: Yeah. And in Velasquez, we said
13 that defense counsel can waive on behalf of defendant, and
14 the court doesn't need to engage defendant in a colloquy to
15 ensure that it was a voluntary waiver, to ensure anything.
16 So why - - - why should it be different when the lawyer
17 says we rescind the waiver, Your Honor?

18 MR. GAGNE: So Judge, the defense attorney can
19 certainly waive on behalf of their client.

20 JUDGE RIVERA: Why can't they rescind on behalf
21 of their client?

22 MR. GAGNE: No, no. But the - - - the judge - -
23 - sorry, the defense attorney still has to discuss the
24 waiver with their client. That can be off the record, but
25 there still has to be a discussion.

1 CHIEF JUDGE WILSON: So here the - - - the
2 defendant didn't speak English. There was a translator
3 present. The written waiver was in English. It was read
4 by a translator to the defendant. But it was also
5 explained by the lawyer what it - - - what it meant to the
6 defendant, right? That all happened before the waiver,
7 right?

8 MR. GAGNE: That's right. Yeah.

9 CHIEF JUDGE WILSON: And so the lawyer knows how
10 he explained it what was going to happen. He knows what he
11 told the defendant about what to expect. So why isn't it
12 sufficient when something different from what he told his
13 client happens, and he realizes that what he's told his
14 client is not right, it's not what's actually happening for
15 him to say, wait a minute, wait a minute. He should hear.
16 Why isn't that enough?

17 MR. GAGNE: Well, I don't know if it was entirely
18 different from what counsel understood. Because, counsel -
19 - - there's no indication that counsel thought that the
20 waiver only applied to these sidebars where jurors
21 specifically asked to speak in private.

22 JUDGE HALLIGAN: Then why would he say he should
23 hear?

24 MR. GAGNE: So I mean, the judge - - - I mean,
25 sorry, defense counsel seem to be concerned with the number

1 of jurors that were there. But it's also important to
2 remember that fourteen of those jurors were there to
3 discuss scheduling. They weren't even there to discuss - -
4 -

5 JUDGE RIVERA: He didn't know that when he - - -
6 when he sought to rescind.

7 MR. GAGNE: Um, ye - - -

8 JUDGE RIVERA: And the judge didn't know that
9 when he sought - - - when counsel said he should be here,
10 he should hear.

11 MR. GAGNE: The judge did know that because he -
12 - -

13 JUDGE RIVERA: How did the judge know that?

14 MR. GAGNE: - - - asked the jurors to raise their
15 hands.

16 JUDGE RIVERA: So you're saying that - - - that
17 the record somehow would have reflected how many people are
18 actually want to have a private conversation regarding
19 matters that are covered by Antommarchi, and how many are
20 not?

21 MR. GAGNE: I think the record shows that the
22 judge understood how many sidebar conferences would
23 implicate defendant's Antommarchi right, because they would
24 involve potential issues of bias and how many - - -

25 JUDGE RIVERA: Did they raise their hands?

1 You're saying, the judge said, how many people think they
2 might be biased and certain people raised their hands?

3 MR. GAGNE: The - - - the judge didn't use those
4 specific words.

5 JUDGE RIVERA: Well, what - - - what did he say?

6 MR. GAGNE: So it was people who were familiar
7 with the crime scene and people who had some moral
8 religious objection - - -

9 JUDGE RIVERA: Okay.

10 MR. GAGNE: - - - to - - - to serving on the
11 jury.

12 JUDGE RIVERA: And private matters?

13 MR. GAGNE: And those - - - those are the private
14 matters. And then there was the question about those who
15 had a scheduling conflict. And so those - - - those jurors
16 - - -

17 JUDGE RIVERA: You're saying there are separate
18 responses to each of those inquiries?

19 MR. GAGNE: Well, yeah, because the jurors raised
20 their hands for - - -

21 JUDGE CANNATARO: So hands are being raised to
22 each of those inquiries and then but all - - - what is
23 that, three groups? All three groups are invited down to
24 the bench, out of the box, down to the bench, right?

25 MR. GAGNE: That's right. Yeah. And that's one

1 of the reasons why, even if there had been a rescission
2 request, it was appropriate to deny it because jury
3 selection had already begun. The court was relying on the
4 fact that defendant had waived Antommarchi.

5 JUDGE TROUTMAN: But again, you indicate it was
6 early in the process, correct?

7 MR. GAGNE: Yeah. It was the preliminary
8 question.

9 JUDGE TROUTMAN: So what's the harm to the court,
10 to the administration of justice, what is the harm at that
11 juncture? Since it was early on to provide clarification
12 when the defendant normally has the right, unless they give
13 it up, to participate in all stages of the proceedings?

14 JUDGE RIVERA: Especially since you've just said
15 that the judge actually knew how many people were covered
16 by that Antommarchi right, not the waiver, the right
17 itself?

18 MR. GAGNE: Well, he knew how - - - I mean, he
19 had a general idea of how many. I don't think he knew
20 specifically which ones were going to answer questions
21 about scheduling, and which ones were not.

22 JUDGE RIVERA: I thought you said they raised
23 their hands.

24 MR. GAGNE: Right. But I don't know if he was
25 taking a specific tally. I mean, that's not in the record.

1 So we don't know that. But at the - - - at a minimum, the
2 judge would have had to redo the questioning to ensure that
3 the defendant was present for the - - - the sidebars that
4 he had a right to attend. So the conferences that
5 implicated potential bias.

6 I see that my light is on. If I could just
7 return to the dismissal point, I would like to respond to
8 one argument, which is that we didn't raise this in our
9 main brief, but in People versus Parmaklidis, the case that
10 we cite in our letter, this court's sua sponte dismissed
11 the appeal of a deported defendant on the basis that the
12 defendant was unable to obey the mandate of the court.

13 JUDGE HALLIGAN: But generally, when - - - I
14 think when your office thinks there is an argument we
15 should consider, particularly one you think would entitle
16 you to relief, you raise it sooner than you did here, yes?

17 MR. GAGNE: Yes. Typically, yes.

18 JUDGE HALLIGAN: So was there a reason not to do
19 that here?

20 MR. GAGNE: It was not - - - it's not our
21 office's standard practice to investigate the basis for
22 someone's deportation. When we did do that, in this case,
23 we felt that dismissal was the appropriate remedy. It is -
24 - -

25 JUDGE HALLIGAN: And why does that turn on the

1 basis - - - I know your lights on if I - - - if I could,
2 Chief, why does that turn on the basis for the deportation
3 and not the fact of the deportation, in your view?

4 MR. GAGNE: Well, because if his conviction were
5 reversed in this case, and his conviction was the basis for
6 deportation, then perhaps he has something to gain from
7 that. But he doesn't have anything to gain in this
8 scenario.

9 JUDGE RIVERA: So the immigration law is very
10 complex, and they do look at your entire criminal record.
11 So it's not going to be limited to the grounds for which he
12 was deported.

13 MR. GAGNE: So the notice to appear in this case
14 lists the convictions that were the - - -

15 JUDGE RIVERA: I understand. I understand your
16 point. I'm just saying that if in the future he sought to
17 lawfully reenter, they're going to look at his entire
18 record.

19 MR. GAGNE: They would look at his entire record,
20 but he's actually permanently ineligible from seeking
21 authorization to return based on his prior, unrelated
22 aggravated felony conviction. So this is really the
23 classic example of a case where dismissal is the
24 appropriate remedy.

25 JUDGE RIVERA: Other than the rule might have

1 implications beyond this particular individual.

2 MR. GAGNE: Well, respectfully, I think that this
3 case is quite fact specific. It turns on a number of
4 utterances that were made during the waiver colloquy,
5 during - - -

6 JUDGE RIVERA: Is it unusual for a defendant to
7 seek to rescind their waiver? Waiver seems to be very
8 commonplace, these Antommarchi waivers. Is it a rare
9 occasion, in your experience, in your office's experience?

10 MR. GAGNE: I - - - I'm honestly not entirely
11 clear if it's unusual or usual.

12 JUDGE RIVERA: Fair enough.

13 MR. GAGNE: But nonetheless, even if we accept
14 that the defendant attempted to rescind, it would still
15 turn on the very fact specific circumstances of this case,
16 whether it was an abuse of discretion or not for the court
17 to deny that.

18 JUDGE RIVERA: Well, we could decide whether or
19 not what was said triggers perhaps an inquiry from the
20 judge. That would be a part of a rule that might be useful
21 for the bench and bar.

22 MR. GAGNE: Sure. I - - - I take that point, but
23 I think the defense attorney's language and the fact that
24 he was speaking on his own behalf, not on behalf of his
25 client, it's pretty clear that the judge simply didn't

1 understand that a request for a rescission was being made.
2 So I don't know if that - - - if this scenario - - -

3 CHIEF JUDGE WILSON: Well, that sounds like
4 another - - - that sounds like another helpful thing we
5 could decide, that the Velasquez right is reciprocal.

6 MR. GAGNE: I'm sorry?

7 CHIEF JUDGE WILSON: That the - - - the - - - the
8 - - - that the attorney can make the request without
9 consulting with the client. We could decide that or decide
10 that he can't, and that seems to be unclear.

11 MR. GAGNE: Well, I think it flows pretty clearly
12 from the fact that the defendant has to personally waive
13 Antommarchi for it to be knowing and voluntary that - - -

14 JUDGE RIVERA: That's not what Velasquez says.

15 MR. GAGNE: It actually is, because - - -

16 JUDGE RIVERA: Okay.

17 MR. GAGNE: - - - the - - - what - - - Velasquez
18 and Flinn, they assume that the defense attorney spoke with
19 their client. It could be off the record. It doesn't have
20 to be on the record, obviously, but there has to be a
21 conversation.

22 JUDGE RIVERA: But again, that could be, as the
23 Chief Judge has already suggested to you before, this
24 reaction to the number of people who were going to come up
25 to the bench, and how the judge was going to handle the

1 voir dire, may be based on the lawyer's understanding and
2 appreciation of what his client understood the waiver
3 entailed.

4 MR. GAGNE: I don't think that that's borne out
5 in this case because the defense attorney said - - -

6 JUDGE RIVERA: Is it any more borne out than when
7 a lawyer just gets up and says, on the record Antommarchi
8 waived?

9 MR. GAGNE: I think so because the defense
10 attorney said specifically, I prefer that they say it out
11 loud. Thank you.

12 CHIEF JUDGE WILSON: Thank you.

13 MR. ZENO: Briefly on the Antommarchi point, and
14 then - - - and then I'd like to spend a couple of minutes
15 that I have left on the dismissal point. I think we all
16 agree that the - - - my colleague and I, that the decision
17 whether to allow rescission of an Antommarchi waiver is a
18 discretionary decision. I still have not heard - - - a
19 discretion is a balancing. I've heard - - - I've
20 articulated, I believe, reasons why the court should have
21 allowed my client to rescind his Antommarchi waiver.

22 It - - - it appears from counsel's protest that
23 he misunderstood and then and likely misconveyed the types
24 of conferences that were going to go on and the scope of
25 those conferences, and Antommarchi says this is a

1 fundamental right. It was done almost immediately. On the
2 other side, I haven't heard any court inconvenience. The
3 only inconvenience is what would originally have been
4 required had my client not waived Antommarchi, there would
5 have had to been, you know, conferences where my client
6 stood at the bench with court officers or conferences in
7 open court.

8 JUDGE RIVERA: What about his argument that it
9 appears to be the lawyer's sua sponte of his own accord,
10 deciding that the waiver should be rescinded as opposed to
11 something based in consultation with his client?

12 MR. ZENO: Right. As - - - as Your Honor,
13 recognized in Velasquez, in Flinn, and Wilkins, this court
14 has recognized that the lawyer has that right to convey a
15 waiver on behalf of the client. I see no reason why a
16 lawyer can't convey a rescission of that right, or at least
17 have an opportunity to discuss whether the client should
18 rescind that right. It appears this all happened at the
19 bench where my client - - - where the lawyer couldn't speak
20 to the client directly. And these - - - these - - - these
21 inconveniences as a matter of discretion just don't
22 outweigh the right that my client was deprived of - - - of
23 pursuing.

24 So let me just briefly address the - - - the
25 legal sufficiency point. This is not a weight of the

1 evidence case. So the court does not have to weigh
2 conflicting inferences about the circumstantial conclusions
3 you can reach about my client's conduct, but it does have
4 to assess the possibility that what my client's intent was
5 was an innocent intent, at least innocent in terms of not
6 when he leaned down at the window to peer through that he
7 was not planning to commit a crime inside the apartment
8 building.

9 JUDGE RIVERA: But intent is hard, right? It's
10 hard to have direct evidence of intent. You have to infer
11 it from the circumstances. Why is there not a sufficient
12 record for the jury to have concluded that there is intent?

13 MR. ZENO: Right. Well, this court has said that
14 a mere attempt to enter a - - - forcibly enter a building
15 is not alone proof of intent. Here, that's all we really
16 have. We have my client leaning in front of a window. It
17 appears that he jiggles, or maybe uses a tool. It's
18 unclear whether he did it with his hand or a tool. Tries
19 to open a window. We don't know what he intended to do
20 inside. He doesn't have burglar's tools. It's not a case
21 where it's a completed entry, and he picks up items inside.
22 It's just a question of is the innocent possibility ruled
23 out beyond a reasonable doubt? And the fact that he may
24 have been going inside to - - - attempting to go inside to
25 get out of the cold is a reasonable possibility. It is at

1 least as likely a possibility as that he was going inside
2 to steal.

3 CHIEF JUDGE WILSON: Thank you.

4 (Court is adjourned)

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

I, Christy Wright, certify that the foregoing transcript of proceedings in the Court of Appeals of Alba (Darling) v. People, No. 12 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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