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Right to Be Present

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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 of 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 a speedy and public trial, by an impartial jury of the state and . . . to be confronted with the witnesses against him

COURT OF APPEALS

People v. Sloan¹²⁵⁴
(decided April 7, 1992)

Defendants contended that their constitutional rights to be present at all material stages of their trial pursuant to the state¹²⁵⁵ and federal¹²⁵⁶ constitutions were violated when the trial judge questioned potential jurors prior to formal voir dire about the effect of pretrial publicity outside the presence of the defendants. The trial judge continued this questioning until eighteen venire members were chosen for formal voir dire. The court of appeals held that the defendants' presence at the inquiry on such matters could have been critical in deciding matters relating to challenges for cause and peremptory challenges, thus, defendants had a fundamental right to be present.¹²⁵⁷

At trial, prior to the start of formal voir dire by counsel, the trial judge conducted a side-bar voir dire of prospective jurors

1254. 79 N.Y.2d 386, 592 N.E.2d 784, 583 N.Y.S.2d 176 (1992).

1255. N.Y. CONST. art. I, § 6.

1256. U.S. CONST. amend. VI.

1257. *Sloan*, 79 N.Y.2d at 392, 892 N.E.2d at 786, 583 N.Y.S.2d at 179.

outside the hearing of the defendants. The judge questioned each prospective juror separately about the effect of pre-trial publicity and the reported involvement of John Roland, a well known local television newscaster.¹²⁵⁸ The nature of the questions included the jurors' exposure to pretrial publicity, their familiarity with Roland and the weight they would give to his testimony. Potential jurors were also questioned about whether "they could weigh a news reporter's testimony fairly; whether they believed that a newscaster has a better ability to observe and recall events than other witnesses; and whether their own knowledge of Roland as a newscaster or their exposure to pretrial publicity would affect their ability to be impartial."¹²⁵⁹ The questioning continued until eighteen venire members were chosen for formal voir dire.¹²⁶⁰

First the court of appeals noted that defendants' fundamental right to be present at all material stages of a trial has long been recognized in New York.¹²⁶¹ The court then stated that *People v.*

1258. *Id.* at 390, 592 N.E.2d at 785, 583 N.Y.S.2d at 177.

1259. *Id.* at 391, 592 N.E.2d at 785-86, 583 N.Y.S.2d at 177-78.

1260. *Id.* at 391, 592 N.E.2d at 786, 583 N.Y.S.2d at 178.

1261. *Id.* See *People v. Turaine*, 78 N.Y.2d 871, 577 N.E.2d 55, 573 N.Y.S.2d 64 (1991). The *Turaine* court held that defendant had a right to be present at a hearing to determine the admissibility of a witness' proposed testimony that defendant threatened him to prevent him from testifying against defendant. *Id.* The court reasoned that defendant had a right to confront the witness against him at the hearing and to advise counsel of any errors or falsities in the witness' testimony. *Id.* The court noted that it was not sufficient that defendant was present when the witness testified before the jury as the court had already determined the evidence had probative value and would be received for the jury's consideration. *Id.* at 872, 577 N.E.2d at 56, 573 N.Y.S.2d at 65; see also *People v. Mehmedi*, 69 N.Y.2d 759, 505 N.E.2d 610, 513 N.Y.S.2d 100 (1987). In *Mehmedi*, the jury requested additional information during deliberations. *Id.* at 760, 577 N.E.2d at 610, 513 N.Y.S.2d at 100. The court did not return the jury to the courtroom and in the absence of the defendant, though defense counsel was present, the court sent a note responding to the inquiry. *Id.* The New York Court of Appeals noted that Criminal Procedure Law section 310.30 makes a defendant's right to be present during jury instructions absolute and unequivocal. *Id.* at 760, 505 N.E.2d 610-11, 513 N.Y.S.2d at 100. Further, failure to comply with this mandate results in a departure from a statutory provision that affects the organization of the court as prescribed by law. *Id.* at 760, 505 N.E.2d at 611, 513 N.Y.S.2d at 101. The court held that defendant was therefore absent

Mullen,¹²⁶² outlined the extent of a defendant's statutory and constitutional rights to be present during court proceedings. In *Mullen*, the court explained that under Criminal Procedure Law (CPL) section 260.20,¹²⁶³ during the trial of an indictment, a defendant's right to be present includes the "impaneling of the jury, the introduction of evidence, the summations of counsel, and the court's charge to the jury."¹²⁶⁴ Additionally the court noted that due process requires the defendants' presence "to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only!"¹²⁶⁵ The court also stated that in *People v. Velasco*,¹²⁶⁶ it held that the defendant's presence is not required when the judge questions potential jurors relating to grounds for juror disqualification in the general sense. These questions concern such matters as physical impairments and family employment obligations and, therefore, a decision to excuse a juror on these grounds is a matter solely for the court.¹²⁶⁷ The *Velasco* court reasoned that the defendant's

during a material part of his trial and application of the harmless error standard was not appropriate. *Id. Accord* *People v. Ciccio*, 47 N.Y.2d 431, 391 N.E.2d 1347, 418 N.Y.S.2d 371 (1979). The *Ciccio* court held that the presence of the defendant is constitutionally required when supplemental instructions are given to the jury. *Id.* at 436-37, 391 N.E.2d at 1350, 418 N.Y.S.2d at 373.

1262. 44 N.Y.2d 1, 374 N.E.2d 369, 403 N.Y.S.2d 470 (1978).

1263. N.Y. CRIM. PROC. LAW § 260.20 (McKinney 1982). 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 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.

1264. *Mullen*, 44 N.Y.2d at 4, 374 N.E.2d at 370, 403 N.Y.S.2d at 472.

1265. *Id.* at 4-5, 374 N.E.2d at 370, 403 N.Y.S.2d at 472 (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 108 (1934)).

1266. 77 N.Y.2d 469, 570 N.E.2d 1070, 568 N.Y.S.2d 721 (1991).

1267. *Id.* at 473, 570 N.E.2d at 1071-72, 568 N.Y.S.2d at 722-23.

presence at the bench conference during pre-voir dire screening would have had no effect on the ultimate fairness of the trial.¹²⁶⁸

The court in *Sloan* distinguished the present case from *Velasco*, and pointed out that the questioning in *Sloan* went beyond matters concerning juror qualifications in the general sense and concerned such matters as the attitudes and feelings about some of the events and witnesses who would later testify.¹²⁶⁹ The questioning also delved into the effect of pretrial publicity on potential jurors and the believability of a key prosecution witness.¹²⁷⁰ The court pointed out that the defendants' presence at such questioning could have given them an opportunity to detect any bias or hostility by assessing jurors' demeanor, expressions, and tone of voice as well as other subliminal responses, and, thus, could have been crucial in determining sensitive matters relating to juror peremptory and cause challenges.¹²⁷¹ Accordingly, the court held that it could not "conclude that the defendants' presence at the side-bar questioning would have been of no benefit" and that their exclusion from the questioning was error.¹²⁷²

Under federal law the controlling case is *Snyder v. Massachusetts*.¹²⁷³ Under, *Snyder* the "presence of the defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only."¹²⁷⁴ The Court also noted that the privilege extends "whenever [defendant's] presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge."¹²⁷⁵ However, the Court recognized that the privilege of presence does not extend to the defendant when his presence

1268. *Id.* at 473, 570 N.E.2d at 1070, 568 N.Y.S.2d at 721.

1269. *Sloan*, 79 N.Y.2d at 392, 592 N.E.2d at 786-87, 583 N.Y.S.2d at 178-79.

1270. *Id.* at 392, 592 N.E.2d 787, 583 N.Y.S.2d at 179.

1271. *Id.*

1272. *Id.* at 393, 592 N.E.2d 787, 583 N.Y.S.2d 179.

1273. 291 U.S. 97 (1934).

1274. *Id.* at 107-08.

1275. *Id.* at 105-06.

would "be useless, or the benefit but a shadow."¹²⁷⁶ Thus, a defendant's right to be present at any stage of the criminal proceeding is only guaranteed if his presence "is critical to its outcome . . . [and] would contribute to the fairness of the procedure."¹²⁷⁷

In conclusion, under New York law a defendant has a right to be present during voir dire questioning of jurors when the questioning concerns events and witnesses to be heard in the trial proceeding. New York courts have regularly followed *Snyder v. Massachusetts*. The court of appeals, in *Mullen*, followed *Snyder* and noted that, apart from CPL section 260.20, a defendant's right to be present at his trial is required by due process "to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only."¹²⁷⁸

Accordingly, under both the state and federal constitutions a criminal defendant's right to be present extends to those stages of the trial where his absence will have a substantial effect on his ability to present a defense and to the extent that a fair and just hearing will be thwarted by his absence. Those stages include voir dire examinations of jurors where the voir dire implicates a potential juror's attitude and beliefs about evidence and testimony to be admitted at trial as well as the effects of pretrial publicity on potential jurors.

¹²⁷⁶ *Id.* at 106-07.

¹²⁷⁷ *Kentucky v. Stincer*, 482 U.S. 730, 745 (1987).

¹²⁷⁸ *Mullen*, 44 N.Y.2d 1, 4-5, 374 N.E.2d 369, 370, 403 N.Y.S.2d 4472 (quoting *Snyder*, 291 U.S. at 108); *see also* *People v. Dokes* 79 N.Y.2d 656, 595 N.E.2d 836, 584 N.Y.S.2d 761 (1992). The court noted that due process requires the presence of a defendant "whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge." *Id.* at 659, N.E.2d at 838, 584 N.Y.S.2d at 763 (quoting *Snyder*, 291 U.S. at 105-06).

People v. Dokes¹²⁷⁹
(decided June 11, 1992)

The defendant appealed his criminal conviction on the grounds that the trial court conducted a *Sandoval*¹²⁸⁰ hearing in his absence and thus his right to be present at all material stages of his trial pursuant to the state¹²⁸¹ and federal¹²⁸² constitutions was violated.¹²⁸³ The court held that the *Sandoval* hearing conducted in the defendant's absence "was a material stage of the trial at which the defendant's presence was required."¹²⁸⁴ Therefore, the order of the appellate division affirming the judgment of his conviction was reversed and a new trial ordered.¹²⁸⁵

Prior to jury selection in the defendant's trial, a conference was held in the judge's robing room in which the court heard counsels' arguments on defendant's *Sandoval* motion to preclude the People from cross-examining defendant about prior crimes. The defendant was not present during this conference.¹²⁸⁶ Prior to this conference there was an earlier *Sandoval* hearing in connection with a previous effort to try the defendant on these

1279. 79 N.Y.2d 656, 595 N.E.2d 836, 584 N.Y.S.2d 761 (1992).

1280. People v. Sandoval, 34 N.Y.2d 371, 314 N.E.2d 413, 357 N.Y.S.2d 849 (1974). The court noted:

In each case the defendant shall inform the court of prior convictions and misconduct. The trial court in its discretion and in the interests of justice shall then determine whether and to what extent the defendant has met his burden of demonstrating that the prejudicial effect of the admission of evidence thereof for impeachment purposes would far outweigh the probative worth of such evidence on the issue of credibility as to warrant its exclusion.

Id. at 378, 314 N.E.2d at 418, 357 N.Y.S.2d at 856.

1281. N.Y. CONST. art. I, § 6.

1282. U.S. CONST. amend. VI.

1283. *Dokes*, 79 N.Y.2d at 658, 595 N.E.2d at 837, 584 N.Y.S.2d at 762.

1284. *Id.* at 662, 595 N.E.2d at 840, 584 N.Y.S.2d at 765.

1285. *Id.*

1286. *Id.* at 658-59, 595 N.E.2d at 838, 584 N.Y.S.2d at 763.

charges.¹²⁸⁷ The People argued that the defendant was present at the prior *Sandoval* hearing and that the subsequent hearing was simply a reargument of the prior *Sandoval* hearing. Accordingly, the People maintained that assuming the defendant's presence is required at a *Sandoval* hearing, his presence at the initial hearing satisfied the requirement for the later proceeding.¹²⁸⁸ The defendant argued that he was not present at the prior *Sandoval* hearing and that his right to be present at all material stages of his trial was violated when the trial court conducted the *Sandoval* hearing in his absence.¹²⁸⁹

The court observed that the record of the second hearing, from which the defendant was absent, indicates that the motion was considered *de novo* and therefore, the factual dispute with respect to defendant's presence at the initial hearing is insignificant.¹²⁹⁰ The court did not consider it material whether the defendant was present or not at the first hearing.¹²⁹¹ The court of appeals reasoned that even if the defendant was present at the first hearing the benefits that the defendant may have obtained by his presence did not carry over to the second hearing.¹²⁹²

The court maintained that "[a] defendant's presence at trial is required not only by the Confrontation and Due Process Clauses of the federal and state constitutions, but also by Criminal Procedure Law section 260.20, which provides that 'a defendant must be personally present during the trial of an indictment.'" ¹²⁹³ The court noted that this statutory right has been extended to "the impaneling of the jury, the introduction of evidence, the summations of counsel, and the court's charge to the jury." ¹²⁹⁴ The court further maintained that due process requires

1287. *Id.* at 659, 595 N.E.2d at 838, 584 N.Y.S.2d at 763.

1288. *Id.*

1289. *Id.*

1290. *Id.*

1291. *Id.*

1292. *Id.* at 659-60, 595 N.E.2d at 838, 584 N.Y.S.2d at 763.

1293. *Dokes*, 79 N.Y.2d at 659, 595 N.E.2d at 838, 584 N.Y.S.2d at 763 (quoting N.Y. CRIM. PROC. LAW § 260.20 (McKinney 1982)).

1294. *Id.* (quoting *People v. Velasco*, 77 N.Y.2d 469, 472, 570 N.E.2d 1070, 1071, 568 N.Y.S.2d 721, 722 (1991)). See also *People v. Mullen*, 44 N.Y.2d 1, 374 N.E.2d 369, 403 N.Y.S.2d 470 (1978). In *Mullen*, the court

that a defendant be present “whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge.”¹²⁹⁵ The court stated that it has applied these standards and “held that a defendant has a right to be present during a pretrial suppression hearing during which wit-

held that important proceedings such as the impaneling of the jury, introduction of evidence, summations of counsel and the court’s charge to the jury must be deemed a part of the “trial” as that term is used in Criminal Procedure Law section 260.20, providing that a defendant must be personally present during the trial of an indictment. *Id.* at 4, 374 N.E.2d at 370, 403 N.Y.S.2d at 472. Accordingly, “any further instructions given to the jury after they have retired to deliberate constitute[s] the court’s charge and are, therefore, viewed as part of the trial . . . [The Court reasoned that] these proceedings are deemed part of the trial because the presence of the defendant is considered ‘essential to the attainment of justice and the protection of the innocent.’” *Id.* (quoting *Maurer v. People*, 43 N.Y. 1, 3 (1870)). In *People v. Sloan*, 79 N.Y.2d 386, 592 N.E.2d 784, 583 N.Y.S.2d 176 (1992), the court held that the defendant had a fundamental right to be present with counsel during voir dire questioning of the jurors about the effect of pretrial publicity on jurors’ attitudes towards the possible predisposition to believe a key prosecution witness and their ability to weigh evidence objectively. The court explained that the defendant’s presence could have been critical in making determinations to challenge for cause and peremptories. *Id.* at 392, 592 N.E.2d at 787, 583 N.Y.S.2d at 179. *But see* *People v. Velasco*, 77 N.Y.2d 469, 570 N.E.2d 1070, 568 N.Y.S.2d 721 (1991). In *Velasco*, the court held that the defendant’s presence was not required when the court posed questions relating only to the qualifications of jurors in the general sense, questions concerning such matters as physical impairments, family obligations, and work commitments. The court reasoned that the defendant’s presence or absence could have had no effect on the ultimate fairness of the trial proceeding. *Id.* at 473, 570 N.E.2d at 1071-72, 568 N.Y.S.2d at 722-23.

1295. *Dokes*, 79 N.Y.S.2d at 659, 595 N.E.2d at 838, 584 N.Y.S.2d at 763 (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105-06 (1934)). *See also Mullen*, 44 N.Y.2d at 5, 374 N.E.2d at 370, 403 N.Y.S.2d at 472 (“[D]ue process requires the presence of a defendant . . . ‘to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only.’”) (quoting *Snyder*, 291 U.S. at 107); *People v. Ciaccio*, 447 N.Y.2d 431, 436, 391 N.E.2d 1347, 1349-50, 418 N.Y.S.2d 371, 373 (1979) (presence of the defendant is constitutionally required at all proceedings dealing with “impaneling the jury, receiving evidence, the summations of counsel, receiving the verdict, . . . the court’s charge, admonishments and instructions to the jury, [and] where the court is required to state the fundamental legal principles applicable to criminal cases”).

nesses are examined and cross-examined noting that 'defendant alone may be able to inform his attorney of inconsistencies, errors and falsities in the testimony of the officers or other witnesses.'"1296

The court of appeals noted that "[i]n determining whether a defendant has a right to be present during a particular proceeding . . . [depends] on whether the proceeding involve[s] factual matters about which defendant might have . . . knowledge that would be useful in advancing the defendant's or countering the People's position."¹²⁹⁷ If it does, then the defendant has a right to be present.¹²⁹⁸ The court held that the "*Sandoval* hearing in this case was such a proceeding."¹²⁹⁹ The New York Court of Appeals reasoned that the importance of the defendant's ability to participate in this proceeding is compounded by the importance of the hearing.¹³⁰⁰

A ruling on the permissible scope of cross-examination is often the pivotal factor in the defendant's decision whether to testify.¹³⁰¹ The court of appeals reasoned that given the number of factors that are relevant to the court's decision in determining the extent that the prosecutor will be able to cross-examine the defendant about prior arrests and prior bad acts, the potential for meaningful participation by the defendant during the determination of the merits of a *Sandoval* motion is apparent.¹³⁰²

1296. *Dokes*, 79 N.Y.S.2d at 659, 595 N.E.2d at 838, 584 N.Y.S.2d at 763 (quoting *People v. Anderson*, 16 N.Y.2d 282, 288, 213 N.E.2d 445, 447, 266 N.Y.S.2d 110, 114 (1956)); see also *People v. Turaine*, 78 N.Y.2d 871, 872, 577 N.E.2d 55, 56, 573 N.Y.S.2d 64, 65 (1991) (holding that defendant had right to be present at hearing to determine admissibility of witness' proposed testimony that defendant threatened him to prevent him from testifying against the defendant, reasoning that defendant had right to confront witness against him at hearing and also to advise counsel of any errors or falsities in witness' testimony).

1297. *Dokes*, 79 N.Y.2d at 660, 595 N.E.2d at 839, 584 N.Y.S.2d at 764.

1298. *Id.*

1299. *Id.*

1300. *Id.* at 661-62, 595 N.E.2d at 840, 584 N.Y.S.2d at 765.

1301. *Id.* at 662, 595 N.E.2d at 840, 584 N.Y.S.2d at 765.

1302. *Id.* at 661, 595 N.E.2d at 839, 584 N.Y.S.2d at 764.

The court observed that usually the focus of such a hearing is a report compiled by the State Division of Criminal Justice Services (DCJS) on the defendant's criminal history.¹³⁰³ This report contains information about prior arrests and the disposition of those charges.¹³⁰⁴ The court noted that the prosecutor will usually seek permission to cross-examine the defendant about the charges in the report.¹³⁰⁵ Further, the People may also seek to inquire about prior bad acts which they are aware of that have not been the subject of formal charges.¹³⁰⁶ The court of appeals stated that "the defendant is in the best position to point out errors in the DCJS report,¹³⁰⁷ to [controvert] assertions by the prosecutor with respect to uncharged acts and to provide counsel with details about the underlying facts of both charged and uncharged acts."¹³⁰⁸ Accordingly, the court maintained that the defendant's presence will help to insure that the court's determination will not be based solely on the prosecutor's "unrebutted view of the facts."¹³⁰⁹

Therefore, "except in circumstances where the nature of the defendant's criminal history and the issues to be resolved at the *Sandoval* hearing render the defendant's presence superfluous, the hearing should not be conducted without the presence of the accused."¹³¹⁰ The court "conclude[d] that the *Sandoval* hearing was a material stage of the trial at which the defendant's presence was required."¹³¹¹ Further, "[s]ince the contention concerns the

1303. *Id.* at 660, 595 N.E.2d at 839, 584 N.Y.S.2d at 764.

1304. *Id.*

1305. *Id.* at 660-61, 595 N.E.2d at 839, 584 N.Y.S.2d at 764.

1306. *Id.* at 661, 595 N.E.2d at 839, 584 N.Y.S.2d at 764.

1307. The court cited to a 1991 State Comptroller report which depicted the DCJS records as replete with errors which rendered them unreliable to law enforcement officials, prosecutors and judges as a source for criminal history data. *Id.* at 661 n.4, 595 N.E.2d at 839 n.4, 584 N.E.2d at 764 n.4.

1308. *Id.* at 661, 595 N.E.2d at 839-40, 584 N.E.2d at 764-65.

1309. *Id.* at 661, 595 N.E.2d at 840, 584 N.Y.S.2d at 765 (quoting *People v. Ortega*, 78 N.Y.2d 1101, 1103, 585 N.E.2d 372, 373, 578 N.Y.S.2d 123, 124 (1991)).

1310. *Id.* at 662, 595 N.E.2d at 840, 584 N.Y.S.2d at 765.

1311. *Id.*

right conferred by CPL section 260.20, the defendant's failure to object is not fatal to his claim."¹³¹²

Federal law in this area is governed by *Snyder v. Massachusetts*.¹³¹³ In *Snyder*, the United States Supreme Court recognized that the "presence of defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only."¹³¹⁴ Further, the Court stated that the privilege extends "whenever his presence has a relation, reasonably substantial, to the ful[ll]ness of his opportunity to defend against the charge."¹³¹⁵ However, the Court did caution that the privilege of presence does not extend to a defendant when it would "be useless, or the benefit but a shadow."¹³¹⁶ In sum, the defendant's right to be present is only insured when it "is critical to its outcome if his presence would contribute to the fairness of the procedure."¹³¹⁷

In conclusion, under New York law, except in circumstances where the nature of the defendant's criminal history and the issues to be resolved at the *Sandoval* hearing render the defendant's presence superfluous, the hearing is a material stage of the trial and should not be conducted without the presence of the accused. Similarly, under federal law, as enunciated in *Snyder*, the defendant's right to be present is not absolute, but is conditioned upon whether the stage of the proceeding is material and whether the defendant's presence is needed to aid in his defense.¹³¹⁸

1312. *Id.*

1313. 291 U.S. 97 (1934).

1314. *Id.* at 107.

1315. *Id.* at 105-06.

1316. *Id.* at 106-07.

1317. *Kentucky v. Stincer*, 482 U.S. 730, 745 (1987).

1318. *Snyder*, 291 U.S. at 105-06.

People v. Antommarchi¹³¹⁹
(decided October 27, 1992)

A criminal defendant claimed that his state¹³²⁰ and federal¹³²¹ constitutional rights were violated when (1) he was not present at a material stage of the proceedings, in which the court, conducting side-bar discussions, asked prospective jurors questions in the presence of counsel,¹³²² and (2) he was denied due process because the court's reasonable doubt charge to the jury was erroneous.¹³²³ The court of appeals, in a unanimous decision,¹³²⁴ held that the "court violated the defendant's right to be present at a material part of his trial . . . [b]y questioning prospective jurors' ability to weigh evidence objectively and hear testimony impartially" in the defendant's absence.¹³²⁵ The court further held that the court's *Allen* charge¹³²⁶ violated due process requirements because it implicitly placed the burden of proving reasonable doubt on the defendant.¹³²⁷

Right To Be Present Claim

During the voir dire and in the presence of the defendant, the court began asking prospective jurors to orally answer the ques-

1319. 80 N.Y.2d 247, 604 N.E.2d 95, 590 N.Y.S.2d 33 (1992).

1320. N.Y. CONST. art. I, § 6.

1321. U.S. CONST. amends. VI, XIV.

1322. *Antommarchi*, 80 N.Y.2d at 249, 604 N.E.2d at 96, 590 N.Y.S.2d at 34.

1323. *Id.*

1324. Judge Smith took no part in the decision.

1325. *Antommarchi*, 80 N.Y.2d at 250, 604 N.E.2d at 96, 590 N.Y.S.2d at 34.

1326. *Allen v. United States*, 164 U.S. 492 (1896). Also known as the "dynamite" charge, an *Allen* charge is used by the court to prod deliberating jurors into reconsidering their positions in order to come to a determination. See STEPHEN A. SALTZBURG & DANIEL J. CAPRA, *AMERICAN CRIMINAL PROCEDURE* 948 (4th ed. 1992):

1327. *Antommarchi*, 80 N.Y.2d at 251-52, 604 N.E.2d at 98, 590 N.Y.S.2d at 36.

tions contained in the questionnaires they had been given as well as follow-up questions asked by the court and counsel.¹³²⁸ During this questioning, several prospective jurors, at the court's invitation, approached the bench to discuss sensitive matters that they did not wish to have publicly disclosed.¹³²⁹ These discussions were conducted on record and in the presence of counsel, but the defendant was not present. One matter discussed was the level of objectivity that a juror could maintain if he or she had been a crime victim or a close friend of someone who had been arrested for a crime.¹³³⁰ In addition, the prospective jurors discussed whether they believed the defendant was guilty "merely because he had been charged with participating in a drug sale."¹³³¹ The court also asked one prospective juror "whether she could objectively assess the testimony of a police officer without being influenced by her friendship with other police officers."¹³³²

The court relied on New York precedent to justify a finding of a constitutional violation. The court stated that "a defendant has a fundamental right to be present during any material stage of the trial"¹³³³ The court cited *People v. Turaine*¹³³⁴ for that proposition but did not give any further rationale. In *Turaine*, the court of appeals explained that the "defendant's presence is necessary so that he or she may confront adverse witnesses and advise counsel of any inconsistencies, errors, or falsehoods in their testimony."¹³³⁵

The court of appeals further supported its holding in *Antommarchi* by referring to its recent decision in *People v. Sloan*.¹³³⁶ In *Sloan*, the court of appeals held that the defendant's

1328. *Id.* at 250, 604 N.E.2d at 97, 590 N.Y.S.2d at 34-35.

1329. *Id.* at 250, 604 N.E.2d at 97, 590 N.Y.S.2d at 35.

1330. *Id.*

1331. *Id.*

1332. *Id.*

1333. *Id.*

1334. 78 N.Y.2d 871, 577 N.E.2d 55, 573 N.Y.S.2d 64 (1991).

1335. *Id.* at 872, 577 N.E.2d at 56, 573 N.Y.S.2d at 65. Incidentally, it should be mentioned that in *Turaine*, defendant was not present at a hearing to determine whether he had intimidated prosecution witness.

1336. 79 N.Y.2d 386, 592 N.E.2d 784, 583 N.Y.S.2d 176 (1992).

right to be present at trial included material stages, such as a side-bar voir dire during jury selection.¹³³⁷ The court made a distinction between an informal voir dire relating only to whether a prospective juror could not serve due to work commitments or physical impairment, and questions dealing with juror bias.¹³³⁸ The court found that the defendant does not have a right to be present at the former, only the latter.¹³³⁹ The *Antommarchi* court echoed that by stating that “[a] court may conduct side-bar discussions with prospective jurors in a defendant’s absence if the questions relate to juror qualifications.”¹³⁴⁰

However, the *Antommarchi* court noted that a court may not explore prospective jurors’ backgrounds absent the defendant because defendants “are entitled to hear questions intended to search out a prospective juror’s bias, hostility or predisposition to believe or discredit the testimony of potential witnesses”¹³⁴¹ The court concluded its brief analysis by explaining that the defendant needs to be present during the aforementioned portions of the trial in order to assess the juror’s “‘facial expression, demeanor and other subliminal responses.’”¹³⁴² The court concluded that the absence of the defendant from such an important stage of the proceeding was a violation of the state constitution.¹³⁴³ Lastly, it added that the defendant’s failure to object to being excluded was not fatal to his claim because the right to be present is a fundamental right.¹³⁴⁴

Although the precise issue of whether the defendant has the right to be present at a side-bar discussion has not yet been de-

1337. *Id.* at 390, 592 N.E.2d at 785, 583 N.Y.S.2d at 177; *see also* *People v. Mullen*, 44 N.Y.2d 1, 374 N.E.2d 369, 403 N.Y.S.2d 470 (1978).

1338. *Sloan*, 79 N.Y.2d at 392, 592 N.E.2d at 786, 583 N.Y.S.2d at 178.

1339. *Id.*

1340. *Antommarchi*, 80 N.Y.2d at 250, 604 N.E.2d at 197, 590 N.Y.S.2d at 35.

1341. *Id.*

1342. *Id.* (quoting *Sloan*, 79 N.Y.2d at 392, 592 N.E.2d at 787, 583 N.Y.S.2d at 179).

1343. *Id.* The court found the conduct to violate New York statutory law as well. *See* N.Y. CRIM. PROC. LAW. § 260.20 (McKinney 1982).

1344. *Antommarchi*, 80 N.Y.2d at 250, 604 N.E.2d at 197, 590 N.Y.S.2d at 35.

cided at the federal level, the law clearly mandates that a criminal defendant must be present during the impaneling of the jury. Rule 43(a) of the Federal Rules of Criminal Procedure states: "The defendant shall be present at the arraignment, at the time of the plea, at every stage of the trial including the *impaneling of the jury* and the return of the verdict" ¹³⁴⁵

This right of a criminal defendant to be present at the impaneling of a jury was recently supported by the Supreme Court in *Gomez v. United States*. ¹³⁴⁶ In *Gomez*, the Court found that the trial commences "at least from the time when the work of impaneling the jury begins." ¹³⁴⁷ The Court explained that "[j]ury selection is the primary means by which a court may enforce a defendant's right to be tried by a jury free from ethnic, racial, or political prejudice." ¹³⁴⁸ Apparently, the only federal case which mentioned side-bar discussions between a judge and a prospective juror was *United States v. Dioguardi*. ¹³⁴⁹ However in that case, the Second Circuit held that where the defendant was not present during a side-bar conference, his right to be present was not violated where he was seated only fifteen feet away and where the defendant had experienced counsel who had advised him of his rights earlier. ¹³⁵⁰

It seems however, that if presented with the issue, side-bar discussions would be afforded the same sanctity at the federal level as it now receives at the New York State level in terms of requiring that a defendant be present. Of course, exceptions such as the one specifically delineated in *Dioguardi* will always be a possibility.

1345. FED. R. CRIM. P. 43(a) (emphasis added).

1346. 490 U.S. 858, *cert. granted and vacated by* Salazar v. United States, 491 U.S. 902 (1989). *See also* United States v. Hernandez, 873 F.2d 516 (2d Cir. 1989).

1347. *Id.* at 873.

1348. *Id.*

1349. 428 F.2d 1033 (2d Cir. 1970).

1350. *Id.* at 1039.

Due Process Claim

The defendant's second claim was that he was deprived of "due process" under both the state and federal constitutions.¹³⁵¹ He contended that the court's charge on reasonable doubt was erroneous.¹³⁵² The charge in question is known as an *Allen* charge,¹³⁵³ which is given to juries during deliberations. The charge given to the jury in this case was as follows:

If you have a reasonable doubt . . . on any relative point or material element or on the evidence or lack of it, and when one or more of your fellow jurors questioned you about it, you would be willing and able to give him what you believe is a fair, calm explanation for your position based upon the evidence or lack of evidence in this particular case.¹³⁵⁴

The defendant claimed that these instructions deprived him of a fair trial because they "unfairly advised the jury that a juror's doubt about guilt was not 'reasonable' unless the juror was able to articulate the basis for it" ¹³⁵⁵ In holding that the charge was erroneous and that the defendant's due process rights had been violated, the court suggested that reasonable doubt is a "nebulous concept not susceptible of precise definition."¹³⁵⁶

The court agreed that "the essence of the jury system is the deliberative process by which a number of intellects are brought to bear on assessing and evaluating the evidence presented at trial to arrive at a just verdict,"¹³⁵⁷ and that it is proper for a court to instruct the jury that a "reasonable doubt [i]s one for which a juror could, if called upon to do so, express or articulate."¹³⁵⁸

1351. *Antommarchi*, 80 N.Y.2d at 249, 604 N.E.2d at 96, 590 N.Y.S.2d at 34.

1352. *Id.* at 251, 604 N.E.2d at 97, 590 N.Y.S.2d at 35.

1353. *Allen v. United States*, 164 U.S. 492, 501-02 (1896).

1354. *Antommarchi*, 80 N.Y.2d at 251, 604 N.E.2d at 97, 590 N.Y.S.2d at 35.

1355. *Id.*

1356. *Id.* at 251, 604 N.E.2d at 98, 590 N.Y.S.2d at 36.

1357. *Id.* at 251-52, 604 N.E.2d at 98, 590 N.Y.S.2d at 36.

1358. *Id.* at 252, 604 N.E.2d at 98, 590 N.Y.S.2d at 36.

However, the court found that the language used in the *Allen* charge went beyond allowable bounds for two reasons. First, it placed upon the juror "the express duty of giving a fair, calm explanation for [his or her] position."¹³⁵⁹ Secondly, the charge reversed the "constitutionally required principle that the defense bears no burden and that it is the prosecution that must introduce evidence sufficient to persuade the fact finder, beyond a reasonable doubt, of the defendant's guilt."¹³⁶⁰ Thus, the court concluded that since the burden of proving guilt in a criminal case must always fall on the People, "[a]n instruction that requires jurors to supply concrete reasons 'based upon the evidence' for their inclination implicitly imposes on defendants the burden of presenting a defense that supplies the jurors with the arguments they need to legitimize their votes."¹³⁶¹ Consequently, the court found that the *Allen* charge violated the defendant's due process rights.¹³⁶²

The federal law on this issue is in accord with New York law. In *In re Winship*,¹³⁶³ the Supreme Court found that manifestly, the burden of proving guilt beyond a reasonable doubt in a criminal proceeding must always remain with the prosecution.¹³⁶⁴ The court reasoned that it is "important in our free society that every individual going about his ordinary affairs have confidence that his government cannot adjudge him guilty of a criminal offense without convincing a proper fact finder of his guilt with utmost certainty."¹³⁶⁵

1359. *Id.*

1360. *Id.* The court of appeals cited to *State v. Cohen*, 78 N.W. 857 (Iowa 1899), for the proposition that an instruction that requires jurors to give reasons based on the evidence for their decision to acquit, implicitly imposes on defendants the burden of presenting a defense that would supply jurors with the arguments they need to legitimize their votes. *Id.*

1361. *Id.*

1362. *Id.*

1363. 397 U.S. 358 (1969).

1364. *See id.* at 361-62.

1365. *Id.* at 364.

SUPREME COURT, APPELLATE DIVISION

FIRST DEPARTMENT

People v. Aguilar¹³⁶⁶
(decided March 19, 1992)

The defendant contended that his constitutional rights to be present at all material stages of his trial pursuant to the state¹³⁶⁷ and federal¹³⁶⁸ constitutions were violated when the trial court gave supplemental instructions to the jury in the defendant's absence.¹³⁶⁹ The court held that the defendant's "presence during supplemental instructions [to the jury] as 'constitutionally required.'"¹³⁷⁰ The court further held that the court committed a reversible error when it failed to inquire into the circumstances surrounding the defendant's absence nor did it recite the facts and reasons it relied upon in reaching its determination that the defendant's absence was deliberate.¹³⁷¹ Lastly, the court held

1366. 177 A.D.2d 197, 582 N.Y.S.2d 383 (1st Dep't 1992).

1367. 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 . . .").

1368. U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right to be informed of the nature of the accusation . . .").

1369. *Aguilar*, 177 A.D.2d at 199, 582 N.Y.S.2d at 384.

1370. *Id.* at 200, 582 N.Y.S.2d at 385.

1371. *Id.* at 200, 582 N.Y.S.2d at 384-85. *See People v. Sanchez*, 65 N.Y.2d 436, 482 N.E.2d 56, 492 N.Y.S.2d 577 (1985). In *Sanchez*, the court of appeals held that if a defendant deliberately leaves the courtroom after his trial has begun or leaves after he has been told that his trial is about to begin, he forfeits his right to be present at the trial regardless of whether he knows that the trial will continue in his absence. *Id.* at 443-44, 482 N.E.2d at 59-60, 492 N.Y.S.2d at 580-81. However, in each of the five consolidated appeals in *Sanchez* the trial courts sought to determine the circumstances surrounding the defendants' absences. *Id.* at 440-43, 482 N.E.2d at 57-59, 492 N.Y.S.2d at 578-80. *See also People v. Brooks*, 75 N.Y.2d 898, 899, 553 N.E.2d 1328, 1329, 554 N.Y.S.2d 818, 819 (1990) (trial court erred in proceeding to summations and jury charge in defendant's absence without making an inquiry

that the defendant's right to be present was not waived by his counsel's consent to proceed during the reading of the supplemental jury instructions in his absence.¹³⁷²

The defendant was arrested and tried before a jury on charges he burglarized a gas station. At the close of the trial, and after the jury had been sequestered for deliberations, the court excused the defendant and his counsel with instructions to return at 2:30 pm. Approximately one hour later, the jury requested supplemental instructions from the court regarding intent and reasonable doubt.¹³⁷³ Shortly thereafter, the court provided the supplementary instructions to the jury in the absence of the defendant, but not before taking note of the defendant's absence, and receiving the consent of defense counsel.¹³⁷⁴

The court began its analysis by noting that in addition to the constitutional mandates, Criminal Procedure Law section 310.30¹³⁷⁵ "makes a defendant's right to be present during instructions to the jury absolute and unequivocal."¹³⁷⁶

into absence and reciting facts and reasons relied upon in determining absence was deliberate).

1372. *Aguilar*, 177 A.D.2d at 201, 582 N.Y.S.2d at 385.

1373. *Id.* at 200, 582 N.Y.S.2d at 384.

1374. *Id.*

1375. N.Y. CRIM. PROC. LAW § 310.30 (McKinney 1982). Section 310.30 provides in pertinent part:

At any time during its deliberation, the jury may request the court for further instruction Upon such a request, the court must direct that the jury be returned to the courtroom . . . and in the presence of the defendant, must give such requested . . . instruction

Id.

1376. *Aguilar*, 177 A.D.2d at 200, 582 N.Y.S.2d at 385. *See* *People v. Ciacchio*, 47 N.Y.2d 431, 436-37, 391 N.E.2d 1347, 1350, 418 N.Y.S.2d 371, 373 (1979) (presence of defendant is constitutionally required when supplemental instructions are given to jury); *see also* *People v. Cain*, 76 N.Y.2d 119, 556 N.E.2d 141, 556 N.Y.S.2d 848 (1990). In *Cain*, after the jury had announced it found the defendant guilty on all counts, defense counsel requested that the jurors be polled. *Id.* at 122, 556 N.E.2d at 142, 556 N.Y.S.2d at 849. During the poll, juror number seven inquired whether he could speak to the trial judge in private. *Id.* Defense counsel for Cain then polled the jurors without incident. *Id.* The trial judge thereafter ordered the jury back into the deliberation room, stating: "Before I accept your verdict . . . [I want to review juror number seven's question]." *Id.*

However, this right is forfeited when a defendant deliberately causes himself to be absent from the courtroom after his trial has begun, whether or not he knows the trial will continue.¹³⁷⁷ However, before the trial court can legitimately find that defendant has forfeited the right, an inquiry and record of the findings must be made.¹³⁷⁸ Therefore, the defendant's constitutional and statutory rights were violated by the court's failure to make a proper inquiry into the defendant's absence before proceeding with the instructions.

The court then addressed the People's argument that the defendant's right to be present during the reading of the supplemental instructions was waived by defense counsel's consent to proceed. The court held that since there was no indication in the record that the defendant exercised a knowing, intelligent and voluntary waiver of his right to be present, or that he later ratified his counsel's waiver, counsel's waiver was "a nullity."¹³⁷⁹

Subsequently, juror number seven was brought to the judge's robing room and questioned in the presence of the defendant's attorneys, but absent the defendants. *Id.* The judge repeated his jury instructions on "acting in concert" to clarify the law for the juror. *Id.* at 122-23, 556 N.E.2d at 142, 556 N.Y.S.2d at 849. The trial judge then returned the entire jury to the courtroom and stated that "we've clarified Juror Number Seven's question I will now accept your verdict as recorded." *Id.* at 123, 556 N.E.2d at 142-43, 556 N.Y.S.2d at 849-50. The court of appeals held that the robing room conference, which included a "discussion of the applicable legal principles, constituted . . . the giving of 'further instruction[s]' within the meaning of CPL 310.30" and found that since defendant had an absolute right to be present, he is entitled to a reversal notwithstanding any lack of actual prejudice resulting from his absence. *Id.* at 124, 556 N.E.2d at 143-44, 556 N.Y.S.2d at 850-51.

1377. *Aguilar*, 177 A.D.2d at 200, 582 N.Y.S.2d at 385.

1378. *Id.* at 201, 582 N.Y.S.2d at 385.

1379. *Id.* See *People v. Windley*, 134 A.D.2d 386, 520 N.Y.S.2d 864 (1987) (defendant effectively waived right to be present during charge where defense counsel waived defendant's presence after being informed that defendant would be late and defendant later ratified his counsel's waiver upon inquiry by court). See also *People v. Parker*, 57 N.Y.2d 135, 141, 440 N.E.2d 1313, 1316, 454 N.Y.S.2d 967, 970 (1982) (holding that in order to effectuate a voluntary, knowing and intelligent waiver, the defendant must be

The United States Supreme Court, in *Snyder v. Massachusetts*,¹³⁸⁰ recognized that the presence of the defendant is required if “[i]t bears, or may fairly be assumed to bear, a relation, reasonably substantial, to his opportunity to defend.”¹³⁸¹ The Court explained that this right is conditioned “to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only.”¹³⁸² Thus, the *Snyder* Court cautioned that due process would not be extended to require the defendant’s presence “when [his] presence would be useless, or the benefit but a shadow.”¹³⁸³

In construing *Snyder*, in *Larson v. Tansy*,¹³⁸⁴ the Tenth Circuit held that the “defendant’s presence in the courtroom during the instruction of the jury . . . would not have been useless [because the] defendant’s presence might have allowed him to provide assistance to his counsel.”¹³⁸⁵ In *United States v. Fontanez*,¹³⁸⁶ the Second Circuit held that the defendant’s exclusion from jury instructions violated his right to be present throughout his trial. As a result, the *Fontanez* court reasoned that the defendant’s exclusion “deprived [him] of the ‘psychological function’ of his presence on the jury during a crucial phase of his trial.”¹³⁸⁷

Although the defendant has the right to be present during jury instructions, this right may be waived by the defendant’s absence. In *United States v. Sanchez*,¹³⁸⁸ the court stated that “[i]t has long been settled that a defendant charged with a crime may knowingly and voluntarily waive his constitutional right to be

informed of the nature of the right to be present at trial and the consequences of failing to appear for trial).

1380. 291 U.S. 97 (1934).

1381. *Id.* at 106.

1382. *Id.* at 107-08; *see also* *Kentucky v. Stincer*, 482 U.S. 730, 745 (1987) (defendant is only “guaranteed the right to be present at any stage of the criminal proceeding that is critical to its outcome if his presence would contribute to the fairness of the procedure”).

1383. *Snyder*, 291 U.S. at 106-07.

1384. 911 F.2d 392 (10th Cir. 1990).

1385. *Id.* at 395.

1386. 878 F.2d 33 (2d Cir. 1989).

1387. *Id.* at 38.

1388. 790 F.2d 245 (2d Cir.), *cert. denied*, 479 U.S. 989 (1986).

present”¹³⁸⁹ However, before proceeding with the trial in *absentia*, the court must determine the defendant voluntarily, knowingly, and *without justification* failed to be present at the designated time and place”¹³⁹⁰

Therefore, under both the New York Constitution¹³⁹¹ and United States Constitution,¹³⁹² a defendant who voluntarily absents himself from the courtroom after his trial has begun forfeits his right to be present at all material stages of his trial.¹³⁹³ In order to determine whether forfeiture can be found, the court must inquire into the circumstances of the absence to determine if it was deliberate and must recite the facts and reasons it relied upon in reaching its determination in the record.¹³⁹⁴ If the court determines that the defendant’s absence was deliberate and continues to proceed in the defendant’s absence, but fails to recite on the record the facts and reasons it

1389. *Id.* at 248; see *Taylor v. United States*, 414 U.S. 17, 20 (1973) (voluntary absence from ongoing trial constitutes waiver of right to be present).

1390. *Sanchez*, 790 F.2d at 249 (emphasis added) (quoting *United States v. Tortora*, 464 F.2d 1202, 1209 (2d Cir.), *cert. denied*, 409 U.S. 1063 (1972); see also *Taylor*, 414 U.S. at 10 n.3 (defendant may voluntarily waive his right to be present at trial, but court must clearly establish voluntariness); *Polizzi v. United States*, 926 F.2d 1311, 1319 (2d Cir. 1991) (court must make factual determination on record regarding whether defendant’s absence was made knowingly and voluntarily); *United States v. Mera*, 921 F.2d 18, 20 (2d Cir. 1990) (“The trial judge in his sound discretion determines whether a defendant’s absence constitutes a waiver The district court must determine: 1) whether the defendant’s absence is knowing and voluntary, . . . and 2) whether ‘the public interest . . . clearly outweighs that of the voluntarily absent defendant’” (citations omitted)).

1391. N.Y. CONST. art. I, § 6.

1392. U.S. CONST. amend. VI.

1393. See *People v. Sanchez*, 65 N.Y.2d 436, 443, 882 N.E.2d 56, 59, 492 N.Y.S.2d 577, 580 (1985) (“Forfeiture, unlike an express waiver which involves an evaluation of defendant’s state of mind, occurs by operation of law and as a matter of public policy.”).

1394. See *People v. Brooks*, 75 N.Y.2d 898, 899, 553 N.E.2d 1328, 1329, 554 N.Y.S.2d 818, 819 (1990) (dismissing indictment because court failed to inquire, and recite on record, reasons it relied on in determining defendant’s absence from trial was deliberate).

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RIGHT TO BE PRESENT

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relied upon in reaching that determination, any resulting conviction will be reversed.

