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COURT OF APPEALS

STATE OF NEW YORK

PEOPLE,

Respondent,

-against-

NO. 13

FERNANDO RAMIREZ,

Appellant.

20 Eagle Street
Albany, New York
January 11, 2024

Before:

CHIEF JUDGE ROWAN D. WILSON
ASSOCIATE JUDGE JENNY RIVERA
ASSOCIATE JUDGE MICHAEL J. GARCIA
ASSOCIATE JUDGE MADELINE SINGAS
ASSOCIATE JUDGE ANTHONY CANNATARO
ASSOCIATE JUDGE SHIRLEY TROUTMAN
ASSOCIATE JUDGE CAITLIN J. HALLIGAN

Appearances:

FELICE B. MILANI
Legal Aid Society of Suffolk County
Attorney for Appellant
100 Wall Street
New York, NY 10005-3701

ROSALIND C. GRAY
Suffolk County District Attorney's Office
Attorney for Respondent
725 Veterans Memorial Hwy
Hauppauge, NY 11788

Christy Wright
Official court Transcriber



1 CHIEF JUDGE WILSON: Next case on the calendar is
2 People v Ramirez.

3 MS. MILANI: Good afternoon, Your Honors. Felice
4 Milani, Office of Laurette Mulry for the Appellant. May I
5 proceed?

6 CHIEF JUDGE WILSON: Please.

7 MS. MILANI: The rules of the court cannot
8 compromise due process, even in a pandemic. The court in
9 this case ordered certain protocol to be followed at the
10 outset, and this order violated Appellant's state and
11 federal right to be tried by an impartial jury, which is
12 one of the most fun - - -

13 JUDGE GARCIA: Counsel, if we hold your way and
14 accept your argument, and then a juror comes in - - -
15 potential juror to serve wearing a mask and says, you know,
16 I have a condition and I'm susceptible to COVID and I need
17 to keep the mask on, but I'd really like to serve. Would
18 that juror be unfit?

19 MS. MILANI: I don't believe he'd be unfit. I
20 believe that if there were other protocol to be followed -
21 - - I mean, for instance, in this case, they had the clear
22 mask and the cloth mask, so very easily the cloth mask
23 could have been dispensed with. I mean, there was - - -

24 JUDGE GARCIA: What if they're wearing a, you
25 know, an M, you know, the super mask, and that's much more

1 effective than this shield. And they say, you know, I need
2 this mask, this particular mask, then they would be unfit
3 because they couldn't wear the shield?

4 MS. MILANI: Well, the - - - you have to weigh -
5 - - weigh the appellant or the defendant, the person on
6 trial, their rights versus the jurors. So if that juror -
7 - - if that - - - if the client or the defendant, whoever's
8 on trial can't assess that particular - - -

9 JUDGE TROUTMAN: And in COVID, we were - - -
10 courts were weighing people's health, their lives. Isn't
11 that a big factor? This wasn't just an arbitrary practice
12 that was put in play. Are you suggesting otherwise?

13 MS. MILANI: I'm not suggesting that it wasn't a
14 serious situation ongoing.

15 JUDGE TROUTMAN: No. The courts put in certain
16 protocols because of COVID, and you're suggesting that
17 because at all times the defendant wasn't able to see
18 facial expressions? Are you saying that is what alone
19 deprived him of due process, whether or not that they were
20 able to see hand signals and the intonation of - - - hear
21 the intonation of the voice, et cetera, that that was
22 insufficient?

23 MS. MILANI: Well, it was definitely
24 insufficient. I mean, there were - - - there were
25 remedies. They could have adjourned the case to see - - -

1 and you know, courts all over the state were doing that.

2 JUDGE TROUTMAN: Adjourn the case?

3 MS. MILANI: Adjourn the case to wait out - - -
4 wait out the situation a little bit.

5 CHIEF JUDGE WILSON: Wait out COVID, you mean?

6 MS. MILANI: Correct. Wait out the - - -

7 CHIEF JUDGE WILSON: Let me - - - let me just see
8 if I've got the protocols in mind correctly. So all the
9 jurors had some kind of cloth mask?

10 MS. MILANI: Correct.

11 CHIEF JUDGE WILSON: They also had a clear face
12 shield?

13 MS. MILANI: Correct.

14 CHIEF JUDGE WILSON: You could see the facial
15 expressions through the face shield if the cloth - - -
16 cloth mask were off.

17 MS. MILANI: Correct. So if - - - but - - -

18 CHIEF JUDGE WILSON: So hold on. Let me just
19 keep going.

20 MS. MILANI: Okay.

21 CHIEF JUDGE WILSON: You can tell me where I get
22 - - - where I get it wrong. Any time there was a voir dire
23 of a particular juror, the instruction was that the cloth
24 mask came down so that the lawyers could see the facial
25 expressions of that juror.

1 MS. MILANI: Yes.

2 CHIEF JUDGE WILSON: But the lawyers couldn't see
3 the facial expression, if there - - - if any, of the other
4 jurors who were not directly being questioned, right?

5 MS. MILANI: Correct.

6 CHIEF JUDGE WILSON: So why is that different
7 from the jurors who have not yet been pulled into the box
8 but are sitting somewhere else in the courtroom?

9 MS. MILANI: Well, it's the panel. It was the
10 entire panel.

11 CHIEF JUDGE WILSON: I un - - - but - - -

12 MS. MILANI: So for example, Judge Wilson, if I'm
13 speaking to you and I say something, I ask you a question.
14 And there was actually particular situation where - - -

15 CHIEF JUDGE WILSON: Well, I understand that,
16 that the panel is the twelve or fourteen, however many
17 people who got in the box. But you might also have another
18 thirty jurors waiting in reserve in the back of the
19 courtroom who you've got your back to. And when they're
20 brought up, you haven't seen their facial expressions, but
21 then they're brought in the box and you've asked a whole
22 bunch of questions. You don't know what their reactions
23 were.

24 MS. MILANI: But you go through a whole new set
25 of questions. And often those questions are - - -



1 CHIEF JUDGE WILSON: Well, you could - - -

2 MS. MILANI: - - - are repeated.

3 CHIEF JUDGE WILSON: You could, right. And so
4 why couldn't you repeat other questions with each
5 individual juror under the existing protocol, if that's
6 what you wanted to do?

7 MS. MILANI: Well, the process is voir dire,
8 right? Which is to see and to speak. So you need to be
9 able to see people's expressions because although someone
10 may answer a certain way, someone's facial expressions are
11 sometimes - - -

12 CHIEF JUDGE WILSON: I understand.

13 MS. MILANI: - - - very telling.

14 CHIEF JUDGE WILSON: So if you asked juror number
15 1 a series of questions and juror number 2 is masked,
16 right? So you can't see that juror's facial expression.
17 Is there any reason you couldn't have then asked the same
18 questions of juror number 2 with the face mask down?

19 MS. MILANI: With the face mask down, yes. But
20 will that juror be as - - - sometimes someone - - - so that
21 almost like the hearsay exceptions, right? There's certain
22 situations which make something more truthful, right. So
23 someone's reaction, right, if someone unwillingly rolled
24 your eyes right, they're not going to do that again when
25 you're actually pointing them out - - -

1 CHIEF JUDGE WILSON: So that's exactly my point.
2 That's exactly my point about the juror - - - potential
3 jurors who have not yet been brought up into the box. They
4 may have rolled their eyes. We couldn't see it when they
5 were in the back of the courtroom. And when you ask them
6 the question, you can't see that eye roll because they
7 don't make it this time.

8 MS. MILANI: Well, but that's why you have a
9 panel each time and you select each time. You don't do a
10 whole courtroom voir dire. I mean, that would just be
11 completely impractical.

12 JUDGE CANNATARO: But counsel - - -

13 MS. MILANI: You're picking twelve or fourteen.

14 JUDGE CANNATARO: Due process is a - - - is a
15 factor-based decision and a weighing of - - - of a certain
16 - - - of whatever the factors in play are. What you seem
17 to be suggesting is that you're entitled to an optimal jury
18 selection. You, as a lawyer or you know, whatever lawyer
19 is doing the jury selection, wants to be able to see the
20 face of each juror unobstructed for the entirety of the
21 time that they're on the panel. In a situation where you
22 do get an unobstructed view of faces of the jurors, as
23 Judge Wilson said, while you're questioning them, what - -
24 - what is - - - let me put it this way. What is the best
25 authority that you have that suggests that you're entitled

1 to that optimal situation, an unobstructed view at all
2 times during jury selection?

3 MS. MILANI: It's - - - well, People v.
4 Antommarchi, right? They - - -

5 JUDGE CANNATARO: Well, that's a right to be
6 present during jury selection. There's - - - there's no
7 question that Defendant was present during jury selection.

8 MS. MILANI: Well, but they also say you're
9 entitled to see every grimace, every reaction.

10 JUDGE SINGAS: Of the juror that you're speaking
11 to, and you were able to do that in this case, correct?

12 MS. MILANI: Correct. But let's go - - -

13 JUDGE SINGAS: Why is it - - - why isn't it
14 different if you're sitting in the jury box or behind an
15 obstruction and maybe you can't see a juror who's tapping
16 their foot very nervously or wringing their hands together?
17 Same sort of argument, right? But we put jurors in the
18 box.

19 MS. MILANI: Well, I'll just bring up two
20 situations that maybe will make my argument clear. So for
21 when everyone signs an Antommarchi waiver, right? That's
22 when the juror has something that maybe they don't want to
23 reveal to everybody. They go up to sidebar and you ask the
24 client to give them sort of their space. You'll fill them
25 in. At that time, you're actually waiving that right for

1 the client to assess not only that particular juror, but
2 the other jurors' reactions to that juror. And even if
3 that, you know, so that's a fundamental right that the
4 client is given up. In this situation, the client didn't
5 sign a waiver saying, I don't need to see all those
6 reactions.

7 JUDGE TROUTMAN: But the - - - I'm having
8 difficulty understanding your argument. In a courtroom
9 when you have jurors brought in en masse, especially with
10 serious - - - serious felonies, the courtroom is packed
11 with jurors. And even when they're in the box, they're
12 oftentimes that the court will see and hear things that
13 attorneys can't. It is not possible to create a situation,
14 even without COVID, where you're going to see everything.

15 And to suggest that taking measures here deprive
16 the defendant of something that he was entitled to. He's
17 present, he's in the courtroom when they're talking, and
18 every lawyer gets the opportunity, as the Chief Judge
19 pointed out, to ask other jurors, are they impacted? And
20 the judge does the same thing. Anything you've seen or
21 heard in this courtroom impacts your ability to be a fair
22 and impartial juror. So I don't understand what the
23 problem is.

24 MS. MILANI: Well, the problem was that the - - -
25 they couldn't assess the actual expressions and reactions,

1 and some of the jurors couldn't even hear the other jurors
2 as they were speaking. And you're not going to get an
3 optimal situation where every juror always says, yes, I
4 heard that. So - - -

5 JUDGE TROUTMAN: There's some things you don't
6 want them to hear.

7 JUDGE RIVERA: I would think that would work
8 favorably to you, right?

9 MS. MILANI: But there are some things you do
10 want them to hear.

11 MS. MILANI: They didn't hear it. So they're not
12 tainted. So now you can ask them the question.

13 MS. MILANI: Right. But sometimes you don't want
14 them to hear. And - - - and there's something to be said
15 for someone's immediate reaction. And I think that, you
16 know, that's a very important part of the process. And the
17 authority is the Constitution, the 14th amendment. I mean,
18 we can't do away with all those things, or else you'll just
19 start putting people in the jury box without even asking
20 them any questions.

21 JUDGE RIVERA: Yes, that's true. I get your
22 point there. I can say otherwise. But certainly lawyers,
23 when they're asking questions of prospective jurors,
24 especially if they're focused on one in particular, unless
25 they've got incredible peripheral vision, they're not going

1 to see all the way down the panel box anyway.

2 MS. MILANI: But the client sees them as well.
3 And I can tell you that there are man - - - there are
4 situations for when I've had trials or I've seen other
5 trials. And your client will say to you, even if you
6 disagree, I did not - - - that person doesn't like me or I
7 do not want her or him on the jury. And there's a huge
8 value to that. And that is their right to be able to
9 discuss it with their lawyer, to be able to gauge reactions
10 from the potential jurors. You know - - -

11 JUDGE RIVERA: Not the eye rolling, right?
12 Because you agree you could see the eye rolling.

13 MS. MILANI: Yes. But if I'm speaking to you,
14 Your Honor, I may not see Judge Cannataro rolling his eyes
15 at me.

16 JUDGE RIVERA: Are you - - - how can that - - -
17 no, the mask doesn't cover that. That was my point.

18 MS. MILANI: Oh.

19 JUDGE RIVERA: We are talking from - - - I'm
20 wearing a mask.

21 MS. MILANI: Yes.

22 JUDGE RIVERA: You could see my eyes if I rolled
23 them.

24 MS. MILANI: Yes.

25 JUDGE RIVERA: Believe you me.



1 MS. MILANI: Yes. But I - - - if you - - -

2 JUDGE RIVERA: Right, just not below - - -

3 MS. MILANI: - - - were laughing at me, maybe I
4 couldn't see that.

5 JUDGE RIVERA: That's what I'm saying. Not
6 including the eye rolling.

7 MS. MILANI: Correct.

8 JUDGE RIVERA: You can see everything above - - -

9 MS. MILANI: But there's a tremendous value. And
10 it's not just, you know, a case or authority. And that is
11 why I did suggest - - -

12 JUDGE TROUTMAN: Not to diminish the value of
13 seeing all expressions, but in addition to the face, there
14 are other physical movements that you make with your body
15 that can be suggesting that you are incredulous with
16 respect to what's going on, folding the arms. And there
17 are - - - there were still other signals that could be
18 observed and taken into consideration; is that correct?

19 MS. MILANI: That is correct. And there were
20 cases cited by the People that suggested that. But most of
21 those cases always said the optimal, which is, I think, a
22 word you used, Your Honor, is the entire facial expression.

23 JUDGE TROUTMAN: So if - - - you want a rule that
24 suggests that if there's a pandemic or anything going on,
25 the only way a defendant can have a trial is if all times

1 the jurors are uncovered.

2 MS. MILANI: Well, we can't - - - I understand
3 that might, you know, be a little hard to follow, but I
4 mean, this protocol, for example, this order in particular,
5 I mean, if they had just lowered the masks, and I
6 understand there may be jurors that are uncomfortable with
7 - - -

8 JUDGE TROUTMAN: There were a lot of jurors that
9 the client - - - so here's the problem. There are
10 instances where it is difficult for people to get what they
11 believe is truly a jury of their peers. And when you added
12 COVID, people were even more reluctant. So there's a lot
13 of balancing. It's difficult. I am sympathetic to your
14 concerns of wanting to - - - and under normal
15 circumstances, yes, trials normally occur that way. Unless
16 of course, there's some people that have religious reasons
17 why they may be covered. Those are factors that occur.
18 But under normal circumstances, people are - - - their view
19 of everyone is unobstructed. But in this particular
20 instance, this one's hard - - -

21 MS. MILANI: If I may, Your Honor, that can be
22 solved by some of the basic questions that are asked by
23 People. Is anyone not getting paid for this, right? Is
24 anyone here uncomfortable with only wearing a plastic
25 shield? Okay. There are enough jurors that could have

1 been asked that. And you know, you might have found enough
2 people who would be willing to sit in the box - - -

3 JUDGE GARCIA: Counsel, can I ask something?

4 MS. MILANI: - - - just quest - - -

5 JUDGE GARCIA: And I don't know the answer to
6 this, but is - - - would this be a problem in a pandemic if
7 a judge said, because of the risk here, I'm going to do
8 voir dire and forget the practical side of this
9 individually, so we'll bring a juror in, we'll ask that
10 juror questions next?

11 MS. MILANI: I think without - - - the client
12 would have had to waive that with his attorney. I think
13 that - - -

14 JUDGE GARCIA: What would be the basis for the -
15 - - what violation would that be?

16 MS. MILANI: It's just your right to select a
17 full, fair, and impartial juror because I think just by
18 questioning single jurors, that's not going to get you - -
19 -

20 JUDGE GARCIA: So questioning - - -

21 MS. MILANI: - - - complete ability to evaluate.

22 JUDGE GARCIA: And I don't know this, but is
23 there any case that says that?

24 MS. MILANI: Well, maybe this one after the
25 court's decision, but who knows.



1 JUDGE CANNATARO: Are you - - - are you placing
2 on equal footing the ability to directly question a
3 potential juror with their mask down so you have an
4 unobstructed view of your face and the - - - and pardon me
5 for characterizing it, the possibility of catching a facial
6 expression from someone on the periphery? I mean, don't we
7 have to gradate the value of the information that the
8 lawyer is getting? Because I think we heard it before from
9 another one of our judges. Maybe you'll see what's going
10 on off on the side, even without a mask. But you might
11 not.

12 MS. MILANI: But even if you don't, it's your
13 client's ability. It's to assess the entire situation. So
14 it's not just trying to see if somebody smiles at you and
15 you think you like them. But there's a value to the whole
16 voir dire process, right? That's why it was created.

17 JUDGE GARCIA: But you may have more than one
18 panel come in, right? I've seen this. You get through an
19 entire panel like, oh, no, we're out of jurors. Bring the
20 next bunch in. Can you do that?

21 MS. MILANI: When?

22 JUDGE GARCIA: Because, you know, let's say
23 you're voir dire-ing a jury and you get through the panel
24 and you only have eight, so you need a whole 'nother group
25 of people to come in who haven't even been in the

1 courtroom.

2 MS. MILANI: That happens all the time.

3 JUDGE GARCIA: So then why isn't that a violation
4 because you didn't get to see them react to the question?

5 MS. MILANI: But you start the whole process
6 over. The judge always - - -

7 JUDGE GARCIA: Right. But they're not going to
8 hear the answers to those questions, because you can always
9 re-ask a question to any juror. I think that's been said
10 here. I thought your better argument is you're not seeing
11 their reaction to the answer, real time. So those new
12 jurors in a different pool haven't heard the answer. You
13 won't be able to gauge their reaction to the answer. Why
14 can you do that?

15 MS. MILANI: Well, because you have the - - - the
16 process, right, where people get prelims - - - preliminary,
17 you know, when you strike the jurors - - -

18 JUDGE SINGAS: Challenges?

19 MS. MILANI: Correct, you challenge the jurors.
20 There are jurors that are challenged by law, right, because
21 they're just implicitly unfair. I mean, there's that whole
22 process to select the jury, and the attorneys and the
23 clients are knocking them off in order to get to the next
24 round of people. And that's how it works.

25 JUDGE GARCIA: But my point is, I'm trying to

1 make, is but the next panel will never have had that
2 experience that you're saying is necessary for a fair jury
3 of being able to - - - you being able to see their reaction
4 to an answer. So it almost seems like your rule would say
5 once you're done with a panel, you've got to start all over
6 again and try to get one jury out of one panel. So
7 everyone's in the room and you can see their reaction to
8 every answer.

9 MS. MILANI: Well, that's - - - that wasn't - - -
10 I think that wouldn't be ideal unless you had twelve or
11 fourteen perfect people come in that are really a fair
12 cross-section of the community with no biases or are
13 comfortable with the case. I mean, you would just start
14 over with a whole group. It's not - - - it's just the way
15 it is.

16 JUDGE RIVERA: I thought your point, since you've
17 said it before, was going to be that the defendant waives
18 that because that's the way the process works.

19 MS. MILANI: That - - - that is - - -

20 JUDGE RIVERA: And the defendant is comfortable
21 with that process, and you can't really change that process
22 without chaos and without it being impossible to do. But I
23 took your argument, I'm not saying I'm persuaded by it, but
24 I'm just trying to understand it.

25 MS. MILANI: That's exactly - - -

1 JUDGE RIVERA: Is that one could have done
2 something about this.

3 MS. MILANI: Yes.

4 JUDGE RIVERA: So let me just get it straight.
5 What is what could have been done about this?

6 MS. MILANI: There could have been better
7 protocols instituted. I mean, the - - - and you know,
8 someone might say, why wasn't the jury - - - attorney
9 objecting, objecting, objecting? Well, the court had
10 already issued this protocol order and - - -

11 JUDGE RIVERA: Okay. But forget the - - - I'm
12 just - - - what else would have been in place because it
13 seems to me you're saying the only way this could proceed
14 is if - - - we'll just stay with the box, not people behind
15 the lawyer and the defendant, the - - - the prospective
16 jurors in the box could have the shield. You seem to have
17 no objection to that, but could not have been masked.

18 MS. MILANI: Correct.

19 JUDGE RIVERA: Is that the only alternative?

20 MS. MILANI: Unless they had nothing on at all.
21 I mean, I think it would just have to be the face shield.
22 And they were already distanced, which was problematic as
23 well. It wasn't just the - - - I mean, I think there
24 should have been it sounded to me on the face of this
25 record, and I wasn't there, that you could not see. You'd

1 have to move around and look because people were all over
2 the place, you know, there was even someone who people
3 forgot about in the courtroom.

4 JUDGE RIVERA: So even without the mask, then you
5 must have a problem with the distancing, because - - -

6 MS. MILANI: Well, the - - -

7 JUDGE RIVERA: I mean, you must admit that a
8 lawyer could not possibly have then followed everybody in
9 that room.

10 MS. MILANI: Right.

11 JUDGE RIVERA: For that little grimace.

12 MS. MILANI: The attorney said so himself.
13 That's why he objected as well. He objected to the entire
14 series of protocols, and he said - - -

15 JUDGE RIVERA: So it sounds like there could not
16 have been a jury process until COVID was declared no longer
17 a health emergency and one could proceed differently.

18 MS. MILANI: Well, on this record - - -

19 JUDGE RIVERA: Is that really what the objection
20 then is?

21 MS. MILANI: On this record, that's what the
22 objection was. I mean, I think that there might have been
23 able to be a - - - a process with a better set of protocol
24 orders put in place to make sure that a client - - - a
25 defendant, was able to assess everybody with his attorney -

1 - -

2 JUDGE RIVERA: That's what I asked you, what
3 would that look like? And it sounds to me that that means
4 they're in the box; they've got a shield but no mask.

5 MS. MILANI: Or there's - - - there's double
6 courtrooms. I know there are double courtrooms, which make
7 it much easier. And I know there were several trials that
8 went on in Suffolk County with masks that seem to be a
9 little better. I won't name the names, but I watched one
10 of them and there was a jury here, a jury box here, a jury
11 box there. Not a lot of people in the courtroom and - - -

12 JUDGE CANNATARO: Don't double courtrooms
13 exacerbate the distance problem - - -

14 MS. MILANI: Well, they - - - they - - -

15 JUDGE CANNATARO: - - - that you were talking
16 about?

17 MS. MILANI: It was - - - I may not - - - I don't
18 know if I'm calling it a double - - - it's a courtroom with
19 two jury boxes. Is that a double courtroom? It has two
20 jury boxes.

21 JUDGE TROUTMAN: There's a practicality problem
22 there. That may work in some areas but not in others. But
23 it goes back to the question then it is it that no jury
24 trial can take place until COVID is completely gone? And
25 as we can see now, it's still present. If you're - - - if

1 you're to have what you say your client was entitled to,
2 completely unobstructed all the time, because there are
3 questions even raised as to whether or not those plastic
4 shields sufficiently protected people. And if jurors
5 started objecting again, how are you going to proceed? So
6 is the answer that no jury trials take place because no
7 protocols are going to be able to afford them what you're
8 asking?

9 MS. MILANI: I think that if people get together,
10 there could be a set of protocols put in place, and you're
11 always going to have jurors - - - potential jurors, unhappy
12 or uncomfortable, and you have to respect that, whether it
13 be religious reasons or for health reasons, so - - -

14 JUDGE TROUTMAN: But you're never going to have -
15 - - even when all things being equal, a perfect trial is
16 nearly impossible. And under any circumstances, you can't
17 always do everything that optimally you would think is
18 appropriate, but it just can't always practically happen.

19 MS. MILANI: Well, I think that we - - - we can't
20 just cast aside someone's right to be tried by an impartial
21 juror as just being impractical. It is paramount - - -

22 JUDGE TROUTMAN: It's not just being cast aside.
23 The question is that we have to explore here is were those
24 protocols such that they did what you say and denied him
25 the right to participate in the way that he was entitled

1 to.

2 MS. MILANI: I think these protocols could have
3 been more narrowly tailored, and I think that it can - - -
4 we can have a trial that protects somebody's right to be
5 tried impartially and also keep everybody safe. And I know
6 that this was a time when no one knew what was going on.
7 But now that we've seen it, I think it's our chance to
8 address it should anything like this happen again.

9 CHIEF JUDGE WILSON: Thank you, Counselor.

10 MS. MILANI: Thank you so much.

11 MS. GRAY: May it please the court. My name is
12 Rosalind Gray. I'm of counsel to Ray Tierney, District
13 Attorney of Suffolk County. The one thing that I think is
14 just very important to think about when we're talking about
15 the discre - - - how the court uses its discretion in
16 implementing the protocols is that there was a pandemic
17 going on. The comfort and the safety of the jurors, as
18 well as the defendant and the court were - - - were things
19 that all had to be considered. And the protocols that were
20 put in place were designed to protect the jurors and
21 everyone else in the courtroom. And they did provide
22 Defendant with an opportunity to pick a fair and impartial
23 juror. Now I understand that my - - -

24 JUDGE RIVERA: Let me ask this. If - - - if
25 during direct questioning of an individual, they were

1 supposed to take off their mask - - -

2 MS. GRAY: Correct.

3 JUDGE RIVERA: Correct, leave on the shield, take
4 off their mask. If they were not willing to do that, let's
5 say they were very tentative, concerned, or just you see,
6 it started with the question they have, they believe
7 they're particularly susceptible, would they have not been
8 allowed to have served? Would they have been discharged or
9 sent back to the pool or?

10 MS. GRAY: Well, there's no indication in this
11 record that defen - - - or a prospective juror who did want
12 to leave their mask on would have been excluded. However,
13 I would argue that even if there was someone who was
14 hesitant to take down their mask, I would - - - I would
15 argue that they should not be excluded for the simple
16 reason that there's more to demeanor, which is what I think
17 Sloan and Antommarchi were talking about, rather than
18 seeing your actual nose and mouth.

19 JUDGE CANNATARO: But just to be clear, counsel,
20 there's no record in this case that anybody who was asked
21 to take down their face mask for direct questioning while
22 leaving the plastic shield on declined to do so, right?

23 MS. GRAY: No. There is no indication in this
24 record that this occurred.

25 JUDGE CANNATARO: And since you just mentioned

1 Antommarchi, let me just ask you, do you think Antommarchi
2 considerations are at play in this appeal, and if so, to
3 what extent?

4 MS. GRAY: No, I really don't believe Antommarchi
5 is in play at all, simply because in Antommarchi and in
6 Sloane, the defendant was excluded. He wasn't part of the
7 conversation, and there was no way for him to give his
8 defense counsel any sort of, I guess, help or - - - or his
9 input into the answers that those jurors were giving. And
10 in this case, even if the view that the defense had was not
11 perfect, the - - - the defendant had an opportunity to
12 actually give his input into what he was seeing. And as I
13 was about to say, there is more to demeanor than just your
14 nose and your mouth. I can see your eyes. I can see how
15 you're standing. I can see whether your arms are crossed.
16 And I - - -

17 JUDGE SINGAS: Can I ask you, do you know if, in
18 this case, the defense attorney was able to speak to every
19 juror that sat on that jury? In other words, you know, the
20 judge, I'm sure, had some questioning of those jurors. But
21 do you know, if they actually questioned the people that
22 actually sat for that jury, were they questioned by the
23 defendant?

24 MS. GRAY: Yes. Yes, they were.

25 JUDGE SINGAS: So the defendant here had an

1 opportunity for each juror - - -

2 MS. GRAY: The defense counsel.

3 JUDGE SINGAS: Not the - - - defense attorney.

4 MS. GRAY: Okay. Okay.

5 JUDGE SINGAS: For each juror that sat for that
6 jury, they had an engagement with the cloth mask down?
7 That's my question.

8 MS. GRAY: I can't really say whether - - - I
9 can't say whether every juror had his cloth mask down,
10 because the record just simply does not reflect that. I do
11 know that there were instances where they were admonished
12 to take their cloth mask down, but I do know that defense
13 counsel did have the opportunity to ferret out what any
14 sort of bias that the jurors may have had. He had his
15 questions where he asked them - - - I don't even - - -
16 about the plane, pilot - - -

17 JUDGE SINGAS: I'm not speaking generally.

18 MS. GRAY: Okay.

19 JUDGE SINGAS: I understand that.

20 MS. GRAY: All right.

21 JUDGE SINGAS: But I'm saying that - - - and I
22 don't know if you know the answer to this, the ones that
23 actually sat on the jury, if they were spoken to by the
24 defense attorney? And during that questioning, we presume
25 they had their mask down because those were the

1 instructions that when you're being questioned, the cloth
2 mask comes down. So I guess my question is, did the
3 defense attorney speak to every person that sat on that
4 jury?

5 MS. GRAY: That, I don't - - - I do know that he
6 did engage in an intense questioning of the jurors,
7 especially the ones that ended up being excused. But I - -
8 -

9 JUDGE TROUTMAN: Were there are times that they
10 just speak to the panel generally?

11 MS. GRAY: Correct. Correct.

12 JUDGE TROUTMAN: Is that what your hesitation is?

13 MS. GRAY: Yes, yes, yes. And the ones that - -
14 -

15 JUDGE TROUTMAN: But the opportunity for that
16 engagement, if the attorney chose to engage a particular
17 juror or to engage them in mass with respect to what was
18 going on with respect to other jurors, that opportunity,
19 are you saying was in fact available?

20 MS. GRAY: Yes, it was available to him. And you
21 can see especially, I believe, with Juror Brue, Juror
22 Doherty and Herberer, he was able to draw out the biases
23 they may have - - - may have had as to whether the his
24 client was going to testify at trial.

25 JUDGE TROUTMAN: What about the argument or the

1 concern raised that the spatial situation was so difficult
2 that that hampered counsel's ability to engage with - - -
3 with the client as to each prospective juror?

4 MS. GRAY: In the courtroom, there's always going
5 to be a spot in, let's say, the jury box that is not
6 optimal. And they were operating under a difficult
7 circumstance. However, there is nothing in the
8 Constitution of the United States that says that a
9 defendant or his defense counsel is entitled to see every
10 single juror all at the same time. It just doesn't exist.
11 And while it may have been difficult, and I will concede
12 that it was difficult, it was not impossible. And it did
13 not deny this defendant the opportunity to question those
14 jurors, to observe those jurors.

15 JUDGE TROUTMAN: What about the comment that
16 sometimes, because of the way they were spaced in the
17 courtroom, some were forgotten about?

18 MS. GRAY: That was Mr. Sullivan, and they were
19 eventually able to find him and - - - and change the sticky
20 notes as to where they were.

21 JUDGE TROUTMAN: But isn't that a problem? You
22 just use verbiage, find him. That's not how the process is
23 supposed to work.

24 MS. GRAY: That is a - - - that is an obstacle,
25 but that does not mean that that obstacle was not overcome

1 and that it denied this defendant the right to choose a
2 fair and impartial juror. And if you look at jury
3 selection itself, it demonstrated that they did. They were
4 able to find that juror. They went through, I think, at
5 least two panels entirely. And they were able to question
6 those jurors. And I believe that the constitutional
7 requirements were fulfilled. This - - - the defense was
8 able to test those jurors and make sure that they could be
9 fair and impartial to him.

10 JUDGE HALLIGAN: Counsel, can I ask following up
11 on a - - - over here, thank you - - - on an exchange I
12 think you had with Judge Cannataro. I think you said that
13 your position was that Antommarchi was not implicated here.

14 MS. GRAY: No.

15 JUDGE HALLIGAN: Well, just to follow, please do
16 correct me, but specifically, my question is if there had
17 been greater difficulty in ascertaining the juror's
18 reactions. So for example, if they had been permitted to
19 leave their cloth face masks on or if perhaps you couldn't
20 see them at all, would there be a point at which the
21 concerns that - - - that we're thinking about would be
22 significant enough? Or is your view that as long as the
23 defendant is on the premises, that's enough?

24 MS. GRAY: Not on the premises, but able to
25 actually observe and to see the expressions and the

1 demeanor of the entire person. And if someone - - - if
2 someone were to argue that that face mask, you know, if the
3 juror did argue that it shouldn't come down, I would argue
4 that there's still enough haptic information that you could
5 receive from that juror that would be able - - - that would
6 enable you to actually choose a juror and determine their
7 demeanor and their biases. And remember, you're also
8 speaking to this juror. It's not as if the juror is not
9 giving some sort of information to you. You're - - - you
10 are able to speak to them and you are able to view their
11 body and see their body language.

12 JUDGE RIVERA: What - - - what if you have a
13 prospective juror that had been called in the box, they're
14 in the box, but they have - - - they have sensitivity to
15 light. So they wear prescriptive sunglasses, right, that
16 they're not going to take them off. Would that give
17 counsel a reason to strike for cause?

18 MS. GRAY: Is it mask and glasses?

19 JUDGE RIVERA: Forget the mask. No, I'm just
20 talking about the glasses.

21 MS. GRAY: Just glasses? Well, there's more to
22 your expression than your eyes. If he's not wearing a mask
23 and you can see his nose and his mouth, and you can see him
24 sitting there and you can see his - - -

25 JUDGE RIVERA: The eyes are the window to the



1 soul. It's a little hard to see that one working that way.

2 MS. GRAY: As a person who's actually gotten in
3 trouble in the Appellate Division for their eyes, I
4 understand that. But I still say that there's more to a
5 person's expression than their eyes. There's their mouth,
6 there's - - - and there's also that questioning. And you
7 can see, especially in this voir dire that - - -

8 JUDGE RIVERA: Well, could it be grounds for the
9 challenge?

10 MS. GRAY: A cause challenge?

11 JUDGE RIVERA: Yes. I can't assess this
12 prospective witness. I cannot see their eyes. I respect -
13 - - I respect their situation is not a judgment, right,
14 it's not a judgment about them.

15 MS. GRAY: I would say, no. I would say, no.

16 JUDGE CANNATARO: You do get the impression,
17 don't you, Counsel, if not Antommarchi, then maybe Sloan,
18 that it's important to be able to see a potential jurors
19 face?

20 MS. GRAY: A potential - - - yes. However, your
21 face isn't just your nose and your mouth. And also you
22 have to balance this with the situation that was going on
23 at the time. It was COVID. People were dying, people were
24 uncomfortable, and you had people come into court. And
25 they were - - - they were sitting there. And I would just

1 argue, if you don't see the nose in the mouth, there's
2 other things that you can work with. If I'm sitting in the
3 courtroom, I'm like this. What am I telling you?

4 JUDGE RIVERA: What about my example, and they
5 were wearing a mask? Because you can't measure anything
6 around the face now.

7 MS. GRAY: Exactly. Exactly. But that's - - -

8 JUDGE RIVERA: That's such a significant part of
9 the body, right?

10 MS. GRAY: But that's not what we have here.

11 JUDGE RIVERA: Well, I understand that, but
12 that's not the question.

13 MS. GRAY: That's not the question. Well, I'm
14 not - - - since I don't know all the circumstances
15 regarding this hypothetical, I am not comfortable giving an
16 answer to that.

17 JUDGE RIVERA: Fair enough.

18 MS. GRAY: But I would argue if you can see the
19 eyes, I would argue - - - and the body, I would argue that
20 there's enough demeanor there for you to be able to - - -
21 to determine and to question that person and find their
22 biases.

23 JUDGE RIVERA: Thank you.

24 MS. GRAY: And if there are any other questions?

25 CHIEF JUDGE WILSON: Thank you.

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MS. GRAY: Thank you, Your Honors.

MS. MILANI: I did not reserve rebuttal time.
But if there's something else that you, Your Honors, would
like to ask, I'm available. Thank you.

CHIEF JUDGE WILSON: Thank you very much.

MS. GRAY: Thank you so much.

(Court is adjourned)

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

I, Christy Wright, certify that the foregoing transcript of proceedings in the Court of Appeals of Fernando Ramirez v. People, No. 13 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

Signature: Christy Wright

Agency Name: eScribers

Address of Agency: 7227 North 16th Street
Suite 207
Phoenix, AZ 85020

Date: January 19, 2024

