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COURT OF APPEALS

STATE OF NEW YORK

PEOPLE,

Appellant,

-against-

NO. 141

ALEX FLORES, LUCIO RAMIREZ, BENIGNO
AQUILAR, and EMMANUEL FLORES,

Respondents.

285 Wall Street
Kingston, NY 12401
November 15, 2018

Before:

CHIEF JUDGE JANET DIFIORE
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE LESLIE E. STEIN
ASSOCIATE JUDGE EUGENE M. FAHEY
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE PAUL FEINMAN

Appearances:

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1 CHIEF JUDGE DIFIORE: The final appeal on this
2 morning's calendar is appeal number 141, the People of the
3 State of New York versus Alex Flores and others.

4 MR. MIDDLEMISS: Good morning, Your Honors. May
5 it please the Court. Robert Middlemiss on behalf of the
6 People.

7 We would request two minutes of rebuttal time.

8 CHIEF JUDGE DIFIORE: You may have your two
9 minutes, sir.

10 MR. MIDDLEMISS: The Appellate Division erred in
11 finding that the trial court was unable to impanel an
12 anonymous jury in three respects.

13 In the first instance, the Court, as a whole,
14 adopted an incorrect reading of CPL 270.15(1) (a) and (1-a).
15 This Court has consistently said that a literal
16 interpretation of the statute will be rejected if it fails
17 to give authority to the clear legislative intent of the
18 legislature in passing the statute.

19 JUDGE STEIN: Well, you would agree that (1) (a)
20 was enacted after - - - I'm sorry. (1-a), right, what
21 enacted after (1) (a).

22 MR. MIDDLEMISS: Yes, Your Honor.

23 JUDGE STEIN: Right? And - - - and so the fact
24 that the second enactment specifically gives permission for
25 the withholding of juror addresses, doesn't that at least



1 suggest that the legislature intended - - - did not intend
2 to also include names in that since - - - since the two are
3 - - - are very different? One says you must, and the other
4 one says you don't have to. They're two different things.

5 MR. MIDDLEMISS: Well, Your Honor, thank you.

6 The - - - the two are indeed very different, but
7 they are also very interrelated. Particularly, today,
8 revealing the name of a juror will almost instantaneously
9 reveal the - - -

10 JUDGE STEIN: Well, that - - -

11 MR. MIDDLEMISS: - - - address as well.

12 JUDGE STEIN: - - - may be. But isn't that
13 argument best presented to the legislature? How do we read
14 something that seems to be inconsistent with the language,
15 the plain language, of the statute?

16 MR. MIDDLEMISS: Well, this Court has
17 consistently adopted broad readings of statutes,
18 particularly 270.15, to offer courts the discretion
19 necessarily to - - - to enforce the - - -

20 JUDGE STEIN: So which - - -

21 MR. MIDDLEMISS: - - - clear legislative intent.

22 JUDGE STEIN: Which of those sections are you
23 suggesting we read broadly?

24 MR. MIDDLEMISS: Both, Your Honor. Both.

25 JUDGE STEIN: So - - - so you're suggesting - - -



1 suggesting that we can read addresses to mean names?

2 MR. MIDDLEMISS: Yes, Your Honor. Well, if I
3 may. We can read addresses to mean addresses and names.

4 JUDGE STEIN: Okay.

5 MR. MIDDLEMISS: Certainly, the intent was to
6 protect jurors, particularly by their addresses. But,
7 again, the main reason that names are relevant is because,
8 without protecting the names, there is no protection at all
9 today.

10 JUDGE WILSON: Well, let me ask you this.
11 I - - - I noticed that in (1)(a), the questionnaire lists a
12 number of things that the - - - you can ask the jurors,
13 including place of birth, current address, education,
14 occupation. But it doesn't list name. So why isn't it a
15 reasonable reconciliation of (1)(a) and (1-a) that the
16 reason (1-a) doesn't mention names is because (1)(a)
17 contemplates the jury questionnaire doesn't have to have a
18 name on it in the first place?

19 MR. MIDDLEMISS: Well, I think that certainly
20 that is a reasonable construction. At the same time, it
21 has to be acknowledged that names are expressly identified
22 in (1)(a) in the sense that the Court is, in theory,
23 required to identify the jurors in - - - in bringing them
24 in by name.

25 JUDGE WILSON: And where do you - - - where do



1 you draw that from? What portion of (1)(a) says that?

2 MR. MIDDLEMISS: The initial portion of (1)(a)
3 indicating the jurors should be called by name and then
4 placed - - -

5 JUDGE WILSON: Now, does called by name mean
6 called publicly by name or, for example, somebody goes and
7 says to the juror, okay, you're it?

8 MR. MIDDLEMISS: Well, the - - -

9 JUDGE WILSON: I mean, isn't there, like, use of
10 the word, of the verb call? You know, I was called to the
11 Bar. I was called to the clergy.

12 MR. MIDDLEMISS: I - - - to be fair, it - - - it
13 is certainly the - - - the - - - the common understanding
14 of - - - of called. But certainly, I mean, I - - - I would
15 - - - I would agree that the - - -

16 JUDGE WILSON: Could the person be called by his
17 first name or her first name only? Would that satisfy the
18 law?

19 MR. MIDDLEMISS: Well, that - - - that's entirely
20 plausible. I mean, it is a reasonable construction as
21 well, Your Honor. Yes.

22 JUDGE GARCIA: Counsel, let's say we agreed that
23 there's room here for an anonymous jury, especially in your
24 reading that address would include name. Would that mean
25 the anonymous jury would have to be impaneled consistent



1 with (1)(a), that is that the defense counsel gets the
2 names and addresses, which isn't traditionally done in
3 federal court, right?

4 MR. MIDDLEMISS: Correct, Your Honor. Correct.

5 JUDGE GARCIA: So what would be in state court
6 under your reading of this statute?

7 MR. MIDDLEMISS: It - - - it would be consistent
8 with the statute. The defendants should receive the - - -
9 the names and addresses.

10 JUDGE WILSON: And that didn't happen here.

11 JUDGE FEINMAN: The - - - the defense counsel.

12 JUDGE GARCIA: The defense counsel.

13 MR. MIDDLEMISS: I - - - yes.

14 JUDGE FEINMAN: You said defendant.

15 MR. MIDDLEMISS: Yes. Thank you, Your Honor. My
16 apologies. Yes. The defense counsel.

17 JUDGE WILSON: And - - - and that did not happen
18 here?

19 MR. MIDDLEMISS: It did not happen here. But we
20 would submit that what the Court did do was substantial
21 compliance and that the Court agreed to provide defense
22 counsel with the names at the conclusion of the trial. And
23 counsel for Defendant Aguilar actually filed a CPL 330
24 motion in which he challenged the issue of the court's
25 decision, but importantly - - -



1 JUDGE FAHEY: How do you - - -

2 MR. MIDDLEMISS: - - - did not make any reference
3 to any information that was revealed based on his receiving
4 those names.

5 JUDGE FAHEY: How do you deal with the - - - the
6 underlying problem of the court by not identifying the
7 jurors by name in public undermines the presumption of
8 innocence in - - - in the conduct of the trial? In other
9 words, by not giving out their names, you would - - -
10 people can maybe rightly, maybe not, assume that this
11 person is so dangerous that we have to have an anonymous
12 jury. And the mere use of an anonymous jury would
13 therefore undermine the presumption of innocence that every
14 defendant has when he comes before the court.

15 So it seems that we would be inevitably faced
16 with an arbitrary situation where, for some defendants, we
17 say, well, this crime, they're not going to undermine the
18 jury, so therefore, the jury is not anonymous. But in this
19 crime, they may. But if we apply our presumption of
20 innocence which is the core value in our criminal cases, it
21 seems that it's in danger of being undermined.

22 MR. MIDDLEMISS: Well, that certainly is a factor
23 that courts necessarily balance in making that
24 determination.

25 JUDGE FAHEY: Well, that's what I'm wondering.



1 See, your response is reasonable. I don't - - - I don't
2 mean that. But can the presumption of innocence be
3 balanced? Can - - - can you balance that fundamental value
4 against anything or is it something that we must stick to
5 and the consequences are the consequences?

6 MR. MIDDLEMISS: Well, the statute, (1-a),
7 clearly recognizes that it is possible to balance in part
8 because it authorizes both parties to - - - to seek to have
9 an anonymous jury. There - - - there's a clear recognition
10 that it's - - - the presumption of innocence is merely one
11 factor.

12 JUDGE STEIN: So as I understand - - -

13 MR. MIDDLEMISS: The desires for - - -

14 JUDGE STEIN: - - - it, under the federal system,
15 there - - - there also has to be a neutral instruction to
16 the jury. And that is intended, I think, to provide some
17 of the balance as well. That did not happen here. Is that
18 fatal?

19 MR. MIDDLEMISS: No, Your Honor. No, Your Honor.

20 JUDGE STEIN: Why not?

21 MR. MIDDLEMISS: State and federal courts have
22 consistently offered different opinions on the issue.
23 There are a number of courts who have said that it's
24 particularly important to - - - to have that, Massachusetts
25 for example. Other courts, such as Nebraska and Tennessee,



1 have said that it's perhaps best not to offer any
2 instruction because that, in and of itself, could lead the
3 jurors to conclude that - - -

4 JUDGE RIVERA: So - - -

5 MR. MIDDLEMISS: - - - something was - - - was
6 unusually dangerous based on the situation.

7 JUDGE RIVERA: So, counsel, let's say we agree
8 with you on - - - on the statute authorizing a judge to
9 impanel an anonymous jury. What - - - what was the basis
10 here? Doesn't that depend on the individual case? What's
11 the basis here for the anonymous jury being impaneled
12 according to the judge here?

13 MR. MIDDLEMISS: The - - - the court was clearly
14 aware of a number of circumstances related to the case
15 because the - - - the court's decision immediately followed
16 the combination Sandoval/Molineux hearing in which the
17 defendants' history - - -

18 JUDGE RIVERA: But what did the judge say at the
19 time - - -

20 MR. MIDDLEMISS: The judge - - -

21 JUDGE RIVERA: - - - at the actual time the judge
22 was going to move forward with impaneling an anonymous
23 jury?

24 MR. MIDDLEMISS: At the time, the judge made
25 reference to his history with jurors and their expressed



1 concern about their names and also the physical conditions
2 outside the courthouse at the time, particularly the
3 parking which jurors had expressed - - -

4 JUDGE RIVERA: So if none of that is specific to
5 the case - - - even assuming we agreed with you that the
6 statute permits a judge in his or her discretion to - - -
7 to make this determination, how - - - how would that have
8 been an appropriate determination in this case if it's
9 based not on the facts of the case and the defendants
10 before the judge?

11 MR. MIDDLEMISS: Two things, Your Honor. First,
12 it clearly was based on the facts of the case because the
13 judge was necessarily aware of them after having just
14 reviewed them with the parties.

15 Second, things like the condition of the parking
16 lot, they - - - they are consistent with what has been
17 recognized as relevant in terms of juror protection. One
18 of the factors commonly recognized for example - - -

19 JUDGE WILSON: But the - - - but the - - - but
20 the - - -

21 MR. MIDDLEMISS: - - - is the publicity of the
22 trial.

23 JUDGE WILSON: But the anonymity of the jury
24 doesn't protect anything going on at the parking lot. You
25 don't need to know somebody's names or address.



1 MR. MIDDLEMISS: That's - - - that's very true.
2 But it clearly limits what can occur. In this case, you
3 actually had Defendant Aguilar, the only defendant out on
4 bail, along with a number of his associates, whatever their
5 connection, waiting in the parking lot next to the car of
6 one of the - - -

7 JUDGE STEIN: But that was - - -

8 JUDGE RIVERA: But even the judge - - -

9 MR. MIDDLEMISS: - - - impaneled jurors.

10 JUDGE RIVERA: - - - said he couldn't reach that
11 conclusion.

12 MR. MIDDLEMISS: Respectfully, Your Honor - - -

13 JUDGE RIVERA: If the judge didn't reach that
14 conclusion and it doesn't inform the judge's decision, then
15 we can't rely on that here.

16 JUDGE STEIN: And that was also after the
17 decision had already been made - - -

18 MR. MIDDLEMISS: Well - - -

19 JUDGE STEIN: - - - to - - -

20 MR. MIDDLEMISS: Thank you, Your Honor.

21 As the - - -

22 JUDGE STEIN: - - - impanel - - -

23 MR. MIDDLEMISS: - - - dissent clearly
24 recognized, the analysis must be retroactive. You
25 can't - - - you can't tell the defendants to unhear jurors'



1 names. It's either/or. Clearly, the court was aware of
2 the defense - - -

3 JUDGE STEIN: No, no, no, no. But you can't rely
4 on something that allegedly occurred and - - - for
5 something that you decided before that ever occurred.

6 MR. MIDDLEMISS: Well, again, the - - - the
7 dissent felt that you could with respect to at least the
8 addresses which the dissent agreed.

9 Importantly, Watts, the case the parties
10 generally cite, the court there noted that it had to be
11 prospective analysis. If there was a concern over jurors'
12 safety, subsequent occurrences that reflected that there
13 was merit to that concern absolutely reflect back on what
14 the Court decided at the time.

15 JUDGE RIVERA: Right. But there has to be some
16 basis at the outset for why one would be concerned about
17 jurors' safety. And as I understand the record, the judge
18 didn't base that determination on concerns related to this
19 specific case, just the judge's experience and what other
20 jurors had said to this judge.

21 MR. MIDDLEMISS: Well, if I may, Your Honor.
22 Obviously, specific rather than implicit identification of
23 concerns would have been far preferable. But the Court had
24 just heard the fact that the - - - the defendants' criminal
25 history, particularly Defendant Ramirez, was relevant in



1 the sense that, one, of course, they were all gang members,
2 consistently identified as relevant. But Ramirez, in
3 particular, had previously been charged with gang assault
4 in the first degree several years before. And his
5 immediate response had been to abscond to, I believe,
6 Nebraska where he remained for several years before
7 returning, at which point he conveniently pleaded to a
8 misdemeanor because it was impossible to prosecute the case
9 at that point.

10 JUDGE RIVERA: But in that example - - -

11 MR. MIDDLEMISS: That wasn't - - -

12 JUDGE RIVERA: - - - he didn't threaten anyone.
13 He left.

14 MR. MIDDLEMISS: True. But again, the point here
15 was Defendant Aguilar was the only one out on bail, the
16 only one out on bail. And then, therefore, he was the only
17 one who could potentially flee.

18 CHIEF JUDGE DIFIORE: Thank you, counsel.

19 MR. MIDDLEMISS: The - - - thank you, Your Honor.

20 CHIEF JUDGE DIFIORE: Counsel?

21 MR. LEVENSON: If the Court would please. My
22 name is Leonard Levenson. I represent the respondent.

23 A hundred and fifty years ago, two legislatures,
24 New York State and the federal government, decided that
25 criminal trials should be open and public.



1 JUDGE GARCIA: Counsel, let's move up a little
2 bit into the - - - near into the - - -

3 MR. LEVENSON: I'm sorry.

4 JUDGE GARCIA: - - - present. Your view, I
5 understand it, is this is never authorized, an anonymous
6 jury.

7 MR. LEVENSON: An anonymous jurors certainly are
8 authorized if there's good cause or reason to.

9 JUDGE GARCIA: So you would read that ability by
10 the trial court to do it into the New York procedural law?

11 MR. LEVENSON: Absolutely.

12 JUDGE GARCIA: And what conditions could the
13 Court order an anonymous jury?

14 MR. LEVENSON: Well, the obvious ones, if you
15 have a mafia gang being tried for murder, they have a long
16 history of abusing witnesses, I would say you have a
17 situation there.

18 JUDGE FAHEY: There's a - - - there's a Fifth
19 Circuit case, U.S. v. Kraut. It sends out a - - - it sets
20 out a test. Are you familiar with that? There are eight
21 different factors that they ask the court to look at. Is
22 that something that we should consider?

23 MR. LEVENSON: Yes, of course. I would - - - but
24 - - -

25 JUDGE GARCIA: And would you agree then also that



1 if we were to find that type of procedure available, it
2 would need to be consistent with (1) (a), that the defense
3 counsel would need to have the names and addresses?

4 MR. LEVENSON: Well, I certainly think there's
5 nothing wrong with giving the defense counsel the names and
6 addresses of these individuals. I think Judge DeRosa said
7 that if you give the names and addresses to defense
8 counsel, they have to turn it over to their clients.
9 That's not true. They don't have to turn it over. They
10 could be - - -

11 JUDGE WILSON: Well, and I - - - and I assume
12 that the protective order referred to in (1) (a) could, if
13 necessary, expressly say counsel cannot disclose these
14 names to anybody. Is that right?

15 MR. LEVENSON: I - - - I - - - I believe that
16 they could be disclosed to defense counsel.

17 JUDGE WILSON: No, no. What I'm saying is (1) (a)
18 specifies that the court may issue a protective order. Are
19 you with me so far?

20 MR. LEVENSON: Right.

21 JUDGE WILSON: That protective order could say
22 I'm disclosing the names and addresses to counsel, but they
23 are not to disclose those names to anybody else.

24 MR. LEVENSON: Yes.

25 CHIEF JUDGE DIFIORE: What went wrong here,



1 counsel?

2 MR. LEVENSON: I'm sorry?

3 CHIEF JUDGE DIFIORE: What went wrong here?

4 MR. LEVENSON: What went wrong here is the - - -
5 is the statement by Judge DeRosa that I'm going to do this
6 in every case that comes before me, I'm going to have an
7 anonymous jury in every case that comes before me, whether
8 there's reason or there isn't reason.

9 I think in this particular case, he mentioned the
10 - - - the garage incident, the parking lot incident.
11 It - - - it - - - that, itself, I think is not necessarily
12 conducive to anything. I mean, it's a question of whether
13 or not he was actually looking at the witness, whether the
14 witness was - - -

15 JUDGE GARCIA: Right. Counsel - - -

16 MR. LEVENSON: - - - concerned in what - - -

17 JUDGE GARCIA: - - - he also offered - - - the
18 trial judge offered to give an instruction. And there was
19 disagreement among the defense counsel as to that
20 appropriateness of that instruction, right, consent.

21 MR. LEVENSON: Well, it seems unfair to the three
22 individuals that wanted the instruction just because one
23 did not want it.

24 JUDGE GARCIA: Could the judge have given that
25 instruction despite the objections?



1 MR. LEVENSON: The judge could have given that
2 instruction, but I don't think it would have been
3 dispositive of the issue. Even - - - even the fact that he
4 did give such an instruction was not - - - would not have
5 made it dispositive.

6 JUDGE GARCIA: So taking it along in your view,
7 there is a possibility to do this, it was not done properly
8 here, so it's a violation. And what is your view of
9 whether this is, per se, error or which standard of
10 harmless error should apply?

11 MR. LEVENSON: Well, we're talking about the
12 issue of harmless error. We have two issues here. The
13 first, it's a constitutional error. The constitution says
14 that all trials, criminal trials, shall be public. Our
15 legislature on many occasions - - -

16 JUDGE STEIN: Well, but if - - - if you - - -

17 MR. LEVENSON: - - - passed that - - -

18 JUDGE STEIN: - - - say it's a constitutional
19 issue, are - - - are we saying that it is unconstitutional
20 to - - - to, by statute, allow, for example, the
21 withholding of addresses as our statute does?

22 MR. LEVENSON: I'm sorry. I missed the last
23 part.

24 JUDGE STEIN: So if we're saying that it's
25 unconstitutional, that it has to be a public trial and all



1 this information - - -

2 MR. LEVENSON: Right.

3 JUDGE STEIN: - - - has to be made available, we
4 have a statute that - - - that allows the withholding of
5 jurors' addresses in certain circumstances.

6 MR. LEVENSON: Right.

7 JUDGE STEIN: Is that unconstitutional?

8 MR. LEVENSON: Well - - -

9 JUDGE STEIN: And is the federal analysis - - -
10 is that unconstitutional?

11 MR. LEVENSON: Well, it's not necessarily
12 unconstitutional. But certainly, the trial should be
13 reasonably open, the extent of which - - -

14 JUDGE FAHEY: Well, isn't the question can the
15 trial be public but the jurors' names still be anonymous?

16 MR. LEVENSON: I don't see how that can be.
17 We're talking about - - - I started mentioning a hundred
18 and fifty years ago. We were talking about small towns
19 where everyone had a right to know what was going on. If
20 you give - - - give up the right to the name of the
21 particular individual, I think you undercut very
22 substantially the public nature of the - - - of the crime.

23 JUDGE FAHEY: Thank you.

24 MR. LEVENSON: All right.

25 CHIEF JUDGE DIFIORE: Thank you, counsel.



1 MR. LEVENSON: Thank you.

2 CHIEF JUDGE DIFIORE: Counsel?

3 JUDGE GARCIA: Counsel, can we start with that
4 point of assume even if there is an anonymous jury
5 procedure available, it wasn't followed here, just for
6 purposes of this question? What would your position be on
7 the error standards?

8 MR. MIDDLEMISS: Thank you, Your Honor.

9 It's absolutely harmless. Virtually every other
10 - - -

11 JUDGE GARCIA: Under what standard,
12 constitutional harmless error or not constitutional?

13 MR. MIDDLEMISS: Not constitutional. No - - - no
14 other jurisdiction, state or federal, has recognized a
15 constitutional right to the names of jurors. New York
16 shouldn't be any different than that. This is
17 fundamentally different from rights like participation in
18 response to a jury note in which it's a question of defense
19 - - - the ability of the defense to take an affirmative
20 role whereas this is - - -

21 JUDGE GARCIA: But why is it more like shackling?
22 You shackle a defendant. You didn't have the proper basis
23 for doing it. Don't we apply constitutional error to that?

24 MR. MIDDLEMISS: Yes, Your Honor. That's true.
25 But I - - - I would submit that this is more like voir dire



1 in general because this is - - - that's what it directly
2 relates to so that you - - - you would need to show - - -

3 JUDGE WILSON: Well, doesn't it - - - doesn't it
4 also relate to the conduct of the trial, that is, if I know
5 the neighborhood that one of my jurors lives in, I can use
6 that in my argument, my opening? If I know something about
7 other characteristics of the jurors, I can also use that in
8 examination. It's not just voir dire.

9 MR. MIDDLEMISS: Well, that - - -

10 JUDGE WILSON: It's the whole conduct of the
11 trial, no?

12 MR. MIDDLEMISS: But - - - but - - - but no. To
13 the extent that you're going to use the address, it's going
14 to be relevant to voir dire - - -

15 JUDGE WILSON: No, no, no.

16 MR. MIDDLEMISS: - - - in the - - -

17 JUDGE WILSON: Not disclose it. But if I know
18 somebody lives in a particular neighborhood, I might phrase
19 questions in a certain way. I might phrase my opening or
20 my closing in a certain way to pitch something to that
21 juror. No?

22 MR. MIDDLEMISS: It may be relevant in that sense
23 certainly.

24 JUDGE WILSON: Which is conduct of the trial.
25 It's outside of the voir dire.



1 MR. MIDDLEMISS: But it's no more interrelated
2 than anything else relative to voir dire. I mean, if you
3 know any other aspect of their history, where they were
4 employed, what - - - what type of - - -

5 JUDGE GARCIA: But under your rule, wouldn't
6 counsel know the neighborhood under a protective order? I
7 mean, you just couldn't mention it in court I would
8 suppose. But you would still have the information.

9 MR. MIDDLEMISS: Very true, Your Honor, yes.

10 JUDGE GARCIA: So going back to why would the
11 standard be different for someone who is shackled or
12 dressed inappropriately and in prison garb, identifiable,
13 why would the - - - why would the standard be different
14 here? Because what's the - - - you know, what's the
15 difference in terms of the perception on the jury? And
16 that's what we're concerned about here; an anonymous jury,
17 this defendant must be dangerous. Somebody is shackled at
18 counsel table, this defendant must be dangerous. What's
19 the difference?

20 MR. MIDDLEMISS: The - - - I - - - I - - - I
21 would submit that it is the same reason that the - - - the
22 courts have - - - have differed on whether or not a jury
23 instruction is advisable or unadvisable. In - - - in the
24 case of things like shackles, the danger is that it will be
25 omnipresent, whereas this is merely a one-time thing at the



1 - - - the initiation of - - - of the trial.

2 Moreover, there's the recognition - - -

3 JUDGE FAHEY: Well, I don't know if that's
4 correct. People v. Buchanan was a shackling case, and I
5 had had it at the Appellate Division in the Fourth
6 Department. And I don't know if you're familiar with it.
7 But he had shackles on during the entire trial initially
8 and on the retrial - - - and it was exactly the judge - - -
9 Judge Garcia is saying required that there be a hearing and
10 a determination that shackling was necessary for a public
11 safety reason. And I sense that - - - that that's what's
12 being suggested here, and the same kind of analysis.

13 MR. MIDDLEMISS: If - - - if I may. It's a
14 different analysis in the sense that the - - - the statute
15 clearly recognizes that only the People or the court, but
16 defendants themselves can request an anonymous jury as
17 well. There is - - - there is a clear recognition - - -
18 whereas in the case of shackling, that - - - that's - - -
19 that's not going to be at the request of the defendant.
20 There is the one case in which the defendant declined
21 to - - - to change clothes to - - - which caused the jury
22 to see the shackles. But that's an instance in which
23 it - - - it's going to be enforced upon the defendant
24 necessarily.

25 But it's - - - there's the recognition that in



1 the case of something like this, it's entirely plausible
2 that you would have the - - - the defense agree that the
3 benefits outweighed the cost. In fact, that was the case
4 in - - - in People v. Owens, the Monroe County case where
5 this came up. The parties both agreed that - - - that it
6 was warranted. And notably there as well, the court
7 declined to give the - - - the curative instruction
8 on - - - on the theory that it would be unadvisable because
9 it would highlight the - - - the unusual situation for the
10 jurors.

11 CHIEF JUDGE DIFIORE: Thank you, counsel.

12 MR. MIDDLEMISS: Thank you so much.

13 (Court is adjourned)

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

I, Michael Drake, certify that the foregoing transcript of proceedings in the Court of Appeals of People v. Alex Flores, Lucio Ramirez, Benigno Aquilar, and Emmanuel Flores, No. 141 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Signature: 

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