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## Right to Be Present

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People v. Ortega<sup>848</sup>  
(decided November 25, 1991)

An analysis of the lower court's decision in *Ortega* appears *infra*.<sup>849</sup>

The court of appeals, in a unanimous decision, held that the trial court's *ex parte* conference with Officer Fritzen, a key witness for the prosecution, regarding the identity of a confidential informant violated the defendant's right to be present at all material stages of his trial.<sup>850</sup> The court concluded that the trial court's "inquiry was a material part of the trial . . . [and its] actions in conferring privately with the witness violated defendant's rights."<sup>851</sup>

The court of appeals based its decision on the fact that there was no record of the *ex parte* conference with Officer Fritzen. Therefore, the court reasoned that "[i]t is possible that Officer Fritzen, in explaining his refusal to disclose the identity of the informant, stated an un rebutted view of the facts which influenced the trial court in reaching its subsequent decision."<sup>852</sup>

848. 78 N.Y.2d 1101, 585 N.E.2d 372, 578 N.Y.S.2d 123 (1991).

849. See *infra* notes 934-56 and accompanying text.

850. *Ortega*, 78 N.Y.2d at 1102, 585 N.E.2d at 373, 578 N.Y.S.2d at 124.

851. *Id.*; see also *People v. Turaine*, 78 N.Y.2d 871, 577 N.E.2d 55, 573 N.Y.S.2d 64 (1991); *People v. Darby*, 75 N.Y.2d 449, 553 N.E.2d 974, 554 N.Y.S.2d 426 (1990). In *Turaine*, the court stated that "proceedings where [adverse] testimony is received are material stages of the trial." *Turaine*, 78 N.Y.2d at 872, 577 N.E.2d at 56, 573 N.Y.S.2d at 65. Therefore, the defendant's absence from the proceeding "could have a substantial effect on his ability to defend." *Id.* In *Darby*, the court investigated the possible taint of an impaneled jury. The trial court conducted a *voir dire* hearing during the course of the trial to determine any potential effect. The court of appeals concluded that an "inquiry to determine the existence and extent of prejudice affecting the gross disqualification of a sworn juror . . . is inextricably related to defendant's entitlement of a fair hearing." *Darby*, 75 N.Y.2d at 453-54, 553 N.E.2d at 975, 554 N.Y.S.2d at 427.

852. *Ortega*, 78 N.Y.2d at 1103, 585 N.E.2d at 373, 578 N.Y.S.2d at 124. In *People v. Ortega*, 572 N.Y.S.2d 241 (4th Dep't), *aff'd*, 78 N.Y.2d 1101, 585 N.E.2d 372, 578 N.Y.S.2d 123 (1991), the fourth department stated that the trial court placed on the record the purpose of the conference which was to inform Officer Fritzen of a potential *Goggins* problem and to persuade him to disclose the informant's identity. *Id.* at 242. The trial court eventually