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COURT OF APPEALS
STATE OF NEW YORK

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent,

-against-

NO. 42

HANZA MUHAMMAD,

Appellant.

20 Eagle Street
Albany, New York
April 20, 2023

Before:

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

Appearances:

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Official Court Transcriber

1 CHIEF JUDGE WILSON: The next matter on the
2 calendar is No. 42, People versus Hanza Muhammad.

3 MR. CONNOLLY: Before I forget, I'd like to
4 reserve two minutes for rebuttal, please.

5 CHIEF JUDGE WILSON: Certainly.

6 MR. CONNOLLY: Good afternoon, Your Honors, Paul
7 Connolly representing appellant Hanza Muhammad.

8 Your Honors, in this case, the Defendant's
9 fundamental right to a public trial was violated when court
10 staff, attempting to implement the court's order forbidding
11 spectator traffic during witness testimony, excluded
12 spectators - - -

13 JUDGE SINGAS: Was there a closing of the
14 courtroom here?

15 MR. CONNOLLY: Yes. I submit there was a closing
16 the courtroom. If we were - - - if I - - - we refer just
17 to those, I count at least six spectators who were excluded
18 from the courtroom, who timely arrived.

19 JUDGE SINGAS: And were told you can't go in
20 because this courtroom is closed?

21 MR. CONNOLLY: Well, whether they were told that
22 or not, it - - - there's a conflict in the - - - in the
23 record about that. There were two of the spectators who
24 wished to get in, testified that they were told that they
25 couldn't go in even though they were there timely.

1 JUDGE HALLIGAN: So can you clarify, I couldn't
2 understand whether your objection was to the inability, or
3 perceived inability, of the spectators who wanted to enter
4 before the witness took the stand, or their inability to
5 enter pursuant to the rule, had it - - - the standing
6 order, had it been properly applied.

7 Is it both, or is it simply the first?

8 MR. CONNOLLY: Well, it's both. And the - - -
9 the first point we make is that those spectators who timely
10 arrived, and should have been admitted into the courtroom,
11 pursuant to the court's rule, were actually excluded from
12 the courtroom.

13 JUDGE HALLIGAN: So a misapplication of the rule
14 first?

15 MR. CONNOLLY: That's the first point.

16 JUDGE HALLIGAN: Is your argument.

17 MR. CONNOLLY: Second point, is an ineffective
18 assistance of counsel argument premised on the argument
19 that the court's underlying rule forbidding all spectator
20 traffic during witness testimony is unconstitutional?

21 JUDGE CANNATARO: So that rule would be
22 unconstitutional under all circumstances? Because my - - -
23 my issue is, I imagine that there are a number of judges
24 who have a rule like that; they don't like distractions
25 during witness testimony. But the argument here is that

1 that won't survive constitutional scrutiny?

2 MR. CONNOLLY: Yes. Yeah, I - - - I'm not aware
3 of any court that does have that rule. I'm not aware that
4 any court, other than this one, has the rule forbidding any
5 spectator traffic during the testimony of every witness.

6 JUDGE HALLIGAN: But are you directly challenging
7 that, or just as a predicate to the ineffective assistance
8 claim?

9 MR. CONNOLLY: It's both. But if - - - point
10 two of the brief deals with the constitutionality of the
11 underlying rule in the context of ineffective assistance of
12 counsel.

13 Point one deals with the preserved issue. The
14 issue that counsel did preserve is that spectators who
15 ought to have been admitted pursuant to the court's rule -
16 - -

17 JUDGE GARCIA: Counsel, we have a - - - a very
18 different record here than we had in the last case, do - -
19 - you just heard.

20 The judge actually had a hearing here, right?
21 And what were the findings the judge made with respect to
22 those six, I guess, you're - - - the - - - the six you're
23 saying were not let in even though - - - even under the
24 policy, the argument is they should have been?

25 MR. CONNOLLY: Well, the court seemed to find

1 that the reason they weren't let in was just a
2 misunderstanding on their part.

3 JUDGE GARCIA: Right.

4 MR. CONNOLLY: In fact, that the courtroom was
5 open, and they just - - - they all misunderstood, everybody
6 - - -

7 JUDGE GARCIA: Apparently, did not realize they
8 could in, I think.

9 MR. CONNOLLY: Everybody misunderstood the
10 court's - - -

11 JUDGE GARCIA: But what do we do with that
12 finding? I mean, there's a hearing, there's a judge,
13 there's a finding; what do we do with that?

14 MR. CONNOLLY: Well, two - - - two responses to
15 that, respectfully.

16 First, the - - - the Appellate Division
17 apparently didn't accept that finding, because the
18 Appellate Division found that part of the cause of the
19 exclusion of these witnesses was the way - - - or the - - -
20 the language that the Appellate Division used was the
21 manner, the manner in which court staff attempted to
22 implement the court's order, led to the exclusion of
23 spectators who timely arrived. So the Appellate Division
24 made, in effect, a different finding than the trial court
25 did.

1 The - - - and second response to that is that the
2 trial court's finding is not supported by the record in
3 that, even if the - - - Court Officer Cummings was accurate
4 when she said she didn't tell anybody they couldn't enter
5 the courtroom, she admitted that she understood that those
6 spectators who timely arrived and gave her their cell
7 phones, did so because they wished to enter the courtroom.

8 JUDGE TROUTMAN: What happens - - -

9 JUDGE CANNATARO: And - - - and she took those
10 cell phones in anticipation of those spectators being
11 admitted into the courtroom, right? She wouldn't have
12 taken the phones if she thought that they were going to be
13 excluded.

14 MR. CONNOLLY: No. That's correct, right. She
15 did not - - - she did not think they were going to be
16 excluded - - -

17 JUDGE TROUTMAN: And when the court - - -

18 MR. CONNOLLY: - - - but - - -

19 JUDGE TROUTMAN: - - - determined that something
20 was amiss outside, suddenly, there - - - there's a video
21 that shows people suddenly getting up and going over to
22 enter the courtroom. They're searched and wanded.

23 So how does that - - - is that record consistent
24 with the courtroom wasn't closed as to them, that they
25 could freely just go in at any moment?

1 MR. CONNOLLY: No, that - - - that's not
2 consistent with any - - - any finding that the - - - that
3 the - - - the court was open to them.

4 Now, to be - - - to be fair, by the time the
5 people got up, the courtroom - - - everybody would agree
6 that the courtroom had been closed for, I think, it's 44
7 minutes. The courtroom, according to the court's rule,
8 would be closed from 9:35, according to the clock on the
9 video - - -

10 JUDGE TROUTMAN: Who closed it?

11 MR. CONNOLLY: It's closed pursuant to the
12 court's order. The court had an order forbidding spectator
13 traffic during witness testimony. So that's on the court.
14 No question about that.

15 What the court said is that, well, those
16 spectators who timely arrived could have gone in at any
17 time. They were just confused. But they court said,
18 that's not my fault; it's not the fault of court staff.
19 They were just confused. So nobody's at fault, and too
20 bad, the spectators missed the testimony of this most
21 critical witness. But there's - - -

22 JUDGE TROUTMAN: What in the record shows the
23 contrary, that it wasn't confusion, that they could have
24 just gone in?

25 MR. CONNOLLY: Okay. Yes, I meant to get to

1 that. Court Officer Cummings testified that when she took
2 their phone, she understood that they wanted to go into the
3 courtroom, and she understood that they would not go into
4 the courtroom until they were given permission. That's
5 point one.

6 And then point two - - -

7 JUDGE SINGAS: But she didn't externalize that?

8 MR. CONNOLLY: Pardon me?

9 JUDGE SINGAS: She didn't say she externalized
10 that, right? She didn't tell the spectators that they
11 couldn't go into the courtroom?

12 MR. CONNOLLY: She explicitly said that she did
13 not tell the spectators that they could not go into the
14 courtroom.

15 But she also said that - - - let me make sure I
16 get this. It can be confusing. So she was asked, did you
17 tell anybody - - - this is what the judge asked, did you
18 tell anybody that they couldn't go into the courtroom? And
19 she said, no, I never said that. But she also testified
20 that, though she understood that these people wanted to
21 enter the courtroom, she never told them that they could.
22 And she knew that - - - so she knew that they were waiting
23 to - - -

24 JUDGE SINGAS: So she didn't extend an invitation
25 to them. And by not extending that invitation, the

1 corollary is the courtroom was closed?

2 MR. CONNOLLY: The courtroom was closed because
3 the court had the underlying order forbidding spectator
4 traffic during witness testimony. These spectators out
5 there - - -

6 JUDGE RIVERA: Well, when - - - when they turn in
7 the phones - - -

8 MR. CONNOLLY: Yeah.

9 JUDGE RIVERA: - - - she didn't let them in?

10 MR. CONNOLLY: She didn't - - - no, she testified
11 that I didn't tell them they couldn't come in. But
12 everybody understood that they couldn't come in until they
13 were told they could come in. And nobody told them. It's
14 undisputed, the record - - -

15 JUDGE TROUTMAN: Counsel, on the day this
16 happened, what day of the trial was this?

17 MR. CONNOLLY: It was the third day of the trial,
18 the second day of testimony.

19 JUDGE TROUTMAN: And so many of these people may
20 - - - I'm not sure the record is clear that they were there
21 earlier. But this - - - was the same process going on day
22 after day?

23 MR. CONNOLLY: Yes. Several of them were there,
24 possibly all of those six. There were six people who can
25 readily be identified on the video who arrived timely and

1 were not permitted to go into the courtroom.

2 At least some of them, at least, I would say,
3 three or four, were there the day before. For example,
4 there's a - - - a Black man - - - they're all black, by the
5 way, and everybody else going into the courtroom is white,
6 for some reason. It's - - - it's an odd fact, but it's - -
7 - the only black person who went into the courtroom during
8 the time in question was the witness, Merritt, and he went
9 in under an escort of - - - of DA investigators. Everybody
10 else, the black people were excluded from the courtroom,
11 the people going in and out are white.

12 But I lost my train of thought. Your question
13 was?

14 JUDGE TROUTMAN: With respect to them being out
15 there, they were - - - they'd been following the court's
16 directives for a number of days?

17 MR. CONNOLLY: Yes. They - - - at least - - -
18 well, one day. This is the second day of testimony. And
19 there was testimony from these witnesses at the hearing,
20 that they understood - - - and they were all very
21 respectful, they understood they couldn't just barge into
22 the courtroom.

23 JUDGE TROUTMAN: And in fact, they orderly
24 stepped to the side, stayed out of the way, didn't block
25 traffic, waiting?

1 MR. CONNOLLY: Yes, they were extremely
2 respectful. And - - - and if you look at the video, I
3 mean, it's - - - it's very, I think, impactful to look at
4 the video. We have five people sitting directly across
5 from the courtroom, on a square - - - a rectangular bench,
6 a hard bench, respectful, quiet, they're honestly waiting
7 to get into the courtroom, and nobody bothered to tell them
8 they can come in, with a consequence - - -

9 JUDGE SINGAS: Can I get one more question?

10 CHIEF JUDGE WILSON: Of course.

11 JUDGE SINGAS: Yes. Should we consider the fact
12 that the judge offered to restart the testimony, and that
13 was rejected?

14 MR. CONNOLLY: That - - - I've never seen that as
15 a remedy, and it - - - it doesn't make sense as a remedy.

16 JUDGE SINGAS: Well, why not?

17 MR. CONNOLLY: Well, for one thing, then the
18 prosecution would get the chance to do over its testimony.
19 And that is - - - maybe the prosecution didn't like the way
20 the direct went in the first time, well, now they get a
21 chance to do it over.

22 Moreover, this was from Mr. Muhammad's
23 perspective, damaging testimony, frankly. I mean, this is
24 a critical witness who identified him as the shooter. The
25 - - - the jury would then have an opportunity to hear that

1 critical testimony twice. It's the same jury, and the same
2 witness, and now they're going to hear that twice. That
3 would be prejudicial. I mean, I wouldn't want that as a -
4 - - as a remedy. I mean, so - - - and even if you did - -
5 -

6 JUDGE SINGAS: Yeah, but you weren't there,
7 right?

8 MR. CONNOLLY: Well, even if you did, I mean,
9 still the - - - the - - - you could tell the jury, like, to
10 disregard all the testimony you heard yesterday during this
11 period. That's very hard to do. I mean, to un-ring that
12 bell, that critical testimony, that dramatic testimony,
13 identifying Mr. Muhammad as the shooter - - -

14 JUDGE RIVERA: If it was an appropriate cure, it
15 would eviscerate the right because you'd do that in every
16 case? I mean, you just do a do-over in every case.

17 MR. CONNOLLY: Yeah, you could just start - - -
18 just - - - whatever part that you're - - - people were
19 excluded from, you could just redo. And that's - - -

20 JUDGE TROUTMAN: Why isn't it the fault of the
21 spectators that they simply didn't ask to come in - - -

22 MR. CONNOLLY: Yeah.

23 JUDGE TROUTMAN: - - - as it's suggested?

24 MR. CONNOLLY: This - - - be - - - this - - -
25 well, I'd point out, again, that a couple of spectators,

1 more than two, really, who testified, said they were told
2 they couldn't enter.

3 But regardless, the record is undisputed that the
4 - - - Officer Cummings understood that those spectators
5 understood that they couldn't enter.

6 And when you - - - they give their phone to
7 Officer Cummings, and they don't go into - - - in the
8 courtroom, the officer could not help but understand that
9 they thought they couldn't go in the courtroom.

10 CHIEF JUDGE WILSON: I mean, your point - - -

11 MR. CONNOLLY: Nobody - - -

12 CHIEF JUDGE WILSON: - - - your point essentially
13 is that handing - - - the act of handing the phone is like
14 the act of taking the number at the deli counter, saying
15 that you want - - - you know, you're number three for
16 service now; you're waiting?

17 MR. CONNOLLY: Yes, except that - - - if the
18 courtroom is really open, they should be just told
19 immediately to go - - - to go in. And they weren't even
20 though the - - - the officer, herself, conceded that she
21 understood their wish in giving her the phone was to enter
22 the courtroom.

23 I see my time is up, though. Thank you.

24 MR. OASTLER: Good afternoon, Your Honors, Brad
25 Oastler for the People.

1 Our position is simply that this was not a
2 courtroom closure. And that short circuits some of the
3 analysis that would otherwise - - -

4 JUDGE TROUTMAN: Why?

5 MR. OASTLER: - - - be undertaken.

6 Because there was no affirmative act by the court
7 that specifically excluded any individual or group of
8 people.

9 JUDGE RIVERA: Well, how is that? The court has
10 a standing policy; the court has officers who are
11 implementing that policy, and they're obviously doing it
12 wrong. How is there not a courtroom closure?

13 MR. OASTLER: Because the - - -

14 JUDGE RIVERA: Even the AD says the manner was
15 inappropriate and incorrect pursuant to that policy.

16 MR. OASTLER: I - - - the - - - I think the the
17 affirmative act that would - - - that would actually be
18 required to effectuate a courtroom closure would be some -
19 - - some act - - - some, you know - - - be it by the judge
20 directly or by a court officer, that actually removed or
21 excluded somebody from - - -

22 JUDGE TROUTMAN: Who controls the court - - - the
23 courtroom?

24 MR. OASTLER: The - - - I mean, the judge is in
25 control.

1 JUDGE TROUTMAN: Do the officers that are
2 stationed outside of her door?

3 MR. OASTLER: So I don't think I could argue that
4 the court officers are not an arm of the court, the judge,
5 in particular - - -

6 JUDGE TROUTMAN: And do you disagree they were
7 out there taking phones and giving permission or not - - -
8 let's say for the sake of argument, they didn't say
9 anything, but they - - - but they took phones. They
10 searched people. When the judge said come in, all of the
11 sudden, they let the people in.

12 So isn't the judge controlling egress and ingress
13 of that courtroom?

14 MR. OASTLER: I - - - I mean, I think it - - - I
15 would agree that it has to somewhat at least be imputed to
16 the judge because the court officers are the arm of the
17 court controlling - - - controlling ingress and egress.

18 JUDGE CANNATARO: Can you explain how it worked
19 when everything was working correctly? How would the
20 officer outside the room know that it's time to let people
21 in?

22 MR. OASTLER: I - - - our record here does not
23 reflect that, and I don't think that was really a topic of
24 - - - a topic that was covered in the day-long hearing on
25 this.

1 JUDGE HALLIGAN: So the Appellate Division says
2 that the people were excluded by a confluence of factors
3 outside the court's knowledge and control. So what
4 specific factors were there that were outside the court's
5 knowledge and control?

6 MR. OASTLER: I think the number of people
7 gathering, and the length of time at which it was
8 happening, and then - - -

9 JUDGE HALLIGAN: Well, the number of people, I
10 don't think would effectuate the exclusion.

11 MR. OASTLER: No, but I - - - I - - - well, I
12 think the second half of that is that the court may not - -
13 - the - - - and I should distinguish, I suppose, the judge
14 may not have been specifically aware of how the court
15 officers were implementing the rule. Again, I don't think
16 the record bears that out one way or the other.

17 JUDGE TROUTMAN: But again, it is the judge who
18 is in charge of that courtroom, correct?

19 MR. OASTLER: Yes. Yes.

20 JUDGE TROUTMAN: I have presided over murder
21 trials, and people coming and going inside and outside of
22 the courtroom, where the officers are, the court is
23 intimately involved.

24 Are you saying that in this particular instance,
25 the court simply gave over her duties to the court officers

1 to decide who could come in or out?

2 MR. OASTLER: Again, I'm not sure I could
3 affirmatively - - -

4 JUDGE TROUTMAN: Or his?

5 MR. OASTLER: - - - answer that, but you know, to
6 the extent that we could read into this a little bit, I
7 think - - -

8 JUDGE TROUTMAN: But isn't that the problem?

9 MR. OASTLER: I - - - it is true that the record
10 could speak to that question specifically.

11 JUDGE RIVERA: Well, it's no great leap. The
12 judge is on the bench. The officers are outside the door.
13 The officers are the ones letting people in and out. Maybe
14 it's Cummings who has the full control, maybe not. The
15 judge cannot be aware. But maybe not seeing anyone come in
16 and out gives you a hint, but the judge cannot be aware
17 whether or not the policy is properly being implemented, if
18 any mistake is being made.

19 MR. OASTLER: I - - - that - - -

20 JUDGE RIVERA: Which I see as different from what
21 you suggested before, which is you need that affirmative
22 act. Which I think you agree that that means either the
23 judge themselves or the person they have given
24 responsibility to, right?

25 So why is that not the act, that they are mis - -

1 - at best - - - at best, innocently misapplying the rule?

2 MR. OASTLER: If that's the case, I think we are
3 then moving away from the territory of a strict courtroom
4 closure and into your Peterson example.

5 JUDGE RIVERA: Okay.

6 MR. OASTLER: Where you have a brief inadvertent
7 closure.

8 JUDGE RIVERA: Um-hum.

9 MR. OASTLER: And I suppose we could all debate
10 on what brief means, and whether forty minutes verses
11 twenty or an hour or whatever is - - -

12 JUDGE RIVERA: Um-hum.

13 MR. OASTLER: - - - is considered brief.

14 But there'd be no question - - - I don't think
15 anybody here could disagree that this was an inadvertent -
16 - - you know, if we want to call it a closure or an
17 exclusion, an inadvertent one. Nobody, neither the court,
18 the judges - - - judge, himself, or the - - - any court
19 officer - - -

20 JUDGE TROUTMAN: Inadvertent why?

21 MR. OASTLER: There's nothing on the record, and
22 when I say on the record, I would, I suppose, point
23 specifically to the video, since that's perhaps the
24 strongest - - - strongest evidence of what occurred.
25 There's nothing on that video that actually shows somebody

1 tried to enter and was denied entry.

2 And I say that with the understanding that
3 several of the witnesses who testified during the hear - -
4 - the hearing the next day said that they were told they
5 could not enter. But the video belies that.

6 JUDGE RIVERA: Yeah, but there is a way to have
7 avoided - - - let's put aside for the moment whether or not
8 the standing policy is constitutional. There is a way to
9 have avoided this, which is every time the courtroom is
10 closed, the judge can announce that, and when it's open,
11 the judge can announce that from the bench and make sure
12 that the officers are aware.

13 But to simply be on the bench and assume that the
14 officers are figuring out when it's open, when it's not, it
15 strikes me as that is a judge making a choice to let the
16 officers decide on their own, their own - - - exercise
17 their own discretion. I don't see how that's
18 constitutional.

19 MR. OASTLER: Well, I would suggest, Your Honor,
20 that the problem that would be created by - - -

21 JUDGE RIVERA: Um-hum.

22 MR. OASTLER: - - - holding that this type of
23 rule or restriction is unconstitutional, is that we're now,
24 in some respects, placing a burden on the court, or the
25 court officers, or a combination to - - - to a large

1 degree, usher people into the courtroom.

2 JUDGE TROUTMAN: Isn't there presumption that the
3 courtroom is supposed to be open?

4 MR. OASTLER: Yes.

5 JUDGE TROUTMAN: And that is the responsibility
6 of the court?

7 MR. OASTLER: It should - - - would certainly be
8 charged.

9 JUDGE TROUTMAN: In this particular instance, the
10 - - - the court says, it believes that it is distracting to
11 have people getting up. And doing what they did here, do
12 you think that this broad statement, nobody in, nobody out,
13 during witnesses, that is okay, that is not overly broad?

14 MR. OASTLER: I don't believe it is overly broad.
15 And I would say that because of the caselaw from this court
16 that would suggest that controls on ingress and egress like
17 this are permissible.

18 JUDGE HALLIGAN: Specifically, these kinds of
19 orders? I don't think it's in the record, but you'll
20 correct me if I missed it. Are there other examples of
21 this type of order specifically that you can point to?

22 MR. OASTLER: I think Colon - - - or Colon might
23 be the closest case. And granted, that was specifically, I
24 believe, with respect to voir dire, and not the rest of the
25 trial.

1 JUDGE HALLIGAN: Right.

2 MR. OASTLER: But I'm not - - - I don't think
3 that it would be particularly wise to really differentiate
4 voir dire from the rest - - -

5 JUDGE HALLIGAN: But you're not aware of any
6 widespread or common practice of implementing a standing
7 order of this nature, I take it?

8 MR. OASTLER: Can't profess to be, no. And there
9 - - - there doesn't appear to be caselaw where this - - -
10 quite as broad a rule was put into place.

11 JUDGE RIVERA: And the Appellate Division said it
12 did not, it specifically said it did not approve, right?

13 MR. OASTLER: I think - - - I don't think - - -

14 JUDGE RIVERA: Of this rule.

15 MR. OASTLER: - - - that the Appellate Division
16 would be alone in casting some question onto whether a rule
17 of this is the most wise decision, or most wise rule to put
18 in place. But I think it's a permissible one.

19 CHIEF JUDGE WILSON: But that also suggests - - -

20 JUDGE TROUTMAN: But couldn't - - -

21 CHIEF JUDGE WILSON: - - - that the burden you
22 were complaining about on the court is really a function of
23 this odd rule that the court has, so maybe it is
24 constitutional for the court to say, I'm not having anybody
25 come in while a witness is on the stand, but perhaps, then,

1 the court is not really in a position to complain about the
2 burden of having a court officer, every time a witness goes
3 off the stand to go out to the hallway and say, the court
4 is now open for anybody who'd like to come in, and in five
5 minutes when the next witness comes on, the court is going
6 to be closed, you're not going to be able to enter.

7 MR. OASTLER: And that - - -

8 CHIEF JUDGE WILSON: If you want to have a rule
9 like that, then that's your burden.

10 MR. OASTLER: And I - - - that would make sense.
11 I understand that. Except I think that is then inviting
12 problems that are going to be legitimately outside of the
13 court's control, even with the exercise of due diligence.

14 JUDGE TROUTMAN: But isn't the problem of the
15 standard policy, you can have a trial going on, and the
16 court certainly has the right to control. It is one thing
17 if a record establishes there's a person in the audience,
18 they keep coming - - - they keep popping up and down, and
19 going in and out, that person can be told, either you're in
20 or you're out.

21 That is reasonable. But to broadly state that
22 nobody can come in, you're saying that's okay?

23 MR. OASTLER: I do think it is. And I think part
24 of the - - - my reasoning for that, Your Honor, is that if
25 the alternative is to essentially wait for interruptions to

1 occur, perhaps, repeatedly, it's somewhat defeating the
2 point of - - -

3 JUDGE TROUTMAN: It's a public trial.
4 Interruptions happen.

5 MR. OASTLER: I understand that interruptions can
6 happen, but I don't - - -

7 JUDGE TROUTMAN: They do. They do.

8 MR. OASTLER: They - - - they do happen,
9 certainly, but the - - - I don't think it's improper for
10 the court to try to regulate or head that off as much as it
11 can.

12 And given that this rule doesn't - - - neither
13 closes the courtroom nor actually excludes anyone, I don't
14 see how the rule is actually, itself, improper. I - - - it
15 appears, watching the video from the hallway, it certainly
16 is an odd sight to see a, you know, relatively large
17 gathering of people arrive. But I think everybody's been
18 in the position where you don't want to be that one to try
19 the locked door, and - - - and that's legitimately what
20 appears to be the case.

21 JUDGE TROUTMAN: It wasn't simply a locked door.
22 They gave their phone. And then when they were ushered in,
23 saying, you can't come in now. There was an additional - -
24 - they're searched outside. And I know that's outside the
25 record. In order to come into the - - - the courthouse,

1 you are searched. You walk through magnetometers. They
2 are searched. That video shows them. They've already
3 surrendered their phones. But they cannot simply walk into
4 that courtroom until after the officers search and wand
5 them.

6 Is that not true?

7 MR. OASTLER: That is what the video depicts, but
8 it also - - - that same action, the wandling, or further
9 search, could have also occurred just inside the what were
10 the outer doors of the courtroom, as well. It didn't have
11 to necessarily occur there. By which I mean, someone could
12 have tried to enter the courtroom, actually gone up to - -
13 - to physically open the door.

14 JUDGE SINGAS: But did you say that there - - -
15 the door was locked?

16 MR. OASTLER: It - - - it was not locked. Well,
17 I mean, prior to the - - - prior to 9 a.m. before any
18 activity was going on. It was unlocked, I think, at about
19 five of, something along those lines, based on the
20 testimony of one of the officers. But throughout the rest
21 of the time, it was certainly unlocked.

22 JUDGE TROUTMAN: But there are times when the - -
23 - the door is unlocked, but the judge has the public out;
24 the times when the judge is conducting business with
25 counsel and the accused, correct?

1 MR. OASTLER: Sure.

2 JUDGE TROUTMAN: So it doesn't have to be locked.
3 But they're not allowed in at a particular time. There're
4 a number of reasons why the spectators can be kept out even
5 with the door unlocked?

6 MR. OASTLER: Yes. But and again, I think that
7 speaks more to whether or not an actual closure occurred by
8 an affirmative act of the court. And I - - - it's just not
9 borne out, I don't think, by the fact that the door was
10 unlocked, and no one actually - - -

11 JUDGE TROUTMAN: So it's the spectator's fault
12 here?

13 MR. OASTLER: I - - - I mean, I - - - I think so
14 based on the fact that no one made an effort to try to
15 enter.

16 CHIEF JUDGE WILSON: Thank you.

17 MR. OASTLER: Thank you.

18 MR. CONNOLLY: Just a few items.

19 The Colon case that counsel referred to involved
20 forbidding spectator traffic during the jury charge. And
21 this court, in that case, back in 1988, said that the
22 reason why we're approving of that restriction for the jury
23 charge is that it's unique in that the court, itself, is
24 completely invested in charging the jury and may not be
25 able to adequately police the courtroom. And the jurors

1 have to pay especially close attention because the law can
2 be hard for them and for attorneys to understand.

3 So that ruling in Colon was specific to the jury
4 charge. And the court in - - - this court in Colon
5 explicitly said that it was not deciding whether the same
6 rule, an exclusion of all spectator traffic, would be
7 appropriate in any other part of the trial.

8 Given that that was the state of the law, there
9 was absolutely not reason for counsel, defense counsel in
10 this case, when this issue arose, to volunteer to the
11 court, incorrectly, as a matter of law, that the court had
12 the power, is the word that he used, to forbid spectator
13 traffic during witness testimony. So that was a - - - a
14 grave error by defense counsel, failing to preserve as a
15 matter of law, the issue of the constitutionality of the
16 underlying order.

17 But as to the issue raised in point one of the
18 brief, our position is that the exclusion of the spectators
19 from the courtroom in this situation was not inadvertent,
20 as this court found in Peterson, where the problem was a -
21 - - forgetting to open a courtroom door that had been
22 physically locked. Rather, here, we had an involved court
23 officer who was taking the phones from these spectators and
24 understanding when she did so that these spectators wished
25 to enter the courtroom. And that court officer, as part of

1 her actions, did not - - - for no reason that appears on
2 the record, did not tell them, hey, courtroom's open, go on
3 inside.

4 And this brings up the point that - - -

5 JUDGE RIVERA: Let me ask you this. Is it - - -
6 okay. There's some back-and-forth about whether or not she
7 had to do that, but - - -

8 MR. CONNOLLY: Well - - -

9 JUDGE RIVERA: - - - let's say she takes the
10 phones, they turn around, they go sit on the - - - on a
11 bench, right? But they can see the door; they can see the
12 officer. And then five minutes later, the officer gets up
13 and opens up the outside door, not - - - not where you have
14 the alcove going in, just that outside - - - just opens it,
15 doesn't do anything else. And they still stay on the
16 bench.

17 Does that not signal it's open?

18 MR. CONNOLLY: No, no, no. Because the - - -

19 JUDGE RIVERA: I'm not saying that happened here.
20 I'm just giving you a hypothetical.

21 MR. CONNOLLY: No.

22 JUDGE RIVERA: I know it didn't happen here.

23 MR. CONNOLLY: Well, what I do know - - - I mean,
24 I do know, the record does show that people went in and out
25 of the courtroom during this period, 8:57, when the first

1 spectator arrived - - -

2 JUDGE RIVERA: Yes.

3 MR. CONNOLLY: - - - to 9:35, when the witness
4 took the stand. People did go in and out of the courtroom;
5 that's true, the record does show that, that the door was
6 open. The - - - but to these spectators, that door was
7 figuratively, but really closed. So an open courtroom - -
8 -

9 JUDGE RIVERA: But I get - - -

10 MR. CONNOLLY: - - - is - - -

11 JUDGE RIVERA: - - - your point, but I'm not
12 asking that. My hypothetical is that the officer keeps the
13 door opened as opposed to people walking in and out, and
14 the door is opening and closing, and those people may
15 appear to be the uniform to other people who would be
16 allowed to move in and out at that time.

17 Could the officer have done that to communicate
18 the courtroom's open? Does the officer have to speak to
19 them, have to announce the courtroom is now open?

20 MR. CONNOLLY: No. I mean, it was - - - he
21 doesn't have to - - - doesn't necessarily - - - has to
22 communicate. There has to be communication between the
23 officer and the spectators.

24 And here, the only communication, really, was
25 implicitly that you can't go in because - - -

1 JUDGE GARCIA: During this time, counsel, during
2 this time that it was - - - should have been open, but it
3 appears to be closed, did anyone come out of the courtroom?

4 MR. CONNOLLY: Yes. Yes.

5 JUDGE GARCIA: Doesn't that signal to them that
6 it's open? Because you can't leave either, right?

7 MR. CONNOLLY: You can't leave - - - yes, that's
8 true. But these spectators seemed to understand, they
9 seemed to think that certain people, people associated with
10 the trial, could go in and out, so they - - -

11 JUDGE GARCIA: But were they court officers who
12 were coming in and out, or were they spectators who were
13 coming in and out?

14 MR. CONNOLLY: They were - - - they were court -
15 - - well, the - - - the only spectators who came out were
16 affiliated with the district attorney's office. They were
17 interns. As they - - - they - - - at the - - -

18 JUDGE GARCIA: Because we've been hearing this is
19 the second day of this process - - -

20 MR. CONNOLLY: Yes.

21 JUDGE GARCIA: - - - and they knew the process,
22 so they knew they couldn't go in during witness testimony,
23 but if - - - and they couldn't leave. So if they see
24 people coming out - - -

25 MR. CONNOLLY: Yes, they seemed to think, though,

1 that these spectators - - - and you have to read the
2 testimony of these witnesses; I'm sure you have. But if
3 you - - - they seem to think that everybody who was going
4 in and out, they had noticed that they were all white, and
5 they were nicely dressed.

6 And the implication was, I think, that they
7 thought that these were people who were associated with the
8 trial, which, in fact, they were. They weren't spectators.
9 They didn't see any spectator going in and out.

10 JUDGE SINGAS: Well, but they don't know that
11 emphatically. I mean, they were surmising - - -

12 MR. CONNOLLY: Yes, they were surmising.

13 JUDGE SINGAS: To use - - - to borrow another
14 word, it was the atmospherics that we were - - - that
15 aren't on the record that people are making assumptions,
16 but the record doesn't say that, right? I mean, the record
17 indicates that people were coming in and out of the
18 courtroom.

19 MR. CONNOLLY: Yes. But the record also has made
20 clear that this Court Officer Cummings understood that
21 these people who were waiting; she knew they were
22 spectators; they'd given her their phone; she understood
23 that they were waiting for permission to enter.

24 So regardless of whether people were coming in
25 and out, she understood that they understood that they

1 needed permission to enter. So - - -

2 JUDGE RIVERA: You want to take 30 seconds on the
3 ineffective assistance of counsel since your red light is
4 on.

5 MR. CONNOLLY: Yeah. I would - - - well, I would
6 just say that this court has never held that a rule barring
7 spectator traffic during witness testimony passes
8 constitutional muster. And I would refer to the Turner
9 case, and I think it's 5 N.Y.3d something, where defense
10 counsel raised one issue in support of a result, one
11 argument in support of a result he wanted. In that case,
12 it was - - - it involved a - - - a lesser included offense.
13 Defense counsel in that case argued that a - - - the lesser
14 included offense shouldn't be charged because it wasn't
15 really a lesser included offense, but failed to argue
16 statute of limitations.

17 In this case, counsel raised one reason why this
18 exclusion of spectators was a problem but failed to raise
19 another issue. And specifically, defense counsel in this
20 case failed to raise the constitutional issue of whether
21 the underlying order was - - - was unconstitutional.

22 And I submit, had the counsel raised that, this
23 would be preserved as a matter of law; this
24 constitutionality aspect of the case would be preserved.

25 Regardless, however, I submit that this court can

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and should reverse the conviction on the basis of the - - -
the way this order of the court was implemented leading to
the exclusion of multiple spectators eager to enter the
courtroom from a material part of the trial.

CHIEF JUDGE WILSON: Thank you.

MR. CONNOLLY: Thank you.

(Court is adjourned)

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

I, Amanda M. Oliver, certify that the foregoing transcript of proceedings in the Court of Appeals of Hanza Muhammad v. The People of the State of New York, No. 42 was prepared using the required transcription equipment and is a true and accurate record of the proceedings.

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