No. _____

IN THE
Supreme Court of the United States

WILBUR IRICK,

Petitioner,

v.

STATE OF NEW YORK,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION, SUPREME COURT OF NEW YORK, FIRST JUDICIAL DEPARTMENT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under the "explicit" holding of *Illinois v. Allen*, 397 U.S. 337, 343 (1970), does a court violate the defendant's right to be present during criminal proceedings when it removes the defendant from the courtroom due to disruptive conduct without first warning the defendant that continued disruption will result in removal?

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The New York Court of Appeals' denial of Mr. Irick's application for leave to appeal is unpublished and can be found at 189 N.E.3d 325 (Table). App. 1a. The opinion of the Appellate Division, Supreme Court of New York, First Judicial Department is reported at 163 N.Y.S.3d 530. App. 2a. The relevant proceedings and order from the trial court are unpublished.

JURISDICTION

The judgment of the New York Court of Appeals was entered on May 26, 2022, making this petition due Wednesday, August 24, 2022. This Court has jurisdiction over the federal question presented under 28 U.S.C. § 1257(a).

RELEVANT CONSTITUTIONAL PROVISIONS

The Sixth Amendment to the Constitution 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 Fourteenth Amendment to the Constitution provides that no state "shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. CONST. AMEND. XIV.

STATEMENT OF THE CASE

I. Overview

This Court has long recognized that an accused's right to be present at every stage of trial is fundamental. *Lewis v. United States*, 146 U.S. 370, 372 (1892). Rooted in both the Confrontation and Due Process Clauses, the right to presence is "scarcely less important to the accused than the right of trial itself." *Diaz v. United States*, 223

U.S. 442, 455 (1912); *see United States v. Gagnon*, 470 U.S. 522, 526 (1985) (per curiam); *Snyder v. Massachusetts*, 291 U.S. 97, 105-06 (1934). Indeed, numerous other trial rights—including the rights to confront witnesses and aid in one's defense—flow from the fundamental right to be present.

Given the importance of the right to presence, "courts must indulge every reasonable presumption against" its loss. *Illinois v. Allen*, 397 U.S. 337, 343 (1970) (citing *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938)). Accordingly, a defendant's unruly or disruptive behavior does not automatically waive the right to be present. Instead, as this Court "explicitly h[e]ld" in *Illinois v. Allen*, a court may only eject a defendant from his criminal proceedings "after he has been warned by the judge that he will be removed if he continues his disruptive behavior." *Allen*, 397 U.S. at 343.

In the fifty years since *Allen*, federal circuit courts and state courts of last resort have split in interpreting the *Allen* Court's reference to a pre-removal warning, disagreeing about both its necessity and its content. *See Henry v. Haws*, 586 F. App'x 359, 359-60 (9th Cir. 2014), *cert denied* 575 U.S. 1031 ("lower courts have diverged on this issue" given "the lack of guidance from the Court").

Some courts, like the Fourth and Sixth Circuits, have adhered to *Allen*'s "explicit" holding by affirming that a warning is required. In doing so, these courts have found constitutional violations where defendants were expelled from courtroom proceedings without any advance warning that disruption would result in removal ("disruption-removal warning"). *Gray v. Moore*, 520 F.3d 616 (6th Cir. 2008), *cert denied* 555 U.S. 894; *United States v. Lawrence*, 248 F.3d 300 (4th Cir. 2001). On the other end of the

spectrum, some courts have dispensed with the warning requirement. *Jones v. Murphy*, 694 F.3d 225 (2d Cir. 2012), *cert denied* 568 U.S. 1165; *United States v. Shepherd*, 284 F.3d 965 (8th Cir. 2002). Taking a third approach, several courts have held that, absent a disruption-removal warning, a court may still expel a defendant if the court conveys disapproval of the disruptive behavior or tells the defendant that disruption will not pause the proceeding. *See, e.g.*, *State v. Chapple*, 36 P.3d 1025 (Wash. 2001) (en banc); *State v. Kluck*, 217 N.W.2d 202 (Minn. 1974).

The New York courts took this third approach here. Before a pretrial hearing (to suppress eyewitness identifications and physical evidence on constitutional grounds), the court forcibly removed Petitioner without advising him that any continued disruption would result in removal. App. 17a-19a. Nevertheless, removal was permitted, the trial court found, because Petitioner had continued to be disruptive after he had been told that the case would continue in his absence if he voluntarily chose to be absent. App. 19a-20a. Petitioner was then absent from court for the remainder of his suppression hearing, which featured the testimony of two police witnesses who testified about Petitioner's apprehension, identification, and arrest. The pretrial court denied Petitioner's motion to suppress eyewitness identifications and the physical evidence. App. 25a. Mr. Irick was convicted of a felony and misdemeanor count.

On direct appeal, the New York Appellate Division rejected Petitioner's claim that his removal violated due process, holding that his "disruptive behavior" justified his exclusion. App. 2a-3a. Further, "[t]he totality of the court's interchanges with

[Petitioner] were sufficient to warn him that if he persisted in his announced plan to prevent the hearing from going forward, the hearing would proceed in his absence." App. 2a-3a. A Judge of the New York Court of Appeals later denied leave to appeal without opinion. App. 1a.

This Court should grant this petition to clarify what, if any, warning is required before removing a defendant from his trial—a "deplorable" act in the *Allen* Court's words. *Allen*, 397 U.S. at 347. American courts that fail to require a disruption-removal warning, like the New York courts here, disregard *Allen*'s clear command and weaken its central mechanism for safeguarding a fundamental trial right.

II. The Trial-Level Proceedings

Petitioner was indicted in New York state court for one felony and two misdemeanor counts. Before trial, the court ordered a pretrial hearing to determine whether track pants seized during his arrest, as well as eyewitness identifications, should be suppressed on constitutional grounds. At the start of that hearing, Mr. Irick sought an adjournment and indicated that he would "put an end to the hearing" if one was not granted. App. 18a. The court told Mr. Irick that the case was "going to proceed . . . no matter what." App. 18a. After the court noted Mr. Irick's continued objections but indicated that the proceedings would continue, Mr. Irick asked for emergency medical attention. App. 18a. As the court began to explain that "[i]f [Mr. Irick] wish[ed] to voluntary[il]y remove," Mr. Irick interjected, saying that he was

"[n]ot going under the *Parker* rule."[1] App. 18a. The court responded that "[t]he case will go on in your absence." App. 19a. The court never warned Mr. Irick that he risked *involuntary* removal if any disruption continued.

The court then admonished Mr. Irick: "Be quiet. We will proceed." App. 19a. When Mr. Irick persisted that he was "not feeling well," he was removed by court personnel without warning. App. 19a. The court made the following record:

> Let the record reflect Mr. Irick has thrown himself on the floor in protest alleging that he has some form of medical problem, which he is clearly malingering in protest. I am having him escorted out of the courtroom at this time. We'll proceed without him.

App. 19a.

The court added that Mr. Irick had previously been instructed that the trial would proceed in his absence if he "wish[ed] to voluntar[il]y absent himself from the court proceedings." App. 19a-20a.[2] According to the court, that is what had happened here: Mr. Irick had understood this rule about voluntary absence (since he had referenced "the Parker rule") but had nevertheless "do[ne] everything possible to prevent the case from going forward." App. 19a-20a. Thus, the "case [would] go on in his absence." App. 20a.

The suppression hearing was then conducted entirely in Mr. Irick's absence. Two police officers testified at that hearing; Mr. Irick, who was absent, did not. Mr. Irick's motions to suppress were denied, App. 21a-27a, and the State introduced the pants

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[1] "*Parker* rule" refers to the rule set forth in *People v. Parker*, 440 N.E.2d 1313 (N.Y. 1982), requiring courts to advise a defendant that trial will proceed in his absence if he voluntarily fails to appear.

[2] The "*Parker* warnings" were given months earlier at two separate court appearances. App. 7a-8a, 14a-15a.

and eyewitness-identification testimony against Mr. Irick at trial. Trial Transcripts from Aug. 23 & 25, 2017 at 32-39, 114-16, 169-70, 183. Ultimately, a jury convicted Mr. Irick of first-degree robbery and second-degree menacing and the court sentenced him to an aggregate term of 18 years' incarceration.

III. The Appeal

On appeal to the New York Appellate Division, Mr. Irick argued that his removal without warning violated his constitutional right to be present under *Illinois v. Allen*, 397 U.S. 337 (1970). Pet. App. Br. 25-30. Mr. Irick argued that the court's statements that the hearing would proceed "no matter what" and would continue in his absence if he voluntarily left did not warn him that disruption would result in involuntary removal. Pet. App. Br. 28-29; Pet. Reply Br. 3-4.

The State argued that Mr. Irick's behavior was somehow "an implicit request to be removed," and that, in any event, the court's various statements put him on notice that his disruptive conduct would "not stop the hearing." State's Br. 13-15. Thus, according to the State, Mr. Irick suffered no constitutional deprivation. State's Br. 15.

Without citing any warning that Mr. Irick would be removed if disruption continued, the Appellate Division found that "[t]he totality of the court's interchanges with [Mr. Irick] were sufficient to warn him that if he persisted in his announced plan to prevent the hearing from going forward, the hearing would proceed in his absence." App. 2a-3a.

On a discretionary application for leave to appeal to the New York Court of Appeals, Mr. Irick specifically renewed his argument that, under *Allen*, the court had a constitutional obligation to provide a disruption-removal warning. A Judge of the New York Court of Appeals denied leave to appeal. App. 1a. This timely petition follows.

REASONS FOR GRANTING THE PETITION

This Court should grant certiorari to settle a constitutional question that has long split our nation's courts: under *Allen*, what kind of warning, if any, must be given before a court may remove an individual for disruption?

Before *Allen*, lower courts disagreed about whether a defendant could *ever* waive his right to be present, regardless of how unruly or even violent his behavior was. With *Allen*, this Court resolved that a defendant could lose this right but imposed safeguards to ensure that the waiver of that right was knowing and voluntary. *Allen* "explicitly h[e]ld" that such a waiver—and the "deplorable" act of involuntary removal—is only permissible "if" he has first "been warned by the judge that he will be removed if he continues his disruptive behavior." 397 U.S. at 343, 347.

In the decades since *Allen*, courts have nevertheless disagreed about the necessity and content of pre-removal warnings, going so far as eliminating a warning requirement entirely. *Henry*, 586 F. App'x at 359-60 ("lower courts have diverged on this issue" given "the lack of guidance from the Court"). As a result, a defendant may now lose the fundamental right to be present—and all the other constitutional rights

that presence secures—without any assurance that he knew the harsh consequence of his conduct.

This petition should be granted to resolve the split in our nation's courts on the question presented and to reaffirm *Allen*'s explicit warning requirement. Doing so will ensure that defendants may only knowingly and voluntarily give up a right "scarcely less important . . . than the right of trial itself." *See Diaz*, 223 U.S. at 455.

I. Our nation's courts have split over the question presented.

1. More than fifty years ago, this Court held that the right to be present at one's trial could be constructively waived based on disruptive conduct. *Allen*, 397 U.S. 337. In reaching this conclusion, however, the *Allen* Court reiterated "that courts must indulge every reasonable presumption against the loss of constitutional rights." 397 U.S. at 343 (citing *Johnson*, 304 U.S. at 464). Consistent with that principle, *Allen* "explicitly h[e]ld" that a waiver could be inferred from conduct only if a defendant was first "warned . . . that he [would] be removed if he continue[d] his disruptive behavior" but "nevertheless insist[ed] on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial [could not] be carried on with him in the courtroom." 397 U.S. at 343.

The facts of *Allen* demonstrate the presumption against waiver and the necessity of pre-removal warnings. There, after demanding self-representation during jury selection, Mr. Allen "started to argue with the judge in a most abusive and disrespectful manner." *Id.* at 339. He persisted in his disruptions, including by threatening the judge ("When I go out for lunchtime, you're [ ] going to be a corpse

here"), tearing his attorney's file, and throwing papers on the floor. *Id.* at 340. The judge then warned Mr. Allen that he would be removed if he continued his behavior. *Id.* Still, Mr. Allen persisted, telling the court that "[t]here's not going to be no trial either," even if he was gagged. *Id.* Only then did the court remove him. *Id.*

Even on these rather extreme facts, this Court still "explicitly h[e]ld" that a court can remove a defendant from criminal proceedings only if the court first warns the defendant that continued disruption will result in removal. *Id.* at 343, 346. Justice Brennan's concurring opinion further summarized the necessity of a warning: "no action against an unruly defendant is permissible except after he has been fully and fairly informed that his conduct is wrong and intolerable, and warned of the possible consequences of continued misbehavior." *Id.* at 350 (Brennan, J., concurring).

Despite *Allen*'s clear language, courts have inconsistently enforced its warning safeguard against unknowing or involuntary waivers. Three camps have emerged in the decades since *Allen*: (1) some courts require a warning that disruption will result in removal ("disruption-removal warning"); (2) some courts dispense with the warning requirement entirely; and (3) others, like the New York courts here, find that a disruption-removal warning is not required so long as the court generally informs the defendant that the case will proceed despite his disruption.

2. Since *Allen*, several courts have affirmed that this Court meant precisely what it "explicit[ly] h[e]ld" there: a defendant must be warned that continued disruption will result in removal. *Allen*, 397 U.S. at 343. In *Gray v. Moore*, the Sixth Circuit held that a state appellate court had unreasonably applied *Allen* by affirming the

defendant's unwarned removal from his trial. 520 F.3d at 621-23. Although the defendant had interrupted a witness's testimony by repeatedly yelling that the witness was "lying," the court was not permitted to remove him without first warning him of the ramifications of continued disruption. *Id.* at 623. "[A]t most[,] [defendant's] conduct entitled the trial court to *threaten* removal." *Id.*

In so holding, the Sixth Circuit acknowledged that it was diverging from some sister circuits but nevertheless concluded "that the warning requirement from *Allen* cannot be interpreted in any non-mandatory way." *Id.* at 624.[3] According to the court, "the proper reading of *Allen* requires a trial court to give the accused one last chance to comply with courtroom civility before committing the 'deplorable' act—in the *Allen* Court's words—of removing that person from his own trial." *Id.* (quoting *Allen*, 397 U.S. at 347).

Similarly, the Fourth Circuit has affirmed that a warning must be given before finding that, due to disruptive behavior, the defendant has waived his right to be present. *Lawrence*, 248 F.3d at 305. There, the defendant had repeatedly disrupted prior proceedings, so the court ordered him to be sentenced virtually. *Id.* at 301-02. The Fourth Circuit held that this violated Federal Rule of Criminal Procedure 43—which, it explained, had codified *Allen*—because the court never gave the defendant

[3] The Sixth Circuit noted that *Allen* has since been codified in Federal Rule of Criminal Procedure 43(c), which states that a defendant "'waives the right to be present . . . when the court warns the defendant that it will remove the defendant from the courtroom for disruptive behavior, but the defendant persists in conduct that justifies removal.'" *Gray*, 520 F.3d at 623 (quoting Fed. R. Crim. P. 43(c)(1)(C)). The advisory committee notes state that the addition of this provision "is designed to reflect" *Allen*. Fed. R. Crim. P. 43. In the Sixth Circuit's view, this modification of the rule post-*Allen* provides further proof "that prior warning is an indispensable part of the constitutional rule." *Gray*, 520 F.3d at 623.

"any opportunity prior to the present sentencing hearing to show that he was not disruptive." *Id.* at 305. According to the court, "[w]arning is an integral part of the rule, as well as to the constitutional underpinning of the rule itself." *Id.* (citing *Allen*, 397 U.S. at 343).[4] Although the court could have "warn[ed] this defendant that the first sign of contumacious conduct would be deemed a waiver of the right to be present," it could not exclude the defendant absent "such a warning." *Lawrence*, 248 F.3d at 305; *see also United States v. Earquhart*, 795 F. App'x 885, 889 (4th Cir. 2019) (reiterating that "[w]arning is an integral part of . . . the constitutional underpinning of" Rule 43); *United States v. Gillenwater*, 717 F.3d 1070, 1082 (9th Cir. 2013) (a trial court "*does* have a duty to warn a defendant of the consequences of his disruptive behavior before the court removes the defendant from the courtroom" under *Allen*); *Jackson v. Commonwealth*, No. 2009-SC-000836-MR, 2011 WL 3793153, at *5 (Ky. Aug. 25, 2011) (under *Allen*, defendant may be removed for disruptive behavior "so long as he has been warned first of the possible consequences and given a chance to cease his behavior").

Consistent with those courts that have reversed convictions due to the absence of disruption-removal warnings, many courts have affirmed convictions because the trial court *did* expressly provide such a warning before removal. *See, e.g.*, *United States v. Hill*, 35 F.4th 366, 377-80 (5th Cir. 2022) (removal proper after court

[4] Because the *Lawrence* court could resolve the defendant's claim under Rule 43, it did not reach the additional claim that "the Constitution itself require[d the defendant] to be physically present at sentencing" under *Allen*. *Lawrence*, 248 F.3d at 303 n.1. However, in interpreting Rule 43, the court recognized that the rule "essentially codified *Illinois v. Allen*, which held that the constitutional right to physical presence is not absolute, and that an unruly defendant could be removed from the courtroom after a warning by the judge." *Id.* at 305.

repeatedly warned defendant that "he would be removed if his behavior did not stop"); *United States v. Daniels*, 803 F.3d 335, 347-50 (7th Cir. 2015), *cert denied* 578 U.S. 1022; *United States v. Awala*, 260 F. App'x 469, 470-71 (3d Cir. 2008), *cert denied* 553 U.S. 1047; *Foster v. Wainwright*, 686 F.2d 1382, 1387 (11th Cir. 1982), *cert denied* 459 U.S. 1213; *Scurr v. Moore*, 647 F.2d 854, 856-59 (8th Cir. 1981), *cert denied* 454 U.S. 1098; *United States v. Munn*, 507 F.2d 563, 566-68 (10th Cir. 1974), *cert denied* 421 U.S. 968; *State v. Mosley*, 200 S.W.3d 624, 630-33 (Tenn. Cr. App. 2005).

3. On the other end of the spectrum, some courts have concluded that *Allen* does not require any warning at all. The Eighth Circuit has held that a defendant's unwarned removal from his trial is "troublesome" but does not "rise[] to the level of a constitutional violation." *Shepherd*, 284 F.3d at 967. In finding as much, the Eighth Circuit relied on language in *Allen* that "[n]o one formula for maintaining the appropriate courtroom atmosphere will be best in all situations." *Id.* (quoting *Allen*, 397 U.S. at 343); *see also People v. Lavadie*, 489 P.3d 1208, 1215 (Colo. 2021) (concluding that *Allen* "merely approved of the trial court's warning to the defendant" before removal but did not "mandate it").

In a divided opinion, the Second Circuit has similarly held that *Allen* does not "create an absolute warning requirement." *Jones*, 694 F.3d at 242 n.9 (citing *Gilchrist v. O'Keefe*, 260 F.3d 87 (2d Cir. 2001), *cert denied* 535 U.S. 1064); *see also Gilchrist*, 260 F.3d at 96 (relying on *Allen* to analyze a defendant's forfeiture of the right to counsel and noting that *Allen* "did not indicate whether . . . a warning was a requirement in every situation").

Judge Pooler dissented from the majority's interpretation of *Allen*. According to Judge Pooler, "a warning was required before [the defendant] was not allowed to return to court." 694 F.3d at 251 (Pooler, J., concurring & dissenting in part). *Allen* "clearly," "unambiguous[ly]," and without "qualif[ication]" mandated a disruption-removal warning. *Id.* at 250-53 & 251 n.2 (quoting *Allen*, 397 U.S. at 343). That warning, Judge Pooler explained, "ensure[s]" that "a defendant's implied waiver by misconduct is both knowing and voluntary." *Id.* at 252-53 (citing *Johnson*, 304 U.S.at 464). Thus, "the lack of warning alone" justified finding a constitutional violation. *Id.* at 253.

4. Between these positions, a third camp has emerged. Several courts have held that, absent a disruption-removal warning, a court may still expel a defendant if it conveys disapproval of the disruptive behavior or tells the defendant that disruption will not pause the proceeding. Under this camp's view, a court need not warn the defendant that continued disruption will result in removal.

The Washington Supreme Court, for instance, has taken that approach. *Chapple*, 36 P.3d at 1030. In *Chapple*, Mr. Chapple had said in the jury's presence that he would be "glad when you get this Klu Klux Klan meeting over with." *Id.* at 1027. After ordering the jury removed, the court warned Mr. Chapple that if he did not "*want* to participate in the trial," it would go on without him. *Id.* As Mr. Chapple continued to express anger about the trial, the court stated that "disruption in front of the jury cannot take place." *Id.* When Mr. Chapple later interrupted during a witness's

testimony, the court dismissed the jury, removed Mr. Chapple from the courtroom without further warning, and proceeded without him. *Id.* at 1027-28.

The Washington Supreme Court rejected Mr. Chapple's contention that the trial court was required to "explicitly warn[him] that he could be removed upon further disruption." *Id.* at 1030. "[W]hen read in its entirety," the court's exchange with Mr. Chapple "constituted an adequate warning," especially because he had been removed from an earlier trial. *Id.* Specifically, three statements put Mr. Chapple on notice that he could be removed: (1) "[i]f you don't want to participate . . . , we'll go on without you;" (2) "if you make statements in front of the jury like that [court was interrupted];" and (3) "disruption in front of the jury cannot take place." *Id.* It was irrelevant that none of these statements referenced *forcible* removal and merely suggested trial would continue in Mr. Chapple's absence only if he did not "*want*" to participate.

The New York courts took a similar approach here. At no point did the court warn Mr. Irick that further disruption would trigger removal. Instead, the court only told Mr. Irick to be quiet; said the case would "proceed . . . no matter what"; and added that if Mr. Irick "wish[ed] to *voluntar[il]y* remove" himself, the case would continue in his absence. App. 18a-19a (emphasis added). Nevertheless, the trial court found Mr. Irick's removal permissible and the Appellate Division affirmed. According to the Appellate Division, a disruption-removal warning was not required because "[t]he totality of the court's interchanges" with Mr. Irick "were sufficient to warn him that if he persisted in his announced plan to prevent the hearing from going forward," it "would proceed in his absence." App. 2a-3a; *see also State v. Kluck*, 217 N.W.2d 202,

207 (Minn. 1974) (removal proper under *Allen* where defendant was warned that "corrective measures" would be taken if he persisted with disorderly conduct but was never warned of the possibility of exclusion).

5. In sum, courts have long divided over whether and how a defendant must be admonished before he can be removed from his own trial. *See Henry*, 586 F. App'x at 359-60 (stating that this Court "has not clearly established that it is a constitutional violation to remove an unruly defendant from the courtroom without issuing the defendant a warning regarding the consequences of his actions" and that "lower courts have diverged on this issue" given this "lack of guidance from the Court"). It is time for this Court to resolve this split and ensure lower courts have the guidance necessary to adequately safeguard the fundamental right to be present.

II. The question presented is important to the fair administration of justice and the integrity of this Court's decisions.

1. Resolving the constitutional question presented and reaffirming *Allen*'s explicit warning requirement is essential for safeguarding the right to be present and the many rights presence secures. Under *Allen*'s holding, courts must issue explicit warnings, specifically stating the consequences of continued disruption. As Professor LaFave has summarized, "before disorderly conduct amounts to a forfeiture," it is "essential" that, as in *Allen*, a defendant be warned that disruption will trigger removal. Wayne R. LaFave, 6 Crim. Proc. § 24.2(c) (4th ed.). Such a warning ensures a defendant is knowingly and voluntarily relinquishing the right to be present by continuing to engage in the sanctioned conduct. And it ensures that a defendant is not trapped into inadvertently abandoning a core right.

But the same cannot be said where, as here, the court hints that continued disruption is improper and will not delay the case's continuation. App. 18a-20a. That vague—and at best implied—"warning" that *something* may result from disruption fails to impress the stark consequences of continued disruption on the accused.

2. A warning rule is also in the State's interest. A clear disruption-removal warning increases the likelihood that the disruption will end and decorum will be restored. Indeed, the central premise of our criminal law is that if individuals know that certain conduct will result in harsh consequences, that conduct will deterred. As Judge Pooler explained in her *Jones* dissent, a defendant "must be given an opportunity to comport himself appropriately, and more importantly, given the opportunity to do so with the knowledge that a failure to behave will lead to the loss of his right to be present." *Jones*, 694 F.3d at 253 (Pooler, J., concurring & dissenting in part). If the defendant is "edging towards or [has] already cross[ed] the line of excludable behavior," he "must be given a chance to step back—or if he fails to do so, knowingly and voluntarily face the consequences of his actions." *Id.* He cannot do so without first being told the consequences of his continued behavior.

3. A clear reaffirmance of the *Allen* disruption-removal rule will help prevent trial and appellate courts from conflating warnings about (1) the consequences of voluntary absence and (2) the consequences of disruption. *See, e.g.*, *Chapple*, 36 P.3d at 1027-30 (finding "[i]f you don't want to participate in the trial, we'll go on without you" sufficient notice under *Allen*); App. 2a-3a, 18a-19a.

Cases where only an indirect warning was given, like Mr. Irick's, show the problems that stem from conflation. Here, the trial court advised Mr. Irick that the hearing would proceed "no matter what" and that, if he wished to voluntarily remove himself, the case would continue in his absence. App. 18a-19a. When Mr. Irick explicitly rejected voluntary departure (saying that he was "not going under *Parker*," the New York case concerning voluntary absence from trial), the court never explained that he risked *involuntary* expulsion due to his behavior. App. 18a-19a. Nevertheless, the trial court illogically cited its admonitions about *voluntary* departure as evidence that Mr. Irick had waived his right to be present based on disruptive conduct. App. 19a-20a.

4. A disruption-removal warning additionally prevents courts from removing defendants for exercising other constitutional rights under the guise of "disruption." Courts often remove defendants as they are invoking other constitutional rights or expressing concern about their abridgement. *See, e.g.*, *Jones*, 694 F.3d at 235-36 (removing defendant after invoking his right to represent himself); *Shepherd*, 284 F.3d at 966-67 (removing defendant after complaining about the quality of court-appointed counsel); *Norde v. Keane*, 294 F.3d 401, 404-05 (2d Cir. 2002) (removing defendant after requesting new counsel). Given this context, it is particularly important that courts notify a defendant that his behavior—which he may view as a legitimate exercise of his rights—risks the loss of the right to be present. Such a warning may improve the perceived fairness of a proceeding and prevent the

unnecessary loss of the right to be present. *See Jones*, 694 F.3d at 252 (Pooler, J. concurring & dissenting in part).

5. Finally, this Court should grant the petition to protect the integrity of its own decisions. *Allen* could not have been clearer: "we explicitly hold today that a defendant can lose his right to be present at trial if, after he has been warned by the judge that he will be removed if he continues his disruptive behavior, he nevertheless insists on [continued disruption]." 397 U.S. at 343. Despite this uniquely "explicit[ ] hold[ing]," lower courts have refused to adhere to *Allen*'s warning mandate. This Court should intervene to prevent the continued violation of the plain terms of its own decision. *Jones*, 694 F.3d at 251 (Pooler, J. concurring & dissenting in part) ("'[T]he warning requirement from *Allen* cannot be interpreted in any non-mandatory way, lest we substitute our own judgment of what the rule should be for that of the Court.'") (quoting *Gray*, 520 F.3d at 624).

III. This appeal is a solid vehicle for resolving the question presented.

This case is an excellent vehicle for resolving the question presented.

1. The facts of this case present this constitutional question perfectly. There can be no dispute that the trial court failed to "warn[ ]" Mr. Irick that he would "be removed if he continue[d] his disruptive behavior." *Allen*, 397 U.S. at 343. Instead, the court merely informed Mr. Irick that the case would proceed over his objection and that, if he chose not to attend his proceedings, the case would proceed without him. App. 18a-20a. Nevertheless, both the trial court and the Appellate Division found Mr. Irick's removal constitutional. App. 2a-3a, 18a-20a. This case thus

exemplifies the third camp's approach of permitting removal after only an indirect warning that fails to convey the consequences of disruption as *Allen* requires. 397 U.S. at 343. Moreover, this issue comes before this Court on direct review, without the complications that sometimes arise on collateral review.

2. This constitutional claim is cleanly preserved and there are no procedural impediments to review. Mr. Irick specifically argued at every appellate stage of this case that *Allen* required a disruption-removal warning and that none was provided here. Pet. App. Br. 28-29; Pet. Reply Br. 3-4; Pet. Mtn. for Lv. to Appeal to the Court of Appeals 3-6. In turn, the Appellate Division reached and decided the question presented on the merits. App. 2a-3a.

3. Next, the question presented is outcome determinative. It is undisputed that Mr. Irick had the right to be present at his suppression hearing. *Snyder*, 291 U.S. at 106-07 (a defendant has the right to be present at all stages of his criminal case unless presence would have been "useless, or the benefit but a shadow").

Nor is harmless error in play. The State never raised harmless error at any point in this litigation and the state courts never found the error harmless. Indeed, as New York law does not apply harmless error to presence violations, *People v. Mehmedi*, 505 N.E.2d 610 (N.Y. 1987), a finding in Mr. Irick's favor on the question presented will result in reversal. This case thus squarely implicates the question presented.

IV. The Appellate Division committed constitutional error.

1. As shown above, the constitutional error here is clear. Nothing in this record indicates that Mr. Irick was warned that if he continued to disrupt or stall the

proceedings, he would be removed. Accordingly, the trial court's removal of Mr. Irick during his pretrial proceedings violated his right to be present under *Allen*. 397 U.S. at 343.

The suggestion that *Allen* does not mean what it "explicitly held," *Allen*, 397 U.S. at 343, is wrong. *See Shepherd*, 284 F.3d at 967. To justify dispensing with a disruption-removal warning, the Eighth Circuit has relied on language in *Allen* that "[n]o one formula for maintaining the appropriate courtroom atmosphere will be best in all situations." *See id.* (quoting *Allen*, 397 U.S. at 343). This is a misreading of *Allen*. As the Sixth Circuit has held, this Court's "no one formula" statement was a reference to the *sanctions* available when a defendant is disruptive; not whether a warning is required prior to removal. *Gray*, 520 F.3d at 623-24.[5]

2. Reinforcing *Allen*'s warning command will also ensure that a readily administrable rule governs this area of law. That rule prevents arbitrary appellate assessments of whether indirect "warnings"—such as references to a case continuing in a defendant's absence, or a judge's comment that certain conduct is inappropriate—somehow provided the requisite notice that disruption will result in forcible removal. This Court has long preferred clear rules in the context of fundamental rights;[6] this Court "explicitly" approved a clear and simple rule in *Allen,*

[5] *Allen*, 397 U.S. at 343-44 ("We believe trial judges confronted with disruptive . . . defendants must be given sufficient discretion to meet the circumstances of each case. No one formula for maintaining the appropriate courtroom atmosphere will be best in all situations. We think there are at least three constitutionally permissible ways for a trial judge to handle an obstreperous defendant like Allen: (1) bind and gag him, thereby keeping him present; (2) cite him for contempt; (3) take him out of the courtroom until he promises to conduct himself properly.").

[6] *E.g.*, *Crawford v. Washington*, 541 U.S. 36 (2004).

397 U.S. at 343; and the time is ripe for this Court to settle the split and reaffirm *Allen*'s explicit rule here.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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Elizabeth G. Caldwell
John L. Palmer
Center for Appellate Litigation

August 24, 2022

APPENDIX

State of New York
Court of Appeals

BEFORE: HON. JENNY RIVERA, Associate Judge

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

ORDER DENYING LEAVE

WILBUR IRICK,

Appellant.

Appellant having applied for leave to appeal to this Court pursuant to Criminal Procedure Law § 460.20 from an order in the above-captioned case;*

UPON the papers filed and due deliberation, it is

ORDERED that the application is denied.

Dated: May 26, 2022

Associate Judge

*Description of Order: Order of the Appellate Division, First Department, entered March 15, 2022, affirming a judgment of the Supreme Court, New York County, rendered December 7, 2017.

Webber, J.P., Moulton, Kennedy, Mendez, Pitt, JJ.

15505 THE PEOPLE OF THE STATE OF NEW YORK, Respondent, Ind. No. 3869/15 Case No. 2019-4515

-against-

WILBUR IRICK, Defendant-Appellant.

Robert S. Dean, Center for Appellate Litigation, New York (John L. Palmer of counsel), for appellant.

Alvin L. Bragg, Jr., District Attorney, New York (Vincent Rivellese of counsel), for respondent.

Judgment, Supreme Court, New York County (Melissa C. Jackson, J. at suppression hearing; James M. Burke, J. at pretrial calendar appearance; Abraham L. Clott, J. at jury trial and sentencing), rendered December 7, 2017, convicting defendant of robbery in the first degree and menacing in the second degree, and sentencing him, as a second violent felony offender, to an aggregate term of 18 years, unanimously affirmed.

The hearing court providently exercised its discretion in removing defendant from the courtroom during the suppression hearing based on defendant's disruptive behavior, including throwing himself on the floor (*see People v Baldwin*, 277 AD3d 134, 135 [1st Dept 2000], *lv denied* 96 NY2d 780 [2001]). The totality of the court's interchanges with defendant were sufficient to warn him that if he persisted in his

announced plan to prevent the hearing from going forward, the hearing would proceed in his absence.

Defendant was not deprived of his right to self-representation. At a calendar appearance a few days before trial, while expressing his dissatisfaction with his then third attorney, defendant mentioned his ability to represent himself, however, defendant did not make an unequivocal request to proceed pro se (*see People v LaValle*, 3 NY3d 88, 106-107 [2004]). Defendant's statements were overshadowed by his numerous complaints regarding his attorney (*see People v Jackson*, 39 AD3d 394 [1st Dept 2007], *lv denied* 9 NY3d 845 [2007], *cert denied* 553 US 1011 [2008]). Regardless, the calendar court appropriately advised defendant that in the event he wished to proceed pro se, he should make that request to the justice who would be presiding at trial.

When, at the end of jury selection, defendant made such a request, the trial court providently denied the request, noting defendant's escalating disruptive behavior during the early trial proceedings as well as defendant's use of profanity and threats to the court and counsel. Further, it was within the sound discretion of the trial court to bar defendant's presence for the remainder of the trial (*see People v Young*, 41 AD3d 318 [1st Dept 2007], *lv denied* 9 NY3d 1040 [2008]; *People v Cumberbatch*, 200 AD2d 376 [1st Dept 1994], *lv denied* 83 NY2d 803 [1994]).

The record fails to support defendant's contention that his counsel made any statements to the court that would amount to taking an adverse position against his client.

Defendant's presence was not required at a very brief discussion during jury selection where the court sought the lawyers' legal opinions regarding its conclusion that

defendant, as a matter of law, had not unequivocally asked to represent himself up to that point (*see People v Rodriguez*, 85 NY2d 586, 590-591 [1995]). In any event, the matter became academic shortly thereafter when, as noted, the court ruled in defendant's presence on his request for self-representation, giving him a full opportunity for input (*see People v Starks*, 88 NY2d 18, 29 [1996]).

The court, which offered defendant an opportunity to consult with counsel before deciding whether or not to testify, providently exercised its discretion in denying defendant's request for a potentially prolonged delay to prepare for his testimony and review of the evidence, including 911 calls, that had been introduced in his absence. Defendant's claimed lack of preparation was the result of his own disruptive conduct, which prevented him from attending the trial, as well as his continued refusal to cooperate or communicate with counsel. In any event, any error in this regard was harmless (*see People v Crimmins*, 36 NY2d 230 [1975]).

Defendant's claim that his original counsel rendered ineffective assistance with regard to defendant's request to testify before the grand jury is unreviewable on direct appeal because it involves matters not reflected in, or fully explained by, the record. Accordingly, because defendant has not made a CPL 440.10 motion, the merits of the ineffectiveness claims may not be addressed on appeal. In the alternative, to the extent the existing record permits review, we find that defendant received effective assistance under the state and federal standards. Defendant has not shown the absence of a reasonable strategic decision (*see People v Hogan*, 26 NY3d 779, 786-787 [2016]), or

any prejudice (*see People v Simmons*, 10 NY3d 946, 949 [2008]; *People v Wiggins*, 89 NY2d 872 [1996]).

We perceive no basis for reducing the sentence.

THIS CONSTITUTES THE DECISION AND ORDER
OF THE SUPREME COURT, APPELLATE DIVISION, FIRST DEPARTMENT.

ENTERED: March 15, 2022

Susanna Molina Rojas
Clerk of the Court

SUPREME COURT NEW YORK COUNTY
CRIMINAL TERM PART 63

THE PEOPLE OF THE STATE OF NEW YORK : INDICTMENT # 3869/15

-against-

WILBUR IRICK, : CHARGE: ROB1

Defendant.

HEARING

111 Centre Street
New York, New York 10013
October 5, 2016

B E F O R E:
HONORABLE GILBERT HONG,
JUSTICE OF THE SUPREME COURT

A P P E A R A N C E S:

FOR THE PEOPLE:

CYRUS R. VANCE, JR. ESQ.,
New York County District Attorney
BY: ERIN TIERNEY, ESQ.,
CAITLIN JAILE, ESQ.
Assistant District Attorneys

FOR THE DEFENDANT:

ENRICO DEMARCO, ESQ.

Kristine Martini,
Senior Court Reporter

THE COURT CLERK: Calendar number one, Irick Wilbur.

Appearances?

MR. DEMARCO: Enrico DeMarco for Mr. Wilbur.

MS. TIERNEY: Erin Tierney for the People.

MS. JAILE: Caitlin Jaile for the People.

THE COURT: Before we begin, I'm required to give you what's known as Parker warnings.

Basically what this means, we're scheduled to do a hearing today and we're scheduled to do a trial. I invite you to come here and help your attorney prepare for the hearing and participate for the hearing and trial.

If you decide not to participate in either the hearing stage or trial stage of the proceeding three things can happen.

Number one, the trial is going to go whether you're here or not.

Number two, if you are convicted you could be sentenced whether you are here or not.

Number three, there could be additional charges pending against you.

Do you understand, Mr. Irick?

THE DEFENDANT: Yes, sir. I'd like to speak.

THE COURT: I'll let you speak. But let me ask you do you understand the warnings?

THE DEFENDANT: At this time I object to the proceeding and protect my rights. I do not want him, Mr. DeMarco. He called me a liar. He exposed information in open court. How can I have a fair chance in trial? I do not wish to have him as my attorney. If possible I'll go pro se.

THE COURT: Let's address them one at a time.

First, with regard to you said that he called you a liar in open court.

THE DEFENDANT: Yes, sir. Yesterday and today he was supposed to come and interview and he didn't show up and today he called me a liar.

THE COURT: Just so we're clear, Mr. Irick, I just want to break things down because what you are saying are very serious allegations. So now you said Mr. DeMarco called you a liar in open court today?

THE DEFENDANT: No, yesterday. Upstairs today he called me that.

THE COURT: I have no recollection of Mr. DeMarco calling you a liar on the record in this courtroom.

Secondly, you said I can only talk about what you are telling me. So you said he did it yesterday. I was here yesterday. I didn't hear him call you a liar.

THE DEFENDANT: He said it right here as I sit. He said you lied to me. He said you are lying.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK: CRIMINAL TERM: PART 62

THE PEOPLE OF THE STATE OF NEW YORK : Indictment No. 3869/2015

-against-

WILBUR IRICK,

Defendant.

100 Centre Street
New York, New York 10013
April 17, 2017

B E F O R E: HONORABLE MELISSA JACKSON
JUSTICE OF THE SUPREME COURT

A P P E A R A N C E S:

FOR THE PEOPLE:
CYRUS R. VANCE, JR., ESQ.
New York County District Attorney
BY: PATRICK NELLIGAN, ESQ.
Assistant District Attorney

FOR THE DEFENDANT:
BY: STEVEN HOFFNER, ESQ.

Melissa Sasso
Senior Court Reporter

THE CLERK: Calling calendar number 11 as to Wilber Irick, indictment number 3869 of 2015.

MR. HOFFNER: Good afternoon. Steven Hoffner for Mr. Irick.

THE COURT: Good afternoon.

MR. NELLIGAN: And Patrick Nelligan for the People.

THE COURT: Good afternoon, Mr. Nelligan.

MR. NELLIGAN: Good afternoon, Judge.

THE COURT: And good afternoon, Mr. Irick.

Have you had an opportunity to review the 730?

MR. HOFFNER: I have.

Judge, my concern now is that Mr. Irick basically told me that he didn't trust me to work for him.

THE DEFENDANT: Hold on. Hold on. Could you slow down a minute? "Trust," what's your definition of trust?

You see, you keep putting words in my mouth.

What I want is for you to excuse yourself. I don't use those words. I didn't use that word, "trust."

You are a part of this corporation, and I'm going to object to that, because I didn't tell you that, and don't say I did.

THE COURT: Mr. Irick, sir?

THE DEFENDANT: Yes.

THE COURT: So how are you today?

THE DEFENDANT: I'm very fine. I'm well.

How are you?

THE COURT: I am very good, sir. Thank you.

So now what I would like to do is choose a trial date for your case.

THE DEFENDANT: Judge, I'm not ready for trial.

THE COURT: No, sir, listen to me. When we say pick a date for trial, we are not going to be going to trial right now, but I'm going to choose a date in the future, okay, so we understand where we are.

THE DEFENDANT: Of course I understand where I am, ma'am. I'm human. I understand everything that is taking place.

As I stated before, I object to this whole proceeding, because it seems like there is a sense of misconduct here, and I'm being very prejudiced against. I know my rights. I'm standing up for my rights. And I do not like to be treated as a second class citizen. I'm totally innocent. I asked to tell my story. I never had a chance. I've been in prison, approximately, two years now. I'm 62 years old. I didn't commit a crime, and all this time I am never given a chance to say not guilty.

You guys are putting words in my mouth that is not being said. I can speak for myself. I'm not a dummy. I can speak for myself. If you are not going to follow the law, then I have a right to my due process. I have a right

to my Fourth Amendment probable cause. I have a right to go before the Grand Jury. I have a right to a speedy trial. I have a right to due process, equal protection under the law. It is not being adhered to and followed. And if you cannot proceed righteously, then you might as well kill me now.

THE COURT: Now, Mr. Irick, I want you to listen to me. I gave you an opportunity to speak, now I want you to listen to me.

I am trying to give you an opportunity to tell your side of the story. That is why I want to choose a trial date.

THE DEFENDANT: Okay. But that was my Grand Jury right. The prosecution had their right. If we are going to play the game, lets play fair. You had your up at bats, why can't I have mine? That is what I'm talking about. Under the presentation of evidence, by my constitutional right under the Fifth Amendment, I have the right under CPL 190.5 Section 5(a) to testify before the Grand Jury.

How can you take that right away from me?

THE COURT: Mr. Irick, I decided that motion. I denied it.

THE DEFENDANT: But that was my right. How can you deny it?

THE COURT: Because under the law I determined that that right was no longer in effect at the time of when I

decided that motion.

You see, my decision was --

THE DEFENDANT: I served notice, ma'am. I hate to interject, but I served notice, and you are forcing my hand now. How could I possibly have a fair trial?

THE COURT: You can object. That is fine. I know you object to it. And you saved your grounds for appeal.

So right now --

THE DEFENDANT: Why must I have to go to Appeals with my right? See, that is prejudice of the case right there.

THE COURT: All right, Mr. Irick. So your application is denied. Now we need to move on, Mr. Irick.

THE DEFENDANT: I will not move on until you give me my right. You guys are moving on prejudicially, and that is what I'm talking about.

THE COURT: Mr. Irick, we are going to move ahead now to trial.

THE DEFENDANT: I stated today that I served notice. I'm not ready to go to trial.

THE COURT: Well, no, we are not going to trial today. We aren't going to be hearing any testimony today. I am going to put it over to May 10th for that purpose.

So, Mr. Hoffner, 5/10, how is that?

MR. HOFFNER: I'm sorry, can we go into the next

week?

THE COURT: You may, indeed.

May 17th?

MR. HOFFNER: That's fine.

THE COURT: 5/17.

THE CLERK: Judge, is this going to Tap?

THE COURT: And, right, this needs to go to Tap A.

And I do want you to know, Mr. Irick, that if you decide you don't want to come to court, sir, for any reason, or if you make it difficult for the Department of Corrections to produce you --

THE DEFENDANT: I object. Man, I object to all this. You see, that is a prejudice statement. I never said I would not come to court. I have no choice but to come to court. I'm forced to. I'm handcuffed and transported by your authority. So why would I not want to come?

THE COURT: All right. Good. And we like to see you, Mr. Irick. But I just need to let you know that if you do not show up because you make it difficult for them to bring you to me, the case will go on in your absence, sir.

THE DEFENDANT: Objection. I object.

THE COURT: Okay, so I will see you on --

THE DEFENDANT: No, no, I'm leaving. I object. This is crazy. I come every day. You aren't going to --

THE COURT: And let the record reflect that the

defendant is walking out of court as the Court is talking.

So we will go ahead and we will proceed to May 17th. The defendant has been Parkerized.

THE CLERK: Judge, Mr. Irick is still remanded?

THE COURT: Yes, Mr. Irick stays on remand.

* * * *

Certified to be a true and accurate transcript of the stenographic minutes taken within.

Melissa Sasso
Melissa Sasso
Senior Court Reporter

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK - CRIMINAL TERM - PART 62

THE PEOPLE OF THE STATE OF NEW YORK

Ind. 3869/2015

-against-

Charge: ROB1

WILBUR IRICK,

Defendant

HEARINGS

100 Centre Street
New York, New York 10013
June 19, 2017

B E F O R E: HONORABLE M. JACKSON, JSC

A P P E A R A N C E S:

For the People:

CYRUS R. VANCE, JR, ESQ.
District Attorney, County of New York
BY: GILBERT REIN, ESQ.
Assistant District Attorney

For the Defendant:

18-B Assigned Counsel Panel
BY: STEVEN HOFFNER, ESQ.

Y.P.

PROCEEDINGS

11:32:18 THE CLERK: Added to the calendar, indictment 4869 of 2015, Wilbur Irick, I-R-I-C-K. This matter was forthwith from Part TAP A for hearings.

11:32:44 THE COURT: Good afternoon, Mr. Hoffner and Mr. Irick.

11:32:47 Who is here for the People?

11:32:49 MR. REIN: Good afternoon. Gilbert Rein for the People.

11:32:55 THE COURT: Good afternoon.

11:32:58 This was sent to me for a Huntley/Wade/Mapp/Dunaway hearing. Are you withdrawing statement notice?

11:33:03 MR. REIN: We are, Your Honor. At this time the People are withdrawing statement notice.

11:33:04 THE COURT: Have you provided Mr. Hoffner with the material he is entitled to?

11:33:07 MR. REIN: Yes.

11:33:11 THE COURT: Do you acknowledge receipt?

11:33:13 MR. HOFFNER: I do have the Rosario, yes.

11:33:14 THE COURT: Do you have a witness list?

11:33:16 MR. REIN: I do. I will hand a copy to the Court Reporter and defense counsel as well.

11:33:18 (Handed.)

11:33:20 MR. HOFFNER: Mr. Irick is expressing he does not want to proceed with the hearing today. He

11:33:25

11:33:34

11:33:36

11:33:38

told me that I should tell you because otherwise he was going to put an end to it himself.

THE COURT: We're going to proceed, Mr. Irick, no matter what. This is an old case and everybody is ready.

THE DEFENDANT: I'm not ready. This is a prejudicial hearing. That is a due process violation. I object to the proceeding, exculpatory. Not grant me, that's a prejudicial issue. I object to the entirety. At this point, I'd like to ask the Court what date we were indicted.

THE COURT: We're not going back there.

THE DEFENDANT: I object. We have no knowledge of nothing. You are not giving me nothing.

THE COURT: Your objection is noted for the record.

THE DEFENDANT: I'm not ready. I'm not feeling well.

THE COURT: We'll move on.

THE DEFENDANT: I'm not feeling well. I need emergency medical attention.

THE COURT: If you wish to voluntary remove --

THE DEFENDANT: Not going under the Parker rule.

11:34:43 THE COURT: The case will go on in your absence.

11:34:45 THE DEFENDANT: I object.

11:34:45 THE COURT: Your objection is noted.

11:34:46 THE DEFENDANT: I am not feeling well. I am not an animal. I'm asking for medical attention.

11:34:48 THE COURT: You are fine.

11:34:50 THE DEFENDANT: No, I am not. You just raised my blood pressure.

11:34:53 THE COURT: You were fine before you were sent to me.

11:34:54 THE DEFENDANT: You raised my blood pressure by denying me my right. I have the right.

11:34:56 THE COURT: Be quiet. We will proceed.

11:34:57 THE DEFENDANT: Okay, I'm not feeling well.

11:34:59 THE COURT: Let the record reflect Mr. Irick has thrown himself on the floor in protest alleging that he has some form of medical problem, which he is clearly malingering in protest. I am having him escorted out of the courtroom at this time.

11:35:00 We'll proceed without him, Mr. Hoffner.

11:35:02 The Court notes that Mr. Irick has a long history before this Court wishing not to proceed, and he has been duly Parkerized before this Court forewarning him if he wishes to voluntary absent himself from the

11:35:05

11:35:08

13:29:19

13:29:19

13:29:19

13:29:19

13:29:19

13:29:20

13:29:20

13:29:20

court proceedings, which he clearly did, so today the case will go on in his absence. Mr. Irick referred himself to the Parker rule but clearly doing everything possible to prevent the case from going forward and the Court will not permit this to happen. The case is over two years old. The fact that he got up off the floor after saying how ill he was and was escorted out by the court officers, having registered his objections to today's proceedings, we will proceed.

Call your first witness, please.

MR. REIN: The People call Police Officer Timothy Harrington.

THE SERGEANT: Witness entering.

COURT OFFICER: Remain standing and raise your right hand.

THE CLERK: Do you swear the testimony you are about to give will be the truth, the whole truth and nothing but the truth?

THE WITNESS: Yes.

THE CLERK: Thank you.

Have a seat.

COURT OFFICER: In a loud, clear voice, state your name, spelling of the last name.

THE DEFENDANT: Officer Harrington, H-A-R-R-I-N-G-T-O-N.

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK - CRIMINAL TERM - PART 62
----------x
THE PEOPLE OF THE STATE OF NEW YORK

Ind.
3869/2015

-against-

Charge:
ROB1

WILBUR IRICK,

Defendant

HEARINGS
----------x

100 Centre Street
New York, New York 10013
June 19, 2017

B E F O R E: HONORABLE M. JACKSON, JSC

A P P E A R A N C E S:

For the People:

CYRUS R. VANCE, JR, ESQ.
District Attorney, County of New York
BY: GILBERT REIN, ESQ.
Assistant District Attorney

For the Defendant:

18-B Assigned Counsel Panel
BY: STEVEN HOFFNER, ESQ.

Y.P.

DECISION

an individual who has committed a crime. So the officer simply remarking that they were looking to see if she recognized anyone or see if she saw anyone would not in and of itself render the show-up to be unduly suggestive.

For all reasons, Your Honor, I am asking that Your Honor deny defense counsel's motion.

THE COURT: Thank you.

The Court makes the following findings of facts and conclusion of law.

I credit the testimony of the two witnesses. Officer Harrington has had significant years of experience with the NYPD and Officer DeMartini, approximately four and a half years experience, both of whom had at least 70 arrests with more than 100 assists. I find their testimony credible, the demeanor forthright and they answered the questions to the best of their recollection and if they did not remember, they informed the Court that they did not remember. They were not at all deceptive or dissimulating in the testimony.

The facts are the following:

At approximately 9:40 in the evening on September 24, 2015, Officer Harrington was driving around in a marked vehicle in uniform when he received a radio run that there was a robbery in progress at a

DECISION

14:58:30 subway station at Bleecker and Mott Street and somebody
14:58:34 following the defendant, a witness of the robbery
14:58:37 following the perpetrator. The officers drove up
14:58:44 towards the location and during that procedure, there
14:58:47 was another communication to go to 317 Bowery where this
14:58:51 witness had seen the perpetrator enter into a building.
14:59:00 So the officers arrived at this location, the witness
14:59:01 was standing outside 317 Bowery, which is a homeless
14:59:08 shelter and said the defendant had run into the
14:59:12 building, that the perpetrator had run into the
14:59:16 building. The officer and his partner with the witness
14:59:19 who had followed the perpetrator all the way from the
14:59:22 subway station to the homeless shelter climbed to the
14:59:30 fourth floor of the shelter where immediately and
14:59:33 spontaneously the witness pointed to the defendant and
14:59:36 said That's him, that is the defendant at the bar,
14:59:44 dressed in underwear, profusely sweating and his track
14:59:49 pants on the floor.

14:59:50 The description that the officers received
14:59:53 over the course of the radio run initially was that the
14:59:57 perpetrator was a male black, bald, wearing blue jogging
15:00:02 pants with a green stripe down the side and 6'2" and his
15:00:17 late 30s.

15:00:19 DeMartini was supplied with additional
15:00:21 information in the accompaniment of the complaining

15:00:26 witness in this matter who he met at Bleecker and
15:00:37 Broadway, blocks away from the subway station at
15:00:41 about 9:38 in the evening. He responded to the same
15:00:47 radio run where he met the complainant, Susan Schoelle,
15:00:51 who told him that she was trying to buy a MetroCard when
15:00:57 the perpetrator came up behind her with a knife, told
15:01:01 her not to move and she threw her wallet at him, which
15:01:06 she no longer had. Officer DeMartini put her in the
15:01:14 RMP, the marked car in order to canvass to see if they
15:01:19 could find the perpetrator and then again, since there
15:01:23 are a number of radio runs, received another radio run
15:01:28 indicating that the perpetrator was at 317 Bowery and
15:01:33 that another witness had seen it and followed the
15:01:36 perpetrator to that location. They immediately went
15:01:39 there.

15:01:40 It was approximately 9:55 p.m. when they
15:01:45 arrived at that location, which was described by the
15:01:49 officer as being a shelter and that when they arrived
15:01:54 with the complainant in the back seat, that they
15:01:59 double-parked their car and that the defendant was
15:02:04 brought down to the vestibule in a lighted area, the
15:02:09 vestibule was lit as well as the streetlights, two
15:02:13 uniformed officers on either side of him and that he was
15:02:20 handcuffed and told the complainant that they might have
15:02:21 someone who fit the description and tell us if you see

DECISION

15:02:26 someone who fits that description, and the complainant
15:02:31 said That's him and the defendant did indeed fit the
15:02:39 description that had been given both by her and the
15:02:42 other witnesses as well as over the radio and the
15:02:47 defendant was arrested at approximately 10:20 by
15:02:51 Officer Harrington. So he was already under arrest at
15:02:54 the time the complainant viewed him.
15:02:56 The Court makes the following findings of
15:02:59 law:
15:03:00 There was ample probable cause to arrest the
15:03:03 defendant upon not only the radio run of the robbery in
15:03:08 progress but the continuing radio runs over the course
15:03:14 of the evening. As Officer Harrington drove up to
15:03:18 317 Bowery and met with the witness who had continuously
15:03:22 followed this defendant all the way to the homeless
15:03:25 shelter and spontaneous point-out on the fourth floor by
15:03:31 this witness that this was indeed the individual who had
15:03:35 robbed the complainant, was certainly probable cause to
15:03:41 arrest and to seize whatever evidence was within the
15:03:46 grabbable area, including the jogging pants that were at
15:03:51 the feet of this defendant who was obviously just
15:03:55 undressing. At that point there was definitely probable
15:04:02 cause for the arrest of the robbery and the pants are
15:04:04 not suppressible.
15:04:06 Furthermore, the spontaneous point-out,

DECISION

15:04:09 1 which really was spontaneous by this complainant was not
15:04:14 2 at all under any form of a police procedure or
15:04:19 3 suggestive under any facts and circumstances.
15:04:24 4 The second show-up identification by
15:04:28 5 Ms. Schoelle approximately 15 to 20 minutes after the
15:04:34 6 crime is also a non-suggestive police procedure. People
15:04:40 7 versus Howard is a very determinative case on the point
15:04:44 8 as to whether or not the fact that the defendant was
15:04:46 9 handcuffed and had two officers on either side of him,
15:04:53 10 wheter the show-up is suggestive. The Court of Appeals
15:04:56 11 has held that it is the facts and circumstances of the
15:04:59 12 case that controls and that in and of itself does not
15:05:04 13 render a finding unduly suggestive when you have a
15:05:09 14 show-up very close in time and spacial proximity to the
15:05:15 15 crime. Indeed, they have found that it is indicative of
15:05:19 16 good police work to quickly bring the victim to identify
15:05:26 17 the perpetrator because the memory of that victim is
15:05:30 18 freshest at that time, unlike months later or weeks
15:05:37 19 later. So the Court, therefore, does find that the
15:05:42 20 second identification procedure is lawful and should not
15:05:46 21 be suppressed. I am, therefore, denying Counsel's
15:05:49 22 motion in the entirety.
15:05:51 23 MR. HOFFNER: Judge, the only thing
15:05:52 24 regarding the third person, there was no testimony and I
15:05:56 25 know there was in the VDF, there was notice provided

15:05:58 about the second --

15:06:01 THE COURT: I see there are two, yes.

15:06:04 MR. HOFFNER: I think the People willingly

15:06:06 concede no testimony about that.

15:06:08 MR. REIN: Your Honor, there was no

15:06:10 testimony about that. I'm unaware of who the second

15:06:22 identification would have been made to. I do concede no

15:06:26 testimony.

15:06:26 THE COURT: I agree with you. There was

15:06:27 nothing other than Ms. Schoelle and the witness who was

15:06:31 already at the Bowery homeless shelter.

15:06:33 MR. REIN: Yes.

15:06:35 THE COURT: So, yes, I agree. Whoever the

15:06:37 third witness is, you are precluded from introducing

15:06:42 that since I have not been able to rule if it was

15:06:45 suggestive or not.

15:06:46 MR. REIN: That witness would not be able to

15:06:50 identify the defendant at trial.

15:06:50 THE COURT: Right.

15:06:55 Now, we go back to TAP A. August 1st, if

15:07:07 that's all right.

15:07:36 MR. HOFFNER: That will work for us.

15:07:38 THE COURT: Is that good for you?

15:07:39 MR. REIN: Can we actually do the 2nd?

15:07:44 THE COURT: August 2nd.

15:07:45 MR. HOFFNER: That's fine.

15:07:46 THE COURT: Okay, so 8/2/17. That would be for trial.

15:07:52

15:07:56 MR. HOFFNER: Thank you.

15:07:57 THE COURT: Same bail.

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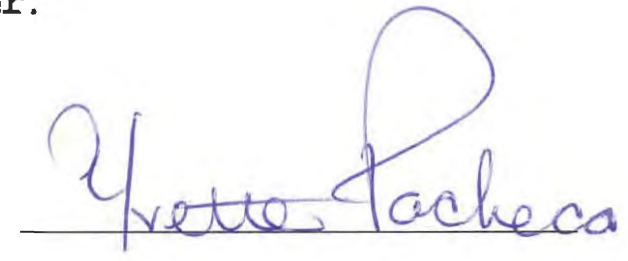
This is certified a true and accurate transcript of my stenographic notes taken in the above captioned matter.



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