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COURT OF APPEALS

STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

No. 143

JAMES ALCIDE,

Appellant.

20 Eagle Street
Albany, New York 12207
September 3, 2013

Before:

CHIEF JUDGE JONATHAN LIPPMAN
ASSOCIATE JUDGE VICTORIA A. GRAFFEO
ASSOCIATE JUDGE SUSAN PHILLIPS READ
ASSOCIATE JUDGE ROBERT S. SMITH
ASSOCIATE JUDGE EUGENE F. PIGOTT, JR.
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE SHEILA ABDUS-SALAAM

Appearances:

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Official Court Transcriber

1 CHIEF JUDGE LIPPMAN: People v. Alcide.
2 Counsel, would you like any rebuttal time?

3 MS. HORLICK: One minute, please, Your
4 Honor.

5 CHIEF JUDGE LIPPMAN: One minute, sure. Go
6 ahead. Start.

7 MS. HORLICK: Thank you. May it please the
8 court. Melissa Horlick on behalf of Mr. Alcide.

9 By personally participating in the read-
10 back of two prosecution witnesses in such a one-sided
11 fashion - - -

12 CHIEF JUDGE LIPPMAN: Counselor, but didn't
13 the judge indicate why he was doing it and that - - -
14 I mean, did it - - - are we to make a per se rule
15 that every time the judge participates in a - - -
16 whether it is the best thing for the judge to be
17 doing or not, are we to make a per se rule that every
18 time that happens, if the judge reads a particular
19 side, then it's reversible error?

20 MS. HORLICK: I would advocate that yes,
21 Your Honor, there should be a blanket rule.

22 CHIEF JUDGE LIPPMAN: If he participates in
23 a read-back and reads the prosecutorial side, then we
24 always reverse, no matter what the judge says about
25 why he's doing it?

1 MS. HORLICK: In this case, the judge did
2 say the judge was doing it to expedite the process
3 and perhaps keep the jurors awake.

4 CHIEF JUDGE LIPPMAN: So why is this
5 reversible error in this case? I hear you that
6 you're saying there should be a per se rule, but talk
7 about this particular case. How is it prejudicial?

8 MS. HORLICK: It was so unfair, Your Honor.
9 The judge informed the jury that it was going to be
10 reading just the direct questions of the prosecutor.
11 And then when it came time to give the same advantage
12 to the defense, the judge then had the court reporter
13 read those questions and - - -

14 JUDGE SMITH: Does it - - - aren't the
15 jurors able to distinguish between whether the judge
16 is reading - - - they know the judge is reading
17 someone else's words; they don't think this is the
18 judge talking to them. I mean, are people really
19 that suggestible?

20 MS. HORLICK: Well, the cases suggest that
21 jurors are very likely to become impregnated by the
22 environing atmosphere in the courtroom.

23 JUDGE GRAFFEO: The judge did give a juror
24 instruction that they weren't to consider that he was
25 favoring one side or the other.

1 MS. HORLICK: Well, that instruction
2 preceded the role that the judge took during the
3 read-back. And deliberations are an extremely
4 critical and sensitive part of the trial. And it was
5 critical that the judge exercise the utmost caution
6 in dealing with the read-back.

7 JUDGE GRAFFEO: There's nothing in the CPL
8 that prohibits this, is there?

9 MS. HORLICK: The CPL doesn't specifically
10 address who should read - - -

11 JUDGE GRAFFEO: So you're asking us to
12 establish a rule?

13 MS. HORLICK: Yes, Your Honor. There is
14 the Second Department case of People v. Facey in
15 which the Second Department has now clearly accepted
16 the rule that the judge should not participate in a
17 read-back because there's always the risk that the
18 judge may unwittingly suggest an opinion.

19 JUDGE READ: But it's not prohibited by
20 310.30; you would concede that?

21 MS. HORLICK: I don't believe that 310.30
22 really address the issue at all. 310.30 deals with
23 that the jury can request information during
24 deliberations and that the judge must get that
25 information to the jury.

1 JUDGE GRAFFEO: What is the - - - what are
2 you proposing that a trial judge do if you have a
3 court stenographer who perhaps isn't really capable
4 or isn't pronouncing things correctly or doesn't want
5 to do read-backs? Then - - -

6 MS. HORLICK: First - - -

7 JUDGE GRAFFEO: Then what would be the
8 procedure?

9 MS. HORLICK: First, there was nothing in
10 this case to suggest that that was even at issue, but
11 assuming - - -

12 JUDGE GRAFFEO: No, but I'm asking because
13 you want us to give a per se rule which means the
14 judge can never read the questions.

15 MS. HORLICK: The Court could - - -

16 JUDGE GRAFFEO: So - - -

17 MS. HORLICK: - - - easily ask for another
18 court reporter to come into the courtroom. This has
19 been the procedure for - - -

20 CHIEF JUDGE LIPPMAN: Can the judge not do
21 either side, in your view?

22 MS. HORLICK: I think it's best if the
23 judge not do either side, because the judge always
24 runs the risk - - -

25 CHIEF JUDGE LIPPMAN: But is the per se

1 rule only if he does the prosecutorial side?

2 MS. HORLICK: I believe that it would be a
3 mode of proceedings error in either case.

4 CHIEF JUDGE LIPPMAN: In either case?

5 MS. HORLICK: Yes.

6 CHIEF JUDGE LIPPMAN: Okay.

7 JUDGE SMITH: So if he had read - - - if
8 had read only the defense lawyer's part, you would
9 still be asking for a reversal?

10 MS. HORLICK: Well, that's - - - well, in
11 this particular case, though, he did not do that. It
12 was done in a very one-sided way. And there could -
13 - - yes, there could be occasions where the judge
14 reads the defendant's testimony that could be highly
15 prejudicial. And this was an identification case.
16 And during the prosecutor's questions, the prosecutor
17 strategically laid those questions out to repeatedly
18 reinforce to the jury that my client was the shooter.

19 JUDGE PIGOTT: What was the Second
20 Department case you said that they recently - - -
21 People v. - - -

22 MS. HORLICK: It was People v. Facey.

23 JUDGE PIGOTT: Can you spell that last
24 name?

25 MS. HORLICK: Yes; it's F-A-C-E-Y - - -

1 JUDGE PIGOTT: Facey.

2 MS. HORLICK: - - - at - - - the cite is
3 104 A.D.3d 788. I believe it was decided this past
4 March. And - - -

5 JUDGE ABDUS-SALAAM: Counsel, do you have a
6 problem with the way the judge handled the note in
7 the first place, by bringing the jury back in before
8 even announcing to counsel and the defendant what he
9 was going to do?

10 MS. HORLICK: Absolutely. I believe the
11 court failed to comply with its core responsibilities
12 in failing to show counsel the note first and
13 informing the attorney that it was going to adopt a
14 very unorthodox procedure. And - - -

15 JUDGE ABDUS-SALAAM: But what - - -

16 MS. HORLICK: - - - personally - - -

17 JUDGE ABDUS-SALAAM: - - - what if the note
18 had simply been, as it was, to read back the entire
19 testimony of two witnesses, and the judge didn't
20 participate in the read-back; would you have the same
21 problem?

22 MS. HORLICK: I think it would not
23 necessarily be a mode of proceedings issue in that
24 case, but it would certainly not be following the
25 O'Rama line of decision - - -

1 JUDGE READ: Why couldn't defense counsel
2 have objected there? Then the judge might have said,
3 okay, we'll call in somebody else, or you know, he
4 might have taken a different tack.

5 MS. HORLICK: Well, by the time the judge
6 told the jury what his procedure would be, was that
7 the judge was going to be participating in the read-
8 back - - -

9 JUDGE READ: But the defense attorney could
10 have said, judge, you know, I'd like to talk to you
11 about that, or I object.

12 MS. HORLICK: But it would have been very
13 prejudicial at that point for the defense to
14 interrupt the judge. The jury was already aware that
15 the judge was going to handle it in a particular way.
16 The cat was sort of out of the bag at that point.

17 CHIEF JUDGE LIPPMAN: That would have done
18 no good for the attorney to have a sidebar with the
19 judge at that point?

20 MS. HORLICK: I think when we're looking at
21 mode of proceedings error, the focus also has to be
22 on what the court was supposed to do.

23 JUDGE READ: Well, that's the question, I
24 guess, whether this should be a mode of proceedings
25 error. It seems - - - you know, you could look at

1 this set of circumstances and say there was an
2 opportunity to object and then that might have cured
3 it, and that's the reason why we have preservation
4 rules.

5 MS. HORLICK: But I think that the judge
6 has an independent duty to remain a neutral arbiter
7 during its supervision of the jury during
8 deliberations. And rather than being a neutral
9 arbiter in this case, you have the judge repeating
10 questions such as, "Now, sir, when the defendant was
11 in front of the store and firing those shots" or "You
12 talked a little bit about what the defendant did
13 after firing the shots. Can you describe that for" -
14 - -

15 CHIEF JUDGE LIPPMAN: So you're saying it's
16 the nature of what he did that makes him not - - - in
17 not consulting that's causing this problem.

18 MS. HORLICK: Well, I think there are two -
19 - -

20 CHIEF JUDGE LIPPMAN: If he'd done
21 something more benign afterwards, you wouldn't call
22 it a mode of proceedings error.

23 MS. HORLICK: I think there are two
24 separate issues.

25 CHIEF JUDGE LIPPMAN: Yeah.

1 MS. HORLICK: One is the O'Rama aspect, and
2 in - - -

3 CHIEF JUDGE LIPPMAN: But if he had not
4 given notice and it was just a read-back and he
5 didn't play any role, that wouldn't be a problem,
6 right?

7 MS. HORLICK: Well, certainly not in terms
8 of the first claim that the judge - - - then the
9 judge would have been acting appropriately in its
10 substantive role of supervising the jury in a neutral
11 way. And in fact, the judge would have been
12 following the procedure that is done in almost all
13 the courtrooms across the state. But instead, the
14 judge chose to adopt a very unorthodox method of
15 dealing in the read-backs by personally participating
16 and reading all of the prosecution's questions that
17 really brought home to the juror that - - -

18 JUDGE SMITH: Isn't there an advantage to -
19 - - I mean, didn't Justice Reichbach have a point?
20 It helps to keep the jury awake to hear two voices in
21 the Q and the A?

22 MS. HORLICK: I think during the
23 deliberations, the jurors have now decided that
24 they're focusing on particular pieces of evidence.
25 There's really no reason - - -

1 JUDGE SMITH: Isn't it easier - - - just
2 when you're listening to - - - if you're listening to
3 testimony, isn't it clearer to have one voice for the
4 question and the other for the answer? Doesn't that
5 help you know what's going on?

6 MS. HORLICK: I don't necessarily know that
7 it's clearer, but if that is a valid concern then the
8 judge certainly could have brought in a second court
9 reporter, and they could have traded voices on the
10 questions and the answers. But the judge did not do
11 that. Instead, the judge decided to participate, and
12 did so in such an uneven way that it could only have
13 conveyed to the jury that the - - -

14 JUDGE ABDUS-SALAAM: How would bringing in
15 another court reporter have expedited anything?
16 Might they not have had to wait until a reporter was
17 available?

18 MS. HORLICK: I don't think that it
19 expedited the process, in any event, to have two
20 readers, because it's the same amount of testimony.
21 It might have caused a minimal amount of delay, but
22 it would have avoided causing any prejudice to the
23 defense, and it would have kept the judge in the
24 proper role during the deliberations.

25 JUDGE ABDUS-SALAAM: What if the court had

1 simply read the questions and not read the answers of
2 the prosecution witnesses; would that have made a
3 difference?

4 MS. HORLICK: I think there's always the
5 risk of the judge creating the real possibility of
6 prejudice, even in how questions can be phrased, the
7 tone of the questions, and I think the risk is just
8 too great to have a judge participate in a read-back
9 that way.

10 I see that my time is up.

11 CHIEF JUDGE LIPPMAN: You'll have your
12 rebuttal, counselor.

13 MS. HORLICK: Thank you.

14 CHIEF JUDGE LIPPMAN: Thank you.
15 Counselor?

16 MR. JOBLove: May it please the court. My
17 name is Leonard Joblove for the respondent.

18 CHIEF JUDGE LIPPMAN: Counsel, why isn't it
19 prejudicial that - - - if the judge plays the role of
20 the prosecutor? Would common sense tell us that a
21 jury views the judge as this kind of impartial person
22 and with a great deal of gravitas; why would it not
23 be common sense that it's a bad thing for the judge
24 to do?

25 MR. JOBLove: Your Honor, it - - - it's not

1 prejudicial precisely because the judge explained to
2 the jury, at the time of this read-back, why it was
3 doing it the way it was doing it. First of all, the
4 jury would have no particular reason to know how it's
5 done in other courtrooms or on other occasions. On
6 this occasion, the jury knew that they'd requested
7 the read-back of the testimony of two prosecution
8 witnesses in its entirety, and that testimony is
9 being read back to them. And the judge says the
10 reason that I'm going to do this along with the court
11 reporter is to help keep you awake and to try to
12 expedite matters.

13 JUDGE ABDUS-SALAAM: Counsel, how did it
14 help to keep people awake by switching roles from the
15 questioner to the answerer - - - the person
16 answering? Why - - - what was the rationale for
17 that?

18 MR. JOBLove: Right. Your Honor, I think
19 that it's a two-part question, because first there is
20 the determination by the judge to have one person
21 reading the questions and another person reading the
22 answers. And the explanation the court gave about
23 why it was doing things the way it was was to keep
24 the jury awake. Apparently, the judge made a
25 determination that just mixing things up a little

1 bit, changing roles, that that would help - - -

2 CHIEF JUDGE LIPPMAN: Yeah, but you agree,
3 in retrospect, it's not such a great idea, right? Or
4 do you?

5 MR. JOBLove: I suppose if the judge
6 instead had said, I will read the questions of both
7 attorneys and the court reporter will read the
8 answers of both witnesses, that would avoid the claim
9 that's being raised now.

10 JUDGE PIGOTT: What'd you think of Brockett
11 - - - People v. Brockett, since you were - - -

12 MR. JOBLove: Yes, Your Honor. To the
13 extent that the - - -

14 JUDGE PIGOTT: Weren't you on that case?

15 MR. JOBLove: It's out of my office, yes,
16 Your Honor.

17 JUDGE PIGOTT: It's got your name on it;
18 that's why I ask.

19 MR. JOBLove: Yes, Your Honor. And to the
20 extent that the Second Department seems to be
21 adopting a blanket rule that no judge should ever be
22 involved in the read-back of testimony, there's no
23 authority for that rule. And the Appellate Division
24 in Brockett, and the more recent case cited by my
25 opponent, has not cited to any authority. The

1 governing authority - - - the statute that governs
2 the procedure that a trial court is to follow when
3 responding to requests from a deliberating jury,
4 either for instructions on the law or for a read-back
5 of testimony, is CPL 310.30, and that statute does
6 not prohibit a judge from participating in the read-
7 back. It doesn't - - -

8 CHIEF JUDGE LIPPMAN: That doesn't mean
9 it's good practice, though, right?

10 MR. JOBLove: Yes, Your Honor. The
11 question in this case, the question before the court,
12 is whether it's a mode of proceedings error to do it.

13 CHIEF JUDGE LIPPMAN: Yes, I agree.

14 MR. JOBLove: And before even getting to
15 the question of whether it's a mode of proceedings
16 error is the question about whether it's error at all
17 under the statute.

18 CHIEF JUDGE LIPPMAN: What about - - -

19 MR. JOBLove: And - - -

20 CHIEF JUDGE LIPPMAN: What about the judge
21 not sharing the - - - the note in advance?

22 MR. JOBLove: Well, the judge did disclose,
23 in full, the content of the notes before the court
24 proceeded to give the response to the jury, and
25 that's all that's actual - - -

1 CHIEF JUDGE LIPPMAN: Is that the proper
2 procedure also? Is that all that's required?

3 MR. JOBLOVE: That's all that's required by
4 CPL 310.30.

5 CHIEF JUDGE LIPPMAN: Again, is there a
6 better practice?

7 MR. JOBLOVE: Yes, and in that regard, this
8 court specified the better practice in O'Rama. So
9 certainly, as a general matter, it's better if the
10 court gives notice of the content of the jury notes
11 before the jury is brought back into the courtroom.

12 JUDGE SMITH: So you admit that there was -
13 - - technically, there was an O'Rama violation, but
14 it was one that required preservation and it wasn't
15 preserved?

16 MR. JOBLOVE: That's correct, Your Honor.
17 I'd go a step further and say - - - Your Honor refers
18 to an O'Rama violation, but O'Rama was construing the
19 requirements of 310.30, and this Court, in the Lykes
20 case, which I believe was decided subsequent to
21 O'Rama, said in a case like this one where there's
22 disclosure of the content of the note, but that
23 disclosure takes place in the presence of the jury,
24 that there was no violation of CPL 310.30, so
25 certainly O'Rama is prescribing a preferred procedure

1 to make that disclosure of the content of the note
2 without the jury there before the jury is brought
3 into the courtroom, although the request in this case
4 was a fairly straightforward one that wasn't subject
5 to much interpretation: we want to hear the
6 testimony of these - - -

7 JUDGE ABDUS-SALAAM: Counsel, you - - -

8 MR. JOBLove: - - - two witnesses.

9 JUDGE ABDUS-SALAAM: - - - you argue that
10 the defense lawyer should have asked for a sidebar or
11 objected when the court advised, in front of the
12 jury, what he was going to do with respect - - - the
13 manner in which he was going to handle the read-back.
14 If the court had done that before the jury came back
15 to the courtroom, wouldn't that have been the
16 opportunity for defense counsel to say something
17 about this rather unusual manner of handling the
18 read-back?

19 MR. JOBLove: The attorney certainly would
20 have had an additional opportunity to register any
21 objections at that point, but the point is that the
22 disclosure of not only what the content of the jury
23 notes was, but the court stated clearly exactly how
24 it intended to respond before it actually proceeded
25 with the response, and there's no reason to conclude

1 that the defen - - -

2 JUDGE ABDUS-SALAAM: Well, but if that had
3 been done outside of the presence of the jury, then
4 counsel wouldn't have been, as defendant - - -
5 defendant is now arguing, put in an untenable
6 position of challenging the judge about how he was
7 going to handle the read-back.

8 MR. JOBLove: Well, certainly the court
9 could have chosen to make that disclosure in advance,
10 outside the presence of the jury, but doing so in the
11 presence of the jury didn't impede defense counsel's
12 ability to register an objection. If he didn't want
13 to say something in front of the jury, he could have
14 just said, Your Honor, may I approach for a moment,
15 may I have a sidebar. He could have made a record.
16 And there's absolutely no reason to think that this
17 judge was so wedded to the idea that either there had
18 to be two participants in the read-ba - - - the
19 process of the read-back or that he was wedded to
20 which part of the read-back he was going to do. And
21 if defense counsel said - - -

22 JUDGE RIVERA: But isn't this an untenable
23 approach you're suggesting? I mean, if the judge had
24 said, I'm doing this to keep people awake, right, and
25 now the defense attorney is going to say to the judge

1 that that makes no sense, and even if the judge
2 agreed, the judge - - - wouldn't that confuse the
3 jurors more and just muddy this up even more? I'm
4 very confused as to the way you're suggesting to
5 resolve this issue, putting aside even if the defense
6 counsel had the temerity to go up to the judge and
7 say I want a sidebar and is successful at persuading
8 the judge to change his or her mind.

9 MR. JOBLove: Well, Your Honor, it's not
10 about temerity; it's an opportunity. And attorneys
11 are required to make objections if they disagree with
12 some manner that the judge is handling the trial.
13 And even a case involving a claim of excessive
14 interference by the court in questioning of
15 witnesses, in the Yut Wai Tom case, this court
16 applied the preservation rule and recognized there
17 may be some practical limits - - -

18 JUDGE PIGOTT: Is that your strongest
19 argument, preservation?

20 MR. JOBLove: Well, that's the dispositive
21 argument, Your Honor.

22 JUDGE PIGOTT: All right. Let's assume
23 that it's not preserved; what do you think? I mean,
24 let's assume it is preserved; pardon me. I mean, I -
25 - -

1 MR. JOBLove: Oh - - -

2 JUDGE PIGOTT: - - - as your counsel points
3 out, you know, you've got the judge saying to the
4 jury, "Now, when the defendant was in front of the
5 store and firing three shots, from your perspective
6 where you were sitting in the car", et cetera, et
7 cetera - - - I mean, as she points out, nine times
8 the man in the black robe says, now, when the
9 defendant was firing the shots, when the defendant
10 was doing this, when the defendant was doing that.
11 Do you think that may have a tendency to tip things
12 in favor of the prosecution?

13 MR. JOBLove: No, Your Honor. I don't - -
14 -

15 JUDGE PIGOTT: You don't?

16 MR. JOBLove: - - - think so at all. The
17 jury is presumed to follow the clear instruction that
18 I'm doing this to keep you awake.

19 JUDGE PIGOTT: I understand that. I'm just
20 asking you as a point - - - you know, if we got rid
21 of preservation, which I agree with you is a big
22 issue here, the idea - - - and that's why I asked you
23 about Brockett. In Brockett the court says you
24 shouldn't be doing this. And if the judge is to be
25 respected, and if the judge is the - - - the arbiter

1 here, juries generally, in my experience, kind of
2 like the judge. And when the judge then does
3 something like this, don't you think it could cause a
4 problem, if not in this case, in future cases?

5 MR. JOBLove: Well, I don't, Your Honor.
6 If the jury is properly instructed - - - just as
7 evidence of uncharged crimes coming in at a trial
8 would be problematic if there's not a proper
9 instruction given, here - - -

10 JUDGE SMITH: What instruction is
11 necessary, even? I mean, is the jury - - - is the
12 jury going to think that the judge is expressing his
13 own view when he says you shot him three times or
14 whatever?

15 MR. JOBLove: No, Your Honor, but as - - -
16 out of an excess of caution, when, as in this case,
17 both general instructions, and at the time of the
18 read-back, a specific instruction was given, there's
19 no reason to think the jury would be - - -

20 JUDGE SMITH: Don't we frequently ask
21 jurors to perform much more difficult feats and much
22 subtler bits of reasoning than to figure out that the
23 judge is just reading what somebody else said?

24 MR. JOBLove: Yes, such as disregarding
25 inadmissible evidence. And in response to the

1 question earlier about defense counsel not having an
2 opportunity to object, an important question in
3 determining whether to treat an alleged error as a
4 mode of proceedings error is the attorney might have
5 thought this was perfectly okay. The attorney might
6 have liked the idea about not having just the court
7 report droning on and on with question, answer,
8 question, answer. And it does expedite the process,
9 because if you have two people reading, one the
10 questions and one the answers, which not only more
11 closely tracks the way the jury actually heard the
12 testimony from the witness stand, you eliminate the
13 need to say question, this, answer, this, because
14 it's obvious that you have two separate parties. And
15 the last place the court wants to expand the mode of
16 proceedings exception is in a case where an attorney
17 reasonably could have concluded I like the way the
18 judge is doing this; I don't have a problem with it.

19 JUDGE RIVERA: Is there any problem with
20 what counsel says, that it's the perception of the
21 judge aligning themselves with the prosecutor - - -
22 the prosecutor's theory. Isn't that what's at the
23 heart of - - - despite the request for the per se
24 rule, that it's that choice?

25 MR. JOBLove: Well, so first, that's not a

1 problem that a per se rule that the judge should
2 never involve him or herself in the read-back to
3 begin with, and in fact, there are benefits to the
4 judge doing that.

5 JUDGE RIVERA: Right, no, that's what I'm
6 saying. Putting aside the per se rule, really at the
7 heart of it is this argument that the judge has
8 aligned himself with the prosecutor - - -

9 MR. JOBLove: Right, so putting - - -

10 JUDGE RIVERA: - - - and is no longer the
11 neutral arbitrator in the ring.

12 MR. JOBLove: Even putting aside the
13 preservation aspect, the court's response under
14 310.30 is generally reviewed. It's the discretion of
15 the court and it's reviewed for abuse of discretion,
16 and that would have to be done on a case-by-case
17 basis. In this case, it seems less than obvious,
18 when the judge says I'm going to mix things up a
19 little bit just to help keep you awake, and the judge
20 has given numerous instructions saying I have no
21 opinion about the case and don't infer that I do from
22 anything that I may say or do during the trial, that
23 it's an abuse of discretion, as a matter of law, for
24 the court to adopt the role it did, and even further
25 to say it's a mode of proceedings error because,

1 generally speaking, if there's a claim of unbalanced
2 or interference by the court with a question of
3 witnesses or unbalanced marshaling of evidence, that
4 could be reviewed for an abuse of discretion as a
5 matter of law, but the preservation requirement still
6 applies.

7 CHIEF JUDGE LIPPMAN: Okay, counselor.
8 Thanks, counselor.

9 MR. JOBLove: Thank you.

10 CHIEF JUDGE LIPPMAN: Counselor, rebuttal?

11 MS. HORLICK: Yes. Regardless of why the
12 judge did it, the judge may have had good intentions
13 to expedite the process or - - -

14 CHIEF JUDGE LIPPMAN: Well, you don't think
15 the judge in this case did this intentionally?

16 MS. HORLICK: No. No.

17 CHIEF JUDGE LIPPMAN: He was an
18 unconventional judge, in the best sense of that word.
19 Go ahead.

20 MS. HORLICK: We're not claiming that the
21 judge - - -

22 CHIEF JUDGE LIPPMAN: Sure. I know.

23 MS. HORLICK: - - - intentionally - - -

24 CHIEF JUDGE LIPPMAN: Go ahead.

25 MS. HORLICK: - - - but regardless of why

1 the judge did it, the impact was the same on the
2 jury. It was impossible, really, I think, for the
3 jury to separate out the judge, who is the most
4 powerful person in the courtroom, basically filtering
5 - - -

6 JUDGE SMITH: Is it impossible for the - -
7 - impossible for the jury to separate it out?

8 MS. HORLICK: I - - -

9 JUDGE SMITH: I mean, it doesn't sound that
10 hard. We ask juries to understand very sophisticated
11 legal concepts. It doesn't sound that hard for the
12 jury to understand, gee, I'm going to read the part
13 of the prosecutor; what's hard?

14 MS. HORLICK: It was such a one-sided
15 presentation that the judge did not give the same
16 advantage to the defense. And instead of then
17 reading the defense's questions, the judge then reads
18 the cross-examination answers that undercut and - - -

19 JUDGE PIGOTT: Isn't Mr. Joblove right
20 about that in the sense that that's why you object?
21 I mean, if you liked the way it's going, why would
22 you object? I mean, if the tables had been turned
23 here, defense counsel might say this is fine with me.

24 MS. HORLICK: Well, there are some
25 instances in mode of proceedings errors where we

1 don't leave it up to the attorneys - - -

2 JUDGE PIGOTT: Right.

3 MS. HORLICK: - - - we want a unified way
4 of doing things. And in this situation the judge
5 should be a neutral arbiter because it impacts on the
6 right to a trial by jury.

7 CHIEF JUDGE LIPPMAN: Okay, counselor.

8 MS. HORLICK: Thank you.

9 CHIEF JUDGE LIPPMAN: Thank you. Thank you
10 both.

11 (Court is adjourned)

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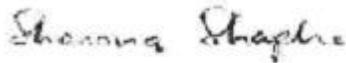
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C E R T I F I C A T I O N

I, Sharona Shapiro, certify that the foregoing transcript of proceedings in the Court of Appeals of The People of the State Of New York v. James Alcide, No. 143 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.



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