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## Confrontation Clause

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## RIGHT TO CONFRONTATION

*U.S. CONST. amend. VI:*

*In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . .*

*N.Y. CONST. art. I, § 6:*

*In any trial in any court whatever the party accused shall be allowed to appear and defend in person . . . and be confronted with the witnesses against him.*

### SUPREME COURT, APPELLATE DIVISION FIRST DEPARTMENT

People v. Rivera<sup>1</sup>  
(decided April 22, 1999)

Defendant, Paul Rivera, was convicted of one count of criminal sale of a controlled substance in the second degree and one count of conspiracy in the second degree, and was sentenced to concurrent terms of eight years to life, and four and a half to nine years.<sup>2</sup> Defendant appealed and claimed that his exclusion from the audibility hearing constituted a violation of his right to be present at material stages of trial, pursuant to the Confrontation and Due Process Clauses of the Federal<sup>3</sup> and New York State Constitutions<sup>4</sup> and New York Criminal Procedure Law § 260.20.<sup>5</sup>

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<sup>1</sup> 691 N.Y.S. 2d 4 (App. Div. 1st. Dep't 1999).

<sup>2</sup> *Id.* at 10.

<sup>3</sup> U.S. CONST. amend. VI. The Sixth Amendment states: "In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." *Id.*

<sup>4</sup> N.Y. CONST. art. I, § 6, stating 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." *Id.*

The Appellate Division, First Department affirmed the decision of the trial court, and held that excluding defendant from the audibility hearing of the drug transaction tape was not reversible error, and the trial court's admission of the tape into evidence was not an imprudent exercise of discretion.<sup>6</sup>

During the period from August to December 1995, the New York City Police Department ran an undercover drug investigation in the area of 136 Street and Amsterdam Avenue in Manhattan.<sup>7</sup> An undercover officer was acting as a drug purchaser during the investigation.<sup>8</sup> During the investigation, transactions between the officer and vendors were recorded on both videotape and audiotape.<sup>9</sup> The investigation culminated in January 1996 with the arrest of the defendant and 11 of his accomplices. The defendants were charged with criminal sale of a controlled substance and conspiracy.<sup>10</sup>

On December 5, 1995, the undercover officer, wearing a wire which fed audio to the video camera recording, approached the defendant on West 136<sup>th</sup> Street.<sup>11</sup> After being asked what he wanted by the defendant, the officer replied that he wanted "50."<sup>12</sup> Defendant then proceeded to the corner pay phone and paged the codefendant, Enrique Serra,<sup>13</sup> who, after about 5 minutes, arrived in a gray van and began negotiating with the undercover officer regarding the drug transaction. The undercover officer then purchased \$5000 worth of "Good Job."<sup>14</sup>

At trial, the prosecution presented the undercover officer's testimony, and the December 5, 1995 videotape of the drug sale, as

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<sup>5</sup> *Rivera* at 6 (citing N.Y. CRIM. PROC. LAW. § 260.20 that "[a] defendant must be personally present during the trial of an indictment . . ." *Id.*

<sup>6</sup> *Id.* at 4.

<sup>7</sup> *Id.* at 6.

<sup>8</sup> *Id.*

<sup>9</sup> *Id.*

<sup>10</sup> *Id.*

<sup>11</sup> *Rivera*, 691 N.Y.S.2d at 6.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.* at 4 (noting "Good Job" is a brand of heroin).

evidence against the defendant.<sup>15</sup> The defense requested an audibility hearing of the videotape with the defendant present at the hearing.<sup>16</sup> The court granted the hearing but excluded the defendant, noting that the hearing was purely legal in nature, and the defendant's presence was unnecessary<sup>17</sup> because the tape had previously been provided to and reviewed by defense counsel.

On appeal, the defendant claimed that the trial court abused its discretion in admitting the partially inaudible videotape into evidence and violated his right to be present at material stages of trial by excluding him from the audibility hearing.

The Appellate Division, First Department held that a defendant's presence at an audibility hearing is not an across-the-board requirement, but is a matter within the court's discretion, giving due regard to a defendant's right to be present when his ability to defend is at issue.<sup>18</sup>

The court began its analysis by noting that "[a] New York defendant's right to be present at material stages of trial is grounded in the Confrontation and Due Process Clauses of the United States and New York constitutions as well as in Criminal Procedure Law [section] 260.20."<sup>19</sup> The Confrontation clause of the Sixth Amendment entitles defendants to be present at "core" stages of a trial where "witnesses or evidence against [defendant] are being presented to the trier of fact."<sup>20</sup> Beyond this, a defendant is entitled to be present at stages "where the defendant's presence might impact his ability to defend himself at a critical stage of the criminal proceeding" pursuant to the Due Process Clause of the

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<sup>15</sup> *Id.*

<sup>16</sup> *Rivera*, 691 N.Y.S.2d at 7.

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 9.

<sup>19</sup> *See supra* notes 3, 4, 5 and accompanying text. *See also* *People v. Sprowal*, 84 N.Y.2d 113, 116-17, 615 N.Y.S.2d 328, 638 N.E.2d 973 (1994).

<sup>20</sup> *Rivera*, 691 N.Y.S.2d at 7 (citing *Kentucky v. Stincer*, 482 U.S. 730, 744-6 for the proposition that "[a]lthough presence is not an [absolute] guarantee when [it] would be useless, or the benefit but a shadow, due process clearly requires that a defendant be allowed to be present to the extent that a fair and just hearing would be thwarted by his absence").

Fourteenth Amendment.<sup>21</sup> Therefore, there may be stages of the trial that are not covered by constitutional guarantees.<sup>22</sup> In this aspect the New York statutory guarantee provides defendants greater protection in that it “encompasses the right be present during the trial of an indictment.”<sup>23</sup>

In *Snyder v. Massachusetts*, the United States Supreme Court addressed the issue of whether a defendant’s Federal Due Process right to be present was violated when he was excluded from a jury viewing the scene of the crime.<sup>24</sup> The Court held that a defendant’s presence was required as a matter of due process “to the extent that a fair and just hearing would be thwarted by his [or her] absence, and to that extent only.”<sup>25</sup> There is no right to be present when “presence would be useless, or the benefit but a shadow.”<sup>26</sup>

When conducting a State law analysis, it is important to distinguish between core and ancillary proceedings because a “defendant usually has an [absolute] right to attend trial—regardless of his or her potential contribution—but only a qualified right to attend ancillary proceedings.”<sup>27</sup> Thus, in ancillary proceedings the court must “evaluate the extent to which defendant’s exclusion affects his ability to defend.”<sup>28</sup> In other words, a defendant’s presence is required in ancillary proceedings if he or she “has special knowledge about facts at issue or is capable of making a valuable contribution.”<sup>29</sup> The *Rivera* court

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<sup>21</sup> U.S. CONST. amend XIV, §1. This section provides in pertinent part: “No State shall . . . deprive any person of life, liberty, or property, without due process of law.” *Id.*

<sup>22</sup> See N.Y. PROC. L. § 260.20 at 11 (noting “[f]rom a constitutional standpoint, the [due process] right extends only to a stage of the criminal proceeding that is critical to its outcome if his presence would contribute to the fairness of the procedure” (quoting *Stincer*, 482 U.S. at 745)).

<sup>23</sup> *People v. Rivera*, 691 N.Y.S.2d at 6 (citing N.Y. PROC. L. §260.20).

<sup>24</sup> 291 U.S. 97 (1934).

<sup>25</sup> *Snyder* at 107-108.

<sup>26</sup> *Id.* at 106-107.

<sup>27</sup> See *People v. Morales*, 80 N.Y.2d 450, 457, 606 N.E.2d 953, 591 N.Y.S.2d 825 (1992).

<sup>28</sup> *Id.*

<sup>29</sup> See *People v. Rivera*, 691 N.Y.S.2d at 7.

held that in proceedings where the issue is legal in nature, the defendant's presence is not required.<sup>30</sup>

The *Rivera* court proceeded by analyzing the nature of an audibility hearing in order to determine whether it is considered to be a "core" or "ancillary" proceeding.<sup>31</sup> The court noted that an audibility hearing is a threshold proceeding where the court determines whether the utterances on a tape are sufficiently clear to be admissible into evidence at trial.<sup>32</sup> The nature of an audibility hearing is such that it does not involve witnesses or cross-examination.<sup>33</sup> Therefore, the court's determination at the hearing is based on "no other fact finding than its own qualitative evaluation of the aural quality of the tape and . . . the defendant's absence will have no effect on his ability to defend."<sup>34</sup> The court has broad discretion in deciding audibility and such discretion includes who is to be present at the hearing.<sup>35</sup>

In conclusion, the *Rivera* court held that the defendant's presence at an audibility hearing is a matter within the court's discretion and due regard is to be given to a defendant's right to be present when his ability to defend is at issue.<sup>36</sup> However, a defendant's presence is not an across-the-board requirement even pursuant to the New York statutory guarantee which provides defendants greater protection than the federal Constitution.<sup>37</sup>

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<sup>30</sup> *Id.* at 8.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Rivera*, 691 N.Y.S.2d at 8.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Rivera*, 691 N.Y.S.2d at 9.

<sup>37</sup> *Id.*

