



1993

Right to Be Present

Follow this and additional works at: <https://digitalcommons.tourolaw.edu/lawreview>



Part of the [Constitutional Law Commons](#), [Courts Commons](#), [Criminal Procedure Commons](#), [State and Local Government Law Commons](#), and the [Supreme Court of the United States Commons](#)

Recommended Citation

(1993) "Right to Be Present," *Touro Law Review*. Vol. 9: No. 3, Article 47.

Available at: <https://digitalcommons.tourolaw.edu/lawreview/vol9/iss3/47>

This New York State Constitutional Decisions is brought to you for free and open access by Digital Commons @ Touro Law Center. It has been accepted for inclusion in Touro Law Review by an authorized editor of Digital Commons @ Touro Law Center. For more information, please contact lross@tourolaw.edu.

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.