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### Right to Be Present

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et al.: Right to Be Present  
**RIGHT TO BE PRESENT**

*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 with counsel as in civil actions and shall be informed of the nature and the cause of the accusation and be confronted with the witnesses against him.*

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

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

**SUPREME COURT, APPELLATE DIVISION**

**SECOND DEPARTMENT**

People v. Barnes<sup>1</sup>  
(decided October 23, 1995)

Defendant, Robert Barnes, appealed his conviction of manslaughter in the first degree and criminal possession of a weapon in the fourth degree on the grounds that his fundamental right to be present at all material stages of the trial pursuant to the New York<sup>2</sup> and Federal<sup>3</sup> Constitutions was violated.<sup>4</sup> The defendant based this claim on the fact that he was neither informed of, nor present during, an in camera conference

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1. 633 N.Y.S.2d 54 (App. Div. 2d Dep't 1995).

2. N.Y. CONST. art. I, § 6. This provision provides in relevant part: "In any trial in any court whatever the party accused shall be allowed to appear and defend in person and with counsel as in civil actions and shall be informed of the nature and the cause of the accusation and be confronted with the witnesses against him." *Id.*

3. U.S. CONST. amend. VI. The Sixth Amendment provides in pertinent part: "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the state and . . . to be confronted with the witnesses against him . . . ." *Id.*

4. *Barnes*, 633 N.Y.S.2d at 55.

“wherein the Assistant District Attorney advised the court that he recognized one of the prospective jurors and that [the Assistant District Attorney] had attended the high school where the juror taught.”<sup>5</sup> The Appellate Division, Second Department, held that the defendant’s “lack of knowledge regarding the Assistant District Attorney’s familiarity with the prospective juror clearly prejudiced the defendant,” and thus entitled him to a new trial.<sup>6</sup>

During voir dire, an in camera conference was held in the absence of the defendant but in the presence of his attorney.<sup>7</sup> During the conference, the Assistant District Attorney informed the court that he recognized a prospective juror and that the juror taught at the high school attended by the Assistant District Attorney.<sup>8</sup> Examination of the trial record revealed that the defendant was not informed of the Assistant District Attorney’s disclosure during the conference and that neither the defendant nor his attorney were asked whether the jurors chosen in that round were acceptable to the defense.<sup>9</sup> Subsequently, the defendant was convicted of manslaughter in the first degree and criminal possession of a weapon in the fourth degree, from which he appealed.<sup>10</sup>

The defendant claimed that his absence from the in camera conference abridged his right to be present under both the New York and Federal Constitutions.<sup>11</sup> The court first noted that the “defendant has a fundamental right to be present at any material stage of a trial against him under both the Federal and New York Constitutions.”<sup>12</sup> The court relied on *People v. Velasco*,<sup>13</sup> which

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5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.* See N.Y. CRIM. PROC. LAW § 260.20 (McKinney 1993). Section 260.20 provides:

A defendant must be personally present during the trial of an indictment; provided, however that a defendant who conducts himself in so disorderly and disruptive a manner that his trial cannot be carried on with him in the courtroom may be removed from the courtroom if, after

held that the defendant's absence from a precharge conference,<sup>14</sup> a side-bar voir dire,<sup>15</sup> and a conference in the robing room pertaining to peremptory challenges and challenges for cause,<sup>16</sup> did not violate his right to be present during material stages of the proceeding against him under both the Federal and New York Constitutions.

The court looked to federal precedents in defining a material stage, as one in which the defendant's "absence would have a

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he has been warned by the court that he will be removed if he continues such conduct, he continues to engage in such conduct.

*Id.*

13. 77 N.Y.2d 469, 570 N.E.2d 1070, 568 N.Y.S.2d 721 (1991).

14. *Id.* at 472, 570 N.E.2d at 1071, 568 N.Y.S.2d at 722. The precharge conference, which was held in the court's robing room and attended by counsel for both sides, encompassed discussions of a stipulation pertaining to the contents of a medical record, the scheduling of the remainder of the trial, and the court's closing instructions to the jury. *Id.* Additionally, the court considered and denied a motion to dismiss the murder charge and granted a motion to dismiss the weapons charge. *Id.* The court found that, since only questions of law or procedure were entertained during the conference, the defendant was not required to be present. *Id.*

15. *Id.* at 473, 570 N.E.2d at 1071, 568 N.Y.S.2d at 722. The side-bar voir dire involved questioning prospective jurors at the bench where the defendant could not hear, but in the presence of counsel for both sides. *Id.* at 472-73, 570 N.E.2d at 1071, 568 N.Y.S.2d at 722. The bench conferences permitted jurors to reply to questions that were asked the jury for disqualification purposes. *Id.* As a result of the bench conferences, some jurors were excused and others returned to the jury box. *Id.* at 473, 570 N.E.2d at 1071, 568 N.Y.S.2d at 722. The court held that "the determination that a prospective juror was disqualified before voir dire was a matter for the court and defendant had no statutory or constitutional right to personally participate in the discussions leading to the court's ruling." *Id.* (citation omitted).

16. *Id.* at 473, 570 N.E.2d at 1072, 568 N.Y.S.2d at 723. In reviewing the defendant's assertion regarding the conference in the robing room pertaining to peremptory challenges and challenges for cause, the court held that the conference did not comprise a material part of the trial since it was merely a "preliminary advisement" of challenges later exercised and recorded in open court in the defendant's presence. *Id.* The court noted that the defendant did have an "opportunity to consult with his attorney before the challenges were made." *Id.*

substantial effect on his ability to defend himself.”<sup>17</sup> In *Snyder v. Commonwealth of Massachusetts*,<sup>18</sup> the defendant was convicted of murder in the first degree and sentenced to death.<sup>19</sup> He appealed on the ground that the judge’s denial of his motion to be present at a jury viewing violated his right of due process under the Fourteenth Amendment.<sup>20</sup> The United States Supreme Court held that, although a criminal defendant “in a prosecution for a felony . . . has the privilege under the Fourteenth Amendment to be present in his own person whenever his presence has a relation, reasonably substantial, to the fullness [sic] of his opportunity to defend against the charge,” this privilege is not absolute.<sup>21</sup> The privilege exists “to the extent that a fair and just hearing would be thwarted by his absence . . .,” but not where the defendant’s “presence would be useless, or the benefit but a shadow.”<sup>22</sup> The *Snyder* Court found that the defendant’s presence would have served no material purpose, because “he could neither ask nor answer questions, nor in any way interfere with the acts, observations or conclusions of the jury.”<sup>23</sup> Furthermore, the Court noted that the defendant would be able to point out any improprieties in the viewing at trial since the “stenographic transcript of all that was said and done” was made available to him.<sup>24</sup> Accordingly, the Court affirmed his conviction.<sup>25</sup>

In the case at bar, the court concluded that the defendant’s absence from the in camera conference violated the defendant’s right to be present, since it “clearly prejudiced the defendant by denying him a full and fair opportunity to question this juror

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17. *Barnes*, 633 N.Y.S.2d at 55 (citing *Snyder v. Commonwealth of Massachusetts*, 291 U.S. 97, 105-06 (1934)).

18. 291 U.S. 97 (1934). *Snyder* was recently cited with approval in *Kentucky v. Stincer*, 482 U.S. 730 (1987).

19. *Snyder*, 291 U.S. at 102-03.

20. *Id.* at 103.

21. *Id.* at 105-07.

22. *Id.* at 106-08.

23. *Id.* at 112 (citation omitted).

24. *Id.*

25. *Id.* at 122.

regarding any potential bias, to object to the selection of this juror, or to exercise a peremptory challenge to eliminate this juror.”<sup>26</sup> The court held that “[t]his right cannot be waived by defense counsel absent ratification by the defendant.”<sup>27</sup> The court noted the absence of any evidence in the record that the defendant was informed by his attorney of the Assistant District Attorney’s familiarity with the prospective juror.<sup>28</sup> Accordingly, the court reversed the defendant’s conviction and ordered a new trial.<sup>29</sup>

The New York and Federal Constitutions are similar in that both guarantee the right to be present. Further, New York has codified the right to be present. The Federal Constitution due process standard set forth in *Snyder v. Commonwealth of Massachusetts*<sup>30</sup> parallels the analysis for a deprivation of the right to be present under the New York Constitution.<sup>31</sup> Thus,

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26. *Barnes*, 633 N.Y.S.2d at 55.

27. *Id.* See *People v. Amato*, 172 A.D.2d 545, 567 N.Y.S.2d 873 (2d Cir. 1991). In *Amato*, the defendant was convicted of first degree assault and third degree criminal possession of a weapon. *Id.* at 545, 567 N.Y.S.2d at 874. The defendant appealed on the ground that the trial court erred in conducting the trial in his absence. *Id.* The defendant was not present during the first two mornings of his trial. *Id.* Both times, his attorney informed the court that the defendant was on his way and consented to proceed in his absence. *Id.* The court held that, although “a defendant who deliberately absents himself from the courtroom after the trial has begun forfeits his right to be present,” the court has an affirmative duty to “determine if the defendant’s absence is deliberate and to recite on the record the reasons for its finding.” *Id.* at 545, 567 N.Y.S.2d at 875. The court concluded that “[t]he failure to conduct such an inquiry constitutes reversible error.” *Id.* The court found that the trial court’s inquiry was only cursory and defense counsel’s replies failed to “indicate that the defendant was deliberately absent.” *Id.* Furthermore, the court found that the defendant’s right to be present “at these particular stages of trial [were] not waived by defense counsels consent to proceed, and there [was] no evidence that the defendant ratified his counsel’s purported waiver.” *Id.* at 545-46, 567 N.Y.S.2d at 875. Consequently, the court reversed the defendant’s conviction and ordered a new trial. *Id.* at 546, 567 N.Y.S.2d at 875.

28. *Barnes*, 633 N.Y.S.2d at 55.

29. *Id.*

30. 291 U.S. 97 (1934).

31. See *People v. Antommarchi*, 80 N.Y.2d 247, 604 N.E.2d 95, 590 N.Y.S.2d 33 (1992). In *Antommarchi*, the defendant was convicted of criminal

under the facts in *Barnes*, it was not necessary to determine whether the state constitution goes further than the federal constitution in defining the right to be present.

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possession of a controlled substance in the third degree. *Id.* at 249, 604 N.E.2d at 96, 590 N.Y.S.2d at 34. He appealed on the grounds that his absence from a portion of the impaneling of the jury constituted a deprivation of his constitutional and statutory right to be present during a material stage of the trial against him, as guaranteed under Article I, Section 6 of the New York Constitution and the Sixth and Fourteenth Amendments of the Federal Constitutions. *Id.* The court found that the questioning of prospective jurors regarding their ability to impartially weigh the evidence and hear testimony violated the defendant's right to be present during a material stage of the proceedings. *Id.* at 250, 604 N.E.2d at 97, 590 N.Y.S.2d at 35.