

St. John's Law Review

Volume 67
Number 4 *Volume 67, Fall 1993, Number 4*

Article 12

April 2012

People v. Antommarchi: Do Antommarchi Rights Benefit Anyone? A Comprehensive Examination of the Decision and Its Ramifications

Christina Boulougouris

Follow this and additional works at: <https://scholarship.law.stjohns.edu/lawreview>

Recommended Citation

Boulougouris, Christina (1993) "People v. Antommarchi: Do Antommarchi Rights Benefit Anyone? A Comprehensive Examination of the Decision and Its Ramifications," *St. John's Law Review*. Vol. 67 : No. 4 , Article 12.

Available at: <https://scholarship.law.stjohns.edu/lawreview/vol67/iss4/12>

This Comment is brought to you for free and open access by the Journals at St. John's Law Scholarship Repository. It has been accepted for inclusion in St. John's Law Review by an authorized editor of St. John's Law Scholarship Repository. For more information, please contact selbyc@stjohns.edu.

COMMENT

PEOPLE v. AN TOMMARCHI: DO AN TOMMARCHI RIGHTS BENEFIT ANYONE? A COMPREHENSIVE EXAMINATION OF THE DECISION AND ITS RAMIFICATIONS

One of the most basic rights of a criminal defendant is the right to be present at trial.¹ This right is sternly embedded in

¹ See *Snyder v. Massachusetts*, 291 U.S. 97, 98-99 (1934); *Lewis v. United States*, 146 U.S. 370, 373-74 (1892) (quoting *Hopt v. Utah*, 110 U.S. 574, 578-79 (1884)); *Schwab v. Berggren*, 143 U.S. 442, 448 (1892); *United States v. Washington*, 705 F.2d 489, 497 (D.C. Cir. 1983); see also Decision, *Presence of Accused Felon at His Trial*, 10 N.Y.L.F. 262, 262 (1964) (stating that presence of accused felon at trial is well established principle of law).

A criminal defendant's right to be present, however, is not absolute. See *Diaz v. United States*, 223 U.S. 442, 450-56 (1912) (indicating defendant can waive right when voluntarily absent from court). By the turn of the century, common law provided that a criminal defendant could waive his right to be present by voluntarily absenting himself once the trial began, as long as he was not charged with a capital offense and was not in custody. See James G. Starkey, *Trial In Absentia*, 53 ST. JOHN'S L. REV. 721, 724 (1979). In 1912, the Supreme Court in *Diaz* recognized the right as extending to every stage of the proceedings and being almost as important as presence at the trial itself. *Diaz*, 223 U.S. at 455. The Second Circuit, however, was reluctant to extend this rule to a criminal defendant who absents himself *before* the trial begins. See Starkey, *supra*, at 727-28. In *United States v. Tortora*, 464 F.2d 1202, 1210 (2d Cir.), *cert. denied*, 409 U.S. 1063 (1972), the Second Circuit held that commencing a trial without the defendant is within the court's discretion but should only be exercised in extenuating circumstances in which the interest of the absent defendant is clearly outweighed by that of the public. *Id.* In reaching this decision, the trial court must consider scheduling problems, the burden of multiple trials, and the ability to proceed promptly without the defendant. *Id.* Although *Tortora's* narrow limits were considered stricter than what the Constitution requires, the Supreme Court implicitly upheld the constitutionality of commencing trial without a defendant in *Tacon v. Arizona*, 410 U.S. 351, 352 (1973).

Alternatively, a defendant may waive his right to be present by engaging in severe misconduct. See *Illinois v. Allen*, 397 U.S. 337, 342-43 (1970) (defendant can lose right to be present if disruptive behavior creates difficulty in continuing trial); *Sny-*

common law² and guaranteed by both the federal³ and state constitutions.⁴ Additionally, it has been secured by federal⁵ and state

der, 291 U.S. at 106; *Scurr v. Moore*, 647 F.2d 854, 858 (8th Cir.) (finding conduct that "violated the dignity, order and decorum of court proceedings" justified defendant's removal), *cert. denied*, 454 U.S. 1098 (1981). This common-law waiver has since been codified in both state and federal statutes. *See* FED. R. CRIM. P. 43(b)(2); N.Y. CRIM. PROC. LAW § 260.20 (McKinney 1993).

A defendant can also waive his right to be present by simply requesting that it be waived. *See* *Pollizzi v. United States*, 926 F.2d 1311, 1317 (2d Cir. 1991). The Supreme Court has pronounced that "[n]o procedural principle is more familiar to this Court than that a constitutional right may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right before a tribunal having jurisdiction to determine it." *Yakus v. United States*, 321 U.S. 414, 444 (1944) (citations omitted). In order to waive a fundamental right, such as the right to be present, however, the waiver must be an "intentional relinquishment or abandonment of a known right or privilege." *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938).

² *See* *Snyder*, 291 U.S. at 99. The right of a criminal defendant to be present at his trial dates back to early Anglo-Saxon law. *Starkey*, *supra* note 1, at 721-22. This right stems from the early methods of determining guilt, such as trial by ordeal and trial by battle, which necessitated the defendant's presence. *Id.*

³ *See* U.S. CONST. amend. VI; U.S. CONST. amend. V; U.S. CONST. amend. XIV, § 1. The Confrontation Clause of the Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . ." U.S. CONST. amend. VI. The Confrontation Clause has often been cited as providing the right of presence. *See, e.g., Snyder*, 291 U.S. at 106; *Dowdell v. United States*, 221 U.S. 325, 329-30 (1911); *United States v. Raper*, 676 F.2d 841, 846 (D.C. Cir. 1982); *infra* note 30 and accompanying text (discussing Confrontation Clause roots of right of presence). It likewise follows that a fair hearing, in accordance with due process protections, cannot be held without the defendant's presence. *Calley v. Callaway*, 382 F. Supp. 650, 683 (M.D. Ga. 1974), *rev'd*, 519 F.2d 184 (5th Cir. 1975); *SEC v. Kimmes*, 759 F. Supp. 430, 437 (N.D. Ill. 1991).

⁴ *See, e.g.,* N.Y. CONST. art. I, § 6 ("In any trial in any court whatever the party accused . . . shall be informed of the nature and cause of the accusation and be confronted with the witnesses against him. . . . No person shall be deprived of life, liberty or property without due process of law.").

⁵ *See* FED. R. CRIM. P. 43(a). Rule 43(a) provides, in pertinent part, that "[t]he defendant shall be present . . . at every stage of the trial including the impaneling of the jury . . ." *Id.* The Rule codifies the common law and the constitutional guarantees of the Confrontation Clause and the Fifth Amendment's Due Process Clause. *See* *Washington*, 705 F.2d at 496; *United States v. Chrisco*, 493 F.2d 232, *passim* (8th Cir.), *cert. denied*, 419 U.S. 847 (1974). As originally promulgated, Rule 43 was intended to be a restatement of existing law on the issue of a criminal defendant's right to be present at his trial. *See* 8B JAMES W. MOORE, MOORE'S FEDERAL PRACTICE ¶ 43.01[2] (2d ed. 1993).

Rule 43 grants broader rights than does the Constitution. *See* *United States v. Gagnon*, 470 U.S. 522, 527 (1985) (indicating that in some circumstances defendant's right to be present may be guaranteed by rule 43 but not by Constitution). The rule must, however, be read in conjunction with rule 52 of the Federal Rules of Criminal Procedure, which requires prejudicial error for a reversal. *See* *United States v. Schor*, 418 F.2d 26, 30 (2d Cir. 1969) (finding that granting of new trial due to defendant's absence subject to rule 52); *Estes v. United States*, 335 F.2d 609, 619 (5th Cir. 1964), *cert. denied*, 379 U.S. 964 (1965) (distinguishing harmless and plain error).

statutes.⁶ Traditionally, a defendant's right to be present at trial has extended to the impaneling of the jury.⁷ Despite this historic protection afforded the accused, sidebar conferences⁸ conducted without the defendant's presence during impaneling have become commonplace in today's courts.⁹ Recently, however, in *People v.*

⁶ See, e.g., N.Y. CRIM. PROC. LAW § 260.20 (McKinney's 1993). Section 260.20 provides that "[a] defendant must be personally present during the trial of an indictment" *Id.*

⁷ See *Pointer v. United States*, 151 U.S. 396, 408 (1894).

Jury impaneling means the entire process of jury selection—the final placing of twelve jurors as a "panel." See *Lewis v. United States*, 146 U.S. 370, 376 (1892). Therefore, the impaneling of the jury has been held to be the official starting point of a trial. *United States v. Miller*, 463 F.2d 600, 603 (1st Cir.) (citing *Hopt v. Utah*, 110 U.S. 574, 578 (1884)), *cert. denied sub nom. Gregory v. United States*, 409 U.S. 956 (1972). A defendant's right to be present at jury impaneling includes all steps of selecting the jury, including the peremptory striking of members of the venire. *United States v. Chrisco*, 493 F.2d 232, 237 (8th Cir.), *cert. denied*, 419 U.S. 847 (1974). The purpose of the rule is so that the defendant can advise his counsel as to his defense. *Snyder*, 291 U.S. at 106 ("[D]efense may be made easier if the accused is permitted to be present at the examination of jurors . . . for it will be in his power, if present, to give advice or suggestion or even to supersede his lawyers altogether and conduct the trial himself."). *But cf. Washington*, 705 F.2d at 497 (noting that right to be present at voir dire not as strong as at other stages of trial).

New York's ruling granting a criminal defendant the right to be present at jury selection "is deeply rooted in the jurisprudence of [New York] state." Paul Lewis, *Interpretation of Law in Letter is Disputed*, 208 N.Y. L.J. 112 (1992) (letter to editor). The rule has a 122-year history in New York case law and is also codified in section 260.30 of the New York Criminal Procedure Law. See *id.*; see also *infra* note 20 (discussing § 260.30).

⁸ See David Bauder, *Ruling Endangers Thousands of Convictions*, TIMES UNION, Nov. 14, 1992, at B2. Sidebar conferences are often called by a trial judge to allow questioning of potential jurors on sensitive matters that they are uncomfortable revealing in open court. *Id.*; see *Court Chaos? Wait and See New 'Sidebar' Rule is An Affirmation of Rights*, BUFF. NEWS, Nov. 22, 1992, at G8 [hereinafter *Court Chaos?*] ("Such meetings—known in the trade as 'sidebars'—are common. They allow discussion of a potential jurors' [sic] viewpoints, prejudices and life history that might have a bearing on selection but might also be embarrassing to the potential juror."). Sidebar conferences were established on the suggestion of criminal defendants to promote impartial juries. See *Washington*, 705 F.2d at 496. The District of Columbia Circuit first suggested sidebars in *United States v. Ridley*, 412 F.2d 1126, 1128 (D.C. Cir. 1969), in response to the defendant's claim that discussing sensitive issues in open court affected the impartiality of the other jurors.

⁹ See, e.g., *People v. Mitchell*, 606 N.E.2d 1381 (N.Y. 1992) (allowing inquiry with prospective jurors about effect of defendant's illness on impartiality in absence of defendant). This was "customary and established procedure." *Id.* at 1383; see *People v. Howard*, 562 N.Y.S.2d 285 (App. Div.) (disallowing appeal because right of presence waived by inaction), *appeal denied*, 573 N.E.2d 583, 583 (N.Y. 1990); *People v. Blake*, 551 N.Y.S.2d 132 (App. Div.) (requiring right of presence to be preserved), *appeal denied*, 555 N.E.2d 621, 621 (N.Y. 1990); *People v. Ganett*, 416 N.Y.S.2d 914 (App. Div. 1979) (holding that bench inquiries without defendant not prejudicial), *aff'd*, 417 N.E.2d 88 (N.Y. 1980). The majority rule is to allow defendants to listen in at the

Antommarchi,¹⁰ the New York Court of Appeals radically departed from the judicial norm by holding that a criminal defendant has a fundamental right¹¹ to be present at sidebar conferences

bench only when they request to do so, but to deem the right waived upon lack of such request. See *Washington*, 705 F.2d at 497. In the great majority of cases, defendants waive their right to approach the sidebar. See *id.*

Sidebar conferences were particularly common in the New York City area. See *Ruling Threatens Verdicts: Defendants Get Listening Rights*, ATLANTA CONST., Nov. 14, 1992, at B10; *Court Chaos?*, *supra* note 8, at G8. The practice was so long-standing and pervasive that neither defendants nor their attorneys ever imagined that such a right of presence existed. See *Morning Edition: New York State Supreme Court Hears Case on Retrying Convicted Criminals* (National Public Radio, Nov. 19, 1992). Paul Schectman, counsel for the Manhattan District Attorney, stated, "Whether you call it a technicality or a fundamental right, the important thing is nobody knew it existed." *Id.*

Under Chief Judge Sol Wachtler, the New York Court of Appeals expanded the rights enjoyed by an accused, even while the United States Supreme Court was moving in the opposite direction. See Jane Fritsch, *Ruling in Minor Trial Imperils Some Big New York Verdicts*, N.Y. TIMES, Nov. 13, 1992, at A1, B5 [hereinafter Fritsch, *Ruling in Minor Trial*]; Jane Fritsch, *Court Limits Appeals of Juror-Interview Errors*, N.Y. TIMES, Dec. 18, 1992, at B1, B14 [hereinafter Fritsch, *Court Limits Appeals*]. In April 1992, the Court of Appeals held that a defendant has the right to appeal if his request to join the sidebar during jury questioning, when his presence would have had a substantial effect, was denied. *People v. Sloan*, 592 N.E.2d 784, 786-87 (N.Y. 1992).

¹⁰ 604 N.E.2d 95 (N.Y. 1992).

¹¹ *Id.* at 97. Acting Chief Judge Simons' use of the term "fundamental" in describing the defendant's right was ambiguous because of its many different definitions, one of which denotes a constitutional right. See WEST'S LEGAL THESAURUS/DICTIONARY 342 (1985). Fundamental rights are derived from, and guaranteed by, the Constitution, see, e.g., *Price v. Cohen*, 715 F.2d 87, 93 (3d Cir. 1983), cert. denied, 465 U.S. 1032 (1984), and state constitutions, see, e.g., *Sidle v. Majors*, 341 N.E.2d 763, 766 (Ind. 1976); see also BLACK'S LAW DICTIONARY 674 (6th ed. 1990). However, in *Mitchell*, a later opinion that determined that *Antommarchi* would not have retroactive effect, Simons wrote that it was strictly a statutory decision, with no constitutional implications. *People v. Mitchell*, 606 N.E.2d 1381, 1385 (N.Y. 1992). Yet, ironically, the *Antommarchi* opinion makes no mention of § 260.20, except to cite it in one parenthetical. *Antommarchi*, 604 N.E.2d at 96. Some commentators have interpreted the decision to be statutory. See Sidney H. Stein, *New York Court of Appeals Roundup*, 209 N.Y. L.J. 3 (1993); Fritsch, *Court Limits Appeals*, *supra* note 9, at B1; Gary Spencer, *No Retroactive Effect for 'Antommarchi': Defendants' Right to Hear Jurors Questioned*, 208 N.Y. L.J. 118 (1992) [hereinafter Spencer, *No Retroactive Effect*]; Gary Spencer, *Misreading of Controversial Ruling Claimed by Simons*, 208 N.Y.L.J. 100 (1992) [hereinafter Spencer, *Misreading*]; John Caher, *Court Cuts Way to Appeal*, TIMES UNION, Dec. 18, 1992, at B2. Others have construed it as resting on both statutory and federal constitutional grounds. See Fritsch, *Ruling in Minor Trial*, *supra* note 9, at A1. Chief Judge Simons later tried to narrow the scope by stating that the holding applies only to an "extreme case" in which questioning prospective jurors about potential bias takes place without the defendant and at the invitation of the trial judge. See Spencer, *Misreading*, *supra*, at 1; see also Fritsch, *Ruling In Minor Trial*, *supra* note 9, at A1 ("I think when the court thinks about it, it's going to think

during jury selection when the questioning relates to the objectivity of prospective jurors.¹²

In *Antommarchi*, the defendant was convicted of third degree criminal possession of a controlled substance in the Supreme Court of New York County.¹³ During the voir dire, the trial judge questioned several of the prospective jurors at the bench regarding personal matters they did not wish to reveal in open court.¹⁴ These sidebar conferences were recorded in the presence of defendant's counsel,¹⁵ while the defendant remained only a few feet away.¹⁶ The defendant did not request to be present at these conferences, nor did he object to his absence at any point during the trial.¹⁷ Nevertheless, he appealed his conviction to the New York Court of Appeals, claiming, *inter alia*, that his absence from the sidebar conferences deprived him of his right to be present at every material stage of trial.¹⁸ The New York Court of Appeals agreed, holding that sidebars constitute material stages of trial, and accordingly, reversed his conviction and granted him a new trial.¹⁹

Writing for a unanimous court, Acting Chief Judge Simons explained that under New York Criminal Procedure Law ("CPL")

twice. They may want to step back and take a couple of paces and rethink this." (quoting Vivian Berger, vice dean of Columbia University Law School)).

¹² *Antommarchi*, 604 N.E.2d at 97.

¹³ *People v. Antommarchi*, 573 N.Y.S.2d 285 (App. Div. 1991) *rev'd*, 604 N.E.2d 95 (N.Y. 1992). The Appellate Division, First Department affirmed the defendant's conviction. *Id.*

¹⁴ *Antommarchi*, 604 N.E.2d at 97. Of 67 potential jurors, 37 were individually questioned at the bench. *See* Spencer, *No Retroactive Effect*, *supra* note 11, at 1. The potential jurors spoke about a wide variety of issues which concerned them. *See* Steven W. Fisher, "People v. Antommarchi": *A Trial Judge's Perspective*, 208 N.Y.L.J. 1 (1992). For example, several discussed their "business commitments, doctor appointments, and Sabbath observance." *Id.* Others expressed their attitudes about drugs and revealed prior arrests of family members. *Id.* Additionally, the potential jurors were asked whether they or anyone they had known had been the victim of a crime or had been accused of committing a crime. *Antommarchi*, 604 N.E.2d at 97. They were also asked whether they thought the defendant was guilty simply because he had been arrested. *Id.*

¹⁵ *See Antommarchi*, 604 N.E.2d at 97.

¹⁶ *See* Bauder, *supra* note 8, at B2.

¹⁷ *See* Fisher, *supra* note 14, at 1.

¹⁸ *Antommarchi*, 604 N.E.2d at 96. On appeal, the defendant argued that both his constitutional and statutory rights were violated by his absence from the sidebar conferences. *Id.* (claiming breach of Sixth and Fourteenth Amendment rights, rights under Article 1, section 6 of New York State Constitution and section 260.20 of New York Criminal Procedure Law).

¹⁹ *Id.* at 97.

section 260.20,²⁰ as well as New York case law,²¹ a defendant has a fundamental right to be present during any material stage of his trial.²² More importantly, the court concluded that sidebar conferences constitute material stages of trial.²³ The court, however, limited a defendant's right to be present at sidebar conferences to questioning relating to a potential juror's bias;²⁴ thus, a defendant need not be present for questioning relating to routine matters such as prior obligations or physical impairments.²⁵ The court reasoned that a defendant should be entitled to observe prospective jurors' facial expressions, demeanor, and body language, so as to gauge any possible bias.²⁶ Furthermore, the court concluded that since the right to be present at sidebars is fundamental, it cannot be waived by a defendant's inaction,²⁷ thus attaching automatically.

²⁰ N.Y. CRIM. PROC. LAW § 260.20 (McKinney 1993). Section 260.30 recognizes jury selection as part of a jury trial. *Id.*; see *Lewis v. United States*, 146 U.S. 370, 376 (1892) (impaneling jury members represents official start of trial). Section 260.20 incorporates the impaneling of the jury as a stage at which a defendant has the right to be present. See *People v. Sloan*, 592 N.E.2d 784, 786 (N.Y. 1992); *People v. Velasco*, 570 N.E.2d 1070, 1071 (N.Y. 1991); *People v. Mullen*, 374 N.E.2d 369, 372 (N.Y. 1978).

²¹ See *Sloan*, 592 N.E.2d at 786; *People v. Turaine*, 577 N.E.2d 55, 56 (N.Y. 1991); *Velasco*, 570 N.E.2d at 1071; *People v. Mehmedi*, 505 N.E.2d 610 (N.Y. 1987); *Mullen*, 374 N.E.2d at 370.

²² See *Antommarchi*, 604 N.E.2d at 97; *Sloan*, 592 N.E.2d at 786; see also *supra* note 11 (discussing ambiguity of word "fundamental").

²³ *Antommarchi*, 604 N.E.2d at 97; see *Sloan*, 592 N.E.2d at 787 (concluding that failure to permit defendant's presence at sidebar questioning of potential jurors was error).

²⁴ *Antommarchi*, 604 N.E.2d at 97 (citing *Sloan*, 592 N.E.2d at 787). The defendant should be present to permit the enhanced assessment of prospective jurors for conferring and advising counsel. *Id.*

²⁵ *Id.*; *Velasco*, 570 N.E.2d at 1071.

²⁶ *Antommarchi*, 604 N.E.2d at 97. The court felt this was necessary so that a defendant can "have the opportunity to assess the juror's 'facial expressions, demeanor and other subliminal responses.'" *Id.* (quoting *Sloan*, 592 N.E.2d at 787).

²⁷ *Id.*; see *People v. Dokes*, 595 N.E.2d 836, 840 (N.Y. 1992) (explaining failure to object to fundamental rights does not bar appeal). The *Antommarchi* court did not hold that the right cannot be waived, but rather that it will not be waived by the defendant's inaction. See *Lewis*, *supra* note 7, at 2. Although the *Antommarchi* opinion did not discuss how a defendant can waive his right, New York courts have held that fundamental rights will be preserved unless they are "knowingly, intelligently, and voluntarily" waived by the defendant personally. *People v. Epps*, 334 N.E.2d 566, 571 (N.Y.), *cert. denied*, 423 U.S. 999 (1975). Almost immediately following the *Antommarchi* decision, Supreme Court Judge Gerald Sheindlin devised a procedure to allow mid-trial waivers to avoid a flood of potential reversals regarding matters which were already pending. *People v. Cook*, 591 N.Y.S.2d 760, 762 (Sup. Ct. 1992). In order to determine whether a defendant had "knowingly, intelligently, and volunta-

It is submitted that by granting criminal defendants an automatic right to be present at sidebar conferences with prospective jurors, the *Antommarchi* court erred to the detriment of both the criminal justice system and criminal defendants. This Comment asserts that such conferences do not constitute material stages of trial, and therefore, do not trigger a criminal defendant's constitutional right to be present. Further, it is suggested that "Antommarchi rights" are not supported by section 260.20 of the CPL.

rily" waived his right, Judge Sheindlin devised the following twelve questions for anyone seeking a waiver in order to ensure that the defendant was made aware of and voluntarily relinquished the right to be present at the sidebar:

- (1) Do you know that you . . . have a right to be present when a prospective juror is questioned concerning the juror's qualifications?
- (2) You . . . have a right to hear the answers of the prospective juror.
- (3) You . . . have a right to evaluate the answers . . . to determine for yourself the prospective juror's bias, hostility or predisposition . . . so that you may see the juror's facial expressions, demeanor and other subliminal responses.
- (4) You . . . have a right to determine . . . whether the juror can be fair and impartial in this trial.
- (5) Do you understand your rights?
- (6) Do you wish to ask me any questions about your rights?
- (7) Do you waive your right to be present during the questioning of any prospective juror?
- (8) Did anyone force you to waive your right to be present?
- (9) Did anyone threaten or coerce you to waive your right?
- (10) Are you waiving your rights voluntarily?
- (11) Are you waiving your rights freely?
- (12) If I asked you these same questions at the time of jury selection, would your answers be the same as it [sic] is now?

Id.

Initially, several commentators reacted to the *Antommarchi* decision with a surge of opposition and outrage. See *supra* note 11. Although these tensions eased slightly when the New York Court of Appeals decided that *Antommarchi* would be applied only prospectively, see *People v. Mitchell*, 606 N.E.2d 1381, 1384 (N.Y. 1992), a debate nevertheless persists concerning the legitimacy and ramifications of the ruling itself. Some critics argue that because the benefit of a defendant's presence at such sidebars would be negligible, if not non-existent, *Antommarchi* rights are unnecessary. See, e.g., George F. Will, *Our Expanding Menu of Rights*, NEWSWEEK, Dec. 14, 1992, at 90 (discussing absurd results that may arise due to *Antommarchi*); *infra* notes 70 to 81 and accompanying text (setting forth policy arguments against *Antommarchi*). However, other commentators reason that the mere prospect of imprisonment warrants providing defendants with the right to attend the sidebar. See *Bauder, supra* note 8, at B2 ("This goes right to the heart of the fundamental right to be present at your own trial . . . These are people who are going to be judging this defendant." (quoting Kenneth Finkelman, Legal Aid Society attorney)); *Lewis, supra* note 7, at 2 (stating defendants should have right to be present at sidebar and should have choice to waive right); *Spencer, Misreading, supra* note 11, at 1 (explaining defendants should be present because "[a] general bias [on the part of a prospective juror] can be much, much more stubborn than a specific bias" (quoting William A. Loeb, Legal Aid Society attorney)).

Finally, this Comment concludes that on both policy and practicality grounds *Antommarchi* rights must be eradicated.

I. CONSTITUTIONAL DIMENSIONS OF THE RIGHT TO BE PRESENT

Courts have determined that a criminal defendant's constitutional right to be present at trial generally commences with jury selection,²⁸ and extends through the return of a verdict.²⁹ A number of constitutional provisions collectively establish this right: the Confrontation Clause of the Sixth Amendment,³⁰ the

²⁸ See *Hopt v. Utah*, 110 U.S. 574, 578 (1884) (stating that trial commences at latest when jury impaneling begins); *United States v. Miller*, 463 F.2d 600, 603 (1st Cir.) (stating that challenging prospective jurors is essential to defendants), *cert. denied*, 409 U.S. 956 (1972); see also *supra* note 7 (discussing inclusion of jury impaneling as material stage of trial).

In *United States v. Chrisco*, the circuit court struggled with the issue of what constituted "presence." 493 F.2d 232, 235 (8th Cir. 1974). In that case, the defendants were present in the courtroom during the entire voir dire of the jury for causal strikes. *Id.* at 236. The peremptory strikes, however, were made in the absence of the defendants, but in the presence of their counsel, although the defendants were later present at the reading of the list by the clerk. *Id.* The court held that the defendants were "sufficiently present" at the impaneling of the jury to satisfy the requirements of rule 43 of the Federal Rules of Criminal Procedure and the Constitution. *Id.* at 237.

In addition to being present during jury impaneling, a criminal defendant also has the right to be present when the jury instructions are given, even if they are only supplemental. See *Evans v. United States*, 284 F.2d 393, 394-95 (6th Cir. 1960) (noting that defendant has right to "see and observe" proceedings). The majority view is that the right to be present at jury impaneling exists only in felony cases. *State ex rel. Shetsky v. Utecht*, 36 N.W.2d 126, 130-31 (Minn. 1949). But see *State v. Campbell*, 24 S.E. 875, 878 (W.Va. 1896) (recognizing right to be present at jury impaneling in misdemeanor trials if imprisonment is at stake).

²⁹ See *Rogers v. United States*, 422 U.S. 35, 39 (1975) (discussing defendant's right to be present until jury renders verdict); *Frank v. Magnum*, 237 U.S. 309, 316 (1915) (stating that defendant has right to be present at every stage of trial but may waive right to be present at verdict); see also J.H.W., *Presence of Accused Felon at His Trial*, 10 N.Y.L.F. 262, 263 (1964) ("[I]t is a prisoner's right to be present throughout the entire trial, from the commencement of jury selection until the verdict is rendered and the jury discharged.").

Although a criminal defendant possesses a broad right to be present at trial, he does not have the right to be present during preliminary, preparatory, or ministerial stages of processes, or during proceedings which do not take place during trial. See, e.g., *Smaldone v. People*, 81 P.2d 385, 388 (Colo. 1938) (holding that defendant does not have right to be present when jurors are drawn to be sent to defendant's district); *North v. State*, 65 So.2d 77, 79 (Fla. 1952) (holding that it is not necessary for defendant to be present when judge excuses jurors), *aff'd*, 346 U.S. 932 (1954); *Commonwealth v. Green*, 20 N.E.2d 417, 422 (Mass. 1939) (holding that defendant's right to be present does not extend to matters before trial begins); *State v. Moon* 262, P. 859, 860-61 (Or. 1925) (same).

³⁰ U.S. CONST. amend. VI; see *New York v. Mitchell*, 606 N.E.2d 1381, 1384 (N.Y. 1992) (stating that right to be present is rooted in Confrontation Clause of Sixth

Due Process Clause of the Fifth Amendment,³¹ and the Sixth Amendment right to effective assistance of counsel.³² The Due Process Clause, however, has been regarded as perhaps the strongest source for the right to be present.³³

A. *The Due Process Standard for Presence*

In *Snyder v. Massachusetts*,³⁴ the Supreme Court set forth the standard to be utilized in determining whether due process mandates the presence of the accused.³⁵ Justice Cardozo stated that "the presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only."³⁶ The *Snyder* Court further articulated that the Constitution grants a defendant the right to be present only when "his presence has a relation, reasonably substantial, to the fulness [sic] of his opportunity to defend against the charge;"³⁷ it does not assure such a right "when presence

Amendment); *United States v. Raper*, 676 F.2d 841, 846 (D.C. Cir. 1982) (same). Since the Confrontation Clause ensures a criminal defendant the right to confront all witnesses, it necessarily follows that a defendant cannot exercise this right without being present at trial. *See supra* note 3 (discussing derivation of right of presence from Confrontation Clause).

³¹ U.S. CONST. amend. V; *see Mitchell*, 606 N.E.2d at 1384; *Raper*, 676 F.2d at 846; WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 24.2, at 1011 (2d ed. 1992) (noting that due process components expand right of presence to situations other than confronting witnesses).

³² *See* U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to have Assistance of Counsel for his defense."); *see also* *United States v. Washington*, 705 F.2d 489, 497 (D.C. Cir. 1983) (noting right of presence is essential to constitutional right of assistance); *cf. Faretta v. California*, 422 U.S. 806, 819-21 (1975) (Sixth Amendment allows defendant to make own defense).

³³ *See Snyder v. Massachusetts*, 291 U.S. 97, 116 (1934) (discussing how Due Process Clause ensures fair trial and creates right to be present).

³⁴ *Id.*

³⁵ *Id.*

³⁶ *Id.* at 107-08; *see People v. Sloan*, 592 N.E.2d 784, 786 (N.Y. 1992). A defendant's right to be present requires not only physical presence, but also the ability to understand the proceedings and cooperate with his attorney. *See In re Dennis*, 335 P.2d 657, 661 (Cal. 1959).

³⁷ *Snyder*, 291 U.S. at 105-06; *see Sloan*, 592 N.E.2d at 786 (holding no right of presence exists where defendant's presence or absence could have no effect on ultimate fairness); *Peterson v. United States*, 411 F.2d 1074, 1081 (8th Cir.), *cert. denied*, 396 U.S. 920 (1969) (holding that defendant's absence did not violate *Snyder* standard).

The court also held that there is no fundamental right for a defendant to be present at a juror view. *See Snyder*, 291 U.S. at 122. Yet in *Snyder*, Justice Cardozo wrote that some "[p]rivileges [are] so fundamental as to be inherent in every concept of a fair trial that could be acceptable to the thought of reasonable men." *Id.* Most impor-

would be useless, or the benefit but a shadow."³⁸ Therefore, for a stage of trial to be deemed one that requires a defendant's presence, it must be essential to the trial, such that the defendant's absence might hinder the ability to properly defend.³⁹

Factors which courts will consider include whether the defendant's attorney was present,⁴⁰ and whether he or she had ample opportunity to consult with the defendant.⁴¹ Additionally, with regard to jury selection, a court will evaluate other factors such as the nature of the questioning,⁴² how far from the bench

tantly, he suggested that a court should consider the particular circumstances of each case, in light of the entire record, to determine whether the defendant's absence "is so flagrantly unjust that the Constitution of the United States steps in to forbid it." *Id.* at 115.

³⁸ *Snyder*, 291 U.S. at 106-07; see *People v. Velasco*, 570 N.E.2d 1070, 1072 (N.Y. 1991) (holding that discussion in chambers was for purpose of preliminary advisement and not material part of trial).

³⁹ See *People v. Harris*, 559 N.E.2d 660 (N.Y. 1990) (holding defendant's presence during communication between judge and deliberating jury was not constitutionally mandated because it would have had no substantial impact on defense). Although the Supreme Court has pronounced that the right exists at "every stage of the trial," *Illinois v. Allen*, 397 U.S. 337, 338 (1973), it has also stated that the defendant "has no constitutional right to be present at every interaction between a judge and a juror." *Rushen v. Spain*, 464 U.S. 114, 125-26 (Stevens, J. concurring), *cert. denied*, 495 U.S. 910 (1983); see *United States v. Gagnon*, 470 U.S. 522, 526 (1985). In *Gagnon*, the Supreme Court held that the defendant's rule 43 right of presence was not violated by *in camera* discussion with a sworn juror who was concerned about the defendant's sketchings. *Id.* In a per curiam opinion, the Court stated that "the mere occurrence of an ex parte conversation between a trial judge and a juror does not constitute a deprivation of any constitutional right." *Id.* (quoting *Rushen*, 464 U.S. at 125 (Stevens, J., concurring)).

⁴⁰ See *infra* notes 46-48 and accompanying text (stressing importance of counsel's presence).

⁴¹ See *United States v. Chrisco*, 493 F.2d 232, 237 (8th Cir.), *cert. denied*, 419 U.S. 847 (1974). In *Chrisco*, the court also considered whether the defendants were "sufficiently present." *Id.* Although the defendants were not in the courtroom when a peremptory strike was made, they were considered "sufficiently present" because they were in the courtroom when the list was read aloud. *Id.* at 236-37.

⁴² See *United States v. Dioguardi*, 428 F.2d 1033, 1039 (2d Cir.), *cert. denied sub nom.*, *Plumeri v. United States*, 400 U.S. 825 (1970). In *Dioguardi*, the United States Court of Appeals for the Second Circuit ruled that an accused does not have a right to be present during a sidebar juror questioning if adequately represented by counsel. *Id.* The defendants were seated only 15 to 20 feet from the bench, and their attorney was informed of the procedure of requesting that the defendants come nearer, but did not request their presence. *Id.* "[M]ost of the jurors thus questioned were excused by the court," and those who remained were challenged by either the prosecution or defense. *Id.* at 1039-40. Similarly, in *People v. Mullen*, 374 N.E.2d 369 (N.Y. 1978), the New York Court of Appeals held that an *in camera* discussion with a juror about his objectivity did not require a defendant's presence because "the presence of counsel . . . was sufficient to afford the defendant a 'fair and just hearing.'" *Id.* at 371; see also *People v. Martinez*, 318 N.Y.S.2d 397, 399 (Sup. Ct. 1971) ("[N]o useful purpose would

the defendant was situated,⁴³ how much of the questioning was conducted in defendant's absence,⁴⁴ and whether the particular juror was actually removed from the case.⁴⁵

B. Application to Antommarchi

In *Antommarchi*, each sidebar conference was conducted in the presence of defendant's counsel,⁴⁶ with whom the defendant was given ample opportunity to consult.⁴⁷ Furthermore, Antommarchi was only a few feet away the entire time.⁴⁸ Although approximately half of the prospective jurors were questioned at the bench,⁴⁹ most of them ultimately did not serve on the jury.⁵⁰ Twenty-one were excused on consent, one was removed for cause, and four were struck by the defense.⁵¹ Thus, of the sixty-seven prospective jurors originally impaneled, only eleven remained who had been questioned in Antommarchi's absence.⁵² Furthermore, not all of the sidebar discussions referred to the jurors' ability to remain impartial.⁵³ As the New York Court of Appeals held in *People v. Velasco*,⁵⁴ this type of questioning does not give rise to a constitutional right of the defendant to be present.⁵⁵

Therefore, it is submitted that careful examination of the jury selection process in *Antommarchi* reveals that the defendant's absence from the sidebar conferences had no impact whatsoever on his opportunity to defend against the drug charge. Accordingly,

be served in having the defendant present in court for resentencing in those instances where the court credits defendant's averment that he was not advised of his right to appeal."), *aff'd*, 331 N.Y.S.2d 334 (App. Div. 1972).

⁴³ See *Dioguardi*, 428 F.2d at 1039 (15 to 20 feet is sufficiently present).

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ See *Antommarchi*, 604 N.E.2d at 97.

⁴⁷ See Supplemental Brief for Respondent at 3-7 (describing voir dire process).

⁴⁸ See *Bauder*, *supra* note 8, at B2.

⁴⁹ See *Fisher*, *supra* note 14, at 1, 4.

⁵⁰ See *Fisher*, *supra* note 14, at 1, 4; Supplemental Brief for Respondent at 3-7. Thirty-seven panelists requested to speak at the bench, rather than in open court. See *Fisher*, *supra* note 14, at 1, 4. Their concerns about serving ranged from "business commitments, doctor's appointments and sabbath observations" to "their own conflicts with the law or the arrests of family members or friends." *Id.*

⁵¹ See *Fisher*, *supra* note 14, at 1, 4; Supplemental Brief for Respondent at 3-7.

⁵² See *Fisher*, *supra* note 14, at 1, 4; Supplemental Brief for Respondent at 3-7.

⁵³ See *Fisher*, *supra* note 14, at 1, 4; Supplemental Brief for Respondent at 3-7. Some of the questioning related to prior obligations of the jurors. See *Fisher*, *supra* note 14, at 1, 4; see also *supra* note 50 (discussing concerns of jurors).

⁵⁴ 570 N.E.2d 1070 (N.Y. 1991).

⁵⁵ See *supra* notes 38 and accompanying text (stating *Velasco's* holding).

the *Snyder* standard for mandating the defendant's presence remained unsatisfied. Because there was no substantial relation between the defendant's absence and his ability to defend, it is asserted that the conferences that took place in *Antommarchi* were not stages of trial at which he had a constitutionally protected right to be present.⁵⁶

II. DID THE *ANTOMMARCHI* COURT MISINTERPRET THE STATUTE?

Section 260.20 of the CPL provides, in pertinent part, that "[a] defendant must be personally present during the trial of an indictment"⁵⁷ The *Antommarchi* court held that section 260.20 bestows upon a criminal defendant the right to be present at sidebar conferences with prospective jurors when the inquiry relates to impartiality.⁵⁸ It is evident from the language and legislative purpose of the statute, however, that section 260.20 is not intended to address such stages of trial.

It is a well-settled rule of statutory construction that courts cannot give a statute an interpretation which the legislature could have, but did not, clearly articulate.⁵⁹ If the New York Legislature had intended that section 260.20 guarantee defendants the right to be present at sidebars, it would have expressly provided so in the statute.⁶⁰ In fact, since it had become standard procedure in New York to conduct sidebar conferences without the defendant,⁶¹ it would have been necessary for the legislature to explicitly indicate that it was supplanting the existing judicial

⁵⁶ See *Snyder*, 291 U.S. at 107-08; Fritsch, *Ruling in Minor Trial*, *supra* note 9, at A1, B5 ("I don't think there is a real injury to the interests of the defendant" (quoting H. Richard Uviller, Columbia University Law School professor)). Further, because there is no constitutional right to be present at sidebars, a defendant's informed and knowing consent is not needed in order to waive it. See *Taylor v. Illinois*, 484 U.S. 400, 402 (1988) (holding that witness may be excluded from testifying without violating Constitution when lawyer commits willful misconduct).

⁵⁷ N.Y. CRIM. PROC. LAW § 260.20 (McKinney 1993).

⁵⁸ *Antommarchi*, 604 N.E.2d at 97.

⁵⁹ See 1 McKinney's Consolidated Laws of New York: Statutes § 94 (1971) ("Words will not be expanded so as to enlarge their meaning to something which the Legislature could easily have expressed but did not, and a court will not strain the clear language of a statute to produce an unintended and inequitable result." (citations omitted)); see also *id.* § 230 ("It is fundamental that the words used should be given the meaning intended by the lawmakers . . ." (citation omitted)).

⁶⁰ See *American Tobacco Co. v. Patterson*, 456 U.S. 63, 71-72 n.6 (1982) ("Had Congress intended so fundamental a distinction, it would have expressed that intent clearly in the statutory language or the legislative history.").

⁶¹ See *supra* note 9 and accompanying text (noting that sidebar conferences in defendant's absence are customary).

interpretation of the statute in order to effectuate such a change in the law.⁶² Furthermore, even if the legislature had intended to change the customary practice in New York by enacting section 260.20, it gave absolutely no guidance to courts on the issue of defendants' presence at sidebars.⁶³

In addition, the legislative purpose behind section 260.20 supports the argument that it was misinterpreted by the *Antommarchi* court. The statute's purposes are to abolish the "ancient evil of secret trials and to guarantee the defendant's right to be [physically] present at all *important* stages of his trial."⁶⁴ The right to be present, however, "must be kept within the limits of common sense and reason."⁶⁵ It is submitted that this purpose illustrates that the statute was intended only to extend to parts of a trial which affect the defendant's opportunity to defend the charge. Therefore, sidebars are necessarily excluded.⁶⁶

The function of the judiciary is not to make law, but to interpret and enforce it.⁶⁷ Judicial intent cannot replace legislative intent.⁶⁸ Thus, regardless of whether it agreed with the result,⁶⁹ the

⁶² See *American Tobacco*, 456 U.S. at 71-72 n.6.

⁶³ See N.Y. CRIM. PROC. LAW § 260.20 (McKinney 1993) (indicating that § 260.20 makes no mention of sidebars).

⁶⁴ *People ex rel. Lupo v. Fay*, 196 N.E.2d 56, 58 (N.Y. 1963) (emphasis added), (citation omitted) *cert. denied*, 376 U.S. 958 (1964); cf. *People v. Huggler*, 378 N.Y.S.2d 493 (App. Div. 1976) (stating that section is designed for defendant's protection, and therefore may be waived).

⁶⁵ See *Lupo*, 196 N.E.2d at 58 (citation omitted).

⁶⁶ See *id.*

⁶⁷ See 1 McKinney's Consolidated Laws of New York: Statutes § 73 (1971).

It is a basic rule of statutory construction that the courts should avoid judicial legislation, since the Constitution of this state vests the legislative power in the Senate and Assembly; and courts may not legislate under the guise of interpretation of statutes. That the courts may not divest or usurp the legislative power has been announced so frequently and in such varying language as to defy complete repetition. Thus it is said that courts may not make, change, amend, or repeal a statute.

As otherwise expressed, the judicial function is to interpret, declare, and enforce the law, not to make it, and it is not for the courts to correct supposed errors, omissions or defects in legislation.

Id. § 73, at 145-48 (citations omitted).

⁶⁸ See *id.* § 73, at 148 ("A statute must be read and given effect as it is written by the Legislature, not as the court may think it should or would have been written if the Legislature had envisaged all of the problems and complications which might arise in the course of its administration" (citations omitted)).

⁶⁹ See *id.* § 92, at 180-81 ("Indeed the Legislature's intent must be ascertained and effectuated whatever may be the opinion of the judiciary as to the wisdom, expediency, or policy of the statute" (citation omitted)).

Antommarchi court was bound to effectuate the statute in the way the legislature intended.

III. "RIGHT TO BE PRESENT": WRONG FOR OUR FUTURE

Ironically, *Antommarchi* rights may work to a defendant's detriment.⁷⁰ According to one member of the judiciary, most jurors already feel uncomfortable about revealing prejudices and sensitive information to judges and lawyers.⁷¹ It is likely, therefore, that many jurors will become even more reluctant to answer questions honestly when a criminal defendant is present, or even to approach the bench when asked.⁷² In the aggregate, this procedure leads to less disclosure of prejudice, resulting in more biased juries.⁷³ Consequently, most defense attorneys now advise their clients to waive their right to be present at sidebars,⁷⁴ so that the

⁷⁰ See *infra* notes 71-75 and accompanying text (noting that defendants may not want "*Antommarchi* rights").

⁷¹ See Fisher, *supra* note 14, at 1, 4; see also Steven B. Rosenfeld, *Misperceived Issue From "Antommarchi"*, 208 N.Y. L.J. 109 (1992) (stating jurors' responses in open court may be inhibited).

⁷² See Fisher, *supra* note 14, at 1, 4 (discussing jurors' desire to respond at bench).

⁷³ See Fisher, *supra* note 14.

⁷⁴ Telephone Interview with David Mudd, Assistant District Attorney, New York County District Attorney's Office (Feb. 23, 1993). Criminal Court Judge Steven W. Fisher accurately predicted the waiving of these rights would occur more frequently when he stated:

[I]t may come to pass that, after an appropriate period of study, the defense bar will conclude that a defendant's exercise of the right to be present exacts too high a toll in disrupting the flow of relevant and useful information about prospective jurors. We may then see increasing numbers of defendants, acting on the advice of counsel, waiving their "*Antommarchi* rights" and allowing jurors to speak on sensitive matters in their absence.

....

I think it is reasonable to believe that many counseled defendants chose not to object to their exclusion from these private discussions in the past because they realized that their presence would be contrary to their own best interests in learning about prospective jurors. . . . It therefore seems ironic that these defendants now stand to win reversal of otherwise valid convictions on the ground that they were deprived of a right which they chose, or would have chosen, gladly to forego.

Fisher, *supra* note 14, at 1, 4.

The practice of advising such a waiver began after the New York Court of Appeals handed down their decision in *People v. Sloan*, 592 N.E.2d 784, 785 (N.Y. 1992) (holding that conference related to jurors' knowledge of "pretrial publicity" went to merits of case, and therefore, defendant must be present); see Gary Spencer, *Defendant's Rights at Trial at Issue; 3 Cases to be Argued Involve Presence of Accused at Sidebar Conferences*, 208 N.Y. L.J. 95 (1992).

attorneys may learn as much as possible about each prospective juror.⁷⁵

Furthermore, it is submitted that *Antommarchi* rights will result in a multitude of baseless appeals and unfortunate reversals. Since it is in a defendant's best interests to waive *Antommarchi* rights,⁷⁶ the majority of defendants who do not waive them will be those who were unaware such rights existed.⁷⁷ Thus, if *Antommarchi* rights are preserved, the criminal justice system will be faced with the anomalous result of defendants exercising rights of which they were previously ignorant to subsequently secure reversals.⁷⁸

Moreover, it is suggested that *Antommarchi* rights merely enable defendants to search for subtle signs of lack of sympathy, rather than to evaluate juror objectivity.⁷⁹ Further, obtaining voir dire transcripts will be time consuming,⁸⁰ thereby causing delays the courts cannot afford.

Accordingly, it is submitted that a criminal defendant should only have the right to attend sidebar conferences during jury impaneling when a balancing of the relevant factors manifests fulfillment of the *Snyder* standard. It is further suggested that a defendant should have the right to appeal only when his or her request to be present was denied and a timely objection was made.

CONCLUSION

A criminal defendant's right to be present during all material stages of trial is a fundamental tenet of criminal procedure law. This Comment has suggested that the *Antommarchi* court, by holding that this right encompasses presence at sidebar conferences with prospective jurors, improperly extended the rights of criminal defendants without any legislative authority or judicial precedent. In holding that section 260.20 of the CPL deems sidebar conferences with prospective jurors material stages of

⁷⁵ Telephone Interview with David Mudd, Assistant District Attorney, New York County District Attorney's Office (Feb. 23, 1993).

⁷⁶ See *supra* notes 70-75 and accompanying text (discussing disadvantages of right of presence).

⁷⁷ See Fisher, *supra* note 14, at 1, 4.

⁷⁸ Fisher, *supra* note 14, at 1, 4.

⁷⁹ *Making Law in the New York Courts*, WASH. TIMES, Nov. 17, 1992, at F2.

⁸⁰ See Spencer, *supra* note 74, at 1, 4 ("The problem is that it will take a very long time to get the voir dire transcripts . . ." (quoting E. Joshua Rosenkranz, attorney in charge of the Office of the Appellate Defender)).

trial, the *Antommarchi* court misconstrued the language of the statute in a way that undermined its legislative purpose. In a society wrought with crime and overcrowded courts, it is astonishing that the New York Court of Appeals would, without precedent, grant useless rights to defendants, which only exacerbate the problems of the criminal justice system.

Christina Boulougouris