SUPREME COURT OF NEW YORK
APPELLATE DIVISION, FIRST DEPARTMENT

People v. Williams[1]

(decided May 22, 2008)

Michelle Williams was "convicted of two counts of offering a false instrument for filing in the first degree."[2] However, during voir dire, the defendant was absent from sidebar discussions with respect to three prospective jurors.[3] Williams appealed to the Appellate Division, First Department, on the ground that "her right to be present at all material stages of her trial was violated because of her absence from conferences with prospective jurors S.D., M.C., and Y.T."[4] She argued that this absence amounted to a violation of her rights to be present during material stages of the proceedings under the U.S. Constitution,[5] the New York Constitution,[6] and New York Criminal Procedure Law § 260.20.[7] The appellate division reversed Williams' conviction, holding that her rights were violated because she did not

[1] 858 N.Y.S.2d 147 (App. Div. 1st Dep't 2008).

[2] *Id.* at 149.

[3] *Id.* at 148-49.

[4] *Id.* at 149.

[5] U.S. CONST. amend. VI, provides, in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . and to be informed of the nature and cause of the accusation; [and] to be confronted with the witnesses against him." U.S. CONST. amend. XIV, provides, in pertinent part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law."

[6] N.Y. CONST. art. I, § 6, provides, in pertinent part: "In any trial in any court whatever the party accused shall be allowed to appear and defend in person . . . and shall be informed of the nature and cause of the accusation and be confronted with the witnesses against him or her."

[7] N.Y. CRIM. PROC. LAW § 260.20 (McKinney 2008) provides, in pertinent part: "A defendant must be personally present during the trial of an indictment."

waive her right to be present,[8] but rather asserted her right in open court.[9]

The defendant "was charged with filing a false New York City Police Department complaint form and automobile theft affidavit alleging that her car had been stolen on February 10, 2005, when in fact it had been destroyed in a fire four days earlier."[10] At trial, the defendant's attorney informed the court that his client "believed one of the prospective jurors[, S.D.,] had been a coworker."[11] That same prospective juror acknowledged that eight years prior, she worked with the defendant at a health center for two months.[12] However, the information came to light at a sidebar conversation, during which the defendant was not present.[13] The transcript indicated that only S.D., the two assistant district attorneys, and the defendant's attorney were present at the sidebar discussion.[14] It was further discovered that although S.D. did not work in the same capacity as the defendant, they did have daily contact during their concurrent employment at the health center.[15] Nonetheless, S.D.'s qualification as a juror was not challenged and she became a jury member, despite the availability of a peremptory challenge for the defense.[16] Contrary to the voir dire of

[8] *Williams*, 858 N.Y.S.2d at 150-51.

[9] *Id.* at 151. Instead of remanding for a reconstruction hearing to determine "whether defendant was 'essentially present at the sidebars,' " the court ordered a new trial. *Id.*

[10] *Id.* at 148.

[11] *Id.* at 149.

[12] *Id.*

[13] *Williams*, 858 N.Y.S.2d at 149.

[14] *Id.*

[15] *Id.*

[16] *Id.* S.D. was asked whether she had any feelings about the defendant, whether she would lean in favor or against the defendant, and whether she ever saw Williams in situations which gave her negative impressions of him. Her response to each was in the negative.

S.D., the "defendant was [later] present for the voir dire of a different prospective juror."[17]

Likewise, Williams was absent from sidebar discussions regarding two other prospective jurors as well.[18] One such individual, M.C., pleaded that she "could not promise that she would keep her own case separate and apart from [the] defendant's."[19] The other, Y.T., believed that she would be biased toward firefighters because she lived next to a firehouse for many years.[20] After pleading their cases, both M.C. and Y.T. were "excused on consent" of the parties.[21]

Following the defendant's conviction and sentence of five years' probation and a $1,000 fine, she appealed to the Appellate Division, First Department, arguing that she had a right to be present during the "conferences with prospective jurors S.D., M.C., and Y.T."[22] The prosecution contested on the ground that Williams was within hearing distance from the sidebar and that she "implicitly waived her right to be present at sidebars with prospective jurors because she was absent from ten sidebar discussions."[23] The appellate division disagreed, stating that her absence from the three sidebar conferences violated Williams' "fundamental right to be present at all material stages of trial."[24]

Id.

[17] *Id.*

[18] *Williams*, 858 N.Y.S.2d at 149.

[19] *Id.*

[20] *Id.* ("[S]he did not think she could keep her positive experiences with firefighters separate and apart from defendant's case.").

[21] *Id.*

[22] *Id.*

[23] *Williams*, 858 N.Y.S.2d at 150.

[24] *Id.* at 149.

The court reasoned that the prosecution's argument regarding the ability of the defendant to hear the discussion was purely speculative.[25] Further, the argument that defendant "implicitly waived her right" to be included at sidebar discussions was unavailing for three reasons.[26] First, sidebar discussions that exclude the defendant are permissible if the " 'questions relate to juror qualifications such as physical impairments, family obligations, and work commitments.' "[27] Only four of the ten sidebar discussions cited by the prosecution pertained to one of those issues.[28] The court would not infer that the defendant implicitly waived all ten just because she was absent for those four.[29] "Second, one of the ten sidebars mentioned by the People was with a sworn juror, not a prospective juror."[30] " 'Whether a seated juror is grossly unqualified to serve is a legal determination' " that does not require the defendant's presence.[31] "Third, a waiver of the right to be present must be 'voluntary, knowing and intelligent.' "[32] Furthermore, a "silent record" does not suggest an implicit waiver.[33]

After discussing the flaws of the prosecution's contentions, the court addressed the arguments against holding a reconstruction

[25] *Id.* at 150.
[26] *Id.*
[27] *Id.* (quoting People v. Antommarchi, 604 N.E.2d 95 (N.Y. 1992)).
[28] *Williams*, 858 N.Y.S.2d at 150.
[29] *Id.*
[30] *Id.* (emphasis omitted).
[31] *Id.* (quoting People v. Harris, 783 N.E.2d 502 (N.Y. 2002)).
[32] *Id.* (quoting People v. Vargas, 668 N.E.2d 879 (N.Y. 1996)). In *People v. McAdams*, the defendant was absent from many sidebar discussions and the court deemed he had not waived his right. *McAdams*, 802 N.Y.S.2d 531, 532 (App. Div. 3d Dep't 2005).
[33] *Williams*, 858 N.Y.S.2d at 150.

hearing.[34] Since the court determined that Williams did not waive her rights and that there was evidence in the transcript depicting who was present at the sidebar discussions, the court decided against a reconstruction hearing.[35] The court also stated that the "distance between the table and the bench is not determinative" because it does not take certain factors into account.[36] Thus, a reconstruction hearing would not likely resolve the issue and, therefore, the court reversed Williams' conviction and remanded the matter for a new trial.[37]

In dissent, Justice Buckley voiced that he would have "remand[ed] for a reconstruction hearing to determine whether the sidebar with prospective juror S.D. was conducted in such a manner as to permit defendant, seated only eight feet away, to see and hear the colloquy."[38] He continued, "we remanded [in *People v. Davidson*] for a reconstruction hearing to determine 'the extent to which defendant actually saw and heard sidebar voir dire.' "[39] In addition, Justice Buckley reasoned that a reconstruction hearing would not be necessary with respect to the prospective jurors, M.C. and Y.T., because they were excused for cause.[40]

---

[34] *Id.* at 150-51.

[35] *Id.* (citing People v. Velasquez, 801 N.E.2d 376 (N.Y. 2003); People v. Lucious, 704 N.Y.S.2d 758 (App. Div. 4th Dep't 2000); People v. Tor, 697 N.Y.S.2d 573 (App. Div. 1st Dep't 1998)).

[36] *Williams*, 858 N.Y.S.2d at 151 ("[I]t does not take into consideration the loudness of the sidebar conferences . . . on the day they occurred or defendant's ability to hear the conversations.").

[37] *Id.*

[38] *Id.* (Buckley, J., dissenting) (citing People v. Brown, 638 N.Y.S.2d 427 (App. Div. 1st Dep't 1995)).

[39] *Id.* at 152 (quoting People v. Davidson, 620 N.Y.S.2d 947 (App. Div. 1st Dep't 1994)).

[40] *Id.*

In *Faretta v. California*,[41] the United States Supreme Court illustrated the accused party's Sixth Amendment right to confront the witnesses against him.[42] More broadly, *Faretta* discussed a defendant's right to waive a Sixth Amendment protection.[43] The defendant was charged with grand theft, and after being assigned a public defender, he demanded that he be permitted to represent himself.[44] Although the judge hesitated, he allowed Faretta to waive his right and represent himself but reserved the right to reverse his decision.[45] Weeks later, the judge held a hearing to test the defendant's abilities and reversed his earlier decision and appointed a public defender to Faretta's case.[46] The jury convicted Faretta and the judge sentenced the defendant to serve time in prison.[47]

On appeal, the Court discussed whether an individual has the right to waive counsel in a state court.[48] The Court found that the Confrontation Clause gives a defendant the right to be present throughout the trial process in order to preserve fundamental fairness and that the defense may be made easier if the defendant is able to participate.[49] Therefore, the Confrontation Clause allows a defendant to be present and to take over for his attorney if he fails to do the job.

---

[41] 422 U.S. 806 (1975). "It is the accused, not counsel, who must be 'confronted with the witnesses against him' . . . ." *Id.* at 819.

[42] *Id.* at 819.

[43] *Id.* at 807. The issue amounted to whether a court may force a defendant to be represented by counsel. *Id.*

[44] *Id.*

[45] *Id.* at 807-08.

[46] *Faretta*, 422 U.S. at 808-10. The judge ruled that the defendant had "no constitutional right to conduct his own defense." *Id.* at 810.

[47] *Id.* at 811.

[48] *Id.* at 807.

[49] *Id.* at 816 (citing Snyder v. Massachusetts, 291 U.S. 97, 106 (1934)).

Accordingly, the Court vacated Faretta's conviction and remanded the case.[50] In so holding, the Court acknowledged not only that a defendant may refuse court appointed counsel, but that a defendant may insist on being present for the examination of jurors.

The Second Circuit Court of Appeals decided an important Confrontation Clause case in *United States v. Hernandez*.[51] The defendant, William Hernandez, was convicted of "conspiracy to possess with intent to distribute greater than 500 grams of cocaine."[52] The defendant failed to appear in court for the first two days of his trial.[53] On the second day, the judge decided to proceed "in absentia"; and the jury was impaneled without Hernandez.[54] Hernandez moved for a mistrial during the trial, and then appealed his conviction on the ground that he was not present during the jury selection.[55]

The Second Circuit fully recognized a criminal defendant's fundamental right to be present at his own trial[56] and remanded for an "inquiry into the reasons for [the] appellant's absence during the impaneling of the jury."[57] Not only is the right guaranteed under the Sixth Amendment but, in federal courts, the Federal Rules of Criminal Procedure require a defendant's presence at "every trial stage, including jury impanelment and the return of the verdict."[58] However,

---

[50] *Id.* at 836.
[51] 873 F.2d 516 (2d Cir. 1989).
[52] *Id.* at 516.
[53] *Id.* at 517.
[54] *Id.*
[55] *Id.* at 517-18.
[56] *Hernandez*, 873 F.2d at 518.
[57] *Id.* at 520.
[58] FED. R. CRIM. P. 43(a)(2). *See Hernandez*, 873 F.2d at 518.

the court qualified the right by stating that it is subject to waiver.[59] Therefore, if, on remand, the court determined that the defendant waived his right to be present during the impaneling of the jury, the judgment would stand.[60]

Another Second Circuit case relating to the accused's right to be present during jury impanelment is *Tankleff v. Senkowski*.[61] The defendant was accused of killing his mother and father.[62] In this highly publicized case, "approximately 500 potential jurors were questioned in open court" about whether media reports molded their opinion of the case and whether they were available for what appeared to be a long trial.[63] While the defendant was present for the first stage of juror questioning, he did not attend the questioning of the 150 prospective jurors siphoned from the original 500.[64] Those prospective jurors were questioned individually in the trial judge's chambers.[65] Although Tankleff's attorney was present in chambers to question the jurors, he did not object to the absence of his client.[66] After the group of 150 potential jurors was filtered, the defendant attended the voir dire of those remaining, which took place in open court with jurors in the jury box.[67] Such jurors presumably stated that the media coverage would not influence their take on the case.[68]

---

[59] *Hernandez*, 873 F.2d at 518.
[60] *Id.*
[61] 135 F.3d 235 (2d Cir. 1998).
[62] *Id.* at 240-41.
[63] *Id.* at 246.
[64] *Id.* at 246-47.
[65] *Id.* at 246.
[66] *Tankleff*, 135 F.3d at 246-47.
[67] *Id.* at 247.
[68] *Id.* at 246-47.

After his conviction, Tankleff unsuccessfully appealed to the appellate division and New York Court of Appeals.[69] He claimed that his "constitutional right to attend all material portions of his trial was violated by the procedure employed by the trial court in screening potential jurors."[70] The United States District Court for the Eastern District of New York denied Tankleff's petition for a writ of habeas corpus but later granted a certificate of appealability.[71] Accordingly, the Second Circuit Court of Appeals addressed whether the defendant "waived his right to be present during [that] particular stage of voir dire."[72] The court concluded that it was likely Tankleff and his attorneys did not believe his presence at the in camera sessions was necessary,[73] and therefore "waiver may properly be inferred from [their] conduct."[74] Thus, although the defendant was not present for a large portion of voir dire, his constitutional right under the Confrontation Clause was not violated.[75]

The Second Circuit discussed the extent to which a defendant's exclusion from sidebar discussions during jury selection violated his rights in *United States v. Feliciano*.[76] Feliciano and two codefendants were convicted of murdering and conspiring to murder a

[69] *Id.* at 247.

[70] *Id.* at 246.

[71] *Tankleff*, 135 F.3d at 239.

[72] *Id.* at 247.

[73] *Id.* ("The far more likely explanation for [Tankleff's] absence is that he and his lawyers did not think it was important for him to be present at this tedious, routine screening designed to eliminate jurors who had been prejudiced by pretrial publicity.").

[74] *Id.* (citing *Hernandez*, 873 F.2d at 518 (stating that " '[a] defendant can waive that right expressly, or can do so effectively by failing to appear at trial.' ")); United States v. Gagnon, 470 U.S. 522, 528 (1985) (stating that an express waiver on the trial record is not necessary)).

[75] *Id.*

[76] 223 F.3d 102 (2d Cir. 2000).

sixteen-year-old member of their gang.[77] The defendants were present during voir dire when Feliciano's attorney requested that the court allow any prospective juror to discuss sensitive issues at sidebar.[78] However, the court refused to allow Feliciano to be present at the bench for security reasons.[79] Instead, the court stipulated that Feliciano's attorney could consult with his client at any point during the proceeding, if desired.[80] Additionally, the prospective jurors were asked if they knew of the defendants' gang and each was given the opportunity to discuss the extent of his or her knowledge at sidebar.[81] Two prospective jurors took advantage of this opportunity and eventually became jurors.[82] The court asserted that—at all times—the defendants were within fifteen feet from the bench and "expressed [no] dissatisfaction with the composition of the jury selected for service," nor did defense counsel interrupt the process to consult with Feliciano.[83]

The defendants appealed their convictions on the ground that "the district court erred . . . by conducting portions of voir dire outside their hearing."[84] Feliciano argued that "conducting this questioning . . . outside the hearing of the defendants violated his constitutional rights under the . . . Sixth Amendment[] and his right to be

[77] *Id.* at 107.

[78] *Id.* at 108 ("[T]he court permitted some of the venire persons to come to the bench to discuss questions they might feel uncomfortable discussing in open court, relating to such matters as personal or family members' involvement with crime or drugs.").

[79] *Id.*

[80] *Id.*

[81] *Feliciano*, 223 F.3d at 108.

[82] *Id.* Another venire person approached the bench to discuss a medical appointment. *Id.* at 108-09.

[83] *Id.* at 109.

[84] *Id.* at 107, 110.

present under Rule 43(a) of the Federal Rules of Criminal Procedure."[85]

The Court of Appeals for the Second Circuit discussed whether the fairness or validity of the trial was compromised by denying the defendants' right to be present at the bench discussions.[86] The court affirmed, concluding that it was "clear that any error . . . did not 'affect[] the framework within which the trial proceed[ed].' "[87] The court reasoned that the defense attorneys had ample opportunity to consult with their clients and that the three defendants were all present throughout the jury selection process.[88] Further, the defendants' counsel fully participated in questioning at the bench and did not oppose any of the jurors selected.[89] Therefore, the court decided that the lack of defendants' presence at the sidebar conversations was harmless.[90]

The ramifications of waiver of the right to be present at sidebar discussions during jury selection were discussed in *Sanchez v. Duncan*.[91] The defendant, Victor Sanchez, was charged in New York State County Court with sexual abuse, harassment in violation of an order of protection, threatening to kill another person, and conspiring to obtain a gun to kill numerous individuals, including a police officer.[92] Before voir dire, the defendant informed the court that he

[85] *Id.* at 110. *See also* FED. R. CRIM. P. 43(a)(2).
[86] *Feliciano*, 223 F.3d at 111.
[87] *Id.* at 112 (quoting Arizona v. Fulminante, 499 U.S. 279, 310 (1991)).
[88] *Id.*
[89] *Id.*
[90] *Id.*
[91] 282 F.3d 78 (2d Cir. 2002).
[92] *Id.* at 79.

would not waive his *Antommarchi* right to be present at "sidebar voir dire conferences."[93] The trial judge advised the defendant that this would inconvenience the jury.[94] The next day, the trial judge emphasized again that the defendant's decision to assert his right to be present would put a strain on the proceedings.[95] The court then asked that the courtroom be prepared for prospective jurors, at which time the defendant changed his mind and signed the waiver.[96] Sanchez asserted that he understood his rights, that no one pressured him, and that he knowingly waived his rights.[97] Throughout the voir dire, nine prospective jurors requested a sidebar, but none of them served on the jury.[98] Ultimately, the jury convicted Sanchez and he was later sentenced to forty-one to eighty-two years in prison.[99]

Sanchez appealed on the grounds that "his federal and state law rights to be present during sidebar voir dire conferences were violated."[100] The Appellate Division, Second Department, modified the length of the sentence and affirmed the conviction, and the New York Court of Appeals denied defendant's leave to appeal.[101] Sanchez then filed a petition for writ of habeas corpus in the Eastern District of New York making the same argument regarding the "right to be present during sidebar" discussions with prospective jurors, but

[93] *Id.*
[94] *Id.* ("[T]he jury is going to be sent in and out and jerked around, and they may resent that.").
[95] *Id.* at 79-80.
[96] *Sanchez*, 282 F.3d at 80.
[97] *Id.*
[98] *Id.*
[99] *Id.*
[100] *Id.*
[101] *Sanchez*, 282 F.3d at 80.

the petition was denied.[102]

The Court of Appeals for the Second Circuit reviewed the habeas denial, acknowledging that a "criminal defendant has a federal constitutional right, under the Confrontation Clause of the Sixth Amendment . . . 'to be present at all stages of the trial where his absence might frustrate the fairness of the proceedings[, and] impaneling of the jury is one such stage.' "[103] The government argued that in New York a criminal defendant's right to be present at sidebars is established in state procedure law—not federal law—so the defendant cannot argue for habeas corpus relief because the right was waived.[104] The court agreed, noting that the error was harmless because:

> (1) Sanchez was present in the courtroom for the entire jury selection process; (2) there were nine bench conferences during the entire voir dire; (3) Sanchez does not adequately refute appellee's assertions that defense counsel participated in the nine bench conferences and that Sanchez had ample opportunity to consult with his attorney about the conferences; and (4) of the nine prospective jurors who attended bench conferences, *none* actually served on the jury.[105]

Accordingly, the court affirmed the district court judgment as there was no structural error and any other error was harmless.[106]

In terms of New York state law, *People v. Antommarchi* set major precedent.[107] In *Antommarchi*, the defendant was convicted of

---

[102] *Id.* at 80.
[103] *Id.* at 81 (quoting *Tankleff*, 135 F.3d at 246).
[104] *Id.* at 81-82. FED. R. CRIM. P. 43(a)(2).
[105] *Sanchez*, 282 F.3d at 82.
[106] *Id.* at 82-83.
[107] 604 N.E.2d 95 (N.Y. 1992).

criminal drug possession in the third degree and the appellate division affirmed.[108] The defendant appealed to the New York Court of Appeals based on his absence from the bench sidebar discussions, wherein several prospective jurors spoke of matters they wished to remain private.[109] Specifically, the court addressed whether the prospective jurors could objectively decide a case after experiences with victims or individuals who had been arrested, whether a drug sale charge made the defendant appear guilty, and whether friendships with police officers would cloud their judgment in hearing testimony from officers on the witness stand.[110]

The court recognized that a criminal defendant has a "fundamental right to be present during any material stage of the trial and questioning during the impaneling of the jury may constitute a material stage of the trial."[111] However, the defendant need not be present for voir dire questioning regarding physical impairments, responsibilities to an employer, and family duties.[112] The defendant's right to be present may be asserted for the exploration of a prospective juror's background and objectivity with respect to the evidence.[113] The right gives a defendant the ability to observe " 'subliminal responses' " from a juror.[114] Accordingly, the court held that the trial court "violated [the] defendant's right to be present during a material part of the

[108] *Id.* at 96.
[109] *Id.* at 96-97 ("The discussions were held on the record and in the presence of counsel, but without defendant.").
[110] *Id.* at 97.
[111] *Id.* (citations omitted).
[112] *Antommarchi*, 604 N.E.2d at 97.
[113] *Id.*
[114] *Id.* (quoting People v. Sloan, 592 N.E.2d 784, 787 (N.Y. 1992).

trial."[115]

People v. Roman[116] reaffirmed a criminal defendant's fundamental right to be present at all material stages of a New York state trial.[117] In *Roman*, during voir dire, a sidebar discussion was held without the defendant present but later the individual was not seated as a juror.[118] The New York Court of Appeals stated that the "right to be present at a sidebar conference with a prospective juror exploring possible general or specific bias is governed exclusively by New York statutory law."[119] However, a court may reject the assertion of such a right when the impact on the outcome is merely speculative or the violation of the statute has minimal effect.[120] The Court of Appeals held that the defendant was not prejudiced by his exclusion from the sidebar because the prospective juror was not seated on the jury and since the trial court disqualified the juror, the defendant could not have added any meaningful input.[121] "When a prospective juror is disqualified by the court for cause, any benefit defendant could possibly claim from his presence at that excuse for cause hearing would have been 'but a shadow' . . . and purely speculative."[122]

The *Williams* Court cited to *People v. Maher*[123] for its analy-

[115] *Id.* Furthermore, the court stated that although he failed to object to the discussions, he was not precluded from making his claim. *Id.*

[116] 665 N.E.2d 1050 (N.Y. 1996).

[117] *Id.* at 1054.

[118] *Id.* at 1053.

[119] *Id.* at 1054.

[120] *Id.* (citing People v. Morales, 606 N.E.2d 953 (N.Y. 1992)).

[121] *Roman*, 665 N.E.2d at 1055 ("Disqualification of [venire woman] was a decision for the trial court to make after hearing argument, if any, by counsel, at which defendant could not have made any meaningful contribution.").

[122] *Id.* (citations omitted).

[123] 675 N.E.2d 833 (N.Y. 1996).

sis of what is considered material regarding the jury selection. In *Maher*, the New York Court of Appeals affirmed the appellate division's reversal of Maher's conviction because the defendant was excluded from a material stage of his trial.[124] Although the prosecution argued that the record did not show by what mechanism certain jurors were excused, the court held that the record supported the conclusion that Maher was "erroneously excluded from a material stage" of his trial; namely jury selection.[125]

In *People v. Davidson*,[126] the court once again held that a defendant was deprived of his right to be present during voir dire questioning of prospective jurors.[127] Originally, the appellate division remanded for a reconstruction hearing because segments of the voir dire were not recorded.[128] The hearing uncovered that three prospective jurors conferred with the court regarding their ability to be impartial, outside the presence of the defendant.[129] Since each prospective juror was dismissed at the discretion of defense counsel, the defendant could have influenced his attorney to do the same or abstain.[130] "[T]he record 'do[es] not negate the possibility that [the] defendant might have made a meaningful contribution to the [proceeding].' "[131] The court rejected the prosecution's speculative argument that credence be given to whether the "dismissed juror appeared fa-

[124] *Maher*, 675 N.E.2d at 835.
[125] *Id.* at 836.
[126] 675 N.E.2d 1206 (N.Y. 1996).
[127] *Id.* at 1207.
[128] *Id.*
[129] *Id.* ("Two of these prospective jurors were challenged peremptorily by the defense, and one was excused by the parties on consent.").
[130] *Id.*
[131] *Davidson*, 675 N.E.2d at 1207 (quoting *Roman*, 643 N.Y.S.2d at 10).

vorable or unfavorable for the defense."[132] The appellate division's order reversing the conviction was affirmed.[133]

In *People v. Vargas*,[134] the trial court applied certain conditions to the prospective juror sidebar discussions.[135] The judge was concerned with a juror's "uneasiness" that often manifested itself when a defendant was allowed to take part in the sidebar discussions.[136] If the defendant refused to waive his right to be present, the judge would insist, as a condition, that the discussion take place in public instead.[137] The defense objected on the ground that it would prejudice other jurors or make the individual discussing private concerns uncomfortable.[138] However, the defendant preemptively waived his right on the record in order to prevent tainting of the other jurors hearing a public testimonial.[139] As a result, the defendant was absent for several sidebar discussions, although his lawyer participated.[140] The jury found the defendant guilty of robbery in the first degree.[141]

Both the appellate division and the Court of Appeals affirmed.[142] The Court of Appeals held that the right to be present at sidebars is not a constitutional right; the right stems from New York

[132] *Id.* at 1208.
[133] *Id.*
[134] *Vargas*, 668 N.E.2d 879.
[135] *Id.* at 882.
[136] *Id.*
[137] *Id.*
[138] *Id.*
[139] *Vargas*, 668 N.E.2d at 882.
[140] *Id.*
[141] *Id.*
[142] *Id.* at 888.

Criminal Procedure Law § 260.20.[143] Accordingly, for the defendant to assert that his right was violated, he would need to possess that right in the first place. "The unassailable fact, however, is that neither the State nor Federal Constitution, nor any statute, nor any decision of this Court or the Supreme Court grants such a set of prerogatives for [the] defendant[]."[144] The right the court referred to is that of a criminal defendant "to have jurors discuss issues of bias and prejudice at sidebar instead of in open court."[145] Moreover, a waiver must be by a voluntary, knowing, and intelligent choice.[146] Although the defendant attempted to assert that his waiver was not voluntary, knowing, and intelligent because of the conditions set by the trial judge, the contention failed because neither the U.S. Constitution nor the New York Constitution afforded that right.[147]

Further, in *People v. Harris*,[148] a seated juror remained on the jury after an "in camera hearing outside of [the] defendant[']s[] presence" because she was concerned about her own safety.[149] In *Harris*, the defendant argued that the trial court erred in allowing the in camera hearing concerning a juror's fitness to take place outside of his presence.[150] The Court of Appeals held that "the presence of both de-

[143] *Id.* at 884. *See also* N.Y. CRIM. PROC. LAW § 260.20.

[144] *Vargas*, 668 N.E.2d at 884-85.

[145] *Id.* at 884.

[146] *Id.*

[147] *Id.* Further, the appellate court acknowledged the need for discretion of the trial court, including, perhaps, the ability to hold such proceedings in open court. *Id.* at 885. "[T]he reasonably based experience of trial courts reveals that jurors are less likely to be truthful about biases at sidebars if they are forced to speak of them in close proximity to the defendant." *Id.*

[148] *Harris*, 783 N.E.2d 502.

[149] *Id.* at 505.

[150] *Id.* at 508.

fense counsel at the hearing was sufficient to ensure that the defendant[] received a 'fair and just hearing' " because such an in camera hearing on a prospective juror's fitness to serve is an ancillary proceeding.[151] Thus, a legal determination by counsel is required and sufficient in order to disqualify a juror.[152]

In *People v. Velasquez*,[153] the Court of Appeals discussed the effectiveness of a somewhat vague waiver. The defendant's attorney waived his client's *Antommarchi* right on the record.[154] Although it may not have been perfectly clear what defense counsel was waiving when he stated " '[w]aived' " to the court, the judge responded immediately by saying " 'Antommarchi waived.' "[155] The Court of Appeals held that a reconstruction hearing was not necessary since "nothing in the record call[ed] into question the effectiveness of [the] defendant's waiver as announced by counsel."[156]

In regard to silence during the sidebars, the *Williams* Court relied on *People v. Lucious*.[157] In *Lucious*, the defendant was convicted of attempted assault, possessing a weapon, and robbery.[158] He argued that he was absent from sidebar discussions and thus could not confer with counsel regarding prospective jurors.[159] The Appellate Division, Fourth Department, remitted the matter to the state supreme court for

[151] *Id.*
[152] *Id.*
[153] *Velasquez*, 801 N.E.2d 376.
[154] *Id.* at 379 ("[I]t is plain from the record that defense counsel informed the court at the bench that his client waived his right to be present at sidebar . . . .").
[155] *Id.*
[156] *Id.* at 380.
[157] *Lucious*, 704 N.Y.S.2d 758.
[158] *Id.* at 759.
[159] *Id.* at 760-61.

a reconstruction hearing because the record failed to identify whether the defendant was present and how prospective jurors were excused.[160] Furthermore, "a waiver by defendant will not be inferred from a silent record."[161]

There does not appear to be a bright line rule regarding a criminal defendant's right under the Confrontation Clause with respect to being present at sidebars during jury selection. Likewise, the distinction between the Confrontation Clause under the U.S. Constitution and the New York Constitution is minimal. The right to be present at prospective juror sidebar conferences is broadly interpreted by the courts based upon a defendant's right to confront a witness against him or her. While many cases were remanded for a new trial when the defendant was missing from a bench conference, absent waiver, some courts have found a violation of this right to be harmless under certain circumstances. For example, if no prospective jurors serve as jurors in the trial, the error may be harmless. However, the fact that the defendant did not have the opportunity to observe a potential juror's reactions and mannerisms may be reason enough to reverse, notwithstanding the dismissal of the juror before trial. Furthermore, the excusal of a prospective juror for cause has been held as either a critical point or inconsequential. A defendant likely has a more convincing argument on appeal if the individual actually served on the jury after conferring with the court at a sidebar to the exclusion of the defendant.

[160] *Id.* at 761.

[161] *Id.* at 760 (citing People v. McCullough, 670 N.Y.S.2d 127, 127 (App. Div. 4th Dep't 1998)).

Some courts remand for a reconstruction hearing and reserve determination for the findings. However, under what circumstances is it appropriate to remand for a new trial rather than reconstruction? Precedent suggests that when the record is silent regarding who was at the sidebar or how a juror was excused, a reconstruction hearing is considered, if deemed necessary. Also, if the defendant sat within a certain distance from the sidebar, there may be a constructive presence to be judged at a reconstruction hearing. Unfortunately, these factors are not necessarily determinative.

Likewise, whether a defendant explicitly waives the *Antommarchi* right as compared to merely remaining silent should substantially affect an appellate court's ruling. Speaking conservatively, a defendant should not be allowed to sit idle while a prospective juror engages in discussion at sidebar and then appeal an unfavorable decision. The prosecution will likely argue that silence constitutes waiver. Should the courts demand an objection in order to preserve the right to appeal on these grounds? Doing so may help create a more efficient judicial system. If not, then the issue should be discussed and resolved by the legislature.

Finally, there has been debate regarding whether the *Antommarchi* court misinterpreted § 260.20 of New York Criminal Procedure Law.[162] In fact, some New York state cases reject that the right

[162] *See, e.g.*, Christina Boulougouris, Comment, People v. Antommarchi: *Do* Antommarchi *Rights Benefit Anyone? A Comprehensive Examination of the Decision and its Ramifications*, 67 ST. JOHN'S L. REV. 991 (1993) (questioning the judicial extension of a criminal defendant's right to be present at trial).

> [I]t is submitted that a criminal defendant should only have the right to attend sidebar conferences during jury impaneling when a balancing of the relevant factors manifests fulfillment of the Snyder standard [and] . .

to be present at sidebars during jury selection exists from anything but state law. Where do the Confrontation and Due Process Clauses of the U.S. Constitution and the New York Constitution fit in then? It appears that the state courts prefer bypassing the constitutions in favor of state statutes. Conversely, the federal courts recognized *Antommarchi* as precedent for sidebar discussions. In either case, a trial court appears to have substantial discretion in making the decision, as does the appellate court in reviewing that decision.

Brian E. Peterson

> . a defendant should have the right to appeal only when his or her request to be present was denied and a timely objection was made.

Id. at 1005.