

No. _____

IN THE
Supreme Court of the United States

FERNANDO RAMIREZ,
Petitioner,

v.

PEOPLE OF THE STATE OF NEW YORK,
Respondent.

On Petition for a Writ of Certiorari
to the New York State Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

Suffolk County Ind. #2627-2017
A.D. #2021-04346
APL #2023-00016

Fernando Ramirez, DIN # 21A0974
Petitioner
Sing Sing Correctional Facility
354 Hunter Street
Ossining, NY 10562-5442

Felice B. Milani, Esq.
Counsel of Record
Of Counsel to the Office of Laurette Mulry
Legal Aid Society of Suffolk County, Inc.
300 Center Drive
P.O. Box 1697
Riverhead, NY 11901
(631) 852-1650
fmilani@sclas.org

I. QUESTION PRESENTED

Whether the Constitution requires that a defendant have a simultaneous, unobstructed view of a prospective juror's facial expression to observe their body language, facial expressions, and demeanor to choose a fair and impartial jury.

II. RELATED PROCEEDINGS

People v. Ramirez, 208 3d 897 (2nd Dept. 2021).

People v. Ramirez, 2024 N.Y. Slip Op 00848

(New York Court of Appeals decided Feb 20, 2024)

III. TABLE OF CONTENTS

	Page
PETITION FOR A WRIT OF CERTIORARI.....	1
I. QUESTION PRESENTED.....	i
II. RELATED PROCEEDINGS	ii
III. TABLE OF CONTENTS	iii
IV. TABLE OF AUTHORITIES.....	iv
V. PETITITON FOR WRIT OF CERTIORARI.....	1
VI. OPINIONS BELOW.....	1
VII. JURISDICTION.....	1
VIII. RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS	2
IX. INTRODUCTION.....	3
X. STATEMENT	4
A. Legal Framework	4
XI. REASONS FOR GRANTING PETITION.....	5
A. The Decision Below is Wrong	5
B. Proceedings Below:.....	8
XII. CONCLUSION.....	9
XIII. APPENDIX A: OPINION OF THE NEW YORK STATE COURT OF APPEALS (FEBRUARY 20, 2024).....	10
XIV. APPENDIX B: OPINION OF THE NEW YORK STATE APPELLATE DIVISION SECOND DEPARTMENT (AUGUST 31, 2022)	11

IV. TABLE OF AUTHORITIES

	Page(s)
 Supreme Court Opinions	
<i>Duncan v. Louisiana</i> , 391 US 146 (1968)	4
 U.S. Constitution	
U.S. Const. amend. VI	2
 United States Code	
28 U.S.C. § 1254(1)	1
 State Cases	
<i>People v. Antonmarchi</i> , 80 N.Y.2d 247 (1992)	4
<i>People v. Maffei</i> , 35 N.Y.3d 264 (2020)	4
<i>People v. Ramirez</i> , 2024 N.Y. Slip Op 00848	ii, 1
<i>People v. Torpey</i> , 63 N.Y.2d 361 (1984)	4
 State Statutes	
CPL §260.20	2
Criminal Procedure Law §260.20	2
 Other	
NY Const, art, I §6	2

V. PETITION FOR WRIT OF CERTIORARI

Petitioner Fernando Ramirez respectfully petitions for a writ of certiorari to review the judgment of the New York State Court of Appeals in this case.

VI. OPINIONS BELOW

The opinion of the New York State Court of Appeals is reported at 2024 N.Y. Slip Op 00848 (New York Court of Appeals decided Feb 20, 2024) and reprinted in the Appendix to the Petition (“Pet. App.”). The decision of the Appellate Division Second Department is reported at *People vs. Ramirez*, 208 3d 897 (2nd Dept. 2021).

VII. JURISDICTION

The court of appeals issued its decision on February 20, 2024. Pet. App. 1a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

VIII. RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

New York guarantees the right of defendants to be present at all material stages of their criminal trial and to meaningfully contribute to their defense, including the opportunity to be present at jury selection and to observe the body language, facial expressions and demeanor of prospective jurors (NY Const, art, I §6;

New York Criminal Procedure Law §260.20 provides that the accused shall be personally present during the trial of an indictment. CPL §260.20.

The Sixth Amendment provides: “In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury.” U.S. Const. amend. VI.

The Fourteenth Amendment provides, in relevant part: “No State shall deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The Sixth Amendment provides, in all criminal prosecutions, the accused shall enjoy the right to have the assistance of counsel for his defense.

IX. INTRODUCTION

This case presents a critically important question of constitutional criminal procedure, with a straight-forward answer. In holding that neither a defendant's right to be present during jury selection nor due process requires that a defendant have a simultaneous, unobstructed view of the entirety of every prospective juror's face during jury selection, the New York State Court of Appeals has come dangerously close to limiting rights of New York State defendants who stand innocent until proven guilty. An accused individual must be able to view the jury panel completely to assess impartiality. This Court's intervention is necessary to resolve this issue and prevent a system in which accused individuals are unable to select a fair and impartial jury of their peers.

Federal questions in this instance were raised during the jury selection process of Mr. Ramirez' trial.

X. STATEMENT

A. Legal Framework

A defendant has a constitutional right to be tried by an impartial jury. *Duncan v. Louisiana*, 391 US 146 (1968); *People v. Torpey*, 63 N.Y.2d 361 (1984). A defendant further has a fundamental right to hear questions intended to search out a prospective juror's bias as well as observe a potential juror's reactions to these questions. A defendant's fundamental right to be present during the *voir dire* of prospective jurors is predicated on the right to personally assess the facial expressions, demeanor and other subliminal responses of potential jurors in order to choose his or her jury. *People v. Maffei*, 35 N.Y.3d 264 (2020) *quoting* *People v. Antonmarchi*, 80 N.Y.2d 247 (1992).

In the instant case, appellant's trial counsel could not fulfill his commitment to searching out an impartial jury

because of the COVID-19 precautions set in place by the trial court. Not only were jurors spaced all over the place, at least 25 to 30 feet apart, but they were wearing face screens and masks. Even though the juror being directly questioned was permitted to lower their mask to answer questions, those potential jurors around the questioned jurors were still completely masked. Therefore, trial counsel could not peripherally see each and every juror's reaction to his questions given the spacing in the courtroom. (T 5-6). Although the intermediate appellate court found otherwise, this contention is amply supported by the trial record.

XI. REASONS FOR GRANTING PETITION

A. The Decision Below is Wrong

In its decision, the court of appeals acknowledges the significance of a defendant's right to a trial by a particular jury chosen according to law, in whose selection the defendant has had a voice, but somehow comes to the conclusion that a defendant's right to be present at jury selection does not entail

the absolute or unlimited ability to observe each prospective juror's facial expressions.

The court below seems to misunderstand the jury selection procedure at issue in appellant's case. During the oral arguments, it was clear that several justices believed that the entire room of prospective jurors was being questioned simultaneously. However, at issue was the questioning of the fourteen jurors in the jury box (comprised of twelve potential jurors and two alternates). In New York, while an entire room is often questioned to find out administrative issues such as calendar conflicts, the main *voir dire* of the jury takes place in the jury box, with fourteen potential jurors. The reason for the confusion might have been the fact that the fourteen jurors being questioned were spaced all over the room due to precautions put in place as a result of the COVID-19 Pandemic. Mr. Ramirez and his counsel simply could not seed out an impartial jury.

In the instant case, jurors were spaced all over the courtroom, at least 25 to 30 feet apart, but they were wearing clear face screens in addition to masks (essentially two layers of masks). Even though an individual juror was allowed to lower their face mask during the jury selection process, trial counsel could not peripherally see each and every juror's reaction to his questions given the spacing in the courtroom and the fact that the jurors in the box had face masks on (in addition to their clear face shields). These precautions were not narrowly tailored to the interest in stemming the spread of COVID-19 because there were different methods that could have addressed the problem and ways of seeding out individuals uncomfortable with lowering their masks without overly prejudicing the appellant's constitutional rights.

Mr. Ramirez was denied a fair trial and his right to due process guaranteed under the 14th Amendment of the Constitution of the United States and Art. I, §6 of the New York Constitution. The court of appeals decision not only

affects Mr. Ramirez but threatens the balance of the adversarial jury process. A jury trial cannot be an event where the attorneys just “go through the motions” but must be one in which the quality of the process of a fair trial remains intact.

This question remains critically important even though the COVID-19 Pandemic has somewhat dissipated given the constitutional import of maintaining a fair and impartial jury selection process whatever the circumstances.

B. Proceedings Below:

The appellate division decision was decided on August 31, 2022, and the court of appeals decision was decided on February 20, 2024.

XII. CONCLUSION

The petition for a writ of certiorari should be granted.

Dated this 30th day of April, 2024.

Respectfully submitted.

A handwritten signature in cursive script, reading "Felice B. Milani". The signature is written in dark ink and is positioned above a horizontal line.

Felice B. Milani, Esq.

Counsel of Record

Of Counsel to Laurette Mulry, Esq.

Legal Aid Society of Suffolk County, Inc.

P.O. Box 1697

300 Center Drive

Riverhead, NY 11901

(631) 852-1650

fmilani@sclas.org

**XIII. APPENDIX A: OPINION OF THE NEW YORK STATE
COURT OF APPEALS (FEBRUARY 20, 2024)**

**XIV. APPENDIX B: OPINION OF THE NEW YORK STATE
APPELLATE DIVISION SECOND DEPARTMENT
(AUGUST 31, 2022)**

State of New York
Court of Appeals

Remittitur

Present, Hon. Rowan D. Wilson, *Chief Judge, presiding.*

The People &c.,
Respondent,
v.
Fernando Ramirez,
Appellant.

Appellant in the above entitled appeal appeared by Laurette D. Mulry, Esq., Legal Aid Society of Suffolk County, Inc.; respondent appeared by Hon. Raymond Tierney, Suffolk County District Attorney.

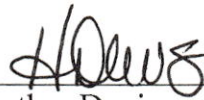
The Court, after due deliberation, orders and adjudges that the order is affirmed. Opinion by Judge Cannataro. Chief Judge Wilson and Judges Rivera, Garcia, Singas, Troutman and Halligan concur.

The Court further orders that this record of the proceedings in this Court be remitted to County Court, Suffolk County, there to be proceeded upon according to law.

I certify that the preceding contains a correct record of the proceedings in this appeal in the Court of Appeals and that the papers required to be filed are attached.

FEB 22 2024

Appeals Bureau


Heather Davis
Deputy Clerk of the Court

Court of Appeals, Clerk's Office, Albany, February 20, 2024

State of New York Court of Appeals

OPINION

This opinion is uncorrected and subject to revision
before publication in the New York Reports.

No. 13
The People &c.,
Respondent,
v.
Fernando Ramirez,
Appellant.

Felice B. Milani, for appellant.
Rosalind C. Gray, for respondent.

CANNATARO, J.:

New York guarantees the right of defendants to be present at all material stages of their criminal trial and to meaningfully contribute to their defense, including the opportunity to be present at jury selection and to observe the body language, facial expressions and demeanor of prospective jurors (NY Const, art, I §6; CPL 260.20; *People v Rodriguez*, 100 NY2d 30, 34-35 [2003]; see *People v Wilkins*, 37 NY3d 371, 374 [2021];

People v Maffei, 35 NY3d 264, 272 [2020]; *People v Williams*, 15 NY3d 739, 740 [2010]; *People v Favor*, 82 NY2d 254, 267 [1993]). On this appeal, defendant maintains that safety protocols implemented during the COVID-19 pandemic—namely social distancing and the requirement that prospective jurors cover their mouths and noses with a face mask when not being questioned individually—violated these rights because defendant could not see each prospective juror’s entire face throughout the jury selection process. Because neither a defendant’s right to be present during jury selection nor due process require that defendant have a simultaneous, unobstructed view of the entirety of every prospective juror’s face during jury selection, we affirm.

I.

Defendant caused a three-car collision in the early morning hours of November 17, 2017 while driving on the South Service Road of Long Island Expressway in Hauppauge. One person died as a result of the crash and four others were seriously injured. A blood test performed later that day revealed that defendant’s blood alcohol content was well above the legal limit. A search of defendant’s vehicle performed by police revealed the presence of several alcoholic beverages, some opened and others unopened. Defendant was indicted on three counts of aggravated vehicular homicide, manslaughter in the second degree and various other crimes.

Defendant’s trial commenced in April 2021. Due to the ongoing COVID-19 public health emergency, a number of safety protocols implemented throughout the New York State court system were employed during jury selection. Specifically, prospective jurors were advised that they would be “assigned specific seats, arranged in a socially distant

manner” and that they were required to wear a face mask at all times while inside the courthouse, but would be permitted to lower their masks and use a clear plastic face shield while being directly questioned.

Defense counsel objected to the safety measures, arguing that *People v Antommarchi* (80 NY2d 247 [1992]) entitled defendant to observe “every smile, every frown of a potential juror” and that the procedures prevented him from doing so. The court overruled the objection noting that prospective jurors were given plastic face shields and were instructed to lower their cloth masks while being questioned so that the attorneys could better see their facial expressions. Jury selection proceeded to conclusion with the safety measures being observed.

At trial, during the prosecution’s opening statement, defense counsel moved for a mistrial after observing the decedent’s surviving spouse crying in the courtroom. Counsel argued that defendant had been unfairly prejudiced as the crying might cause the jury to feel overly sympathetic towards the victim. The trial court denied the motion, noting that the decedent’s surviving spouse was seated 15 feet behind defense counsel, that the court did not hear any crying and that, since the jury was even farther away than the judge, there was little likelihood the jury was aware of the crying. Nonetheless, the court directed the prosecutor to advise the decedent’s surviving spouse that they should not cry during proceedings and that if they did, the court would exclude them from the courtroom. Further, the court offered to instruct the jury not to sympathize with either side, which the defense counsel declined.

Defendant was ultimately convicted of all twelve charged counts. The Appellate Division affirmed defendant's conviction, holding that there was no record support for the assertion that the safety procedures in place interfered with or deprived defendant of the ability to observe and assess prospective jurors (208 AD3d 897, 898-899 [2d Dept 2022]). The Court further concluded that, in view of the trial court's observations on the record that the surviving spouse's crying was inconspicuous and did not distract from the proceedings, that defendant was not entitled to a mistrial (208 AD3d at 899). A judge of this Court granted defendant leave to appeal (39 NY3d 1074 [2023]).

II.

"A defendant has a constitutional right to a trial by a particular jury chosen according to law, in whose selection the defendant has had a voice" (*Rodriguez*, 100 NY2d at 33-34 [internal quotations omitted]). Additionally, CPL 260.20 confers a statutory right to be present during jury selection. The gravamen of a defendant's right to be present at jury selection is to "hear questions intended to search out a prospective juror's bias, hostility or predisposition to believe or discredit the testimony of potential witnesses and the venire person's answers so that they have the opportunity to assess the juror's facial expressions, demeanor and other subliminal responses" (*Antommarchi*, 80 NY2d at 250 [internal quotation marks and citation omitted]; see *People v Sloan*, 79 NY2d 386, 392 [1992]).

The key question in determining whether a defendant's exclusion from any phase of jury selection violates a right is whether the exclusion would have a substantial effect on the ability to mount a defense and the right is not violated where defendant's presence

would be “useless, or the benefit but a shadow” (*People v Velasco*, 77 NY2d 469, 473 [1991], quoting *Snyder v Massachusetts*, 291 US 97, 106-107 [1934]). We have previously held that the sidebar questioning of prospective jurors concerning their ability to participate as impartial jurors outside of the presence of the defendant violates the statutory right to meaningfully participate in jury selection (see *Antommarchi*, 80 NY2d at 250; *Sloan*, 79 NY2d at 392-393). Conversely, we have found no such violation when questioning was confined to “juror qualifications such as physical impairments, family obligations and work commitments,” because such questioning does not have a “substantial effect on [a defendant’s] ability to defend” (*Antommarchi*, 80 NY2d at 250; see CPL 260.20, *Velasco*, 77 NY2d at 473).

It is undisputed that defendant was present at all phases of jury selection. It is also undisputed that defendant was able to hear the questions posed to prospective jurors and to observe their responses including their “facial expressions, demeanor and other subliminal responses.” Nonetheless, defendant argues that both he and his counsel were prevented from simultaneously observing the unobstructed facial expressions of all members of the venire, including those not being actively questioned, and that this deprivation violated defendant’s right to fully participate in jury selection. Defendant cannot point to any authority supporting such a sweeping interpretation of the right to meaningful participation. Instead, defendant relies upon language from *Sloan* and its progeny to argue that he has a constitutional right to see all prospective juror’s faces simultaneously. *Sloan*, which dealt with the defendant’s exclusion from the side-bar questioning of individual prospective jurors on matters directly relevant to their “attitudes and feelings” concerning the defendant

and the facts of the case, did not recognize such a broad right (79 NY2d at 392). In fact, *Sloan* made no mention of potential jurors who are present in the jury room but who are not being questioned (*id.* at 390-391).^{*} Plainly, *Sloan* is not instructive with respect to the circumstances presented here.

Even assuming the rights articulated in *Sloan* could be more broadly applied to non-questioned members of the venire, the safety protocols in use at defendant's jury selection were permissible as they did not impede defendant's ability to be present and observe the selection process. A defendant's right to be present at jury selection does not entail the absolute or unlimited ability to observe each prospective juror's facial expressions. After all, there is much more to body language than a person's nose or mouth; defendant could still observe a great deal about prospective jurors including their posturing, the position of their arms, and their eyes and eyebrows (*see United States v Trimarco*, 2020 WL 5211051, *5, 2020 US Dist LEXIS 159180, *15-16 [SD NY Sept. 1, 2020, 17-CR-583 (JMA)] [a person's demeanor consists of more than just their mouth and nose]). As the People note, the mere fact that a particular trial procedure might be tactically preferable to a defendant does not mean that the procedure is constitutionally required. To the contrary, the safety protocols challenged here are in line with those upheld by numerous state and federal courts nationwide (*see eg, United States v Watkins*, 2021 WL 3732298, *6-7, 2021 US Dist

^{*} Indeed, jury selection in New York often involves the questioning of individual jurors, or the questioning of the entire room of prospective jurors simultaneously (*see* 8 Carmody-Wait 2d § 55:35; 8 Carmody-Wait 2d § 55:36). In both scenarios it would be impossible for defendant to view all juror's faces simultaneously regardless of any masks.

LEXIS 160031, *18-20 [WD NY, Aug. 24, 2021, 18-CR-32-A] [masking requirements were in line with recommendations issued by the US Courts COVID-19 Judicial Task Force]; *United States v Crittenden*, 2020 WL 4917733, *8, 2020 US Dist LEXIS 151950, *22-23 [MD Ga., Aug. 21, 2020, 4:20-CR-7 (CDL)]; *People v Garcia*, 2022 COA 144, 527 P3d 410, 418 [Colo App 2022]; *Guerin v Commonwealth*, 658 SW3d 481, 484 [Ky Ct App 2022]; *Prince v State*, 255 Md App 640, 661-662 [Md Ct Spec App 2022]).

Moreover, the safety protocols in use at the time of trial did not violate defendant's due process rights (*see People v Standard*, 42 NY2d 74, 84-85 [1977] [due process not violated due to restriction of cross-examination in order to protect witness's safety]). "[D]ue process is a flexible constitutional concept calling for such procedural protections as a particular situation may demand" (*LaRossa, Axenfeld & Mitchell v Abrams*, 62 NY2d 583, 588 [1984]). Proper consideration of whether an individual's due process rights have been violated requires balancing "the interest of the parties to the dispute, the adequacy of the contested procedures to protect those interests and the government's stake in the outcome" (*id.*). Here, defendant asserts that he had an interest in viewing the entirety of prospective jurors' faces to aid in determining potential bias. The procedures in place afforded defendant an adequate opportunity to do so. Defendant was fully able to observe prospective jurors while they were being questioned, and even able to observe prospective jurors who were *not* being questioned, albeit with masks that covered their mouths and noses. This is at most a slight restriction, and permissible when weighed against the safety of all persons present in the court. Indeed, it would have been difficult, if not impossible, to conduct a jury trial with procedures that would permit a completely unobstructed view

of all prospective jurors until the pandemic had subsided. Thus, the trial court properly balanced defendant's right to be present during jury selection with the safety of those present in the courtroom in accordance with due process considerations (*see LaRossa, Axenfeld & Mitchell*, 62 NY2d at 588).

III.

Turning to defendant's request for a mistrial, we see no reason to disturb the decision of the trial court (*see People v Michael*, 48 NY2d 1, 9 [1979]). The court's observation that the spouse's crying was inconspicuous and that there was no indication that the jury heard it is entitled to deference (*see People v Batticks*, 35 NY3d 561 [2020]). Furthermore, the exploration of alternatives, such as instructing the People to speak with the spouse and offering defendant a curative instruction—which he rejected—justifies the decision not to grant the defendant's motion (*see People v Moore*, 71 NY2d 684, 688 [1988]; *People v Young*, 48 NY2d 995, 996 [1980]; *see also People v Baptiste*, 72 NY2d 356, 360 [1988] [A defendant may move for a mistrial pursuant to CPL 280.10(1) when there has been an "error or legal defect in the proceedings, or conduct inside or outside the courtroom (that is) prejudicial to the defendant and deprives him of a fair trial..."]]). Finally, notwithstanding the trial court's efforts to temper the surviving spouse's courtroom reactions, there is no requirement that a trial judge keep courtroom spectators from displaying any emotion whatsoever absent prejudice to a party.

Accordingly, the order of the Appellate Division should be affirmed.

Order affirmed. Opinion by Judge Cannataro. Chief Judge Wilson and Judges Rivera, Garcia, Singas, Troutman and Halligan concur.

Decided February 20, 2024

**XIV. APPENDIX B: OPINION OF THE NEW YORK STATE
APPELLATE DIVISION SECOND DEPARTMENT
(AUGUST 31, 2022)**

Supreme Court of the State of New York
Appellate Division: Second Judicial Department

D69944
C/htr

_____AD3d_____

Argued - June 13, 2022

FRANCESCA E. CONNOLLY, J.P.
SHERI S. ROMAN
WILLIAM G. FORD
LILLIAN WAN, JJ.

2021-04346

DECISION & ORDER

The People, etc., respondent,
v Fernando Ramirez, appellant.

(Ind. No. 2627/17)

Laurette D. Mulry, Riverhead, NY (Felice B. Milani of counsel), for appellant.

Raymond A. Tierney, District Attorney, Riverhead, NY (Rosalind C. Gray, Marion Tang, and Meaghan Powers of counsel), for respondent.

Appeal by the defendant from a judgment of the County Court, Suffolk County (Timothy P. Mazzei, J.), rendered June 1, 2021, convicting him of aggravated vehicular homicide (three counts), manslaughter in the second degree, aggravated unlicensed operation of a motor vehicle in the first degree, aggravated driving while intoxicated, driving while intoxicated (two counts), driving while ability impaired by the combined influence of drugs or of alcohol and any drug or drugs, reckless driving, and consumption or possession of an alcoholic beverage in a motor vehicle, upon a jury verdict, and imposing sentence.

ORDERED that the judgment is affirmed.

The defendant was convicted, after a jury trial, of multiple crimes relating to his operation of a motor vehicle, which he drove into an intersection, ignoring a steady red light, causing a fatal crash involving two other vehicles. The defendant appeals, and we affirm.

The defendant's contention that the People did not present legally sufficient evidence that he operated his vehicle in a reckless manner is unpreserved for appellate review, as the defendant failed to move for a trial order of dismissal on the basis of that specific claim (*see People v Hawkins*, 11 NY3d 484, 492; *People v Peloso*, 176 AD3d 1107, 1108). In any event, viewing the

August 31, 2022

PEOPLE v RAMIREZ, FERNANDO

Page 1.

evidence in the light most favorable to the prosecution (*see People v Contes*, 60 NY2d 620), we find that it was legally sufficient to establish the defendant's guilt beyond a reasonable doubt. Moreover, in fulfilling our responsibility to conduct an independent review of the weight of the evidence (*see* CPL 470.15[5]; *People v Danielson*, 9 NY3d 342), we nevertheless accord great deference to the jury's opportunity to view the witnesses, hear the testimony, and observe demeanor (*see People v Mateo*, 2 NY3d 383; *People v Bleakley*, 69 NY2d 490, 495). Upon reviewing the record here, we are satisfied that the verdict of guilt was not against the weight of the evidence (*see People v Romero*, 7 NY3d 633).

There is no merit to the defendant's contention that the County Court's COVID-19 procedures deprived him of the ability to meaningfully participate in jury selection. While a defendant has the right to participate in jury selection (*see* CPL 260.20; *People v Sloan*, 79 NY2d 386, 391; *People v Rodriguez*, 71 NY2d 214, 218), which is generally understood to include an "opportunity 'to assess the jurors' facial expressions, demeanor and other subliminal responses as well as the manner and tone of their verbal replies so as to detect any indication of bias or hostility'" (*People v Wilkins*, 37 NY3d 371, 377, quoting *People v Sloan*, 79 NY2d at 392), the record here does not support the notion that either face coverings, or spacing due to social distancing, interfered with, or deprived, the defendant of the ability to observe potential jurors, or to otherwise assess their facial expressions and demeanor during voir dire (*see generally United States v Thompson*, 543 F Supp 3d 1156, 1163-1164).

Contrary to the defendant's contention, he was not entitled to a mistrial on the ground that the decedent's widow was observed crying at the beginning of the People's opening remarks, in view of the County Court's observations that the widow's crying was inconspicuous and did not distract from the proceeding, and any resulting prejudice was promptly ameliorated by a directive, outside of the jury's presence, that the widow must refrain from further emotional displays during the trial (*see People v Rivera*, 268 AD2d 538, 539; *People v Pantoliano*, 127 AD2d 857). The defendant's contention that the court, in effect, should have inquired of the jury consistent with *People v Buford* (69 NY2d 290, 298; *see* CPL 270.35[1]), is unpreserved for appellate review, as defense counsel never requested any such inquiry (*see People v Bailey*, 32 NY3d 70, 80; *People v Terrell*, 149 AD3d 1108, 1109). In any event, according the court the benefit of its own observations that the widow's crying was inconspicuous, did not distract from the proceeding, and was of brief duration, further inquiry of the jury was not required (*see People v Rivera*, 124 AD3d 917, 918; *cf. People v Arena*, 70 AD3d 1044, 1046).


The defendant's contention that certain of the prosecutor's summation remarks constituted reversible error because they misstated the evidence concerning the speed at which the defendant operated his vehicle at the time of the crash, is unpreserved for appellate review because the defendant failed to object, request curative instructions, or timely move for a mistrial on these grounds (*see* CPL 470.05[2]; *People v Stallone*, 204 AD3d 841; *People v Rivera*, 130 AD3d 655, 656). In any event, the contention is without merit. The challenged remarks were either fair comment on the evidence (*see People v Ashwal*, 39 NY2d 105, 109), or constituted harmless error in light of the overwhelming evidence of the defendant's guilt, and the fact that there was no significant probability that such errors might have contributed to the defendant's convictions, and were not so flagrant or pervasive as to have deprived the defendant of a fair trial (*see People v*

Crimmins, 36 NY2d 230, 241; *People v Macon*, 200 AD3d 907).

The sentence imposed was not excessive (*see People v. Suitte*, 90 AD2d 80).

CONNOLLY, J.P., ROMAN, FORD and WAN, JJ., concur.

ENTER:


Maria T. Fasulo
Clerk of the Court

No. _____

IN THE
SUPREME COURT OF THE UNITED STATES

FERNANDO RAMIREZ

(Your Name) — PETITIONER

VS.

PEOPLE OF THE STATE OF NEW YORK

— RESPONDENT(S)

PROOF OF SERVICE

I, Kathleen Caulfield, do swear or declare that on this date, April 30, 20 24, as required by Supreme Court Rule 29 I have served the enclosed MOTION FOR LEAVE TO PROCEED *IN FORMA PAUPERIS* and PETITION FOR A WRIT OF CERTIORARI on each party to the above proceeding or that party's counsel, and on every other person required to be served, by depositing an envelope containing the above documents in the United States mail properly addressed to each of them and with first-class postage prepaid, or by delivery to a third-party commercial carrier for delivery within 3 calendar days.

The names and addresses of those served are as follows:

Respondent, Raymond A. Tierney, Esq., Suffolk County District Attorney's Office; 200 Center Drive, Riverhead, New York 11901

Petitioner, Fernando Ramirez, DIN #21A0974, Sing Sing Correctional Facility, 354 Hunter Street, Ossining, New York 10562-5442

Office of the Clerk, Supreme Court of the United States; 1 First Street NE, Washington DC 20543

I declare under penalty of perjury that the foregoing is true and correct.

Executed on _____ April 30 _____, 20 24

Kathleen Caulfield

(Signature)